

HEINONLINE

Citation: 1 Digital Performance Right in Sound Recordings Act of
Pub. L. No. 104-39 109 Stat. 336 I 1995

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon Mar 18 18:32:40 2013

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.

**THE PERFORMANCE RIGHTS IN SOUND
RECORDINGS ACT OF 1995**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

S. 227

A BILL TO AMEND TITLE 17, UNITED STATES CODE, TO PROVIDE AN
EXCLUSIVE RIGHT TO PERFORM SOUND RECORDINGS PUBLICLY BY
MEANS OF DIGITAL TRANSMISSIONS, AND FOR OTHER PURPOSES

MARCH 9, 1995

Serial No. J-104-11

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1996

35-913

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-053930-7

COMMITTEE ON THE JUDICIARY

ORRIN G. HATCH, Utah, *Chairman*

STROM THURMOND, South Carolina
ALAN K. SIMPSON, Wyoming
CHARLES E. GRASSLEY, Iowa
ARLEN SPECTER, Pennsylvania
HANK BROWN, Colorado
FRED THOMPSON, Tennessee
JON KYL, Arizona
MIKE DeWINE, Ohio
SPENCER ABRAHAM, Michigan

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin

MARK R. DISLER, *Chief Counsel*
MANUS COONEY, *Staff Director and Senior Counsel*
CYNTHIA C. HOGAN, *Minority Chief Counsel*
KAREN A. ROBB, *Minority Staff Director*

(II)

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah	1
Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts ...	18
Brown, Hon. Hank, a U.S. Senator from the State of Colorado	19
Feinstein, Hon. Dianne, a U.S. Senator from the State of California	20
Thompson, Hon. Fred, a U.S. Senator from the State of Tennessee	24
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	25

CHRONOLOGICAL LIST OF WITNESSES

Panel consisting of Jason S. Berman, chairman and chief executive officer, Recording Industry Association of America, accompanied by Hilary Rosen, president, Recording Industry Association of America; Don Henley, recording artist; and Mark Tully Massagli, president, American Federation of Musicians of the United States and Canada, accompanied by Arthur Levine, copyright counsel, American Federation of Musicians of the United States and Canada	3
Panel consisting of Hon. Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks; and Hon. Marybeth Peters, Register of copyrights and Associate Librarian for Copyright Services	30
Panel consisting of Jerold H. Rubinstein, chairman and chief executive, International Cablecasting Technologies, Inc., Steven Randall, Mountain West Audio, Inc./Muzak, Salt Lake City, UT; Edward P. Murphy, president and chief executive officer, National Music Publishers' Association, Inc.; Hal David, American Society of Composers, Authors, and Publishers; and Kurt Bestor, Broadcast Music, Inc.	51

ALPHABETICAL LIST AND MATERIALS SUBMITTED

Berman, Jason S.:	
Statement	3
Prepared statement	6
Bestor, Kurt:	
Statement	71
Prepared statement	73
Brown, Hon. Hank: Statement	19
David, Hal:	
Statement	66
Prepared statement	68
Feinstein, Hon. Dianne:	
Statement	20
Submitted the prepared statement of Senator Max Baucus	21
Hatch, Hon. Orrin G.:	
Opening statement	1
Prepared statement	2
Henley, Don: Statement	9
Kennedy, Hon. Edward M.:	
Statement	18
Prepared statement	19
Leahy, Hon. Patrick J.:	
Statement	25
Prepared statement	28

IV

	Page
Lehman, Burce A.:	
Statement	30
Prepared statement	32
Massaggi, Mark Tully:	
Statement	12
Prepared statement	14
Murphy, Edward P.:	
Statement	62
Prepared statement	64
Peters, Marybeth:	
Statement	34
Prepared statement	35
Randall, Steven:	
Statement	58
Prepared statement	60
Rubinstein, Jerold H.:	
Statement	51
Prepared statement	52
Thompson, Hon. Fred: Statement	24

APPENDIX

QUESTIONS AND ANSWERS

Responses to Questions Submitted by Senator Leahy from:	
Jason S. Berman	81
Hal David	83

ADDITIONAL SUBMISSIONS FOR THE RECORD

Letters to Senator Orrin G. Hatch from:	
Arts Management International	84
Electronic Industries Association	87
Billy Joe; Bette Midler; Paul Simon; Faith Hill; Mary Chapin Carpenter; Kathie Lee Gifford; Amy Gran; Diane Schuur; and James Naughton	88
National Cable Television Association	88
Prepared statements of:	
CompuServe	91
National Association of Broadcasters	95
Songwriters Guild of America	118

THE PERFORMANCE RIGHTS IN SOUND RECORDINGS ACT OF 1995

THURSDAY, MARCH 9, 1995

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee), presiding.

Present: Senators Hatch, Brown, Thompson, DeWine, Abraham, Kennedy, Leahy, Feinstein, and Feingold.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The Chairman. The committee will be called to order. We are happy to welcome our witnesses here this morning with us and we appreciate the efforts of everybody who has come to testify this day because this is what I consider to be one of the more important bills with regard to performers' performance rights in sound recordings, records, CD's, digital, you name it. It is just very interesting.

Sound recordings, whether records, CD's, or tapes, are the only copyrighted works capable of performance that do not enjoy a performance right under our copyright law, even though they enjoy such a right in more than 60 other nations. This simple fact and the reasons for it is what this hearing is all about. Should the public performance of sound recordings be covered by copyright? If not, why not?

Senator Feinstein and I joined together last Congress to begin the Senate debate on this subject. The bill we filed did not seek to create a performance right for all public performances of sound recordings, but instead addressed only the most immediate threat to the owners of copyright in sound recordings, the ease of copying, and the greater fidelity that is achievable through digital transmission of sound recordings.

We were unable to pass S. 1421 in the 103d Congress, but because of the discussions and negotiations held throughout the past 2 years, we are able this Congress to introduce a still more limited bill in the hope that the legitimate interests of everyone involved in the music licensing, distribution, and performance systems can be accommodated.

I am very pleased to note that the Performance Rights in Sound Recordings Act of 1995 is also cosponsored by Senator DeWine, by Senator Simpson, and by Senator Lott. I believe this bill represents a realistic attempt to accommodate in this area, and to accommo-

date a bewildering array of different perspectives on this important issue.

I look forward to hearing from the witnesses today. It is important that the creators of America's music, whether they compose the score, write the lyrics, sing the songs, or produce the recordings, be fairly and equitably compensated for the public performances that result from their efforts. For too long, they have not been, and we are going to try and do something about it here today.

So we have a particularly distinguished group of witnesses with us today. At the table are Mr. Jason S. Berman, of the Recording Industry Association of America; Mr. Don Henley, one of our great performing artists in this world; Mr. Mark Tully Massagli, president of the American Federation of Musicians of the United States and Canada, and later we will hear from some other panels before we are through.

What we are interested in is getting to the bottom line and trying to get this matter resolved. We hope we have accommodated everybody we should, and if there are some changes we need to make, this is the time to make those points to us.

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Sound recordings—whether records, compact discs, or tapes—are the only copyrighted works capable of performance that do not enjoy a performance right under our copyright law, even though they enjoy such a right in over 60 other nations. All other works, whether they be films, plays, operas, songs, or ballets are protected by the performance right that guarantees that, when their works are heard or seen publicly, the artists who created and produced the works are compensated.

This simple fact—and the reasons for it—is what today's hearing is all about. Should the public performance of sound recordings constitute a copyright violation? If not, why not?

From the very first moment that federal copyright protection was extended to sound recordings in 1972, Congress has been concerned about whether this discrimination with regard to the performance right makes sense. In the Copyright Act of 1972, we ordered the Register of Copyrights to study this problem and to report to Congress "after consulting with representatives of owners of copyrighted materials, representatives of the broadcasting, recording, motion picture, entertainment industries, and arts organizations, representatives of organized labor and performers of copyrights materials." 17 U.S.C. § 114(d).

The report of the Copyright Office strongly recommended the adoption of a sweeping performance right for sound recordings. Over ten years later, Congress requested a supplemental study of the issue, one that would take into account the many technological and legal changes in the intervening years. That report, filed in October 1991, reaffirmed the view that sound recordings are illogically and unfairly discriminated against in our Copyright Law, with clearly identifiable adverse consequences for American artists individually and for our balance of trade in general.

Responding to these studies, Senator Feinstein and I filed S. 1421 in the previous Congress. That bill did not seek to create a performance right for all public performances of sound recordings, but instead addressed only the most immediate threat to the owners of copyright in sound recordings—the ease of copying and greater fidelity that is achievable through the transmission of sound recordings by means of digital technologies.

We were unable to achieve passage of S. 1421 in the 103rd Congress; but, because of the discussions and negotiations held throughout the past two years, we are able this Congress to introduce a still more limited bill in the hope that the legitimate interests of everyone involved in the music licensing, distribution, and performance systems can be accommodated.

I am very pleased to note that the Performance Rights In Sound Recordings Act of 1995 (S. 227) is also cosponsored by Senator DeWine, by Senator Simpson, and by Senator Lott.

S. 227 amends § 106 of the Copyright Act by creating a new subsection recognizing to the exclusive right of a copyright owner in a sound recording "to perform the copyright work publicly by means of a digital transmission." That general right is modified by a number of broad exceptions, covering—

- (1) Most nonsubscription transmissions, such as radio broadcasts;
- (2) Transmission incidental to a nonsubscription transmission, such as a feed received by and then retransmitted by the nonsubscription transmitter;
- (3) Retransmissions of nonsubscription broadcast transmissions within a radius of 150 miles from the site of the transmitter;
- (4) Transmissions by a business within its premises or immediate vicinity; and
- (5) Retransmissions simultaneous with the primary transmission where authorized by a licensed primary transmitter.

With respect to subscription transmissions, W. 227 creates a broad statutory licensing scheme, to be administered by the Librarian of Congress. However, it retains the full exclusive right of public performance in two situations:

- (1) Where the transmission is part of an interactive service, and
 - (2) Where the subscription transmission consists of more than a few selections from an album or boxed set or the works of a particular featured recording artist.
- I believe that S. 227 represents a realistic attempt to accommodate a bewildering array of difference perspectives on this important issue. I will be interested in hearing today from the many organizations concerned with our present music licensing system to hear their views. And my door is always open to hear later from anyone else with an interest in this bill.

Yet I must add that the version of S. 227 that Senator Feinstein and I filed this January already responds to and incorporates numerous amendments, additions, and clarifications that have been requested by many people in this room—that is why it is longer and more technical than I perhaps would have preferred. But in many instances the current text represents the limit of how far we are able to respond to your concerns without undermining the important purposes of the legislation.

This is a vital piece of legislation that only begins to level the playing field for copyrighted works. I hope that the entire intellectual property community will realize the need to provide basic copyright protection in the area of sound recordings and will thus be supportive of this very limited effort, particularly in light of the need to extend copyright protections in other areas.

It is important that the creators of America's music—whether they compose the score, write the lyrics, sing the songs, or produce the recordings—be fairly and equitably compensated for the public performances that result. For too long, they have not been.

The CHAIRMAN. So at this point, we will turn to Mr. Jay Berman. We welcome all of you here today, and we will take your testimony, Mr. Berman.

STATEMENTS OF A PANEL CONSISTING OF JASON S. BERMAN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, RECORDING INDUSTRY ASSOCIATION OF AMERICA, ACCOMPANIED BY HILARY ROSEN, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA; DON HENLEY, RECORDING ARTIST; AND MARK TULLY MASSAGLI, PRESIDENT, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ACCOMPANIED BY ARTHUR LEVINE, COPYRIGHT COUNSEL, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA

STATEMENT OF JASON S. BERMAN

Mr. BERMAN. Thank you, Mr. Chairman, and thank you for your indulgence. I am accompanied by Hilary Rosen, who is the president of the Recording Industry Association of America. Unfortunately, I am going to have to give my testimony and leave. I have accompanied Ambassador Kantor to Beijing for the signing of the United States-China trade agreement.

The CHAIRMAN. Well, we want to congratulate you on the headway that has been made over there.

Mr. BERMAN. We appreciate the fact that we had united support from an administration and a Congress that led to a very, very good agreement.

I will leave the tough task to Hilary; she will answer all the questions.

The CHAIRMAN. That seems about right, doesn't it? [Laughter.]

Mr. BERMAN. The privileges of rank.

Mr. Chairman, I applaud your leadership in introducing S. 227, along with Senator Feinstein, and for holding this important hearing concerning performance rights in a sound recording. I am also pleased to note that this is the committee's first hearing on intellectual property, a decision that I hope indicates the priority that you place on moving this bill.

Members of the Recording Industry Association of America create, manufacture, and distribute approximately 90 percent of all the legitimate sound recordings sold in the United States. The association's 250 members include such familiar names as Warner Bros. Records, Columbia, Motown, RCA, Walt Disney, and Capitol, as well as lesser known labels such as Sparrow, Jim Henson Records, and Rabbit Ears, with manufacturing plants, distribution facilities, and employees throughout the United States.

The thing that connects such a disparate bunch of companies is a fragile existence wholly dependent upon copyright law. Copyright owners are unique in that our property can be stolen without physical trespass, thus placing our livelihoods completely in the hands of those like yourselves who write our copyright laws.

I appear before you today with a simple, fundamental question directed both at this committee and all the interested parties. Will we collectively manage to get past the historical political hurdles and our own internal differences so that U.S. copyright law can be fixed to correct a glaring inequity? To do so requires extending to copyright owners of sound recordings the right of public performance, the same right enjoyed by all other copyright owners under U.S. law.

Seventeen years ago, following the last major revision of U.S. copyright law, the Register of Copyrights delivered a report to Congress calling for the introduction of performance rights in a sound recording and suggesting that there were no viable policy justifications for failing to do so. At that time, and again today, the Register pointed out that this gap in U.S. law is extremely prejudicial to the interests of America's music community, and proposed granting record producers a public performance right in the sound recording.

In the 17 years that have passed, the question of whether to grant performance rights to the copyright owner is no longer a question of providing additional rights or secondary sources of income. Advances in digital technology that permit the transmission of CD-quality sound to the home threaten to completely change the way in which consumers gain access to prerecorded music.

Under existing law, record companies and performers have no rights in respect to the broadcasting or other public performance of these works. Songwriters, music publishers, and composers justifi-

ably get paid for such uses of their work, in addition to which they claim mechanical payments made for every record. No payment is made to the record company or the performer for their role in creating the performance.

What worries us is that what has traditionally been viewed as a potentially ancillary source of income and a secondary right may soon become the means for making recorded music accessible to the public. When you can get an album or any particular selection of your choice to play on your stereo system whenever you want it, why buy the record? When, for a small subscription fee, you can get hundreds of channels of CD-quality sound, with the music provided by artist or genre, why go to the record store? It does not take a leap of the imagination to see how quickly this could erode and perhaps one day eliminate the sale of recorded products.

Mr. Chairman and members of the committee, the legislation before you has been carefully crafted and narrowly tailored to address a specific problem. It does not attempt to recapture the past. The bill is limited in scope and covers only digital subscription and interactive services, those services that transmit digital CD-quality sound to subscribers for a fee or offer the individual the ability to access particular sound recordings at a time of their choosing.

These services are taking money out of the consumer's pocket that might otherwise be used to purchase a sound recording in a retail store, and under current law these commercial services have no obligation to compensate the record company or the performer who produced the recording they are, in effect, selling.

This legislation also provides numerous protections designed to ensure that there is no negative impact on any other rights-holder, especially songwriters and music publishers. In sum, it is a bill that has demanded compromise by all parties in the music industry, but most especially by record companies and performers.

We began this process, Mr. Chairman, over 23 years ago when we sought the same right enjoyed by all other copyright owners, a full performance right. Last Congress, this effort was limited to digital transmissions. Today, we are seeking an even more constricted bill that applies only to digital subscription and interactive services. It specifically excludes radio broadcasting, performances of sound recordings in bars and restaurants and other businesses, and it is subject in some part to statutory licensing. If this is the price of gaining a minimum level of protection for the future, we are willing to pay it.

The bill also contains numerous provisions designed to protect the integrity and vitality of other copyrights, as I just said, those of the songwriter and music publisher. These protections are more than adequate to guard against any fear of change in the status quo. At a time when others are seeking to expand their rights, we seek to catch up.

I urge the committee to move quickly and to withstand attempts by those who would like to use this narrowly crafted bill as a vehicle for addressing much broader concerns that would expand existing rights.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF JASON S. BERMAN

Mr. Chairman and members of the Committee, my name is Jason S. Berman, and I am Chairman and Chief Executive Officer of the Recording Industry Association of America. RIAA is the trade organization representing the interests of American record companies. Our members create, manufacture and/or distribute approximately 90 percent of the prerecorded music sold in the United States and 60 percent of all sound recordings created worldwide.

I am pleased to have the opportunity to appear before you today to address an issue of paramount importance to the recording industry and its performers—the manner in which our industry will be able to operate in the new technological environment of digital audio subscription and interactive transmissions, whether via broadcast, cable, telephone, satellite, or other means. I commend you, Mr. Chairman, and Senator Feinstein for your leadership in introducing S. 227 and for directing the Committee to address these issues.

Our nation's copyright law is intended to provide authors and publishers the incentive to create and disseminate new works of authorship for the public benefit. A U.S. copyright is, in actuality, a "bundle of rights" generally providing copyright owners with the exclusive rights of reproduction, adaptation, distribution, public performance, and public display. Unlike the owners of all other works protected under U.S. copyright law, however, copyright owners of sound recordings are not currently afforded the right to control the public performance of their works. Because of this historical anomaly, recording companies, those they employ, and their performing artists and musicians have no right to authorize, and receive no compensation for, such performances.

The right to public performance is recognized for every other copyrighted work capable of being performed, including motion pictures, books, computer software and musical compositions. Sound recording copyright owners are thus in the ironic position of being able to control the public performance of their works as embodied in music videos, but not the performance of the very same recorded music, without the visual images, over radio, digital cable audio services, or any other audio transmissions services.

On the international front, it is now more important than ever for Congress to press forward for such legislation. Over the course of the past 10 years, the United States has been at the forefront of efforts to improve protection for intellectual property rights internationally. It is time to close this glaring gap in our own copyright law—the absence of a performance right in sound recordings—by granting this protection.

I. U.S. LAW UNFAIRLY AND UNREASONABLY PREJUDICES RECORD COMPANIES AND PERFORMERS

U.S. copyright law contains one glaring omission—the right of the copyright owner of a sound recording to authorize the public performance of his or her work. The sound recording is the only category of copyrighted work that does not enjoy this right. As a result, unlike the songwriter and music publisher who properly get paid every time a recorded song is played on the radio, the record company and performer receive absolutely nothing.

The creative contributions of those who are responsible for putting sound recordings into the hands of the public are no less valuable to transmission entities and no less worthy of recognition than are the efforts of those who create works that are protected by a performance right. For example, a recording artist's interpretation of a song is no less a contribution to, or an integral part of, the recorded product that is the composer's score and lyrics. Consider the song "I Will Always Love You," which was actually written by Dolly Parton. However, this song became one of the greatest hits of all time when performed by Whitney Houston on "The Bodyguard" soundtrack. An artist's rendition is a distinct and unique product because of the creative contributions of the principal vocalist and the supporting artists and musicians who breathe life into the musical composition. Clearly, the performance of a song is a creative act that itself makes a significant difference.

It is difficult to justify why the bundle of rights enjoyed by the copyright owner of a sound recording should not include a right enjoyed by all other copyright owners—the right to license public performances. This disparate treatment and injustice have always harmed record companies and performers. It is particularly harmful to older performers whose recordings are still popularly broadcast but whose records no longer sell.

Current advances in digital technologies threaten to take this existing gap and turn it into a chasm. We urge this Committee to act quickly to establish the right necessary to protect record companies and performers in this new digital world.

II. DEVELOPMENTS IN DIGITAL TECHNOLOGY THREATEN CREATIVE INCENTIVE AND INVESTMENT

Digital transmission systems have advanced to the stage where acts of broadcasting can be more akin to a means of distribution and less like our traditional notion of broadcasting. Digital transmission offers the opportunity to replace our traditional forms of distributing information. Everything capable of being reduced to zeros and ones, whether literary text, audio or audio-visual signals, or other information, can be delivered to the home digitally without the transfer of a physical product.

The ability to transmit "CD-quality" digital audio signals challenges our assumptions about the means of delivering musical entertainment as we approach the 21st Century. Traditionally, the recording industry has looked upon the sale of prerecorded music on disc or tape as the primary form of delivering sound recordings to the public. The copyright law currently limits us to deriving our income solely from this form of distribution. As we will see, this limited scope of rights is outdated and will not provide sufficient incentive to invest the vast sums of money required for new musical productions.

The new digital audio transmission services take us far beyond traditional terrestrial analog radio broadcasting. With their ability to offer CD-quality music to the home, it does not take a great deal of imagination to foresee what choices consumers will make. Indeed, one need only listen to what these services say about themselves, plan to offer, and in some cases, are already offering.

For example, the programming of digital audio cable services, such as Digital Music Express (DMX) and Digital Cable Radio (DCR), involve multichannel offerings with a number of features that are designed to make performances of sound recordings in consumers' homes a viable substitute for album purchases. As one DCR brochure puts it, there will be "no need to spend a fortune on a CD library." How true that statement is! A DCR subscriber, paying less per month than the cost of one compact disc, can receive more than forth continuous, uninterrupted, CD-quality channels of prerecorded music.

Moreover, one proposed digital audio broadcast service, Satellite CD Radio, itself has announced its intent to charge subscribers directly for listening to our members' product and to offer program guides, album hours, etc. Digital audio cable services also have the unfettered right under current law to do the same.

Patterned after the evolution of cable television services, they all can also further close the gap between transmissions and record store purchases by offering pay-per-listen services which, like current cable pay-per-view services, will enable listeners to obtain a direct, time-certain transmission of an album of their choice with a pricing structure likely to be cheaper than that of record stores. And just beyond that is the advent of on-line electronic delivery services, what some have called "audio on demand" or the "celestial jukebox," which will enable consumers to select music to listen to at their convenience without ever buying the compact disc or making an actual copy.

Some may say that these services simply enhance consumer access to music and increase the choices available. The emergence of niche marketing of diverse entertainment may be made possible on an unprecedented scale. The term "narrowcasting" could take on a whole new meaning in terms of music delivery systems.

Suppose, however, that rather than leading to increased investment in the production of recorded music these new services operated outside the control of the company producing the recordings and resulted in little or no financial return to the record company, the artist, and others who are involved in the creation of a recording. In this case, digital delivery would siphon off and eventually eliminate the major source of revenue for investing in future recordings. Over time, this will lead to a vast reduction in the production of recorded music.

III. THE INTERNATIONAL IMPLICATIONS OF THE ABSENCE OF A PERFORMANCE RIGHT IN SOUND RECORDINGS

The unfairness of this discriminatory treatment is all the more glaring since the United States, the world's leader in the creation of sound recordings, is one of only a very few developed nations that fail to recognize a performance right in sound recordings. Approximately 60 nations, including at least nine European Community member states, grant public performance rights in sound recordings. The failure of U.S. law is depriving our performers, musicians and recording companies of foreign revenues because many nations will not pay sound recording royalties to nationals of countries that do not have reciprocal performance rights. American recording companies, artists and musicians have thus either been excluded in part from roy-

alty pools that distribute performance royalties in excess of \$120 million in 1991, or are at risk of losing any current entitlement to these monies. And the size of these pools will grow exponentially over the coming years as the number of countries that recognize a performance right in sound recording increases. Unless U.S. law is changed, American recording companies, musicians and artists will continue to be carved out of royalty pools.

The absence of a performance right in sound recordings also prejudices the position of the U.S. government in international trade and copyright discussions. Promoting high levels of intellectual property protection within both multilateral and bilateral fora is a major trade policy goal of the United States. However, our trading partners naturally question our commitment of such standards when we fail to accord sound recordings the basic protection of a performance right. Just as the United States' reluctance to accede to the Berne Convention once placed U.S. trade negotiators in the awkward position of asking for more copyright protection in the international arena than were afforded at home, the absence of a performance right in sound recordings now similarly frustrates and embarrasses U.S. negotiators.

The lack of a performance right in a sound recording under U.S. law, and the consequent inability of the United States to credibly or forcefully argue that sound recordings are "copyright works" like books and motion pictures, have also been used effectively by our trading partners that wish to maintain a low level of protection for sound recordings. This low level of protection can take several forms—including short term of protection, no retroactivity, application of reciprocity rather than national treatment, and broad limitations on exclusive rights (e.g., exemption for "personal use"). Whatever the inadequacy, there is a common thread—the ability to reproduce, distribute or perform U.S. sound recordings without payment.

The current situation completely undercuts U.S. credibility by forcing the U.S. to take positions on international obligations with respect to sound recordings to protect our industry throughout the world that differ from our own law. Our position is often incoherent and the confusion is unnecessary. The American recording industry is too important to our nation's balance of trade to allow this situation to continue. The negative international consequences resulting from the status quo are but another reason why sound recording copyright owners should now be granted the long-overdue right of public performance.

IV. THE U.S. NEEDS TO MOVE QUICKLY IN ESTABLISHING A PERFORMANCE RIGHT IN A SOUND RECORDING

The present existence and announced future plans of digital transmission systems require us to establish a proper legal framework for assuring that our copyright law does not become antiquated and overtaken by technology. A central concept of copyright protection is that copyright owners, as creators or beneficial owners, should be able to authorize the commercial uses of their works—the theory being that the public benefits most when the copyright owner is granted the necessary incentive to invest in the creation of artistic works. Therefore, Congress should act now, before consumers and businesses rely too heavily on free and unfettered access to copyrighted sound recordings.

V. PERFORMANCE RIGHTS AND OTHER INTELLECTUAL PROPERTY ISSUES IN THE NATIONAL INFORMATION INFRASTRUCTURE

This legislation has been carefully drafted by Senators Hatch and Feinstein to address a very real problem in U.S. law—the absence of a performance right for sound recordings. It is, by design, a compromise bill, one that attempts to grant the sound recording performance right without prejudicing existing rights enjoyed by other copyright owners, especially songwriters and music publishers.

In my opinion, it adequately meets that objective. It deliberately does not attempt to settle every copyright issue that is raised with respect to new technology and I urge the Committee to resist attempts to burden this bill with language that is sought by ASCAP and others that would fundamentally alter existing copyright law.

Congress will address many of these broad definitional issues later this year. Let's not delay enactment of this important legislation.

The CHAIRMAN. Thank you, Mr. Berman. Good luck in your trip to Beijing.

Mr. Henley, we are honored to have you here today. We enjoy your music, as do millions of people around the world, and we look forward to taking your testimony as one of the great performers in this world.

STATEMENT OF DON HENLEY

Mr. HENLEY. Thank you, Mr. Chairman and members of the committee, for allowing me to present my views on this matter. I have never testified before a committee before and some of my colleagues have advised me that I should give you a brief personal history about my struggles in the music industry.

I believe that they think you would assume that I have always been what the media calls a rock star, but I think it is rather presumptuous of them to presume that you would presume that I sprang from the womb all rich and famous and singing the blues. If you will indulge me for a second, I will give you my version of the Abraham Lincoln story, without the log cabin and the railsplitting.

I grew up in a very small town in northeast Texas, population 2,400. It was near the Louisiana border, and because of my geographical location, I was exposed to all kinds of music, all kinds of great music, including blues and country and blue grass and Cajun music and Western swing music and the big band music of the 1940's and 1950's and rock and pop.

Like a lot of smalltown kids, I had big dreams of traveling the world with a band and making my living that way. When Elvis Presley came along, that really got my attention and whetted my appetite, and then when the Beatles emerged I knew exactly what I wanted to do for a living. Elvis Presley, in fact, gave his first public broadcast only 60 miles from my hometown in Shreveport, LA.

I began my career in the early 1960's and I worked extremely hard before moving to California in 1970. In fact, I would venture to say that I have played every bar and juke joint and roadhouse and frat party and American Legion hall in Texas and Louisiana and Arkansas and Oklahoma. I even performed at a Chevrolet dealership in the fall of 1963. [Laughter.]

The CHAIRMAN. You are taking away a lot of the glamour of this industry. [Laughter.]

Mr. HENLEY. It is very glamorous, sir. It was the coming-out party for the 1963 Chevrolet. I was very honored. [Laughter.]

But I have been extremely fortunate in that I have enjoyed success for many years not only as a performer, but as a songwriter and a producer, and so I have to wear many hats. Frankly, it was a little difficult at first to decide which hat to wear here today, but it eventually became clear to me that I am primarily here as an artist because the RIAA is here to represent the industry; that is, the record companies. ASCAP and BMI and the other performance rights societies are here to represent the songwriters, and musicians are represented by the AFM and the publishers are represented by the National Music Publishers Association. So the only people who are really not represented here today by an organization or a recognized body are the artists.

It is funny. We artists seem to be able to organize ourselves for just about every other cause imaginable—save the whales, save the field mice, save the depressed penguins.

The CHAIRMAN. We have noticed that. [Laughter.]

Mr. HENLEY. Yes; I am sure, but when it comes to looking out for our own interests, we hardly ever bother. I suppose we are to be commended for our total selflessness. [Laughter.]

While I have enjoyed success for many years, the fact remains that there are thousands of other artists and musicians who love the act of making music, who strive for success and look for that big break, but unfortunately many of these artists never achieve that success. Some of them, in fact, do not seek it. For many of the artists, I think the dream is just to be able to make a living doing what they love to do, which is making music, and I think the majority of these musicians, including myself, ask only for fairness in the way our works are treated.

We have now entered a digital marketplace that threatens our creative efforts, and that is why I urge the committee to move as quickly as possible on the passage of a performance right for sound recordings.

Today, as Mr. Berman told you, there are new digital audio delivery services in operation that threaten to seriously erode the ability of an artist to control the songs that he or she records, or the music that we play. Because of the absence of a performance right for sound recordings, these new services, with the purchase of one record or one CD, can charge 1 million subscribers for the privilege of listening to our music without paying anything to the artist or the company that produced that sound recording.

Unfortunately, the absence of a sound recording performance right in the United States doesn't just harm Americans here in our own country; it results in real discrimination around the world. I do not believe it is an exaggeration to say that, after going on several world tours, I can tell you that American music is the most popular music in the world, the most listened to, the most emulated, the most sought after. Yet, the United States is sorely lagging behind our trading partners.

As you stated earlier, more than 60 nations, including virtually every member of the European Commission, has legislated public performance rights in favor of rights' owners in sound recordings, and the list continues to grow as others upgrade their copyright laws. For example, I am told that virtually all major revisions of copyrights laws enacted around the world in the last 3 years, including even those of former Eastern bloc nations, have included the creation or extension of sound recording rights.

When one considers the international implications of the lack of a performance right in this country that produces 60 percent of the world's music, it is even more difficult to understand why our Congress has not protected us. This gap in U.S. copyright law is more than a theoretical legal deficiency. It effectively denies American performers and rights holders our rightful share of performance royalties paid worldwide.

Today, more than \$120 million is collected worldwide each year for the performance of sound recordings. Even though our sound recordings account for roughly 60 percent of these musical performances, American recording artists and rights holders are denied these moneys because other nations can limit distribution of royalties to only those nationals of countries that provide reciprocal rights. This is the issue of reciprocity and it is very important.

Worse still, every dollar that is lost due to the lack of a performance right in the United States often operates as a direct subsidy of foreign music. The United States is, in effect, permitting our

competitors to take money that is due American artists to promote the production, for example, of French music. We are subsidizing French music. I don't know about you, but I am not a big fan of Charles Aznavour.

The use of reciprocity to deny U.S. record companies and performers their deserved compensation is no accident. It is a deliberate public policy that is designed to shortchange U.S. rights holders. It is a commercial policy decision, and I can also tell you that the effect here at home is a discouraging one.

On the one hand, American music is consistently used to represent the very essence of what it means to be American. It is one of the things that is best known about America in the furthest reaches of the globe. I went on a trip to Honduras a couple of years ago and I went to a remote mountain village. I was with the CARE organization on a factfinding mission, and we went up to about 5,000 or 6,000 feet to a village and one of the villagers went into a back room and emerged with a cassette of "Hotel California" and gave it to me, and I was staggered, to say the least.

Still, the United States lags behind on the issue of a performance right, and this has been a severe negotiating liability for our trade negotiators in their attempt to achieve higher worldwide levels of intellectual property protection, in general. In fact, for example, I understand that in several international negotiations, including GATT, the United States itself has been forced to block an international consensus involving performance rights that would have primarily benefited U.S. performers and record producers. And in NAFTA, our negotiators were forced to deny American recording artists the right to seek sanctions in the event that Canada should grant a performance right in sound recordings that excludes these artists as beneficiaries.

So, Mr. Chairman, this legislation is ultimately about fairness. At the heart of the recent high-profile agreement between the United States and China was the underlying principle that creators of intellectual property should have the ability to control and be compensated for the exploitation of their creative work. Others should not profit from the creative talent and hard work of the artist and the company that produced the sound recording. The question is, shouldn't we apply the same principle here at home? Shouldn't the creative impetus be encouraged in our own marketplace, especially in the digital marketplace? This is the premise for S. 227.

In conclusion, I would like to commend the chairman and Senator Feinstein for their efforts to craft this bill so as not to impair the rights currently enjoyed by songwriters and composers. I think that is very important. As a songwriter myself, I am already protected and compensated when songs that I write are performed on these new digital services. In fact, as a publisher and songwriter, I enjoy every right afforded by U.S. copyright law, all the rights that I need.

My songwriter interests are protected, my publishing interests are protected, but not my rights as a recording artist. Today's U.S. copyright law fails to grant the copyright owner of a sound recording the right to authorize public performances of his or her work, a basic right which is granted to copyright-holders for all other protected works that can be performed publicly, including motion pic-

tures, books, plays, choreography, computer software, and musical compositions, the written lyrics, and the notes.

We should keep in mind that without the performer, the song is merely sheet music. The performer's ability to bring a song to life should also be recognized and protected. As you know, the world is changing very rapidly. Technology is changing everything. No one can say exactly what will constitute a performance in the future. These laws will need to be amended and rewritten in order to keep up with all these amazing and complex developments, but right now we just need to get the train out of the station.

I sincerely hope that this committee will play a very decisive role in determining that the music of the up-and-coming artists and established artists are ensured a safe place and a fair place in the new digital world.

Thank you very much for your time.

The CHAIRMAN. Well, thank you. We appreciate your testimony. Mr. Massagli, we will turn to you at this time.

STATEMENT OF MARK TULLY MASSAGLI

Mr. MASSAGLI. Thank you. Good morning, Senator Hatch and members of the committee. I am Mark Tully Massagli. I am the president of the American Federation of Musicians of the United States and Canada. Accompanying me here today is our copyright counsel, Mr. Arthur Levine. Should any questions be required of us, I am sure he would be prepared to answer on those matters.

I appear here today on behalf of the American Federation of Musicians, as well as the American Federation of Television and Radio Artists, AFTRA. These two organizations represent approximately 250,000 people, professional musicians and vocalists living in every State of the Union, the District of Columbia, Puerto Rico, and Canada. I want to thank the committee for the opportunity to testify today and, in particular, to thank you and Senator Feinstein for introducing S. 227.

Since at least 1909, composers of musical compositions have enjoyed a right of public performance in their creative works. Certainly, the performing artist's interpretation of a song is no less a contribution to the recorded product than the composer's original lyrics and score.

Consider, for example, how the performer's rendition of the tune "Hello Dolly" gave rise to a different recorded product when it was sung by Carol Channing, by Louis Armstrong, or by Pearl Bailey. In virtually every recorded rendition, skillful musicians and support vocalists intricately weave their artistry around the star performer, fortifying, enriching, complementing, underscoring, accenting, making the performance even more definitive.

Indeed, it is often the artist's performance that provides the creative spark that breathes life into a musical composition. There must be more than 100 versions of "White Christmas," but it is Bing Crosby's special rendition that has become an integral part of Christmas each year. In some cases, a song that enjoyed little success in one recording becomes a hit when a recording is made with a different artist or arrangement. For example, the recording of Kurt Weill's "Mack the Knife" as sung by Lotte Lenya achieved

some popularity, but when Bobby Darin applied his unique style to the song, record sales skyrocketed.

Ironically, up to this time the performer who makes a composer's song into a hit and earns that composer much compensation in the form of mechanical royalties and performance royalties shares in none of the performance royalties him or herself.

The gap in our copyright law that leaves performers without any right to compensation for the exploitation of their recorded performances is particularly unfortunate when you consider the importance of American music on the international arts scene. The world looks to American musical performers as leaders and ground-breakers, especially in such quintessentially American art forms as jazz and rock. Yet, our copyright law fails to foster and protect the creativity of these performers and leaves them uncompensated, while others profit from the exploitation of their work.

The gap in our current copyright law has always been unfair, as well as antithetical to the Federal policy of fostering creativity. The results for performers have been tragic. The use of recorded performances has increasingly replaced the demand for live performances, and as a result performers have been driven out of work by their own product in movie theaters, radio, and television.

But now the adverse effect of our copyright law on performing artists is threatening to reach a new level, caused by technological changes already underway. In the past few years, digital audio music services have appeared that, unlike radio, can offer CD-quality music in the home. Under current law, these digital audio subscription services will be available to commercially exploit the creative efforts of performers on sound recordings without any compensation to them or to the record companies.

Unlike radio broadcasts, these digital audio subscription services have the ultimate potential to deeply undermine or even replace record and CD sales because the subscriber will be able to enjoy CD-quality music at home without having had to buy CD's in the first instance.

Reductions in record and CD sales will adversely affect recording artists' income. Worse, if we reach the point where new music delivery technologies replace the sale of records and CD's, record company employment of recording artists is also threatened. America cannot continue at the forefront of the musical arts unless its performing artists can survive and prosper.

Despite the popular image of wealthy recording artists, only a very few musicians and vocalists reach stardom and attain the ability to command high-paying recording contracts. The vast majority of recording musicians, even the very gifted ones, remain unknown to the public and simply work for collectively bargained scale wages and trust fund payments, but the creativity of these performers is essential to an important American art form. The copyright law should reward them for their creative contributions and preserve their ability to express and increase their God-given talents.

Mr. Hatch and members of the committee, we now see at least some cause for optimism, and that optimism derives directly from the enlightened recognition by Congress that the digital era which

brings new opportunities for the creative artists also has the potential of exploiting those creative efforts without just compensation.

The Audio Home Recording Act of 1993 was an important first step in recognizing the rights of copyright owners and creators in the new digital environment. S. 227 is a continuation of your recognition, Mr. Chairman, that the digital world really changes the method by which recorded performances are communicated. We support S. 227 because it recognizes that recording artists should be rewarded for their recorded performances and because that bill provides some assurance to artists that they will be compensated for the digital delivery of their performances. We strongly urge its passage.

Thank you very much for this opportunity to address you today.
[The prepared statement of Mr. Massagli follows:]

PREPARED STATEMENT OF MARK TULLY MASSAGLI

Good morning, Senator Hatch and members of the Committee. I am Mark Tully Massagli, the President of the American Federation of Musicians of the United States and Canada. I appear here today on behalf of the American Federation of Musicians, as well as the American Federation of Television and Radio Artists. These two organizations represent approximately 250,000 professional musicians and vocalists living in every state of the Union, the District of Columbia, Puerto Rico, and Canada.

I want to thank the Committee for the opportunity to testify today, and in particular to thank you and Senator Feinstein for introducing S. 227.

Since at least 1909, composers of musical compositions have enjoyed a right of public performance in their creative works. Certainly, the performing artist's interpretation of a tune is no less a contribution to the recorded product than the composer's original lyrics and score. Consider, for example, how the performer's rendition of the tune "Hello Dolly" gave rise to a different recorded product when it was sung by Carol Channing, by Louis Armstrong, or by Pearl Bailey. And in virtually every recorded rendition, skillful musicians and support vocalists intricately weave their artistry around the star performer—fortifying, enriching, complementing, underscoring, accenting—making the performance even more definitive.

Indeed, it is often the artist's performance that provides the creative spark that breathes life into a musical composition. There must be a hundred versions of "White Christmas," but it is Bing Crosby's special rendition that has become an integral part of Christmas each year. In some cases a song that enjoyed little success in one recording becomes a hit when a new recording is made with a different artist or arrangement. For example, the recording of Kurt Weill's "Mack the Knife" as sung by Lotte Lenya achieved some popularity, but when Bobby Darin applied his unique style to the song, recorded sales skyrocketed. Ironically, up to this time, the performer who makes a composer's tune into a hit, and earns that composer much compensation in the form of mechanical royalties and performance royalties, shares in none of the performance royalties himself.

The gap in our copyright law that leaves performers without any right to compensation for the exploitation of their recorded performances is particularly unfortunate when you consider the importance of American music on the international art scene. The world looks to American musical performers as leaders and ground breakers, especially in such quintessentially American art forms as jazz and rock. And yet our copyright law fails to foster and protect the creativity of these performers, and leaves them uncompensated while others profit from the exploitation of their work. The gap in our current copyright law has always been unfair, as well as antithetical to the federal policy of fostering creativity. The results for performers have been tragic.

The use of recorded performances has increasingly replaced the demand for live performances and, as a result, performers have been driven out of work by their own product in movie theaters, radio and television. Today, musical artists still suffer from the displacement of work opportunities by the public performance of records and CDs. Hotels, lounges, and other establishments which until very recently employed performers to provide live musical entertainment, increasingly are switching to the use of recorded music, and performers continue to lose work opportunities in the live entertainment field to the expanded use of recorded music.

But now the adverse effect to our copyright law on performing artists is threatening to reach a new level, caused by technological changes already under way. In the past few years digital audio music services have appeared that, unlike radio, can offer CD-quality music in the home. For a monthly subscription fee, these services will provide commercial-free, deejay-free, CD-quality music digitally transmitted into the home over coaxial cable. Under current law, these digital audio subscription services will be able to exploit commercially the creative efforts of performers on sound recordings without any compensation to them or to the record companies. Unlike radio broadcasts, these digital audio subscription services have the ultimate potential to deeply undermine or even replace record and CD sales, because the subscriber will be able to enjoy CD-quality music at home without having had to buy CDs in the first instance. Reduction in record and CD sales will adversely affect recording artists' income. Worse, if we reach the point where new music delivery technologies replace the sale of records and CDs, record company employment of recording artists is also threatened. America cannot continue at the forefront of the musical arts unless its performing artists can survive and prosper.

Despite the popular image of wealthy recording artists, only a very few musicians and vocalists reach stardom and attain the ability to command high-paying recording contracts. The vast majority of recording musicians—even the very gifted ones—remain unknown to the public and simply work for collectively bargained scale wages and trust fund payments. Moreover, most of them do not work steadily as regular, year-round employees of a particular record company, but only episodically whenever they are hired for a particular recording session. A few individual musicians with sufficient leverage, in addition to receiving scale wages or, on rare occasions, double scale, can bargain with the record companies for some rights to royalties from the sales of the records upon which they perform. Again, the number of these "royalty artists," as we refer to them, is extremely small. And often the royalties they receive from sales are quite small as well. But the creativity of these performers is essential to an important American art form. The copyright law should reward them for their creative contributions and preserve their ability to express and increase their God-given talents.

Mr. Hatch and members of the Committee, we now see, at last, some cause for optimism, and that optimism derives directly from the enlightened recognition by Congress that the digital era, which brings new opportunities for the creative artists, also has the potential of exploiting those creative efforts without just compensation. The Audio Home Recording Act of 1993 was an important first step in recognizing the rights of copyright owners and creators in the new digital environment. Indeed, that legislation marks the first time in the history of U.S. copyright law that performers have been specifically included in the copyright law. S. 227 is a continuation of your recognition, Mr. Chairman, that the digital world really changes the method by which recorded performances are communicated.

We support S. 227 because it recognizes that recording artists should be rewarded for their recorded performances and because S. 227 provides some assurance to artists that they will be compensated for the digital delivery of their performances.

Would we like to see a broad performance right that is co-extensive with the right enjoyed by song writers and which encompasses both analog and digital performances? Of course we would, but we recognize that S. 227 represents a major step in protecting the creative talents of performers in the new digital era. We strongly urge its passage.

Thank you very much for this opportunity to address you today.

The CHAIRMAN. Well, thank you. We appreciate the testimony of all three of you. I have to say that just this morning we got a letter from Billy Joel and Bette Midler, who are also supporters, as are, I think, most performing artists.

Let me start with you, Mr. Henley, and ask a couple of questions of you. It always strikes me as puzzling that our copyright law gives a performance right to the authors of a music video, but not the authors of a sound recording. In connection with your current tour, you have released a CD, as well as a music video, as I understand it.

Mr. HENLEY. Yes.

The CHAIRMAN. Most new works are released in video and audio versions, aren't they?

Mr. HENLEY. Yes.

The CHAIRMAN. Often with the same soundtrack?

Mr. HENLEY. Often, there can be minor variations.

The CHAIRMAN. But generally with an identical soundtrack?

Mr. HENLEY. Yes, right.

The CHAIRMAN. My understanding is that every time your music video is played on a cable or broadcast channel, a performance royalty must be paid to the owners of the copyright in the music video.

Mr. HENLEY. That is correct.

The CHAIRMAN. And that includes the performer?

Mr. HENLEY. Yes.

The CHAIRMAN. Yet, an audio-only cable channel can take one copy of your CD and transmit it royalty-free an unlimited number of times. Is that right?

Mr. HENLEY. That is right.

The CHAIRMAN. You have, for instance, the video by the Eagles. A royalty is paid every time that is played?

Mr. HENLEY. Correct.

The CHAIRMAN. You have your CD by the Eagles and no royalties are paid for those performances?

Mr. HENLEY. Yes. It is a mystery to me. [Laughter.]

The CHAIRMAN. It is starting to become one to me.

You anticipate far greater sales of your audio release than your video release, don't you?

Mr. HENLEY. Oh, absolutely.

The CHAIRMAN. I mean, this audio release is going to sell a lot more than this video release.

Mr. HENLEY. The video, I would estimate, will sell maybe 100,000, 150,000 copies. The audio work has already sold about 7 million copies around the world.

The CHAIRMAN. Goodness. I think I am going to have to get back and start playing the violin again. [Laughter.]

Mr. HENLEY. Jack Benny did very well.

The CHAIRMAN. They have been trying to get Kennedy and me to sing a duet for a long time.

Senator KENNEDY. Any time you want to go, we will shed the tears and see you go, Orrin. [Laughter.]

We will miss you for a little while, Orrin. [Laughter.]

The CHAIRMAN. I just don't want to ruin his reputation, that is all.

So the side of the business on which you are unprotected is, without question, the more important one economically?

Mr. HENLEY. Absolutely.

The CHAIRMAN. That is 7 million versus 150,000?

Mr. HENLEY. Correct.

The CHAIRMAN. Well, that is pretty important. Most countries of the world pay royalties, but you are saying under this reciprocity rule, because we don't, they will not recognize our artists?

Mr. HENLEY. That is correct.

The CHAIRMAN. Let me ask you, Ms. Rosen, just a couple of questions. In his statement, Mr. Rubinstein, the head of Digital Music Express, describes the international growth of his company. They are expanding into Europe, Canada, and many other nations. Now, since more than 60 nations recognize the performance rights in sound recordings, there will be few nations other than the United

States in which they will not have to pay performance royalties. Is that right?

Ms. ROSEN. Yes, that is correct.

The CHAIRMAN. Who gets those royalties?

Ms. ROSEN. Actually, the problem is that royalties will likely be collected in those countries for artists and producers.

The CHAIRMAN. But who gets them?

Ms. ROSEN. The problem is that they will only be distributed to local artists and producers. The example that Don gave in his testimony, for instance, in France, where they will collect performance royalties for, for instance, Digital Music Express, Mr. Rubinstein's company, and other kinds of broadcast services, what they will do is in the fund they will distribute all of the moneys to French artists and French producers, but the money that is paid in on the basis of U.S. works being performed—they will take that aside and hand that over into a fund they have created to promote the sale of French music.

The CHAIRMAN. I see, so it is really a disadvantage to us. Is it really possible that an American company transmitting American sound recordings abroad will pay royalties for the right to transmit those recordings in foreign nations, but that the Americans who own the copyright and the sound recordings will never receive any part of those royalties?

Ms. ROSEN. Right.

The CHAIRMAN. That is really what is happening?

Ms. ROSEN. In fact, what has happened throughout the world is that countries know that because of a lack of a performance right in the U.S. law, it gives them an excuse, if you will, not to pay U.S. artists and producers, and they use that in the trade negotiations. They say to our negotiators, well, why should we pay your artists when you don't even pay your artists? So the fact that our law doesn't take care of artists and producers is used as an excuse all around the world for other countries not to, and in that sense it is hard to blame them.

The CHAIRMAN. And you believe this bill will remedy that defect?

Ms. ROSEN. Well, it is not going to go backwards, but we believe that in new digital transmissions and the like which will be the wave of the future, it will remedy that.

The CHAIRMAN. Right, and that is going to be the wave of the future because you can copy anything and have a perfect copy from digital.

Ms. ROSEN. And you won't even have to copy it. In the case of Mr. Rubinstein, I think you will hear that these are performances that are publicity for artists and record companies, and the likelihood is that you never actually have to have a physical copy if you can have access to the music any time you want to. That is the use that we are terribly concerned about as well.

The CHAIRMAN. Mr. Massagli, I am not sure I even realized until this morning how many professional musicians there really are, and you were talking about 250,000-plus.

Mr. MASSAGLI. That is a combined number, Senator, of American Federation of Musicians members and members of AFTRA.

The CHAIRMAN. Well, I have heard from many performers in support of S. 227; we have heard from a lot of them. Do you know of any in your organization who oppose this bill?

Mr. MASSAGLI. Absolutely no one.

The CHAIRMAN. Nobody?

Mr. MASSAGLI. None.

The CHAIRMAN. Senator Kennedy.

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Well, thank you very much, Mr. Chairman. I think all of us have a good many friends testifying today and we want to welcome them all. I want to recognize Don Henley, whom I have known for a long period of time not only as an extraordinary artist, but also as someone who has spent a great deal of time and effort and energy in the preservation of environment, particularly a very special area in my State, Walden Pond.

I think most Americans are aware of his unique efforts and singular leadership in terms of awakening the citizens not only in our State and region of the country to the wonders of Walden Pond, but also assuring its preservation. So I am delighted to welcome Mr. Henley, as well as others here this morning.

I want to just commend you Mr. Chairman,—I am only going to say just a very brief word on this—commend you for having the hearing. The copyright issues are a difficult and rather mundane subject matter. I think most of us as elected officials are generalists. We spend some time on health and education, on the Constitution, and on other kinds of issues that are of very great importance. But this one comes up periodically and it has enormous implications. This kind of hearing is incredibly important and valuable in the education of all of us on the committee.

I start off with the recognition that we have an explosion in terms of technology. We have enormous national pride in the creative artists that we have—the musicians, the songwriters, and the composers—and it is a national treasure and resource.

We always have to be sensitive to new technology being developed, so much of it here in the United States, some of it obviously abroad. We should assess its impact in terms of the rewards with respect to the creative individuals who are the driving force in terms of all of this music and of this talent.

We have to be sensitive to their interests. The powerful economic interests should be sensitive, but too often are not. We have with these new technologies a real threat to those creative individuals, and I want to commend you and those who have really sharpened and brought this matter to our attention. This is an area where, if we don't take action, there is going to be very serious injustice, and it is an area on which we have to move forward.

I just want to thank you, Mr. Chairman, and these excellent panelists who are here today. I think they make a very powerful and compelling case, and I look forward to working with them. I thank them for being here, and I thank you, Mr. Chairman.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY

I commend Senator Hatch for convening this hearing on the Performance Rights in Sound Recordings Act and the important issues it raises on copyright protections in the music industry.

As we all know, the industry is being rapidly transformed by technological advances. The revolution in technology means vast changes in the dissemination of music. The old system is still the basis for copyright earnings, and there is an urgent need to ensure that adequate protections are available for musical compositions and performances.

Today's hearing will review one of the fundamental issues in the industry—performance rights. Songwriters already have performance rights for their music; the legislation under consideration proposes similar performance rights for record companies and musical performers.

Cassettes and CD's are currently the sole source of revenues for record companies and recording artists and the new digital technology will undoubtedly undermine their sales. So it is timely to examine the effect of new technology on copyright protections to make sure that the laws continue to be fair.

At the same time, any new rights for musicians must be conferred in a manner that respects existing rights for songwriters.

The distinguished witnesses testifying today will bring expertise and insight into all of these new developments in the industry.

Our nation's musical heritage and achievements are a source of great national pride and international renown and we intend to do all we can to keep them strong for the future. Our copyright laws are an important part of this mission.

I look forward to the testimony today and to working with Chairman Hatch and other members of the Committee to meet our responsibility.

The CHAIRMAN. Thank you, Senator Kennedy.
Senator Brown.

**STATEMENT OF HON. HANK BROWN, A U.S. SENATOR FROM
THE STATE OF COLORADO**

Senator BROWN. Thank you, Mr. Chairman.

Don, I particularly wanted to thank you for coming today. We are not only honored to have you make your residence in Aspen, but—for those of you who don't know, it is a small impoverished community on the western slope of Colorado. [Laughter.]

But, obviously, your work has been dedicated to—at least many think it is dedicated to people here on the Hill. "Hell Freezes Over," of course, has an obvious reference to our deliberations, and "Life in the Fast Lane," Mr. Chairman, I understand, is descriptive of at least some of our members.

The CHAIRMAN. I am afraid I haven't been in that group.

Senator BROWN. I think that is the subject of another hearing.

I would be interested in your thoughts, maybe from the whole panel, on the length of this copyright. Life plus 50 years, I think is what we are talking about, or 75, some are saying. If we are thinking about Strom Thurmond, that obviously is a fairly lengthy process.

I assume you are modeling this on other statutes that provide this protection that exist in many other countries. What are your thoughts on that particular length of time or if there is another length of time that is appropriate?

Ms. ROSEN. Well, sound recordings have a copyright now of 75 years, period. Frankly, if we could get 75 years worth of protection right here, we would be happy. There are some discussions worldwide and obviously here in this Congress about extending copyright terms generally. Obviously, sound recordings would be included in that, but frankly we believe that it is very important to create the

basic level of copyright protection for everybody before we worry about extending terms of protection for what exists.

Senator BROWN. Well, what do other countries do in this area?

Ms. ROSEN. Seventy-five years actually was part of the TRIPS agreement, which is the intellectual property provisions of the GATT. So those countries that aren't currently at 75 years, if they want to join the GATT, will come in line.

Senator BROWN. And your preference is 75 years, I take it.

Ms. ROSEN. We are satisfied with 75 years, if that is your question, Senator, yes.

Senator BROWN. Thank you.

The CHAIRMAN. Senator Feinstein. We are initiating a 5-minute rule on questions, but if Senator Feinstein needs a little bit more time as a cosponsor of this, we will be happy to grant it to her.

**STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR
FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. Thank you very much, Senator Hatch. I want to thank you for convening this hearing and for your leadership on this issue. This is something that the experts have said should have been done decades ago, and that is, of course, to establish a performance right in sound recording.

Senate bill 227, as Senator Hatch noted, attempts to correct an imbalance that has existed since the 1970's. Songwriters and composers, along with copyright-holders, enjoy protection under copyright law with respect to digital sound recordings. However, recording companies and musical artists don't have this same protection. Unlike songwriters and composers, these companies who invest huge sums in the production of recordings and performing artists receive no compensation each time their work is performed.

Now, why is this important? As has been said, it is important because the technology is changing. We now have audio on demand, pay-per-listen, direct satellite, and subscription services that bring these recordings to people in a very different way than broadcasts do.

In 1991, the Copyright Office said that sound recordings should have copyright protection, and as one of the charts that was up there a little earlier showed, America is one of the very few countries on earth that does not afford this. So Senator Hatch and I introduced a version of this bill in the last Congress, and I want to take this opportunity really to thank all of the parties who have spent many hours at the negotiating table. At the same time, I want to encourage them to continue to talk and push forward.

I remember how pessimistic many were about progress that would be made when we first sat down to talk in February 1994, and I remember how surprised people were 4 hours later when they left the table, and that is the level of dedication that we need to continue to perfect and pass this bill in this Congress.

There is some controversy in that, and in my questions I will try to get to the heart of it because I think I need to put it on the table. But I want to emphasize that in a digital and a computer age, the protection of America's intellectual property industries has taken on a tremendous urgency. These industries are really the cutting edge of America's technological superiority.

All of America's copyrighted industries have contributed 3.7 percent to the Nation's gross domestic product in 1993. Now, that is a contribution of \$238 billion, not millions of dollars, but billions of dollars, and just between 1977 and 1993, the number of workers in this country employed by these industries has doubled to 3 million people. So it is a huge, cutting-edge, developing industry, and without copyright protection—and yesterday, Mr. Chairman, I sat in a hearing on the intellectual property bill that Mr. Berman just left to join Mr. Kantor in China for the signing of, and it became very clear how important the opening of markets is to these products and, when those markets are protected, how important it is that they have copyright protection.

These industries together have achieved foreign sales of \$45.8 billion in 1993. Amazingly, that was the second biggest single contribution to America's balance of trade, and one of the reasons the dollar is plunging is because of the imbalance of trade. Therefore, as we look at what we are going to do to strengthen the dollar and strengthen the balance of trade, the copyright industries of America become signal in their importance in this area.

I would also like, Mr. Chairman, that the Senator from Montana's statement, Senator Max Baucus' statement, with your permission, be included in the record.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Baucus follows:]

PREPARED STATEMENT OF SENATOR MAX BAUCUS

Thank you Mr. Chairman. I appreciate the opportunity to offer this statement and I applaud you for holding this hearing. And I commend both you and the distinguished Senator from California, Senator Feinstein, for your hard work and bipartisan approach to an issue of great importance to so many talented Americans.

S. 227 recognizes a right which is paramount if we are to continue America's preeminence in the arts. While the details raised by this legislation are complex, there is really just one simple, overriding reason that it should be passed: fairness. It is only fair that our laws should protect the right of an artist to benefit from the use made of his or her work.

For many years, I have worked on the Finance Committee to open new markets for American products. But I have also worked to protect the value of intellectual property in the international marketplace. I have consistently pushed our trade representatives for measures ensuring a principled approach to prevent piracy.

My efforts in 1988 led to the drafting of Super 301, a trade law which has benefited the authors of intellectual property all over the world. By empowering our trade representatives, Super 301 has led to the closing of piracy operations in many foreign countries. Most recently, Super 301 helped us reach an historic agreement with China to protect the rights of our performers.

Likewise, I believe we must also protect the rights and interests of performance artists here in the United States. S. 227 accomplishes just that goal.

By granting a royalty to performers of creative material, this bill resolves an inequity which has existed for some time in the recording industry. As Chairman Hatch so eloquently stated upon introducing this bill, it is difficult to "understand the historical failure to accord to the creators of sound recordings the rights seen as fundamental to other creators." Since 1971, we have recognized recordings as works entitle to copyright. But we have failed to allow the producers of these works to benefit from the use of their work. This bill takes a significant step toward fairness for all involved.

I might add that this bill appears to preclude a new inequity by exempting the broadcasters from paying twice for the right to broadcast the recordings to which this legislation applies.

I believe this bill is both fair and appropriate and I am pleased to take this opportunity to express my support for its passage.

Thank you, Mr. Chairman.

Senator FEINSTEIN. Now, I would like to turn to my questions and get to the first one, and I am afraid in Mr. Berman's absence, it is going to fall to Ms. Rosen.

Let me ask a major question right up front for the record. An industry-wide agreement was reached last May based on a bill that Senator Hatch and I introduced in the Senate and Mr. Hughes offered in the House, as you well know. In crafting this year's bill, why wasn't that agreement, provision for provision, incorporated into the draft that the RIAA is backing this year? As ASCAP and others will address on the third panel, this question is really at the core of the debate over this bill and I would like to resolve it right now, if we can.

Ms. ROSEN. A good and, unfortunately, complicated question. Last year when there was an industry, if you will, agreement—and a significant portion of those compromises to ensure that songwriters and publishers were protected, as you know, took place in discussions in your office—there was agreement among all of the parties over a draft that was to be considered in the House.

Unfortunately, at the last minute the publishers and writers, through their licensing societies, decided that that was not an agreement that they could live with because they wanted an additional provision which would define all digital transmissions as performances, and effectively the legislation died at that point.

When we looked again this year to reconsider what made good policy sense for the Copyright Act, and started, of course, with what has now become the infamous May 11 draft, there were three things that we looked at that we found did not make good policy sense, and if I could I will just go through them quickly.

Senator FEINSTEIN. Please do.

Ms. ROSEN. The first one was the issue of whether or not the protections that we put in the bill to address the so-called gatekeeper issue, which is would the record companies and artists somehow prevent licensing of their music which would then eliminate the ability of songwriters and publishers to also receive money on their music—we created in your office a sort of statutory license for a large number of these services, so that essentially artists and record companies would be forced to license their music. It wasn't something we thought was necessary, but it was a protection that we were willing to obviously live with.

Included in that was, in effect, a miscommunication—I don't know how else to describe it—because something called interactive services is what is now excluded from the bill that Senator Hatch and you have introduced. Interactive services, in the minds of artists and record companies, are those times where someone can be sitting in their home and pull up the Don Henley channel on Digital Music Express or Digital Cable Radio and they can actually decide which of Don Henley's songs they want to play at any given time.

Now, they may not be downloading it, but they are using it as they are using a record, and artists and record companies simply felt that those were marketing and distribution decisions that should retain the exclusive right that all other copyright owners enjoy under the same circumstance. If that was a movie instead of a sound recording, it would have that exclusive right.

Now, I think the fear issue is will artists and record companies use that exclusive right to somehow eliminate songwriters and music publishers from licensing their work. The answer is obviously a clear no. Artists and record companies are in the business of disseminating their work and they are going to want to look for opportunities to do that.

The second issue has become the so-called Muzak issue, and I will outline that as a policy decision that obviously this committee has to make. Should Congress exempt commercial services that are selling music to businesses from this legislation when you are covering commercial services that sell music to consumers? Should businesses not have to pay if cable systems that are charging consumers have to pay? We simply think the answer is no.

The songwriter and publisher concern is that if Muzak and other services have to pay artists for their works, then they will pay less to songwriters and publishers. The legislation specifically says that is not the case; that those royalty payments to songwriters and publishers are not to be taken into account when those negotiations take place.

The final one is a quite complex issue that has become known as the nontrackable music publisher issue. Essentially, legislation in that May 11 draft would have required that if, at any time during any possible broadcast, somebody thought that somebody might be making a copy of the recording, then we should have this Government body and record companies' enforcement of payments to music publishers separate and apart from the payments they receive from the performance of those works.

We took that out of the draft, but I think it should be clear to this committee no rights were taken away from the music publisher by taking it out of the draft. If there are services that distribute music that can be traced as a distribution, music publishers are perfectly free under the current law to go to those transmitters to protect their rights.

Senator FEINSTEIN. Thank you. I think you have explained a very difficult, complicated issue very clearly, and I think it is important for members of the committee to come to grips with it.

Mr. Chairman, if I might say I worked with songwriters and with ASCAP in trying to assure them that nothing in this legislation is meant to in any way diminish their protection, and we have tried very hard to do it. I believe that this draft is a fair draft. If there are better ways, I am certainly open to them.

I think the important thing that is achieved here—in the earlier draft, as well, the broadcasting was included, and that is deleted in this draft legislation. So this bill really just has before it the particular services that are involved that I mentioned in my opening comments, and I think that is important to know. I am hopeful that the songwriters and ASCAP will realize the basic fairness of this and that we did try to do everything we possibly could to see to it that their rights are protected, and specifically not diminished in any way.

So, that really completes my statement and my question. I think this is the big point of any possible disagreement.

The CHAIRMAN. Thank you, Senator.

Senator Thompson.

**STATEMENT OF HON. FRED THOMPSON, A U.S. SENATOR
FROM THE STATE OF TENNESSEE**

Senator THOMPSON. Thank you, Mr. Chairman. Coming from Tennessee, you can imagine how near and dear this subject is to my heart, and I want to thank the chairman and Senator Feinstein for their leadership in this area.

I think it is very important that legislation keep up with technology, and it looks to me like we have fallen behind a little bit in this country in many different respects in that regard. I think it is fair that we simply apply standards of common sense and fairness here, and that people not benefit from the sweat of other people's brow, is kind of what it gets down to.

A lot of people look at this as a big industry and big business, and it certainly is that, but I know of all those people in Nashville and other places in Tennessee who are those 10-, 15-, 20-year overnight successes that are not being treated fairly.

I think what Senator Feinstein touched on is very important. I have been concerned about the balance. Mr. Henley talked about the various hats he wears. I certainly wear various hats and I am very concerned that we strike the right balance between the songwriters and publishers, on the one hand, and the artists and the record companies on the other hand.

I have studied this bill. I think it is a good effort. I continue to study and examine it and talk to all the people that I can about it and get up to date on it. Senator Feinstein and Senator Hatch have been at this, laboring hard, for many, many years, and some of us newer to the table are having to play catch-up, but I am encouraged at what I see.

I look forward to working with you as the days go on in making sure that we get this job done and that we are fair to all the people concerned. I think the gatekeeper issue, it looks like, is pretty much resolved. The concerns the songwriters had, for example—it looks like we are well on the way to resolving those, and I am encouraged.

I just have one question, and perhaps Ms. Rosen would be the one to address it to. We talk about this impending technology and, of course, this legislation does focus right in on the digital subscription service. We hear a lot about impending technology and how things are going to be revolutionized the day after tomorrow, and it sometimes doesn't happen. Fiber optics and interactive and all those things that a decade ago people were talking about were right around the corner haven't come yet.

I think certainly that this digital subscription situation is going to be there and we need to get in front of it as much as we can, but I am just curious to what extent is it already upon us. Where do we stand with regard to that? Is this an immediate problem or is this something that is going to be down the road a bit and may or may not be as imminent as some people think, in your opinion?

Ms. ROSEN. It is an excellent question, Senator, and I have two responses. One is I think it would be appropriate to ask Commissioner Lehman about the work that he is doing with the national information infrastructure and how the superhighway, in effect, affects some of these issues.

The second answer is that nobody knows what technology is going to take and what technology isn't going to take. Nobody knows whether a consumer is going to end up getting music 15 years from now through their telephone, through their cable television, or through their computer. The copyright law has never been based, and never should be based on defining technology. That is why it has lasted as long as it has.

Our principal concern with trying to make as many technical changes and specificities in the statute that some of the other interests want to happen is that you don't want to twist yourself into a way that, No. 1, either dictates which way technology goes or ends up creating a loophole if technology goes another way.

The copyright law should be about what rights do people have, and then the marketplace should be the place to enforce those rights. So I think it would be wise for this committee to look at what are the basic rights we want people to have, how do we make sure that those rights exist in as broad a way as possible, and then allow the marketplace to be in charge of enforcing those.

Senator THOMPSON. So you would think this legislation should be broader, really, than it is?

Ms. ROSEN. Oh, absolutely. It is a huge compromise to have it be as narrow as it was, but I think that to try and make it even narrower to accommodate what, in effect, is fear of technology, and legitimate fears—nobody has as much heart and concern and sympathy for the whole of the music community than I do, but we are not going to be able to legislate against fear of technology. We can only, as proponents of good public policy, legislate a basic right and depend on the marketplace. If technology changes in 10 years, then you will come back to the committee and say, well, maybe somebody might get hurt here.

Senator THOMPSON. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Thompson.

Senator Leahy.

**STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR
FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you, Mr. Chairman. I have a statement that I would ask to put in the record.

The CHAIRMAN. Without objection.

Senator LEAHY. We have talked about technology changing and I think how true that is. I can sit at my computer in my office here or in my home in Vermont, and I call up my e-mail messages from all over the country and from my various offices and I am listening to "Hotel California" or "Get Over It" on the computer at the same time. In fact, my staff encourages it because it puts me in a somewhat better mood when I am getting messages that I might not want otherwise. So, Mr. Henley, I thank you for that, but it shows the changes.

Who knows what is next? We use a little square in the computer where it can also be monitoring the TV feed from the floor. They will be putting in music videos. Maybe we will be better for it, but I have been involved with this issue, as the chairman knows, for a number of years on this committee because, as Ms. Rosen said,

we don't know where the technology will lead us. We do know where we ought to be protecting rights.

I look at a man like Winn Cooper, who is a professor at a small college in the southern part of Vermont, Marlboro College. He has one published collection of poems he published 10 years ago and it had a poem called "Fun" that was made into the hit song, "All I Want To Do," that was sung by Grammy Award winner Cheryl Crowe. She did it on the Tonight Show. He got \$432 from that because the rights were there. The most he had ever made from the poems was \$100 before that. On the other hand, of course, there are others where it is huge amounts of money, depending upon how it is done.

We are going to hear from a later panel that there is a concern that the copyright interests of the composer and songwriter in the musical composition will be adversely affected by the establishing of a performance right in the sound recording. How do you answer that, if any one of you want to try it?

Ms. ROSEN. Well, I guess the two answers are, No. 1, we think it is coming down a little bit to this issue I raised before, which is the fear factor. No. 2, there are two principal, substantive issues that have been raised by the writers and publishers. One is the so-called gatekeeper theory. Are we going to use our rights to prevent their rights? The second is the pie. How big is the pie? If these digital services have to pay songwriters and music publishers, they are going to get less if they also pay other rights holders.

There are three specific things in the bill that deal with that. One is the provision I mentioned before which simply says that royalties paid to songwriters and publishers are prohibited from being considered in the consideration of other payments. The second is the vast majority of current income, of course, is not included in the bill—radio—now or in the future—bars, taverns, restaurants.

Senator LEAHY. Let me ask you a little bit about that because the bill, as I understand it, is very precise about how you divide the performance royalty among the recording artists and the record companies.

If my numbers are correct, featured artists receive 45 percent, musicians and backup singers another 5 percent, and a 50-percent royalty for the record company. Now, if these percentages are fixed in law, can they be waived or renegotiated or altered by contract?

Ms. ROSEN. Well, the simple answer is no.

Senator LEAHY. Well, then what is apt to be the magnitude of the licensing fee for a recording? Are we talking in the range of a few pennies a recording, or more? I am thinking now of the impact on consumers of this.

Ms. ROSEN. Well, it is nice; we should think more about the consumer and less about our own internal bowel here because, frankly, I think there is a public interest in this legislation that is getting lost in the morass of whether this is artists versus songwriters.

Senator LEAHY. That is why I thought I would bring it up.

Ms. ROSEN. The specifics of a negotiation, I really can't address. I don't know. Obviously, each individual artist and record company are going to be negotiating that. There is some practice in the in-

dustry on other kinds of uses, but it will depend on the use, how many subscribers, how many times is it going to be used, what is the charge to the consumer for the basic service.

Senator LEAHY. Mr. Chairman, could I just extend this a bit because I think probably Mr. Henley is an encyclopedia on this? He is a songwriter, a performer. You have a music publishing company, too, do you not?

Mr. HENLEY. Yes, sir.

Senator LEAHY. Well, let me ask you this. As a songwriter, wearing that hat, what are your sources of compensation, normally?

Mr. HENLEY. Well, my sources are my publishing and just the basic—

Senator LEAHY. Well, for example, take “Desperado.”

Mr. HENLEY. Right.

Senator LEAHY. Do you get paid directly by the publishing company for writing that or do you get paid again as a songwriter—not as a performer, but as a songwriter, do you then get paid as it is performed?

Mr. HENLEY. Well, I am fortunate to own my own publishing, which is administrated by Warner Bros., so I get paid there and then I get paid as a songwriter.

Senator LEAHY. If “Desperado” was, for example, published by Sony—I don’t want to plug a particular company, but do you see what I am getting at, Mr. Henley? If somebody else had written it, for example, how would they get paid?

Mr. HENLEY. They would get paid for sales and performance; mechanicals, in other words. But I have to say for the record companies that I don’t think that ASCAP nor any of the performance rights societies should be in the business of distributing mechanicals. I am not worried about the gatekeeper issue.

Senator LEAHY. You anticipated my next question. Thank you. Then you have copyright royalties from sales or public performances of the songs you author?

Mr. HENLEY. Yes.

Senator LEAHY. Tours, performances, merchandising—that is another area that a performer might get?

Mr. HENLEY. Yes, sir; many of these things are negotiable.

Senator LEAHY. All of these things are not dependent on this bill passing or U.S. law recognizing a performance right in sound recordings?

Mr. HENLEY. That is correct.

Senator LEAHY. If we pass this, you are talking about a new and different form of compensation, is that correct?

Mr. HENLEY. As far as I can tell.

Ms. ROSEN. Senator, maybe I can clarify a little bit the relationship between how an artist makes their money and how a songwriter, if you will, makes their money. Artists will make their money based on contracts that they will have, assuming they are not the songwriter, with the record company for sales. So they get a percentage of the sales.

Some artists are obviously lucky enough to go on tours. Some artists are obviously lucky enough to go on world tours. The touring life of artists, though, for big tours is relatively short. One of the things that we have found in our industry is that the older, if

you will, an artist gets and their fan base decreases, the venues that they end up playing too frequently get smaller, not larger.

Senator LEAHY. Some of the fans are also getting older. [Laughter.]

I go to these concerts.

Ms. ROSEN. You get to go sometimes to smaller, quieter clubs instead of to RFK Stadium, like I do.

These artists, in effect—because they may not be generating record sales, their appearances end up being their only source of income. For songwriters, it is sort of the opposite because writers will get paid as long as people are enjoying their music because radio is what keeps music alive in so many instances, and writers will get paid regardless of whether the artist is touring or not.

Senator LEAHY. Mr. Chairman, I appreciate your indulging me with the extra time. As we know, it is a complex issue, and as a result of that I may want to submit some questions to this panel, if I might.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

The question of establishing rights in connection with the public performances of sound recordings has been with us at least since sound recordings were accorded copyright protection in the early 1970's. I commend Chairman Hatch and Senator Feinstein for moving quickly this Congress to continue that discussion by their introduction of S. 227 and scheduling this Senate hearing.

This issue has important ramifications for the public that delights in hearing recording artists, for the record industry, for the musicians and featured artists who record, for international trade, and for our future.

As we enter an age of digital transmissions, record companies and recording artists are worried that the precision of digital transmissions and the emerging digital transmission services, will displace traditional sales of records, tapes and CD's. Consumers will be able to call up a favorite recording by the touch of a button on their phones or set top boxes, without the bother of standing in line at a store to purchase it. Record companies and recording artists understandably want to be compensated for the use of their recordings by such services.

I understand that the public performance right granted in this legislation would not cover traditional broadcasting because broadcasting is not through a subscription service, does not charge listeners and is not interactive. Indeed, such broadcasts have traditionally provided exposure and publicity for sound recordings.

I want to encourage new services, new technologies, new opportunities and new markets. At the same time, I think it important that we examine and understand the impact of this proposal on established rights, included the rights of the music composers and songwriters who are not themselves performers and recording artists.

We are delighted to be hearing from Commissioner Lehman and our Copyright Register Mary Beth Peters. Their knowledge of copyright law and practices and the international implications of this proposal are essential components of this hearing.

We will also be hearing from talented artists whose compositions and performances enrich our lives and culture. They need make no apology for their interest in fair compensation. I am proud to count among constituents in Vermont a number of songwriters, composers and performers. They are comfortable in our traditions and values—and perhaps a bit inspired by the Green Mountains. They number among our most creative and valued citizens. Their work and livelihoods ought to be respected.

I am one who believes that the copyright clause of the Constitution and our copyright laws provide important incentives for creative activity. I would like to continue to create opportunities for the greatest possible accessibility to creative works in the interests of enriching the quality of life of more and more of our citizens, especially those in rural areas, and in the hope that royalties may be moderated by wide markets.

I hope that our Committee Chairman will invite Assistant Secretary Lehman to join us again when he is ready to release the Administration's final recommendations for protecting copyright on the national and global information highways and

that we can take prompt action on appropriate legislation in that regard. Structuring firm copyright protection into the new century and in connection with new technology is both a challenge and an opportunity that we should embrace.

Finally, it is my hope that this Committee and those appearing before us today will do more to help educate the public about the importance of protecting intangible rights and respecting intellectual property rights. I fear that as we enter the digital world of the 21st century, we are losing that respect. The recent arrest of a fugitive computer hacker Mitnick, a hero's welcome home for another person after serving his sentence for computer-assisted theft of intellectual property, the dismissal of charges of the *La Macchia* case in Massachusetts, the proliferation of reports of young people delighting in their ability to break through security and steal information from computerized files, these all give me cause for deep concern.

All of us interested in these matters must do a better job of teaching respect for others' creativity and valuing the intellectual output of others. These are the products of the next century and we can ill-afford a society that fails to encourage and protect creativity.

The CHAIRMAN. That will be fine. We will keep the record open for questions because there are some other Senators who had to leave to go to other committee meetings who want to submit some questions to you, and I hope you will answer them as soon as you get them.

I just want to thank you all for being here. There are a lot of points here, but one is that with regard to videos, performance royalties must be paid every time that video appears on MTV or pay-per-view, but with regard to CD's, no performance royalty ever has to be paid under current law. No matter how many times it is played on a pay-per-listen basis, nobody has to pay any royalties, and I think that that is not right and that is what we are trying to do here.

Now, I have had some issues raised by some of the opponents of the bill and we are certainly going to listen to them today as well, but to be honest with you, this is something that has to be done. We need to get into the real world where the rest of these countries are. Wherever I go around the world, I talk in terms of intellectual property rights and we want to certainly try and get this bill passed.

So I appreciate all those who are supporting this bill. I appreciate all of you testifying here today. Above all, we want to be fair in every way we possibly can. We appreciate your being here.

Mr. Henley, it is an honor to have you here. You are a great artist, and as staid as I am, I have enjoyed your music very much.

Mr. HENLEY. Thank you, sir.

The CHAIRMAN. Actually, most people don't know I used to help run a rock group.

Senator FEINSTEIN. You are kidding. [Laughter.]

The CHAIRMAN. There is a seething person underneath this placid exterior.

Senator THOMPSON. That explains those neckties.

Senator FEINSTEIN. Yes, that is right. [Laughter.]

The CHAIRMAN. Every once in a while, I have to let a little bit out. It was one of the most expensive experiences I have ever had, but I enjoyed every minute of it. I love music and I appreciate you artists, whether they range from Arthur Rubinstein or whoever.

Senator LEAHY. Mr. Chairman, I will be glad to bring you—I go to rock concerts all the time. I will be glad to bring you with me.

The CHAIRMAN. I am afraid to be seen with him. [Laughter.]

Ms. ROSEN. Mr. Chairman, could I just clarify the record for one moment? I guess I could do this in writing, but the TRIPS agreement has a term of 50 years. It is U.S. law for sound recordings that has the term of 75 years.

The CHAIRMAN. Well, we are glad to have that corrected. You all three have been excellent witnesses. We appreciate your being here. Thanks for coming and being with us.

Our next two witnesses will be the Honorable Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, and the Honorable Marybeth Peters, Register of Copyrights. I would particularly like to thank our governmental witnesses, the Patent Commissioner, Bruce Lehman, and Register of Copyrights, Marybeth Peters, for their flexibility in allowing us to reverse the traditional order of testimony this morning in order that the travel schedules of others could be accommodated. So I appreciate that because normally we would have them go first.

So thank you, Bruce, for being willing to do that.

Mr. LEHMAN. Would you want me to proceed, Mr. Chairman?

The CHAIRMAN. Thank you for being willing to let us have that first panel first because of travel schedules.

I would like to note that this is the first committee appearance for Marybeth Peters in her new role as Register of Copyrights, and I want to congratulate her on her appointment. As people know, she was appointed last August by the Librarian of Congress, Jim Billington, but you have been around a long time helping us, a 28-year veteran of the Copyright Office who has appeared before the committee on a number of other occasions.

So we are appreciative of both of you being here, appreciative of both of you allowing us to put you on second to accommodate these others, and we will turn to you, Mr. Lehman, at this time.

STATEMENTS OF A PANEL CONSISTING OF HON. BRUCE A. LEHMAN, ASSISTANT SECRETARY OF COMMERCE AND COMMISSIONER OF PATENTS AND TRADEMARKS; AND HON. MARYBETH PETERS, REGISTER OF COPYRIGHTS AND ASSOCIATE LIBRARIAN FOR COPYRIGHT SERVICES

STATEMENT OF BRUCE A. LEHMAN

Mr. LEHMAN. Thank you very much, Mr. Chairman. With the permission of the committee, I would like to submit my written statement for the record.

The CHAIRMAN. We would appreciate it. We would like you to keep within 5 minutes because I have to be gone by 12 o'clock or a little bit before 12 o'clock and I do want to hear that last panel.

Mr. LEHMAN. In view of the necessity of time, if it is OK with the chairman, I would like to proceed and just make a few comments summarizing our testimony and a few observations about this subject that you have been hearing about. First, I would like to commend you, Mr. Chairman, and Senator Feinstein for the work that you have done on this bill and to say that the administration supports your legislation.

The main purpose of the bill, as we see it, is very simple. It is simply to make certain that Americans get paid for what they do for a living. It is as simple as that, and we are working in a global

environment now in which increasingly what Americans do for a living and what they export to the rest of the world is what comes right out of here, right out of their head.

I just came here from a meeting in San Francisco—fact, I came back early because of this hearing and the importance of this hearing, and Ms. Peters was with me there—of 11 industrialized nations to try to work on these very issues, and that is how are we going to protect what people in the modern world do for a living in this global digital environment.

We have an administration task force on the emerging information infrastructure, and first we started looking at the United States and we realized almost immediately, after looking at the United States and its laws, that we couldn't even speak of a national information infrastructure. We had to immediately think of a global information infrastructure.

If you keystroke into the Internet right now, you will immediately find displayed on your screen in images and sounds—if you have a multimedia computer that comes through the sound, and Senator Leahy referred to that, you will find images and sounds that are stored in data banks and computers in other countries. So we are dealing in a global environment and it is very important for us to make certain that we have rules in that global environment which protect the interests of U.S. workers. That is particularly important because this country is the fountain of intellectual property; it is one of its most important national assets.

Now, one of the areas in which we have, frankly, an anomaly between U.S. law and the law of the rest of the world is in this area of historic area of sound recordings. Even though we have the biggest sound recording industry in the world, we have provided less protection than other countries.

I was listening to the comments of Ms. Rosen earlier and it is absolutely the case that other countries have used this anomaly in U.S. law to raise money off the labor of U.S. performers and U.S. record companies and then returned the fruits of that labor to their own nationals. This is unfortunately a problem which is threatening to expand because, as we move into new technologies—and sound recordings were really the first new technology to come along in the 20th century—we find that it is not clear that the existing copyright treaties, particularly the Berne Convention, cover all of these new technologies.

So to the extent that we have anomalies in U.S. law of the type that we currently have in sound recordings, we find ourselves in a situation where other countries will begin to use those anomalies to deny us our proper revenue from the labor of our own workers when we move into uncovered areas, areas that aren't covered under international law.

So, Mr. Chairman, the administration actually would prefer to go further than your bill and Senator Feinstein's bill, and we would prefer to have a much more comprehensive performance right so that we could use that right to match up with the systems of other countries and obtain a better deal for Americans.

But we recognize the political realities of the situation at the moment, and I would only encourage those parties who have very parochial interests in the United States to try sometimes to look be-

yond those interests to the larger picture, as I know you have, Mr. Chairman and Senator Feinstein. But for the moment at least, what you have done will certainly give us a start and we would like to commend you for that work and support it in any way that we can. Hopefully, this will be a start and we will even do better in the future.

[The prepared statement of Mr. Lehman follows:]

PREPARED STATEMENT OF BRUCE A. LEHMAN

Mr. Chairman and Members of the Committee, I am pleased to appear before you today to testify on a bill that will perform their sound recordings publicly by means of digital transmissions.

As you know, sound recordings are the only copyrighted works that are capable of being performed that are not granted public performance rights. This deficiency in our system is not justifiable as a matter of policy. We applaud the efforts of the Chairman and Members to correct this inadequacy and I come before you to express the Administration's support of the provisions of S. 227 that would establish an exclusive right in the public performance of sound recordings by means of digital transmission. However, as I will note, we do not support the establishment of a compulsory license limiting this right.

We believe that the time has come to bring protection for performers and producers of sound recordings into line with the protection afforded to the creators of other works.

Public performance rights are granted in many foreign markets, but some countries, asserting the Rome Convention as justification, condition the availability of these royalties on reciprocity. The Rome Convention, although based on the principle of national treatment, permits this. That is, its members may refuse to give performance rights (and thus refuse to pay performance rights royalties) to record producers from countries that do not grant performance rights. Other countries may reserve the right to base protection on reciprocity, and thus, while currently basing it on national treatment, can change their policies at any time and still comply with the Rome Convention. Due to the lack of a performance right in the United States, U.S. performers and record companies are denied their fair share of foreign royalty pools for the public performance of U.S. sound recordings in some countries and are in danger of losing access to their share in others.

By granting performance rights in sound recordings, the United States will treat the creators of these culturally and economically important copyrighted works the same as all the other works capable of being publicly performed. This legislation will provide increased incentive for the creators of sound recordings to produce and disseminate more works, thereby expanding consumer choice. In addition, the enactment of these rights will strengthen the hand of Government negotiators and private advocates seeking a fair share of foreign royalty pools.

I stated earlier that there are no policy justifications for the lack of a public performance right in sound recordings. I would like to address briefly two of the arguments some have posed as justifications.

Some argue that copyright owners of sound recordings should not be granted a public performance right because they derive some indirect benefit from the public performance of their works. This argument is based on the theory that the public performance of a work increases the sales of reproductions of that work. Therefore, the copyright owner gets an indirect benefit (i.e., increased sales of reproductions) from the so-called "free advertising" that public performances provide. This, in fact, may be true in some cases. However, it is not a valid policy argument against providing sound recording copyright owners with the full panoply of exclusive rights other copyright owners enjoy. Moreover, with the advent of high quality copying devices that can be used to copy sound recordings from digital broadcasts, those broadcasts may, in fact, decrease sales of sound recordings. S. 227 would partially compensate copyright owners of sound recordings for such lost sales.

The exercise of one right often increases the value of the exercise of another right, but we do not restrict any other copyright owners from exercising *all* of his or her rights. For instance:

The copyright owner of the musical composition embodied in a sound recording is paid both when recordings of the composition are sold *and* when the composition is publicly performed—even though the public performance might increase the number of records sold and thus benefit the copyright owner.

Serial excerpts from a novel that are published in a magazine might increase sales of the book, but the magazine nonetheless must obtain permission from the author of the book.

The copyright owner of that novel may also increase his book sales when a motion picture based on the novel is released. However, no one suggests that the motion picture company shouldn't have to pay the copyright owner of the novel for the right to turn it into a movie, just because the movie might indirectly benefit the copyright owner.

The copyright owners of sound recordings should be able to decide for themselves, as do all other copyright owners, if "free advertising" is sufficient compensation for the use of their works. If the users' arguments regarding the benefit copyright owners derive from the public performance of their sound recordings are correct, the users should be able to negotiate a very low rate for a license to do so.

It also has been argued that there is a finite limit to the "public performance royalties" that can be paid by those who publicly perform musical compositions and sound recordings, and that the benefits currently enjoyed by the copyright owners of musical compositions will be reduced if their licensees also must obtain licenses from the copyright owners of sound recordings. Although we do not accept this "royalty pie" argument as justification for denying public performance rights to sound recordings, it does highlight a marketplace issue we believe should be addressed.

The compulsory mechanical license was added to our copyright law in 1909 in response to fears that "a great music monopoly" would dominate a fledgling market. Section 115 of the Copyright Act requires the copyright owner of a musical composition to allow record companies to make and distribute records utilizing that composition, and, in the absence of a negotiated fee, fixes the amount of money the record company will pay the copyright owner for that privilege. The compulsory license has no place in our law today. Myriad composers, music publishers, and record companies can and should engage in price competition and free negotiation in the marketplace. As the United States is trying to rid the rest of the world of unjustified and unnecessary compulsory licensing systems, which force U.S. copyright owners to accept statutory license fees for the use of their works abroad, we cannot justify keeping this unnecessary compulsory license in our law. Continuing an unnecessary compulsory licensing scheme that has outlived its justification sends the wrong message abroad and sets a undesirable precedent internationally.

The Administration believes that granting a public performance right in sound recordings and eliminating the compulsory mechanical license, taken together, will go a long way toward regularizing the treatment of sound recordings and musical compositions under the copyright laws.

Finally, I would like to address briefly the limited scope of this legislation. As you know, the right granted in the bill is not the full performance right granted to other copyrighted works. The eliminations on the right include carve-outs and exemptions for:

- All public performances not involving transmissions, such as DJs playing records in nightclubs;
- All analog transmissions, such as those of traditional radio broadcasters;
- All nonsubscription digital transmissions; and
- Many retransmissions and further transmissions of subscription digital transmissions.

The Administration believes that a full public performance right is warranted—certainly to cover all digital transmissions. We believe that there is no reason to afford a lower level of protection to one class of creative artists and we note once again that the absence of such a right has frustrated the efforts of our artists to obtain access to revenues generated by their works abroad. The digital communications revolution—the creation of advanced information infrastructures—is erasing the distinctions among different categories of protected works and the uses made of them. Therefore, we are disappointed that the right granted in the bill is not the full public performance right granted to other copyrighted works. Nevertheless, we accept that this may be all that is possible now, and we support the granting of this limited right based on our belief that part of a loaf is better than no bread at all. We will continue, however, to support all efforts to grant the same panoply of rights for sound recordings that are granted for other copyrighted works.

While we can accept the limited scope of the right granted, we are troubled by the imposition of a compulsory license on a big part of what little is left of the public performance right in the bill—such as the statutory licensing requirements for subscription transmissions found in section 114(f), and the statutorily defined remuneration percentages of section 114(g). We recognize the concern expressed by some that owners of the exclusive performance right in sound recordings could have the potential to exercise their right to the detriment of owners of the rights in the musi-

cal composition—particularly in vertically integrated business arrangements. Absent evidence of anti competitive practices, however, the Administration believes that the licensing of this right should be left to the marketplace and sees no reason to create a new compulsory license. At present, we are not convinced this further limitation on an already very limited public performance right is necessary.

With that exception, I am pleased to offer the Administration's support for this bill, and I thank the Chairman and Senator Einstein for introducing it.

I would be pleased to answer any questions Members of the Committee may have.

The CHAIRMAN. Well, thank you so much.

Ms. Peters.

STATEMENT OF MARYBETH PETERS

Ms. PETERS. Thank you very much, Senator Hatch, and thank you for your kind welcome. It is a privilege to be here and to testify on S. 227.

The Copyright Office forever, almost, has supported performance rights in sound recordings. When you consider what a sound recording is, it is basically the performance and when you don't give it a performance right, you have basically taken away the biggest right that a record star needs. So, for us, we see it as basically simple justice. It is one of the rights that is given to every other work; it should be given to sound recordings, and we are delighted that you and Senator Feinstein have introduced this bill.

Like Mr. Lehman, we also wish it went further. When you look at digital and you look at what it is going to do, it is hard to see a total carve-out for digital broadcasters. It may cause some unfair competition vis-a-vis the cable companies and digital broadcasters, and I don't know how you handle that. I am very well aware of the fact that this is a very difficult issue and one that has to be compromised.

We also had, like Mr. Lehman, a concern that this may not give us enough to deal with this issue internationally. Yes, it would help here, and for that reason we should do it, but I think maybe when you look at the laws where they apply material reciprocity, it won't get equivalent payment back to us, and it may not work for the new instrument that they are trying to craft for sound recordings because countries may not accept this as the minimum level.

We also basically had some concern with regard to composers and music publishers, and although they are given an exclusive music performance license, the way that it is exercised is in a non-exclusive fashion or collectively. We note that the May 11th consensus agreement was basically very different than what we have before us, and we have a few concerns about the sound recording performance complement and how that would work.

On May 11, it talked about two consecutive performances or three consecutive performances and that is easy to track, but two in a day is very difficult. We wonder how this will work vis-a-vis the music performance rights societies, and I am sure you can work that out.

We must consider what is at stake here. We think with regard to the national information infrastructure and the global information infrastructure that we are talking about the very viability of the music industry and the recording industry. So despite the few concerns that I have, I really do congratulate you for moving this legislation forward and working with the parties to gain consensus

and so we can see finally a public performance right for sound recordings in the United States.

Thank you.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

Mr. Chairman and members of the committee, it is a privilege to appear before you today to testify on S. 227, a bill that creates a performance right for sound recordings when they are performed publicly by digital transmission to paying subscribers and also proposes changes in the mechanical compulsory license.

Senators Hatch and Feinstein introduced S. 227 on January 13, 1995; they proposed similar legislation in the 103d Congress. The Copyright Office has always supported the principle behind S. 227.

As Senator Hatch so aptly noted in his floor statement, the joint authors of sound recordings—those who produce them and those who perform on them—must be seen as creators fully entitled to those rights of reproduction, distribution, adaptation, and public performance that all other authors enjoy.¹

My statement begins with an analysis of S. 227, indicating where the Office has questions or comments. It also contains a brief summary of the history behind this bill, notes the reasons the United States should recognize performance rights in sound recordings, and concludes with some of the concerns the Office has on S. 227.

I. THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT

A. Activity during the 103d Congress

1. *Legislation introduced in the Senate and House.*—On August 6, 1993,² Senators Hatch and Feinstein introduced S. 1421; this bill provided for “an exclusive right to perform sound recordings publicly by means of digital transmissions.” The grant of exclusive performance rights in sound recordings³ would enable copyright owners to authorize or prohibit all digitally transmitted performances. Under current law, broadcasters may publicly perform recordings as long as the performances are licensed by the copyright owners of the underlying works. Performance rights in non-dramatic musical compositions are typically licensed by performing rights organizations.

Representatives Hughes and Berman had introduced H.R. 2576 on July 1, 1993.⁴ Both bills broadened the scope of exclusive rights in sound recordings in the same manner, by amending 17 U.S.C. § 106 (exclusive rights in copyrighted works) to include sound recordings performed publicly by means of a digital transmission, including cable television and satellite transmissions.

Both bills also deleted subsections (a), (c), and (d) from section 114, leaving subsection (b) to stand alone.⁵ Unlike the House bill, the later Senate bill addressed some concerns⁶ raised by existing rights holders by adding a section that stated licensing fees payable for the public performance of sound recordings under section 106 “shall not be taken into account in any administrative, judicial or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works.”⁷ In her floor statement, Senator Feinstein noted that this provision was added to let governmental and judicial agencies know that the legislation was not intended to reduce existing royalties and that in the course of hearings there would be a determination whether “additional statutory protection for current rights holders” would be required.⁸

¹ 141 Cong. Rec. S948 (daily ed. Jan. 13, 1995) (statement of Sen. Hatch)

² S. 1421, 103rd Cong., 2d Sess. (1993).

³ A sound recording typically embodies two copyrightable works, the musical work and a sound recording. Music copyright owners presently enjoy an exclusive performance right, although this right is exercised in a nonexclusive way; music performance is licensed pursuant to consent decrees. Moreover, rates for licensing musical performances are subject to judicial review.

⁴ H.R. 2576, 103rd Cong., 2d Sess. (1993).

⁵ Subsections (a) and (c) referred to the exclusive rights mentioned in section 106, and would no longer be pertinent if S. 1421 passed. Subsection (d) requires the Register to perform the study that was completed in 1978, and is, therefore, no longer necessary.

⁶ These concerns related to what is sometimes referred to as the “pie” theory: users might seek to reduce music performance fees to composers, songwriters and publishers because a new category of authors would be entitled to claim royalties from sound recording performance.

⁷ S. 1421 at Sec. 3.

⁸ 139 Cong. Rec. S10900 (daily ed. Aug. 6, 1993) (statement of Sen. Feinstein).

2. *Consensus agreement.*—Although there was a great deal of debate on these two bills, neither the Senate nor the House held hearings.⁹ However, in an effort to forge some consensus between interested parties, Chairman Hughes hosted “round-table” discussions. Among those represented at the discussions were leaders of broadcasting, cable, satellite, restaurant owners, and copyright owners of music and sound recordings. As a result of these meetings some agreements were reached, and last spring music industry organizations representing songwriters, performers, unions, performing rights societies, music publishers and record companies announced they had reached an agreement on legislation that would create a digital public performance right in sound recordings. The May 11, 1994, agreement was endorsed by the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), the American Federation of Musicians (AFM), the American Federation of Television and Recording Artists (AFTRA), the National Music Publishers Association (NMPA), and the Recording Industry Association of America (RIAA). Conspicuously missing, but not surprisingly so, was the endorsement of the National Association of Broadcasters (NAB).

The agreement did not provide so broad a public performance right for sound recordings as did S. 1421 and H.R. 2576. Instead, it focused generally on creating a compensation system for performance of sound recordings that are distributed by commercial subscription audio services. An exemption was included for services such as MUZAK. The May 11 consensus agreement also included a so-called window of exclusivity. This window consisted of an exclusive right to authorize digital performance by subscription services three months from first public performance or four months from first sale of a recording, whichever came first. This provision was aimed at giving sound recording owners lead time to authorize or prohibit subscription transmission on new recordings. Sound recording owners, pursuant to this provision, could control the introduction of new products into the digital market.¹⁰ After that period, digital transmissions of the sound recording by a subscription service were subject to negotiation or arbitration. The May 11 agreement provided a statutory license for digital subscription transmission falling within a certain sound recording performance complement. This complement restricted subscription transmission to two consecutive selections from the same phonorecord, and three consecutive selections by the same feature artist or from the same set of works marketed together as a unit.

The consensus agreement also addressed and revised the application of the mechanical reproductions compulsory license of § 115 of the Copyright Act, and gave the Librarian of Congress substantial responsibility in that area. Mechanical reproductions rights of writers and publishers would apply when phonorecords were delivered to consumers by way of digital transmissions. The mechanical royalty rates would vary depending on whether or not it was possible to identify the particular work being copied. The two categories of works were “trackable,” i.e., identifiable deliveries, for which information would be available as to which works were being copied, and “nontrackable” deliveries, those deliveries for which copying can reasonably be expected but identification of the works copied would be impossible or difficult. The concept underlying this division into categories was to encourage record companies to collect information for the purpose of paying mechanical royalties. The consensus agreement rates for identifiable deliveries would be the mechanical compulsory license rate. The rates for nontrackable deliveries, where the making of phonorecords was facilitated without making an effort to determine which works were being copied, were to be set by voluntary negotiations. If negotiations were unsuccessful, rates would be subject to the binding determination of copyright arbitration royalty panels, convened by the Librarian of Congress.

3. *Amendment Based on the May 11, 1994, Consensus Agreement.*—Following that agreement, Chairman Hughes circulated several draft substitute amendments to H.R. 2576 and scheduled a markup on a draft substitute bill on June 28, 1994.¹¹ That draft legislation proposed a digital public performance right in sound recordings that exempted over-the-air broadcasters engaging in digital transmissions. Digital delivery was defined as occurring if “the person entitled to the compulsory license has authorized a digital transmission of a sound recording that results in the identifiable making by the transmission recipient of a phonorecord of that sound re-

⁹ An oversight hearing had been held in the House earlier concerning these rights—“Performers and Performance Rights in Sound Recordings: Hearing before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary,” 103d Congress, 1st Sess. (1993).

¹⁰ The significance of this provision is seen when the digital transmission represents a lost sale because interested consumers record a digital transmission rather than purchase it.

¹¹ All references are to the draft amendment circulated on June 28, 1994.

ording.”¹² The performance right would apply to broadcasters who offered subscription services. The draft provided either a statutory license or a negotiated license. Royalty rates for statutory licenses would either be negotiated between copyright owners of sound recordings and entities transmitting sound recordings, or would be defined through arbitration. The statutory licensing fees would be paid to copyright owners, as well as featured recording artists, and nonfeatured musicians and vocalists, according to percentages prescribed in the bill.

The Librarian of Congress was charged with responsibilities that would be similar to those he has under the Copyright Royalty Tribunal Reform Act. If negotiating parties could not reach agreement on licensing rates and terms, the Librarian would convene a Copyright Arbitration Royalty Panel (CARP) to determine rates and terms. Results would be binding on all parties that had not entered into a private licensing agreement. Proceedings would occur every five years, or whenever a copyright owner of a sound recording filed a petition identifying a new type of digital transmission service. Licensing fees were not to adversely affect fees paid to copyright owners of musical works for public performances of their works.

The substitute differed from the consensus agreement and drew criticism from music copyright owners who were concerned that compensation to songwriters and copyright holders for existing rights would be threatened. Sometime after the circulation of the proposed House amendment, some of the parties to the May 11 consensus agreement began to back away from the legislation being circulated. Part of the problem was the failure to make a bill that was palatable to the interested parties. Chairman Hughes was not interested in a bill that excluded broadcasters. Others were concerned about the issuance of the Green Paper¹³ which called for a performance right but raised again the question of whether a digital transmission is a public performance. Ultimately, even the recording industry withdrew from consideration of a bill in the 103d Congress.¹⁴

B. Analysis of S. 227, the Digital Performance Right in Sound Recordings Act of 1995

1. Overview of Bill.—Senators Hatch and Feinstein introduced S. 227 on January 13, 1995. Although S. 227 creates a public performance right for digital transmissions of sound recordings, it is much more limited in scope than their earlier bill, S. 1421. Only subscription services come under this bill; broadcasters are completely exempt. The bill subjects certain transmissions to a statutory license, the rates and terms of which will be decided by either voluntary agreements or compulsory arbitration before a Copyright Arbitration Royalty Panel (CARP).

While the new bill reflects some of the points reached in the May 11 consensus agreement, it is not identical. Nor does the bill contain everything that was in the draft amendment circulated by Chairman Hughes. It does not contain an exclusivity window, and its sound recording complement restrictions are different.

This Committee, therefore, will be considering whether S. 227 represents acceptable consensus among interested parties and good copyright policy. In order to help you with that determination, we offer the following summary and comment on the provisions of S. 227.

2. Summary and Comment on Sections of S. 227.—Section 2 amends § 106 (exclusive rights in copyrighted works) and adds a new paragraph 6 to grant another exclusive right in copyrighted works to those enjoyed by the authors of sound recordings. It gives these authors a performance right in the digital transmissions of their works to the public.

Comment: This appears to be a broad right that would cover at least all digital transmissions. Limitations on the enjoyment right are set out in the next sections of the bill.

Section 3 amends § 114 (exclusive rights in sound recordings) to refer to § 106(6) and to clarify the extent of the reproduction rights. It does this by deleting the reference after “copies” to motion pictures and other audiovisual works.” It also deletes subsection (d), of the existing section and replaces it with new subsections (d), (e), (f), (g), (h), (i) and (j). Each of these new subsections will be discussed in order.

Comment: The Office welcomes S. 227’s clarification of the scope of the sound recording reproduction right. Section 114(b) currently states that the copyright owner’s rights in a sound recording are limited to the right to control the duplication

¹²Sec. 4(2)(B), draft amendment, June 28, 1994.

¹³Department of Commerce, Patent and Trademark Office, Working Group on Intellectual Property Rights of the White House Information Infrastructure Task Force. *Preliminary Draft of the Report of the Working Group on Intellectual Property and the National Information Infrastructure* (1994).

¹⁴Bill Holland, *Performance Right Legislation Called Off*, BILLBOARD, Oct. 8, 1994, at 14.

of the work in the form of phonorecords or copies of motion pictures and other audiovisual works that recapture actual sounds fixed in the recording. S. 227 deletes this limitation to particular types of works and clarifies the comprehensive scope of a sound recording copyright owner's reproduction right to include reproductions of the sound recording in all media, including machine-readable copies. Since the scope of the sound recording reproduction right has been the subject of some controversy, this clarification should be helpful.

The new subsection (d) "limitations on exclusive right", delineates exempt transmissions, those that create no liability despite the proposed changes in 17 U.S.C. § 106.

Subsection (d), subparagraph (1), "exempt transmissions" is intended to exempt from copyright liability certain digital transmissions that are not part of an interactive service. An interactive service is defined as "one that enables a member of the public to receive, or request, a transmission of a particular sound recording chosen by or on behalf of the recipient."¹⁵ Subsection (d) sets out a list of limitations or exemptions on exclusive rights:

Subsection 114(d)(1) exempts public performance of a sound recording by digital transmission if it is:

(A) a nonsubscription broadcast transmission (such as a digital radio or television broadcast);

(B) an incidental nonsubscription transmission, such as a feed received and then retransmitted by the nonsubscription transmission, e.g., a satellite downlink to a radio station;

(C) a retransmission of a nonsubscription broadcast transmission within a 150 mile radius (to make clear that regional or national radio stations would not be exempt);

(D) a further transmission by a business confined to its premises or immediate vicinity (such as a transmission of a broadcast signal throughout a store or restaurant); or

(E) a retransmission otherwise subject to liability, with authority from a primary transmitter, with the primary transmitter licensed to publicly perform the sound recording (such as radio stations carried on cable systems).

Comment: Exemption of Digital Over-the-Air Broadcasts: This exemption would drastically curb future rights as top 40 stations switch to over-the-air digital broadcasts. It would force sound recording copyright owners to subsidize future digital transmissions of over-the-air broadcasts and give these services an unfair advantage over other providers of similar services.

Subsection (d), subparagraph 2, "subscription transmissions," creates a new compulsory license. The bill defines a "subscription transmission," to which the compulsory license attaches, as "a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission." The compulsory license does not apply to "interactive services", or where the subscription transmission exceeds the "performance complement." The "performance complement" is the transmission of no more than two selections each day of sound recordings embodied in any one phonorecord distributed in the United States or three selections each day featuring the same recording artist or embodied in a set or compilation sold as one unit.

The definition of subscription transmission seems to be directed principally at cable services which provide cable television subscribers with several channels of digital music in various genres (classical, country, rock, etc.). "Interactive services" seem to contemplate network services and addressable cable systems which allow subscribers to select, or request, particular sound recordings. The performance complement limits the type and amount of sound recordings a subscription transmission service may offer; for example, performances of entire record albums or multiple works of the same recording artist would need to be licensed by the copyright owner.

Comment: Exclusivity: The music public performance is exercised non-exclusively; earlier bills provided only a statutory license. The consensus agreement provided for a narrow exclusive license for (a) performances of sound recordings within a short window and (b) those performances that exceed a sound recording complement defined as performances of two consecutive selections of sound recordings from one phonorecord or three selections by the same artist or within the same compilation. Exclusivity questions were a key feature of the compromise, and we have some concerns about how S. 227, as drafted, affects the rights of music copyright owners. Eliminating the "consecutive" requirement and the window of exclusivity creates a much broader exclusive license.

¹⁵S. 227, Sec. 3j(2).

Performance Complement: Is this proposed performance complement too stringent for practical business reasons? How will stations track nonconsecutive performances within a 24-hour day? How will this provision be enforced?

Subscription Services: Does this mean that most or nearly all digital subscription sound recording performances will be subject to exclusive rights?

Subsection (d), subparagraph 3, "Rights not otherwise limited," emphasizes other sections of the Copyright Act that are not eliminated by the new section. They include the exclusive rights to publicly perform a musical work, under § 106(4), to reproduce and to distribute a sound recording as the musical work embodied therein under §§ 106(1) and 106(3); the right to reproduce and distribute includes reproduction and distribution by means of a digital phonorecording delivery as defined in the revised § 115.¹⁶ This subsection also contains a general clause that states that the Act does not eliminate or limit any existing rights or remedies.

Subsection (e), "Authority for negotiations," gives the parties the right to negotiate and reach agreed upon terms and rates of royalty payments for digital transmissions covered under the new public performance right for sound recordings. This section also gives these parties the right to designate common agents to act on their behalf.

Subsection (f), "Licenses for subscription transmissions," creates a statutory license for non-exempt digital transmissions. Not later than 30 days after enactment of S. 227, the Librarian of Congress must publish a notice in the Federal Register initiating voluntary negotiation proceedings among parties to establish terms and rates of royalty payments for activities subject to the new statutory license for the period from the date of enactment of the bill until Dec. 31, 2000. If the parties do not reach a negotiated agreement the Librarian must convene a CARP to determine and publish rates and terms. This proceeding will be under Chapter 8, and will be binding on any party not subject to a voluntary agreement.

Unlike the satellite carrier license, convocation of a CARP to set terms and rates is not a one time occurrence. The bill directs the Librarian to adopt regulations which require convening a CARP:

"(A) within a six-month period each time that a petition is filed by any copyright owners of sound recordings or any entities performing sound recordings affected by this section indicating that a new type of digital transmission service on which sound recordings are performed is or is about to become operational, and

"(B) between June 30 and December 31, 2000 and a five year intervals thereafter."

The new technology provision in subsection (A) is, of course, similar to the one in chapter 10 requiring arbitration over new DART devices. The rate adjustment provision of subsection (B) presumably happens automatically, since no petition for rate adjustment is mentioned.

Subsection (f)(2) requires the Librarian to establish requirements by which copyright owners receive reasonable notice of the use of their sound recordings that are subject to statutory licensing. This subsection also directs the Librarian to establish requirements under which entities performing sound recordings shall keep records of their performances.

Comment: No guidance is included for what constitutes "terms" of use or payment. In determining the "rates and terms," subsection (f)(2) permits the CARP to consider any voluntarily negotiated rates. The procedure is similar to the arbitration process for the satellite carrier compulsory license with one important exception. The satellite CARP is only charged with determining royalty fees for the retransmission of broadcast signals. The sound recordings CARP must determine fees and terms of the license. Furthermore, the bill is unclear as to the standards to be applied by arbitrators in determining royalty rates and terms. Suggestions for governing standards by the parties would be helpful.

The Office presumes that the usage record requirements of this section could be fulfilled by a subscription transmitter from its normal business records, rather than requiring additional detailed records. The Office envisions a system where listings, cue sheets or "logs," of transmitted performances would be made available to copyright owners, to enable them to compile performance information similar to that gathered on behalf of composers and authors under section 118. However, clarification on this point would be helpful.

¹⁶ A "digital phonorecord delivery" is "each individual digital transmission of a sound recording which results in a specifically identified reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein."

Subsection (g), "Proceeds from licensing of subscription transmissions," gives a formula for allocation of royalties to recordings under subsection (f), which should mean either by voluntary licensing or by CARP. Nonfeatured musicians receive two and one half percent of receipts. Nonfeatured vocalists receive two and one half percent of receipts; in both cases, funds are deposited in escrow accounts managed by a jointly chosen independent administrator. In addition, featured artists receive 45% of receipts, allocated on a per sound recording basis.

The bill does not envision royalty distribution by a CARP; money is given directly to the copyright owners of the performed sound recordings, who must then set aside a portion for artists featured on the recordings. The responsibilities of the Librarian of Congress are confined to adopting notice requirements, establishing a voluntary negotiation period, convening CARPs every five years to set "terms and rates," and convening CARPs to address new types of digital transmission services.

Comment: How will nonfeatured musicians who are not members of the musicians' or vocalists' union be identified and paid by the independent administrators? Do they file claims with the independent administrator? Do they have an alternative method of obtaining royalties?

Subsection (h), "Licensing to affiliates." This subsection addresses the issue of vertical integration among companies involved in both the music and the subscription service business. This is designed to assure that products are available to similar types of subscription services at fair prices and terms.

Comment: Although we are pleased to see a non-discrimination provision in S. 227, we have some questions about its operation. What will be the effect of non-performance of subsection (h)? Does the copyright owner of a sound recording ever lose the 106(6) right? What kind of action would be brought? Would an injunction to compel performance apply?

Subsection (i), "No effect on royalties for underlying works." The language in this section is that of Sec. 3 of S. 1421, last year's Senate bill, and was included to alleviate fear that royalties going to existing rights holders might be reduced.

Comment: Although the statement is a good idea, it is not clear how it works with other sections that provide general considerations for setting rates.

Although we are not commenting on the merits of this section, we note that inclusion of ongoing businesses such as MUZAK, which currently pay only music public performance royalties, may violate this section.

Subsection (j), "Definitions." Definitions of note include the description of an "interactive service," which allows "a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient," and the "sound recording performance complement" which a service provider must meet to avail himself or herself of the statutory license. It limits transmissions to two a day for "sound recordings embodied in any one phonorecord distributed in the United States . . .", and to three a day for "sound recordings of performances (i) by the same featured recording artist, or (ii) embodied in any set of phonorecords or compilation of sound recordings marketed together as a unit . . ." We have previously commented on most of these definitions.

Section 4 of S. 227 amends 17 U.S.C. § 115. It adds language to include delivery by means of a digital phonorecord to the applicable scope of § 115. It also attempts to clarify which § 115 activities are affected by S. 227.

Comment: Secs. 115(c)(3) and (4) of S. 227 do not carry forward the May 11 consensus agreement regarding digital phonorecord deliveries. That agreement called for mechanical compulsory license fees in all situations where deliveries might substitute for the purchase of phonorecords. Under S. 227, the term "digital phonorecord delivery" applies only to reproductions that are specifically identified. This leaves unaddressed digital phonorecords delivered with the expectation of copying for which no information is available about which works have been copied. Congress may wish to consider alternative means to encourage the carriage of copyright management information to facilitate the payment of mechanical royalties to songwriters and publishers on digital phonorecord deliveries that substitute for the purchase of phonorecords.

Section 5's Conforming Amendments adds to the § 101 definition of "device", "machine", or "process" the definition of a "digital transmission" as "a transmission in whole or in part in a digital or other non-analog format." Sections 111(c)(1) and 119(a)(1) are amended to conform these sections to the new recognition of rights under proposed § 106(6). Sections 801(b)(1), 802(c), 802(g) and 802(h)(2) of title 17 are also amended to add § 114 to the list of CARP duties.

Comment: We cannot think of anything other than digital that is non-analog. An example (or definition) of the term "non-analog format" would be helpful within the bill's new definition of "digital transmission," perhaps specifying whether non-analog is to include later developed technology.

The language text of the amendment to § 111(c)(1) needs to be corrected.

Section 6, "effective date," is "three months after the date of enactment, except that the provisions of §§ 114(e) and 114(f) shall take effect immediately upon enactment." These are the sections that require the Librarian to publish notice in the Federal Register of the requirement for negotiation of licenses for S. 227 activities.

II. BACKGROUND

A. Constitutional Grant

The United States Constitution grants Congress the power "to promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹⁷ The work of an author must be a "writing" in order to be eligible for copyright protection.

Section 4 of the 1909 Copyright Act stated that "all the writings of an author" were subject to copyright. But sound recordings were not treated as "writings" in the early part of this century, largely based on the decision in *White-Smith Co. v. Apollo Co.*¹⁸ The court's narrow reading of what constituted a "writing" underlay the approach legislators took toward bills proposed between 1909 and 1971 that might have defined recorded aural works as the writings of authors.¹⁹ Some courts noted that the contributions of performers rose to the level of a writing, but felt an amendment to the 1909 Copyright Act was necessary.²⁰ In the 1970s there were a number of cases dealing with unauthorized duplication of pre-1972 sound recordings; these cases either assumed that the performers' contributions were protectable property, or simply stated the principle with little discussion.²¹

In 1971 Congress recognized sound recordings as "writings" deserving copyright protection. Copyright protection was granted, but owners of copyright in sound recordings were not granted the full array of exclusive rights afforded other authors; the controversial public performance right was withheld.²²

B. Legislative History

Many copyright reform bills have been introduced to provide extension of a public performance right to copyright owners of sound recordings. Opponents argued that a performance royalty would be unconstitutional, and would represent a serious financial burden to users. Proponents felt that such a royalty would be constitutional, that users had the ability to pay, and that performers and record companies deserved compensation for the use of their creative efforts for the commercial benefit of others.

The legislative history of the 1971 Act shows that protection was mainly intended to prohibit unauthorized copying, known worldwide as piracy of phonograms.²³ The Act was passed to create uniform federal protection against unauthorized duplication of sound recordings rather than continue to fight piracy in fifty state courts.²⁴

¹⁷ U.S. Const. art. I, § 8, cl. 8.

¹⁸ 209 U.S. 1 (1908). The Court held that since the perforations on a piano roll were not visually intelligible, the recording was not a copy of the underlying music, and the author of the composition had no control over the use of such a recording.

¹⁹ See, Ringer, "The Unauthorized Duplication of Sound Recordings," Study No. 26 in Copyright Law Revision, Studies Prepared for the Committee on Patents, Trademarks and Copyrights of the Comm. on the Judiciary, U.S. Senate, 86th Cong., 2d Sess. (Comm. Print 1961).

Attempts to provide extended protection for sound recordings occurred frequently in the form of proposed legislation. See discussion of legislative history at 28 *et seq.* "Performance Rights in Sound Recordings," Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Comm. on the Judiciary, 95th Cong., 2d Sess. (1978). (Comm. Print No. 15) [Hereinafter 1978 Performance Rights Report].

(See, e.g., in 1936 with H.R. 11420, and then again in 1937 with S. 2440. Bills were also submitted in 1939, 1943, 1947, 1951, 1967, 1976, 1979, and 1982.)

²⁰ See e.g., *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433 (1937); *RCA Manufacturing Co., v. Whiteman*, 114 F.2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940), and *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955).

²¹ See e.g., *United Artists Records, Inc. v. Eastern Tape Corp.*, 19 N.C. App. 207 (1973), and *Mercury Records Productions, Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163 (1974).

²² Sound Recordings Act, Pub. L. No. 140, 85 Stat. 39 (1971).

²³ Legislative reports on the Act made clear that it was directed only at tape piracy and did not "encompass a performance right so that record companies and performing artists would be compensated when their records were performed for commercial purposes." H.R. Rep. No. 487, 92d Cong., 1st Sess. 3 (1971). Piracy was addressed by the United States on an international scope by its ratification of the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms in 1971.

²⁴ H.R. Rep. No. 487, 92d Cong., 1st Sess. 2 (1971).

Subsequent U.S. court decisions affirmed the constitutionality of the 1971 Act.²⁵ Passage of the Act also strengthened efforts to smooth U.S. entry into the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.

Passage of the Sound Recording Act did not quiet the controversy over the extent of protection that sound recordings deserve. The Recording Industry Association of America (RIAA) continued to lobby for increased rights, but others, including broadcasters represented by the National Association of Broadcasters (NAB), continued to oppose performance rights. Representatives of performers, manufacturers, publishers, jukebox interests, and motion picture-interests were also vocal. The concerned parties emphasized the adverse economic effects passage, or nonpassage, of further legislation might cause them.

Additional legislation was eventually overshadowed by concern about passage of a comprehensive copyright revision bill. Congress was troubled by unsuccessful attempts to reach compromises not only on the performance rights issue, but also difficult cable and photocopying issues.²⁶

The new copyright law, the 1976 Copyright Act, did not expand rights of copyright owners of sound recording to include a public performance right. The House Report stated that:

"[t]he Committee considered at length the arguments in favor of establishing [sic] a limited performance right, in the form of a compulsory license, for copyrighted sound recordings, but concluded that the problem requires further study. It therefore added a new subsection (d) to the bill requiring the Register of Copyright to submit to Congress, on January 3, 1978, a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners . . . any performance rights in copyrighted sound recording."²⁷

The study that Congress required the Copyright Office to undertake was issued in 1978. It placed the Copyright Office squarely in the corner of those advocating public performance rights for sound recordings. That recommendation was reiterated by the Office in a report it issued to Congress in October 1991 titled "Copyright Implications of Digital Audio Transmission Services."

1. The Register's 1978 Report on Performance Rights in Sound Recordings.—In the introduction to its thorough 1978 report, the Register of Copyrights stated:

"Our investigation has involved legal and historical research, economic analysis, and also the amassing of a great deal of information through written comments, testimony at hearings, and fact-to-face interviews. We identified, collected, studied, and analyzed material dealing with a variety of constitutional, legislative, judicial, and administrative issues, the views of a wide range of interested parties, the sharply contested arguments concerning economic issues, the legal and practical systems adopted in foreign countries, and international considerations, including the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (adopted at Rome in 1961)."²⁸

The Copyright Office adhered to the philosophy it traditionally followed to interpret its constitutional mandate; that is, that copyright legislation must ensure the necessary balance between giving authors necessary monetary incentive without limiting access to an author's works.²⁹ After weighing the arguments of commentators participating in the proceeding and assessing the impact of the information presented to the Office in an independent economic analysis, the Register outlined the Office's conclusions.³⁰ In essence, the Office concluded that:

²⁵See *Shaab v. Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972) (sound recordings qualify as writings of an author that may be copyrighted); *Goldstein v. California*, 412 U.S. 546 (1973) (the term "writing" can be broadly interpreted by Congress to include sound recordings).

²⁶See 1978 Performance Rights Report at Chapter IV. See also Olson, "The Iron Law of Consensus", 36 J. COP. SOC'Y 126-27 (1989); D'Onofrio, "In Support of Performance Rights in Sound Recordings", 29 UCLA L. REV. 169, 70 (1981).

²⁷H.R. Rep. No. 1476, 94th Cong., 2d Sess. 106 (1976).

²⁸1978 Performance Rights Report at 1.

²⁹In a narrow view, all of the author's exclusive rights translate into money: Whether he should be paid for a particular use or whether it should be free. But it would be a serious mistake to think of these issues solely in terms of who has to pay and how much. The basic legislative problem is to insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should because of copyright restrictions.

Copyright Law Revision, Part 6. Supplementary Report of the Register of Copyrights on the General Revision of the Copyright Law, 89th Cong., 1st Sess. House Comm. Print, at 13 (May 1965). Emphasis added. As quoted in 1978 Performance Rights Report at 174.

³⁰1978 Performance Rights Report 174-177.

"Sound recordings fully warrant a right of public performance. Such rights are entirely consonant with the basic principles of copyright law generally, and with those of the 1976 Copyright Act specifically. Recognition of these rights would eliminate a major gap in this recently enacted general revision legislation by bringing sound recordings into parity with other categories of copyrightable subject matter. A performance right would not only have a salutary effect on the symmetry of the law, but also would assure performing artists of at least some share of the return realized from the commercial exploitation of their recorded performances."³¹

The 1978 Report's discussion of performance rights in sound recordings included a compensation scheme structured as a compulsory licensing system. The goal was to benefit "both performers (including employees for hire) and . . . record producers as joint authors of sound recordings."³² Although legislation was introduced following publication of the 1978 report, it was not enacted by Congress.

2. *The Register's 1991 Report on Copyright Implications of Digital Audio Transmission Services.*—In October 1991 the Register delivered a report on the legal and policy implications of digital audio broadcasting technology. While the performance right issue was not the predominant topic in that report, it was the most controversial. Once again lines were clearly drawn between broadcasters and the recording interests.

After weighing all of the evidence, the Copyright Office again concluded that there were strong policy reasons to equate sound recordings with other works protected by copyright and to give owners of sound recordings a performance right. The Office stated that it:

"[S]upports enactment of a public performance right for sound recordings. The Office concludes that sound recordings are valid works of authorship and should be accorded the same level of copyright protection as other creative works. In fact, as advanced technology permits more copying and performing of American music, the Office is convinced that a performance right. . . [is] even more essential to compensate American artists and performers fairly."³³

3. *Recent Statements.*—On March 23, 1993, the Register of Copyrights testified before the House Subcommittee on Intellectual Property and Judicial Administration on the general subject of public performance rights for sound recordings, as well as on performers' rights. Along with the former Register, Ralph Oman, other distinguished panelists representing the record industry, songwriters and publishers, and broadcasters briefed the subcommittee on their views. The Register once again supported a public performance right for sound recordings, and also supported extending rights to performers.

III. WHY THE UNITED STATES SHOULD ADOPT A PUBLIC PERFORMANCE RIGHT IN SOUND RECORDINGS

The question of whether there should be a public performance right in sound recordings has been debated for a long time. As noted in an earlier part of this statement, the Copyright Office has always supported such a right.

Undoubtedly, U.S. performers would benefit if Congress granted a public performance rights in their sound recordings enabling these authors to claim their fair share of foreign royalties. Moreover, justice requires that performers and producers of sound recordings be accorded a public performance right. As a world leader in the creation of sound recordings, the United States, should no longer delay in giving its creators of sound recordings the minimum rights many countries give their performers and producers. Unlike many of those countries, the United States already protects sound recordings under copyright law, but it is time to take the next step and recognize a performance right in sound recordings. Finally, protection should be granted swiftly before technology erodes even further the rights that performers and producers of sound recordings should enjoy.

In the past a strong argument for recognition right in sound recordings was based on trade agreements. United States' sound recordings have dominated the world market. Supporters of the right argued that we should strengthen the rights we give to creators and boost our gross national product; i.e., since the United States leads in production of copyrighted music, books, motion pictures, computer programs, and sound recordings, it should also provide a high level of copyright protection for those works both nationally and internationally. In the last few years, the United States has improved copyright protection for foreign authors by implementing both the

³¹ 1978 Performance Rights at 177. (Emphasis added).

³² 43 Fed. Reg. 12,763 (1978) at 12,766.

³³ U.S. Copyright Office, "Copyright Implications of Digital Audio Transmission Services" 160 (October 1991).

NAFTA and TRIPS agreements.³⁴ Some might say that any trade arguments for creating a performance right in sound recordings are less forceful since the United States has already implemented both GATT and NAFTA, and a performance right was not part of the obligations set out in those treaties. In fact, the United States could not support such an obligation because its domestic law does not now accord this protection.³⁵ There are, however, still important international considerations that support the creation of such a right.

A. International efforts to improve protection

The United States protects sound recordings as a category of copyrightable works. In 1989, the United States became a member of the Berne Convention for the Protection of Literary and Artistic Works which does not extend to sound recordings. The effort by the World Intellectual Property Organization (WIPO) to develop an international consensus on a so-called Model Copyright Law served as the triggering mechanism for full-scale debate on the classification of sound recordings as literary or artistic works. Many countries protect sound recordings under neighboring rights law rather than copyright law.

Discussions on how sound recordings should be protected are intensified by the global realization that digital technology may obliterate the traditional classification of rights. Some of these global concerns were addressed last year in a symposium organized by WIPO in cooperation with the Ministry of Culture and Francophonie of France. In that conference, Nicholas Garnett, Director General and Chief Executive of the International Federation of the Phonographic Industry, urged that:

"The speed of commercial development gives "digital" copyright issues edge and urgency. They affect all rights holders in the intellectual property universe and whether or how we adjust the interests of any right holder can have radical implications for the entire cultural and informational market place. The task of the policy maker is to test the rules of copyright and neighboring rights against the demands of changing circumstance, in order to assure that the principles of copyright and related rights remain valid. It is not always easy."³⁶

Mr. Garnett also called for discussion "about fundamental interests, how they can be secured without damage to any part of the creative community and seek a set of balanced intellectual property rights that permits us to serve the public fully and fairly."³⁷ Mr. Garnett's comment may well serve as the goal of this Committee.

The United States would like to see a higher level of international protection for sound recordings and a way to bridge the copyright and neighboring rights systems. This attempt is now focused on the creation of a new instrument to be administered by the World Intellectual Property Organization.³⁸ Critical issues for discussion include: the scope of the national treatment obligations protection for pre-existing sound recordings (i.e., retroactivity), the scope of the rights and limitations on those rights, and whether audiovisual performers should be included.

The next session on the new instrument, as well as what's known as the Berne protocol, will be held in September of this year. The United States should be in a better position to support its position in that meeting with a performance right for digital transmissions of sound recordings on Congress's legislative agenda.

B. Is S. 227 enough?

Although S. 227 creates performance rights in sound recordings, implementation of the act only covers certain digital transmission services. It is not clear whether such a limited right will qualify U.S. authors for royalties on performances of their works where payment is based on reciprocity. This question was addressed in the 1993 House hearings;³⁹ it is not resolved by S. 227. In other words, while S. 227 is a pragmatic response to political reality, it is not necessarily one that will require countries who have a performance right in both analog and digital transmissions to

³⁴ Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat 4809 (1994); North American Free Trade Agreement Act Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

³⁵ "Ironically, the United States, who has the most to gain, was recently forced to block an agreement in the GATT that would have created a new international obligation to extend public performance rights to sound recordings. This same footing has occurred in drafting a model law in the World Intellectual Property Organization in the past." (Oversight hearing, *supra* note 9, at 41, (statement of Jason S. Berman, President, Recording Industry Association of America)).

³⁶ Nicholas Garnett, "Recording Industry, the First Cultural Industry Fully Exposed to the Impact of Digital Technology," WIPO Worldwide Symposium on the Future of Copyright and Neighboring Rights at 99 (1994).

³⁷ *Id.* at 114.

³⁸ There have been three committee of experts meetings in Geneva (June, 1993, November, 1993 and December, 1994).

³⁹ See statement of Jason Berman, *supra* note 9, at 40.

pay money to U.S. authors when their authors receive little or nothing from the United States because the rights are not equivalent.

S. 227 shows a preference for voluntary negotiations between rights holders of sound recordings and parties that make these works available via digital subscription services. If that process fails, there must be a proceeding before a Copyright Arbitration Royalty Panel. Despite the provision of the right to authorize or prohibit public performance of sound recordings by digital means, S. 227 does not provide an exclusive right except for interactive and subscription performance outside the performance complement. It only applies to works digitally delivered to subscribers, and rates and terms may have to be set through the binding arbitration process.

The Copyright Office supports S. 227, in principle; I would, however, like to note our concerns and questions on the language of the bill.

1. S. 227 as a Model for Other Legislation:

Does S. 227 serve as a good model for international agreements? Will it advance the interests of American authors in the international arena?

2. Limitations:

Are there too many limitations on the right to make it effective?

We are concerned that the bill is now aimed narrowly at two cable services and online service providers and that over-the air broadcasts are exempted forever. What happens when traditional broadcasters deliver digital signals? Broadcasting is an important commercial use and continued exemption for digital audio radio is difficult to justify.

The international test is that exemptions should only apply where they do not conflict with the normal exploitation of the sound recording or otherwise prejudice the legitimate interests of rights holders. We are concerned that the right is too limited—not just that it is limited to digital transmission but that it only covers subscription digital transmissions and may not be enough to get international consensus for a new treaty that sets this as the minimum and provides broader rights as an option or makes them subject to reservations.

Exclusivity: The music public performance right is exercised non-exclusively; thus, earlier bills provided only a statutory license. The consensus agreement provided for a narrow exclusive license: (a) performances of sound recordings within a short window and (b) those that exceeded a sound recording complement defined as performances of two consecutive selections of sound recordings from one phonorecord or three selections by the same artist or within the same compilation per day. By eliminating the consecutive requirements, S. 227 creates a much broader exclusive license. We wonder why there was a change from the earlier consensus text and how such an exclusive license would work especially in relation to music performing rights.

CONCLUSION

Despite the concerns addressed above, I applaud Senators Hatch and Feinstein for introducing this important piece of legislation and holding this hearing. The Copyright Office supports closing the gap in existing copyright law by creating a pragmatic but workable digital public performance right in sound recordings.

The CHAIRMAN. Thank you so much.

Commissioner Lehman, can you comment briefly on how important the performance right issue may be for the U.S. balance of trade, especially with respect to intellectual property? We are all aware, for instance, of how successful American copyrighted works are in the international marketplace. Now, how would passage of S. 227 help this situation, and what threats do we face if we fail to act?

Mr. LEHMAN. Well, Mr. Chairman, we have over \$500 million in royalty revenue that remains uncollected in Europe as we sit here today; that is, I believe an annual figure of about \$500 million that is collected does not flow back into our economy simply because we don't have a reciprocal performance right.

The area of sound recordings is not covered under the Berne Copyright Convention and we have no international treaty at this point to which the United States can belong that mandates national treatment, and so we are leaving a tremendous amount of

money on the table. Now, when I use that figure of about \$500 million, that is Europe alone. When you start looking at all the other countries in the world where there are performance rights, you start to see that it adds up.

The CHAIRMAN. Many people concerned with this issue claim that S. 227 should define when the digital transmission of a copyrighted work constitutes a distribution and when, if ever, it constitutes a performance. I have to say that that strikes me as an issue irrelevant to the purposes of our bill, but do you think that it is necessary for us to address that issue in this context?

Mr. LEHMAN. Mr. Chairman, I do not believe that it is necessary for you to address that issue. I think that is a longstanding issue of U.S. law of when the exploitation of a particular work which enjoys a performance right is a public performance and when the exploitation of a particular work which also enjoys the right of distribution is being exploited as a distribution.

Those kinds of decisions have historically been decided on a case-by-case basis, looking at the actual facts of the situation, and the courts have sorted out those factual circumstances over the years and I suspect that they will again. In fact, there is litigation ongoing right now that music publishers are involved in which should give us some more answers to these questions.

The CHAIRMAN. Well, the national information infrastructure should help sift that through, as well as the courts, I suppose. Am I wrong there?

Mr. LEHMAN. Yes, we have been looking at that issue. In fact, we addressed it in an initial report that we wrote. It will be addressed in a final report that we wrote, and if I could preview what that report is going to say, I would expect that it will recommend that we leave this issue to the courts.

The CHAIRMAN. Now, your testimony criticizes S. 227, as does Ms. Peters' testimony, for not going far enough for creating a compulsory license rather than an exclusive right, but isn't it correct that the Rome Convention, to which you refer, only requires that sound recordings be granted a right of equitable remuneration by parties to that Convention?

Mr. LEHMAN. Yes, Mr. Chairman, it is true that a right of remuneration is provided, but as Ms. Peters can confirm, we were just at a meeting in the last couple of days with our European counterparts and there is beginning to be an increasing international recognition that this is a problem; that a right to remuneration alone is not adequate to ensure the proper basis of copyright control for creators in the new, emerging digital environments, and so I think you are going to see a move away from this.

Certainly, in every other aspect of U.S. intellectual property negotiations over the years, and a bedrock part of the GATT TRIPS agreement, was to resist the use of compulsory licenses, and we find that this is a weapon that is used against us, particularly on the patent side, and also on the copyright side, around the world.

So to the extent that the United States adopts compulsory licensing schemes, it just gives ammunition to people in other countries who basically are not world leaders in the producing of these products to figure out ways to deny us our fair share.

The CHAIRMAN. Well, let me express again my thanks to the Copyright Office for their excellent work in producing two major studies on the performance rights question, studies that I, for one, find very persuasive. Your 1978 report was issued before the United States had even ratified the Berne Copyright Convention, and your 1991 report was issued before the GATT TRIPS agreement was implemented.

Now, am I correct in assuming that these developments in the international arena only serve to underscore your conclusions? Would they lead you to change any of your findings?

Ms. PETERS. Absolutely not. I think that what you see is the business becoming much more global, and therefore the need for a performance right is even stronger than when we made our reports in 1978 and 1991. So, actually, it would strengthen our support.

The CHAIRMAN. Your statement suggests that the committee take as its goal the furthering of discussion about fundamental intellectual property interests. You note, quoting Nicholas Garnett, that "Digital technology may eventually obliterate the traditional classification of intellectual property rights and that sound recordings may only be the first category of works to feel the full impact of this development." Could you just elaborate for a second on that point?

Ms. PETERS. I think what Mr. Garnett was saying, and we included it, was that the digital world is a very different world and business relationships are going to change radically, and we are not sure which way they are going to go, but we have to make sure that all of the interests are protected and we have to look at the balance and we have to reach consensus. So I think it is really just encouraging legislators like you and your committee to do exactly what you are doing today to try to reach an equitable result that can help America continue to lead in this area.

The CHAIRMAN. Well, thank you.

Senator Feinstein.

Senator FEINSTEIN. Let me just thank both of you for being here. I think you have stated some of the problems very well, and the complexity and difficulty of the area. Obviously, the overall goal of this legislation is to protect an American industry abroad as well as domestically, and see that people have rights that are fair and sound.

I don't think any one of us believes this legislation is perfection. I know I can speak for myself, and I believe for the rest of the committee, in saying we would welcome any suggestions that you might have which could increase the fairness and enable our industries to receive their fair and just compensation. So as far as I am concerned, we are open to any suggestions or thoughts you might have.

My understanding, Ms. Peters, is that the sound recording complement that you noted is being renegotiated and hopefully will not be a sticking point in this legislation, and I know there the parties would certainly welcome any thoughts that you might have.

You both make mention in your testimony of concerns regarding vertical integration within the industries granted the limited new performance rights. I know you can't speak for the Justice Department, but would you tell us, in general terms, please, whether the

approach in this legislation appears to be an adequate safeguard against anticompetitive practices?

Mr. LEHMAN. Well, actually, our testimony does take exception to the approach in the legislation, and we would prefer that—there, in fact, is a compulsory license in this legislation that requires ultimately the Register of Copyrights to make a decision if parties cannot agree. That is a kind of legislative intrusion in the marketplace that we would prefer not to have, and to instead rely on traditional antitrust law.

Now, that has worked in other areas. For example, composers at the present time, composers and lyricists, enjoy an exclusive right of public performance. That right is licensed through the big performing rights societies, ASCAP and BMI, and they receive a non-exclusive grant of that right.

One of the reasons they do is because there has been a lot of antitrust litigation over the years and there is antitrust supervision of this so that these rights are not abused. That system has worked quite well and we think it will work well in this area, as well.

Senator FEINSTEIN. So, in other words, you find this acceptable, outside of the compulsory license which you would prefer?

Mr. LEHMAN. Well, we would prefer not to have a compulsory license.

Senator FEINSTEIN. I thought you said you—

Mr. LEHMAN. No. The bill contains a compulsory license and we would prefer to have that as a matter of administration policy.

Senator FEINSTEIN. Oh, all right.

Mr. LEHMAN. It is an intrusion into free-market principles, and also it creates a lot of international difficulties for us.

Senator FEINSTEIN. So you say omit that and just let the natural course of antitrust law prevail?

Mr. LEHMAN. That is correct. I think that a lot of the concern here is driven by fear which will not necessarily reflect the reality that will emerge. I think there will be marketplace negotiations. They will be fair, and if they aren't there will be antitrust remedies that people can use to straighten things out.

Senator FEINSTEIN. Thank you very much, and I thank you both.

The CHAIRMAN. Well, thank you, Senator.

Senator Leahy.

Senator LEAHY. Well, thank you, Mr. Chairman.

Commissioner Lehman, Ms. Peters, if I state her testimony correctly, says there is a much broader exclusive contained in this bill as compared to the May 11 draft. Am I getting that correct?

Ms. PETERS. Right.

Senator LEAHY. Commissioner, are you confident that such an exclusive license will work in relation to music performing rights? Are we ready to move to a free market system here?

Mr. LEHMAN. I am confident that we are. You know, we have a free market system in most other areas of copyright ownership. Senator Hatch, in the previous panel, held up a copy of a compact disk and a copy of a video cassette, and he asked the witness, as I recall, what was the difference. That video cassette is marketed in a completely free-market context. There is no compulsory license regarding its exploitation or the exploitation of its performance

right, and we have the healthiest—in fact, the industries built on the exploitation of that exclusive right in the video are the strongest in the world, and they are so strong and so dominant in the world market that the problem that we have is facing constant efforts on the part of our trading partners to protect themselves against them.

Senator LEAHY. Speaking of the rest of the market, then, in your view, do the limited performance rights that are set forth in this bill for digital transmissions—are they sufficient to obtain reciprocity from other countries? There are fairly large foreign royalty pools for the public performance of U.S. sound recordings. Would this allow our people to get their share of that?

Mr. LEHMAN. The short answer to that is at the present time, no, Senator. Now, we will try to take what you can give us and you can get through the Congress as a practical matter—and I want to emphasize we commend you for your work; we are completely sympathetic with the practical need to get legislation passed. We will try to take that and we will try to negotiate reciprocity, but there is no international treaty at this time that would immediately invoke reciprocity in this area.

Senator LEAHY. The reason I asked that is foreign performance rights apply to both analog and digital. We limit it to digital. As you try to negotiate those reciprocity rights, does that create a problem?

Mr. LEHMAN. I can tell you, actually, because it has come up in international meetings in the last several months, that the current position of most of our trading partners is that unless we enact a comprehensive performance right that includes analog and digital and broadcasting by radio and everything else, there is no reciprocity. We will obviously attempt to work with what we get to try to obtain reciprocity and to negotiate something.

Senator LEAHY. I have had to divide my time between this and another hearing. The other hearing was on agricultural policy and there was a discussion of NAFTA in that. Neither Canada nor Mexico recognizes public performance rights in sound recordings, do they?

Mr. LEHMAN. I believe Mexico does and Canada is in the process of enacting legislation to recognize a performance right in sound recordings. It is not enacted yet. In fact, we were just informed yesterday by the Canadian delegate at this meeting that that is making rapid progress.

Senator LEAHY. If the holder of a public performance right—let's take a situation. You have the holder of the public performance right in sound recordings. Could that holder exercise his rights and refuse to allow sound recordings to be performed, and thus cut off the rights of the authors of the musical composition as well?

Mr. LEHMAN. Well, the owner of any exclusive right has the right to control the use of that right and the use of that recording. That doesn't necessarily cut off any other person's right. To the extent that the composer's work is used in other works, in other formats, it will be exploited in those other formats.

Senator LEAHY. One of the issues implicated here is the question of when electronic transmission is a distribution and when it is a public performance. You published the Green Paper. Have you

given more thought on that issue? When will we have a final report on that?

Mr. LEHMAN. Well, I think the most controversial aspect of our Green Paper, a preliminary report, was that it indicated that something either had to be a public performance or a distribution of a copy of a work.

Senator LEAHY. That is why I raised the issue.

Mr. LEHMAN. Yes, and after listening to scores of witnesses at public hearings we had around the country, not under the 5-minute rule, and after receiving over 1,500 pages of testimony, some of it submitted electronically through the Internet, we have tentatively come to the conclusion that you can have both a public performance and a distribution of a copy simultaneously.

I think the question is still unanswered, however, of whether there are circumstances under which, when a work moves through, let's say, the Internet, when it moves through electronic commerce, it could constitute only a distribution of a copy. These are the factual circumstances, we think, should be worked out on a case-by-case basis by the courts.

Senator LEAHY. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you, Senator Leahy. I want to compliment Senator Leahy. He has played a tremendous role in intellectual property issues ever since I have been on this committee, so we feel very honored that he stayed through this hearing thus far and I personally appreciate working with him.

We want to thank both of you. We know that normally we would start with you, and we appreciated your kind accommodation. It is just typical of both of you and we appreciate it. Thanks so much for being with us.

Our next four witnesses will be Mr. Jerold H. Rubinstein, chairman of the board and CEO of International Cablecasting Technologies, Inc.; Mr. Steve Randall, of Muzak of Salt Lake City; Mr. Edward P. Murphy, president and CEO of the National Music Publishers' Association; Mr. Hal David, of the American Society of Composers, Authors and Publishers; and Mr. Kurt Bestor, Broadcast Music, Incorporated.

I notice we have two from Salt Lake City. I am very honored to have both of you with us, but I am honored to have all of you here, and we appreciate it and we are very interested in your testimony. I would like you to summarize because I am supposed to be in another place at 12 o'clock. I clearly am not going to make that, but if you could summarize, we would very much appreciate it.

We will start with you, Mr. Rubinstein, and I am concerned about all the issues you will raise.

STATEMENTS OF A PANEL CONSISTING OF JEROLD H. RUBINSTEIN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, INTERNATIONAL CABLECASTING TECHNOLOGIES, INC.; STEVEN RANDALL, MOUNTAIN WEST AUDIO, INC./MUZAK, SALT LAKE CITY, UT; EDWARD P. MURPHY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.; HAL DAVID, AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS; AND KURT BESTOR, BROADCAST MUSIC, INC.

STATEMENT OF JEROLD H. RUBINSTEIN

Mr. RUBINSTEIN. Thank you very much, Chairman Hatch, and thank you for inviting me to testify here today. I will try and be brief and summarize my 5 minutes into something less than 5 minutes.

By background, I am a former chairman of ABC Dunhill Records and former owner and chairman of United Artists Records, and was a member of the RIAA and have been active in lobbying 20 years ago here on the Hill for performance rights. So even though I am the only one here today representing a company that would, in fact, pay these royalties, I have never been anything but in favor of a performing right.

However, I feel that the bill as written really puts us at a great disadvantage. While we have talked about a level playing field and how this would not affect the way we do business, it greatly affects the way we do business from the point of view that we are currently in a business of distributing a subscription digital service and there is one other company that is more than half owned by recording companies.

The other aspect of this is that this bill does not, in fact, address itself to what happens in the future when radio goes digital and could do exactly what we are doing, but would be exempt from not only the royalty, but the complement issue, which greatly affect the way we program our service.

Therefore, I will tell you that while I support the concept of a performing right for all the good reasons that have been stated here today, I take a great deal of objection to the way it would affect my company, and my company alone, both from the vertical integration point of view and the complement point of view, and certainly not in the cost that it might be to us because that, I feel, is a justifiable cost.

So I think that if the bill can be negotiated in such a way to protect us from radio in the future as digital broadcasters, which they certainly will be, and the complement issue, which would allow us to more readily be competitive in our programming, I think the bill and the right is very justifiable and should be passed at long last. I feel that we could support it and we would be more than pleased to be paying the royalty to the performers and the recording companies.

I would just like to say in closing that it is a bill that should, in fact, encourage the proper use of recordings. We have from the outset put into our programming certain safeguards to safeguard against the very things that have been of concern here, one of which is we don't play albums, we don't pre-announce, and we don't

give any ability for anybody to know what is coming up or what to record. We do not have pay-per-listen. We do not have audio on demand, even though it was mentioned here today that we do. That is not the business we are in. The complement issue would greatly hurt the way we do business and probably keep us from doing business.

Thank you for your time.

The CHAIRMAN. Well, thank you. We will be interested in any ideas you have, OK?

Mr. RUBINSTEIN. Excellent.

The CHAIRMAN. We will try and keep an open mind on it.

Mr. RUBINSTEIN. Very good.

The CHAIRMAN. But I have to warn you that we have worked really hard to try and bring everybody together on this and, as you can see, even the Commissioner and the Register feel like we didn't go far enough. So it is kind of a balancing act trying to get everybody together, and I know that some of my dearest friends are worried about some of these things.

Everybody in this industry has been a very good friend. I am worried, so help us out and see what we can do.

Mr. RUBINSTEIN. I certainly will.

[The prepared statement of Mr. Rubinstein follows:]

PREPARED STATEMENT OF JEROLD H. RUBINSTEIN

Chairman Hatch and Members of the Committee: My name is Jerry Rubinstein. I am the founder, Chairman and Chief Executive Officer of International Cablecasting Technologies, Inc., or "ICT." On behalf of ICT, thank you very much, Mr. Chairman, for inviting me to testify today.

ICT programs, markets and distributes a digital music subscription service known as Digital Music Express of DMX. DMX provides 30 channels of continuous, commercial-free music to some 300,000 home subscribers and 20,000 commercial businesses, via cable systems and satellite transmission. DMX serves up a diverse menu of program formats, including channels devoted to orchestral and chamber music, country, folk, religious and inspirational music, classic rock, jazz, blues and alternative music. We have obtained all broadcast licenses for performance of copyrighted musical works, and pay license fees to ASCAP, BMI and SESAC. We are expanding our network internationally into Europe, Canada, Latin and South America and Africa. Although we have been in operation since September 1991, we are still incurring substantial losses from operations.

I come from the record business. During the Mid-1970's through the early 1980's, I was the Chairman and C.E.O. of two record companies, ABC Dunhill and United Artists Records. As a former director of the Recording Industry Association of America, I share the concern that the record industry remain vibrant and profitable. For 20 years now, I have joined the record industry in calling for the recognition in U.S. copyright law of a performance right for sound recordings.

DMX uses innovative technologies to assure that DMX is a resource that promotes rather than displaces record sales. The remote control that DMX provides to the consumer, at the touch of a button, gives the consumer all the information they need to walk into a record store and purchase the recording. We do not play albums in their entirety. We don't even play two songs in a row by the same artist. Soon, we will be offering subscribers an 800 telephone number that they can call to purchase by mail order the records heard on DMX.

Our competition is broadcast radio and other subscription broadcast systems. Currently, there are two major commercial home music subscription services in the United States. One is DMX, which is independently owned by ICT. The other is Digital Cable Radio's Music Choice," which is owned in large measure by three of the world's largest record companies: Time Warner, which controls the Warner, Reprise, Elektra, and Atlantic labels; Sony Corporation, which was the Sony Music, Columbia and Epic labels; and EMI, which owns the EMI, Capitol and Engel record labels.

I am extremely concerned that the narrow performance right provided by S. 227 unfairly targets DMX, and only DMX. S. 227 exempts analog broadcasters, exempts digital broadcasters, and potentially legitimizes otherwise unlawful and discrimina-

tory licensing practices by those record companies that are vertically integrated into subscription services, such as Music Choice. The reason seems to be that the multi-billion dollar recording industry has been unable to impose upon the multi-billion dollar broadcast industry the kind of financial burdens that, under S. 227, my company must bear. I do not object to paying my fair share, Mr. Chairman, but for DMX to be the only company to shoulder the burden is simply unfair.

SUMMARY AND OVERVIEW

DMX supports performance rights, but opposes S. 227 because it unfairly targets DMX

It comes as no surprise to anyone that knows me and my history in the music business that I am a strong believer that sound recording companies and music performers need and deserve performance rights, and that commercial entities that perform sound recordings should compensate producers and performers. I have called on Capitol Hill and in the press for the enactment of a performance right as a fundamental principle of copyright law.

But a principle must be applied fairly, Mr. Chairman. A performance right, if applied only where it seems convenient or pragmatic to do so, is not principled at all. It becomes a pretense of fairness and an excuse for discriminatory treatment. That is why, with deep disappointment, I must strongly oppose S. 227.

The intent of S. 227 is to level the playing field of copyright law for producers and performers in sound recordings. To a limited extent, it does that. But the limited scope of S. 227, Mr. Chairman, creates a distortion in the marketplace for music delivery services. By entirely exempting broadcasters, and by giving an unfair advantage to vertically integrated record companies, S. 227 tilts the playing field against DMX:

S. 227 imposes a performance license and payment obligation only on digital subscription services, while it broadly exempts all broadcasters, whether analog FM or tomorrow's CD-quality digital broadcasts. This commercial advantage for the broadcast industry cannot be justified on the basis of copyright law principles or market realities. Whether over radio airwaves, cable, or satellite, a public performance is a commercial use that should be subject to a performance right.

S. 227 further exempts all broadcasters from draconian programming restrictions that would be imposed only on digital subscription services, such as DMX. This so-called "sound recording performance complement" should instead be called the "prevent programming or premium payment perk." It either restricts subscription services from providing the normal type of programming that radio broadcasters can do, free of the performance royalty obligation; or requires subscription services to pay a premium just to remain competitive with broadcasting. Even if applied across the board, the "sound recording performance complement" is unduly restrictive and unworkable in practice.

Section 3(h) of S. 227 provides inadequate safeguards against anticompetitive licensing practices by record companies that are vertically integrated with digital music subscription services. The threshold of ownership under Section 3(h) is too high to assure equal treatment for all competitors, and Sections 3(h) (1) and (2) open loopholes wide enough to justify almost any form of discrimination.

Finally, DMX is concerned that if S. 227 is amended, as some suggest, so as to exempt those who provide subscription music services to business establishments, any exemption also must apply to those DMX operations which service the business community.

I wish to elaborate on these basic philosophical and policy points, and to comment on a few smaller concerns with respect to the drafting of S. 227.

1. THE BROADCASTER EXEMPTION FROM LICENSING OBLIGATIONS IS UNJUSTIFIED UNDER COPYRIGHT LAW AND THE REALITIES OF THE COMPETITIVE MARKETPLACE

Broadcast or subscriptions, it's all a performance

As a matter of copyright law, there is no reason to limit the scope of a performance right to subscription services. Performance rights should apply to all commercial users of sound recordings, including over-the-air broadcasting. Every day, tens of thousands of copyrighted sound recordings from compact disks are being played with high quality reproduction on AM and FM radio stations across the U.S. Not a penny of performance royalties is paid by those broadcast stations now, nor would it be paid under S. 227.

Digital subscription music services compete for the same radio audience. Listeners tune to a music channel to enjoy a particular type of music, be it on FM radio or DMX. By contrast, a consumer who wants to listen to a specific piece of music at a particular time will listen to a purchased compact disk, tape or vinyl record. We

are no more in competition with record companies than any radio station in America. Indeed, as I will explain further below, DMX has established a number of promotional innovations that make DMX a more direct and effective promotional medium than broadcast radio.

The biggest differences between radio and DMX are, first, that radio derives its income from annoying commercial announcements or taxpayer-funded subsidies, while commercial-free DMX derives its income from reasonably-priced monthly subscriptions. In that regard, I should note that broadcasters are better able to pass on the costs of a performance right than subscription services. Broadcasters can marginally increase the price of their commercial announcements to their sponsors. DMX cannot as easily pass on the cost of a performance royalty directly to the consumer.

Second, DMX plays a much wider variety of music that could be supported in the average radio market. Even in genres that are well represented on broadcast radio, DMX exposes the consumer to many artists that receive little or no airplay from the "more hits, more often" crowd on the FM dial.

So if the broadcasters are correct that airplay promotes sales, surely DMX is a better friend to the record industry than FM broadcasting. There is no reason to leave broadcasters out, while roping in DMX.

Subscription or broadcast, digital is digital

A distinction is being made in S. 227 on the basis of digital versus analog technology. "Digital" does not, and of itself, mean "better." A low bit-rate digital signal may in fact sound worse than FM radio. Moreover, this distinction between analog and digital finds no basis in the legal principles that justify performance rights. Nevertheless, in today's technology, digital cable music subscription services are one step ahead of FM analog broadcast in sound quality and interference-free reception.

Scant years from now, the public airwaves will be teeming with digital broadcast radio stations delivering CD-quality sound to millions of home consumers and commercial businesses, absolutely free of charge. The sound is as good as DMX. The reception is equally clear. Digital radio will continue to compete for listeners with digital subscription music channels.

However, S. 227 will give digital broadcasters a very significant and unfair advantage. Under S. 227, digital subscription services must pay a performance right license fee; digital broadcasters—our competitors—will not. If we find it unpalatable to cover digital broadcasting now, before it becomes a reality, it will become virtually impossible to do so once the new FM radio is digitized. If S. 227, as the recording industry asserts, must look to the future, then we should not now exclude digital audio broadcasting.

Digital subscription channels promote, not displace, sales

There is no reason for disparate treatment of broadcasters and subscription services. Subscription-based radio services do not displace music sales any more than do broadcast radio stations. In fact, as I suggested earlier, DMX technology is better designed than radio to promote, not displace, record sales.

Digital subscription radio, and DMX in particular, adds technological innovations that mean more sales for the recording industry. For example:

How many times have you listened to the radio, gotten interested in the music or the performance, but never heard the announcer identify the piece or the performer? DMX gives its customers the answer at their fingertips. The DMX DJ Remote control has a visual display window. At the touch of a button, the consumer learns the name of the song, the artist, the composer, the album, the identification number of the recording and the record label that published the sound recording. Our research shows that consumers are in fact taking this information to the record store, and that our customers are purchasing more CDs than before subscribing to DMX.

Early this year, DMX will bring a new service to its subscribers—an 800 telephone number that the subscriber can call to purchase any compact disk heard on the DMX channels and receive it by mail order.

If digital subscription music services were a danger to the record industry, one would not expect record companies to so heavily invest in my competitor, Music Choice; but one also would expect that DMS's subscriber households already would have depressed record industry sales. However, since the launch of DMX in 1991, record industry revenues from compact disk sales are up by more than 40 percent.

Despite the furor and rhetoric over the dangers of subscription services, one may search high and low for a single shred of empirical evidence that digital cable and satellite-based services displaces sales. I guarantee you will not find it.

DMX audience research shows what the U.S. Congress Office of Technology Assessment confirmed some six years ago: Those who are the most interested in new technologies are the heaviest purchasers of recorded music. DMX listeners actually have increased their purchase of recorded music because of exposure to new artists on DMX channels. The DMX listener is the record industry's best customer.

Throughout this century, new technologies initially feared as dangerously competitive have proven instead to be synergistic. Records didn't kill the concert hall, they whetted consumer appetites to see live performances. Radio exposed the public to new artists and promoted record sales and concert tours. Tape recorders spurred the purchase of millions of prerecorded cassettes for playback. The VCR and MTV created the multimillion dollar worldwide market for sales of music video.

Some argue that listening to DMX may displace record sales. By their logic, broadcast radio should displace more sales than DMX. Broadcasters pre-announce records. Many publish a daily newspaper listing or monthly magazine program guide. DMX does not engage in any of these practices. Consumers don't know what specific music is going to be played on DMX. And, unlike radio stations which encourage their listeners to write a little letter, call in or fax requests to their local deejay, the consumer has no control over what is played over DMX. Given the magnitude of radio listening versus listening to DMX, broadcasters, not subscription services, should be subject to performance rights.

Finally, the justification for performance rights does not lie in the possibility of home off-the-air recording. It resides in the principle of payment for commercial usage. Congress already addressed and resolved any home recording issue in the 1992 Audio Home Recording Act. Once again, there is no principle at work here that justifies exempting broadcasters while imposing performance rights on DMX.

A broadcaster exemption will not promote international reciprocity

One justification offered for S. 227 is that it will assist our trade negotiators in opening up pools of performance royalties held hostage in foreign countries, which royalties rightfully should be paid to American record companies. Mr. Chairman, through my experiences in the record industry and DMX's foreign operations, I am well familiar with the attitudes expressed abroad toward the lack of a sound recording performance right in this country. Unfortunately, I believe that S. 227 will do nothing to change those attitudes. The limited scope of S. 227 may instead reinforce them.

Of the more than 60 countries that currently grant performance rights to sound recordings, none has a law that is comparably as narrow in scope as S. 227. Those countries all broadly apply their performance right, without differentiating between subscription and nonsubscription services. Indeed, no other country has a law even as narrow as the performance rights bills considered in the last session of Congress, which at least would have included digital broadcasting. It is hard to imagine, Mr. Chairman, that countries that have intentionally withheld from United States interests more than \$120 million in annual royalties, in spite of the obligations of the Berne Convention, the Rome Convention and the GATT, would suddenly open their coffers in light of a performance right that applies only to digital subscription music services.

I have heard the argument that although S. 227 does not solve our international problems, it couldn't hurt and could possibly help—like a bowl of chicken soup. Mr. Chairman, chicken soup remedies will not cure international inequities; and the narrow performance right of S. 227 is a mighty thin broth. A performance rights bill that at least includes digital broadcasting might have some substance.

We should not use S. 227 as an excuse not to take the strong medicine we really need. If we are unwilling to do what is right, we should not enact an unfair bill just for the sake of doing something.

2. THE SOUND RECORDING PERFORMANCE COMPLEMENT IS INEQUITABLE AND UNWORKABLE

The two-cut/three-cut rule is the unkindest cut of all

I have nothing complimentary to say about the sound recording performance complement. It is the single most arbitrary, bizarre, discriminatory, unworkable and insupportable proposal in this bill. Let me take the sugar-coating off that last comment and explain my objections.

The sound recording performance complement—something for nothing for broadcasters

Having paid nothing for their exemption from the licensing obligations of S. 227, broadcasters get absolutely free an extra added bonus: Draconian programming regulations that restrain their competition.

Consider the effect of restricting normal programming to two cuts per album, or three cuts per artist or per box set per day:

Top 40 radio stations repeat the same song several times each day. Classic rock stations play, in the course of a day, multiple cuts by the most popular artists of the era. These programming techniques make sense because most people listen to radio for short periods of time, not 24 hours a day. Subscription services would have to pay a premium just to run a Top 40 or classic rock format; broadcasters pay nothing.

Radio stations regularly program music blocks by featured artists—"Two-fer Tuesdays," "Three-for Thursdays," "Four-for Fridays" and so forth. DMX voluntarily does not do this; but S. 227 would make it unlawful for us, yet legitimate for broadcasters.

Broadcast stations regularly program short two and three-song tributes to commemorate the birthday or the passing of a great artist. Subscription services could not.

The sound recording performance complement either would prevent subscription services from engaging in normal programming formats and practices, or would charge us a premium price for that basic need. I can't imagine what the broadcasters have done so right to deserve this multimillion dollar perk, or what DMX has done so wrong to be forced to foot the bill.

Moreover, DMX does not play entire albums. However, S. 227 ensures that broadcasters can continue to do so, without any charge. It is a bizarre and surely unintentional irony that this bill would restrain subscription services from engaging in normal programming, but may actually encourage potentially prejudicial activities by broadcasters.

The complement is vague and unworkable

S. 227 leaves unanswered questions as to what the complement means in practice:

Do the programming restrictions apply on a channel-by-channel basis, or across all 30 channels of DMX programming? Can our country channel, pop channel and adult contemporary channel each play three songs by Garth Brooks or Mary Chapin Carpenter on the same day? If the complement applies across all channels of service, DMX would have to get a separate license for each of hundreds of cross-over artists, just in case the programming on any of our channels happens to coincide over a 24 hour period.

How is the term "selection" defined? Is a "selection" an entire symphony, or just one movement? Is it a complete opera, or is it measured by act, by scene or by aria? Is a medley of showtunes one selection or many?

How is "featured recording artist" to be defined? Does the complement prevent DMX from playing two Eagles songs and two Don Henley solo recordings on the same day? Can I play a John Lennon record, a Paul McCartney and Wings tune, a George Harrison cut and a Beatles song on the same day, only if Ringo sings lead? Is DMX liable if we play Mozart in the morning, Schubert in the afternoon, Brahms in the evening and Stravinsky at night, performed by the same orchestra? What if we play recordings by different orchestras, but all conducted by Leonard Bernstein?

How can DMX monitor what is and is not a "set of phonorecords or compilation of sound recordings marketed together"? There are literally thousands of compact disk anthologies of particular genres of music, or the greatest hits of a particular decade, or soundtrack albums like "American Graffiti" or "Forrest Gump" that feature hits evoking a particular era. If DMX is not actually playing the songs off of a particular collection, would S. 227 still render DMX liable? What happens if I program my channel on March 1st for distribution on March 9th, and one of these new anthologies comes out on March 8th? Will anything in this bill protect me from the lawsuit that undoubtedly would be filed on March 10th?

Importantly, who gets to decide the meaning of these open-ended terms, and how they are to be applied? DMX is still in its early stages of development, Mr. Chairman. We have yet to turn an operating profit. I am sickened by the prospect of betting my company's future on the outcome of a court case or arbitration proceeding.

And, once again, why is it that DMX gets to have all the fun worrying about this, but not the broadcasters?

A double whammy for DMX, double compensation for the record industry

There of course is another way around this problem under S. 227. DMX could pay an additional fee to every record company in the United States as an insurance policy against potential violations of the complement. However, with new independent record companies emerging every day, and small companies licensing music and selling compilations in record stores or late night television, even such extreme measures provide no guarantees.

A healthy dose of programming reality

I understand the record industry concerns that underlie the performance complement—I was twice a record company executive myself. But before we try to slay every bugaboo hiding in some record company executive's anxiety closet, we should take a closer look at the programming practices of subscription music services today.

The DMX programming code respects the interests of the record industry. DMX does not program entire albums. We intentionally do not program consecutive selections from the same album or the same artist.

Our studies show that album programming does not well serve our market. People tune in a subscription channel like DMX to be exposed to a genre of music. We program a varied selection of artists and composers to increase listenership and to maintain audience interest. No one likes all composers or performers in a particular genre. Even people who love particular artists often can't stand some of the songs on their albums. That's why some songs were hit singles and others ended up on the flip side.

I don't think any programmer, broadcast or subscription, can afford to intentionally alienate a large portion of their listening audience by programming an album at a time. But I also do not know any programmer who can seriously afford either to live with the unduly restrictive programming micromanagement that is inherent in the complement, or to pay premium prices for normal programming practices.

Another example of unreality is Section 5(a), the definition of "digital transmission." According to this definition, a digital transmission is "a transmission in whole or in part in a digital or other non-analog format." I don't know what an "other non-analog format" is. Perhaps, someday, if we can transmit music chemically, telepathically or genetically, this definition will make some sense. For now, it makes no sense to solve imaginary problems while ignoring those right before our eyes.

3. S. 227 GIVES AN UNFAIR ADVANTAGE TO VERTICALLY INTEGRATED SUBSCRIPTION SERVICES.

S. 227 does not adequately safeguard against unlawful and anticompetitive licensing practices by vertically integrated record and subscription services. Having exempted broadcasters entirely, any provision that legitimizes discriminatory licensing practices by integrated record companies would mean that S. 227 applies to only one company—DMX.

The vertical integration of three of the world's largest record companies, which together hold some 60-to-70 percent of popular music catalogs, into one of the two digital subscription services raises serious competitive issues for DMX. It is essential that any performance rights bill must provide competing music services with adequate protection against discriminatory license practices. S. 227 does not provide that protection.

Vertical integration could result in better financial terms, such as a lower performance royalty to the affiliate. Or, it could take the form of more flexible programming terms, such as a looser interpretation of, or complete exemption from, the sound recording performance complement. Or it could permit their affiliated companies advance access to new hit recordings. Any of these would prejudice DMX's ability to remain competitive.

Section 3(h) of S. 227 attempts to remedy this problem, but I am deeply concerned that it simply does not go far enough.

The threshold for granting licenses to competitors on "similar terms and conditions" is too high. Section 3(h) only applies where the recording companies own a "controlling interest," or exert a "controlling influence." What does that mean in terms of Digital Cable Radio, which is approximately 50 percent owned by three record companies? Is each of these companies' shares enough to be a "controlling interest"? Does any one company hold a "controlling interest," or wield a "controlling influence"? Does this provision adequately prevent these companies from offering better terms to their affiliates out of self-interest, not out of a controlling interest?

The scope of "similar terms and conditions" is too vague and unclear. The body of section (h) promises licensure by the copyright owner on "similar terms and conditions to all other similarly-situated entities offering similar types of digital transmission services, . . ." This seems fair enough in theory. In practice, the ability to discriminate remains. The requirement of "similar terms and conditions" could cut both ways. A record company could charge its affiliate a lower or longer-term license fee so as to maintain higher profits; or, it could charge an unduly high license fee, secure in the knowledge that the bulk of the money is simply being transferred from one pocket to the other. The antitrust laws are designed to preclude

both unduly favorable licensing practices and monopolistic pricing. S. 227 does not adequately address either of these problems.

The ability to unlawfully discriminate remains. The vagueness of Section (h)(1) and (2) further exposes competitors to discrimination. Together, they list five specific factors and one kitchen sink factor by which any vertically integrated record company could excuse otherwise unlawful disparate treatment. The existence of this statute may unintentionally impede a competitor's efforts in a court of law to remedy anticompetitive conduct.

4. ANY BUSINESS SUBSCRIPTION EXEMPTION ALSO SHOULD APPLY TO DMX.

My colleagues in the background music industry believe that music channels serving commercial establishments should be exempt from the new performance right. As a provider of commercial services, DMX appreciates their concern. If it is determined that such commercial subscription services should be exempted, then DMX requests that the exemption be drafted so as to exempt that portion of DMX's service that provides music to commercial establishments.

CONCLUSION

In introducing S. 227, Senator Feinstein remarked that none of the bill's proponents "suggest that digital audio services should not be able to operate just as they do now to bring top-quality digital signals to American homes." These are encouraging words that I wholeheartedly endorse. And I also emphatically support your wish to continue to work closely with all the affected industries to make S. 227 a strong and properly tailored piece of legislation.

Mr. Chairman, S. 227 should not seek to do equity for copyright holders by creating a fundamental inequity in the market for music services. A bill that covers a broader range of commercial performances would be what RIAA President Jay Berman has described as "simple justice." A narrow bill skewed to the competitive benefit of broadcasters and vertically integrated music services is simply unjust.

Thank you again for inviting me to testify today. I would be pleased to answer any questions.

The CHAIRMAN. Mr. Randall, we are happy to welcome you here.

STATEMENT OF STEVEN RANDALL

Mr. RANDALL. Thank you so much, Chairman Hatch. I want you to know that Kurt and I were visiting earlier and we want you to know how nervous this makes us. We are just sort of hometown, Salt Lake City people, and we do appreciate the opportunity of being here.

The CHAIRMAN. I have heard that before, too, let me tell you. [Laughter.]

Mr. RANDALL. We are glad that you sit where you sit, sir.

The CHAIRMAN. Well, thank you. Kurt, I am worried about you. We are getting you to the point where you are ready to go worldwide. I know of some of your talents.

Go ahead, Mr. Randall.

Mr. RANDALL. My name is Steve Randall and I own a small company in Salt Lake City called Mountain West Audio and we are the local Muzak franchise. Senator Hatch and Senator Feinstein, as sponsors of this bill, we want you to know that we recognize as Muzak that the record industries really do have a valid concern with some of the new digital services that might displace some of the record sales. Record sales are the industry's primary source of income, so it is a very valid concern.

With S. 227, while it doesn't create a broad performance fee, we feel that it does go a little bit more broadly than what we feel is necessary. The point that I would like to leave with all of you is that Muzak's services in no way threaten record sales, and yet S. 227 in its current form would impose a significant burden on us as

if we were part of that threat. We do feel, however, that those concerns in S. 227 can be addressed by amendments that further define and target its application to services that really do pose a threat to lost record sales.

One of the things that many people may not understand about our service is that, far from reducing record sales, Muzak services actually encourage record sales. Just like broadcasters, many record companies request that we play their new songs each month. In fact, we even have a toll-free number where our customer's customers can actually call and find out who the artist is and what the name of the song is so that they can, in fact, purchase that music.

This bill exempts broadcasters whether they transmit analog or digital signals, and we agree with the broadcasters that it is not the signal technology that should determine whether a service should be subject to a performance fee, but instead the test should be whether the service itself poses a demonstrable threat to record company sales and revenues.

Mr. Chairman, it is important to know that in Salt Lake City broadcasters are my biggest competitor, and I am not suggesting that you impose a fee on broadcasters, but to exclude them from this bill that imposes a performance fee on me skews the industry and gives them a further advantage. We already pay royalties to ASCAP and BMI more than three times what the broadcast industry does, and for us to have another fee causes us great concern.

This bill also targets subscription services, as distinguished from nonsubscription services. We are not quite sure exactly what that means and what the difference would be between advertiser support and listener support and its impact on record sales.

Muzak believes that this bill should only focus on two characteristics of the service; first, whether it is interactive, and, second, delivery to the consumer. We believe if a consumer can interactively request a particular song to be played at a particular time, he is admittedly less likely to purchase a prerecorded product. Moreover, consumers are much more likely than businesses to record such music service. In fact, Senator Hatch, in my 20 years in this business I have never heard of anybody recording off their business Muzak system.

Accordingly, since Muzak services are not interactive and delivered to the consumer, we think that there appears no reason for us to be included in this royalty regime. By way of principle, however, if at some time in the future we are digital, we are interactive, and we transmit to the consumer, we would expect to be subject to the obligations of S. 227.

Senator, we are a small group of business people and our only hope for fair treatment is with our elected representatives. We just simply don't have the financial wherewithal to fight these things through the courts. We therefore need to make our concerns known here and appreciate this time that you have given us. We just don't feel that we should be burdened with an additional fee when we are not part of that particular problem, particularly when our broadcast competitors are exempted. We hope that we can work with the committee in terms of amending S. 227 so that we, too, can support this bill.

Thank you for your time.
 [The prepared statement of Mr. Randall follows:]

PREPARED STATEMENT OF STEVEN RANDALL

Chairman Hatch and Members of this Committee, I am Steve Randall of Salt Lake City, Utah, and I own and operate Mountain West Audio, a Muzak affiliate. I want to start by thanking my Senator, Chairman Hatch, for inviting me here today to testify on behalf of Muzak and our 135 independently-owned affiliates which collectively comprise the nation's oldest and largest business music company. We appreciate the opportunity to be heard in these proceedings, as the issue before this Committee is exceedingly important for all business music providers.

Summary. Muzak recognizes that there are valid reasons for the recording industry's concern that new digital services could, in some circumstances, displace sales of prerecorded or packaged music. This could harm creators and performers and, thus, upset the economic balance that Congress has masterfully crafted with respect to the creative and user communities. Like broadcasters, however, Muzak does not displace sales of prerecorded music, but rather promotes their sale, as evidenced by the many recording industry promotional staff who visit our headquarters urging the addition of their music to Muzak playlists.

Accordingly, Muzak proposes that the Committee refine S. 227 to ensure that the solution to the new threat to record sales and revenues does not become a pretext to burden business services such as Muzak that are not in any way part of the problem. We suggest in this testimony some principles that the Committee might find useful in distinguishing among various music delivery services, and how such distinctions might assist the Committee in tailoring any new rights.

What is Muzak? Muzak's 135 independently-owned affiliates provide commercial-free music to more than 250,000 business establishments nationwide. Muzak transmits music over 16 channels by two analog methods: satellite and FM sideband. Notwithstanding our first and most famous instrumental channel, Muzak's channels generally mimic the stations on your radio dial—for example, jazz, pop and country. One major difference, however, is that Muzak transmits monophonically (for sound consistency throughout the establishment) and through a hard-wired speaker system that is unlikely to have a recording device interposed by a copyright pirate.

Like most broadcasters—and we are essentially a broadcaster—Muzak expects to begin transmitting digitally in the near future. Accordingly, Muzak is quite concerned about the new licensing obligation that would be imposed by S. 227, The Digital Performance Rights in Sound Recordings Act of 1995. Muzak's initial concern is that our business music service—whether digital or analog—does not displace sales of packaged music and, thus, should not be taxed in order to offset harms caused by others. In addition, this Committee should understand that business music, due to some unfortunate agreements entered into twenty and thirty years ago, pays proportionately more to ASCAP, BMI and SESAC than any other music user, and can ill afford to pay more for a new performance license.

Performance Rights in Sound Recordings. The question of whether to create a performance right in sound recordings has been considered many times during the past thirty or more years in both the House and Senate Judiciary Committees. Although performers and recording companies have argued strongly over the years in favor of a broad performance right to their benefit, the Congress has repeatedly decided in favor of maintaining the current economic balance, whereby performers and recording companies benefit from the sales to consumers of packaged music. Because performances stimulate such retail sales, Congress has decided that performers and recording companies do not need the additional compensation that would be generated by broad performance right. The sponsors of S. 227 elected not to seek such a broad performance right, notably excluding in this bill the imposition of any obligation on broadcasters.

As the Chairman has noted, however, there are new aspects of this issue that have not been debated before, primarily the implications of new technologies and new services that threaten to upset the historic economic balance by displacing record sales by which performers and recording companies are compensated. In the past, this Committee and the Congress have acted aggressively when technology threatened the economic balance between creators and users, for example, by enacting the Record Rental Act of 1984 and the Audio Home Recording Act of 1992.

Mindful of this history, it is Muzak's view that the primary question before this Committee is, as Mr. Berman of the RIAA asked also two years ago in the other chamber of this institution, whether we can "collectively manage to get past the historical political hurdles and our own internal difference so that U.S. copyright law can be updated to keep pace with technology," e.g., the recording industry's sole rev-

enue source, packaged music sales. I believe Mr. Chairman, and Mr. Berman, that the answer is "yes," and that Muzak will support such a change so long as it is narrowly tailored to address only services that demonstrably threaten packaged music sales.

How Broad Should A Performance Right Be? In his 1993 testimony, Mr. Berman argued persuasively that a performance right in sound recordings was warranted because developments in digital technology threaten to unravel existing commercial relationships. Mr. Berman's testimony concerned digital transmission services that might replace traditional forms of information distribution, particularly advances in digital technology that permit the transmission of CD quality sound to the home and threaten to completely change the way in which consumers get their primary access to prerecorded music. The result, Mr. Berman feared, would be the severe curtailment of sales of packaged music, the single revenue stream that compensates performers and recording companies.

While we understand the concerns of Chairman Hatch and the recording industry, Muzak respectfully suggests that the threat to record companies is not as immediate nor as broad as some have stated, and that the threat to record sales is in fact much narrower than they argue, and the proposed remedy should be narrowed accordingly. We believe S. 227 could be scaled back in a manner that would continue historic copyright policy and the economic balance, and still address concerns raised by new technologies, without unnecessarily burdening music services such as Muzak that do not and will not in the future pose any threat.

Defining the Scope of the Performance Right. The recent history of digital audio copyright policy suggests that virtually any threat to the recording industry can be narrowly defined and quantified—as lost sales. Both the Record Rental Act and the Audio Home Recording Act were founded on the notion that the act being restricted by Congress, record rentals or consumer digital recording, may reduce recording companies' product sales. Accordingly, any public performance that can be proven to displace retail sales of prerecorded music is an appropriate subject of a performance fee. Similarly the corollary is true—if a music delivery service does not displace product sales, then it is not the appropriate subject of a performance fee.

The various music services that have in the recent past or today been mentioned as possible subjects of a performance fee are either digital services, subscription services, or both. Rather than focusing on these characteristics, it is Muzak's view that neither the digital nature of a service nor the method by which the provider is compensated bear any relationship to the service's impact on sales of prerecorded music. Rather, the characteristics of a music delivery service that affect record sales are (1) interactivity, and (2) recordability, which is directly related to transmission quality and the nature of the consumer.

Digital versus Analog. As the National Association of Broadcasters noted in its 1993 House of Representatives testimony, the advent of digital technologies will not in and of itself change the nature of the service provided by radio stations, and it will not change the historically positive impact that radio stations have on sales of prerecorded music. Accordingly, Muzak supports NAB's position that the digital or analog quality of a broadcast should not determine whether its performances of recorded music should be subject to a licensing fee.

Accordingly, Muzak opposes the notion that any music delivery service—broadcast or subscription—should be subject to a performance fee solely because it employs digital rather than analog technologies. Digital enhances the quality of a transmission and of any subsequent recording, but it does not enhance the consumer's ability to enjoy a specific performance at a specific time, such as can only be done by purchasing a prerecorded product.

Broadcast versus Subscription. Muzak believes that it is similarly inappropriate to categorize all "subscription" services as threats to performers, as if the sole characteristic of being listener-supported rather than advertiser-supported affects the service's capability to displace record sales. Whether analog or digital, a subscription service by its nature does not necessarily permit the consumer to hear a specific recording at a specific time. Just like radio, a Muzak customer does not know whether or when a particular recording will be performed. The Muzak customer can only be assured of hearing specific music at a specific time by purchasing the prerecorded product.

Also, like broadcast radio, Muzak and other business music providers have been for many years acknowledged by the recording industry as viable promotional outlets that enhance prerecorded music sales and recording industry profits. Muzak is constantly being approached by recording companies represented here, who ask us to play certain recordings on our service as part of their promotional efforts to boost sales. This activity supports our position that Muzak's current service does not dis-

place record sales, is not an economic threat to recording companies, and, is not a justifiable target for a performance fee.

In addition to accommodating record company promotion requests Muzak has also instituted a service that allows a customer's customer, the record-buying consumer, to call Muzak's 800 phone number at any time and, so long as they know the location and time that they heard a song, learn its title, the recording artist's name, and the recording company that produced the song. Since instituting this service Muzak has responded to thousands of consumer inquiries and undoubtedly generated significant new sales for these companies and performers.

Interactivity. Muzak agrees with Chairman Hatch, Senator Feinstein, and the recording industry that interactive music services, which as a matter of economics are likely to also be digital and subscription, may by their nature be an enormous threat to recording company product sales. Consumers may well be less likely to purchase a recording if they are assured of hearing it whenever they wish via an interactive service. Although there are levels of interactivity that might need to be defined and distinguished, certainly everyone in this hearing room will agree that on-demand music delivery services that would permit consumers to choose what recording is performed and when it is performed, could constitute a threat to recording company product sales that could upset the economic balance.

Recordability. Although consumer digital recording was addressed by the Audio Home Recording Act of 1992, the recording industry continues to use the threat of consumer recording as a basis for the need for a performance right in digital transmissions of sound recordings. From the Muzak perspective, let me be very succinct: Muzak transmits only to business establishments, and those businesses are: (a) forbidden by contract from recording the transmission; (b) prevent by technology from interposing a recording device into the transmission network; and (c) dissuaded by quality issues from even desiring to record Muzak, for example, by the monophonic quality of our broadcasts that ensure that a clothing store customer in sportswear hears the same music as the customer in eveningwear.

Should this Committee determine that it should again provide performers with payments to offset consumer recording, as was already done in the Audio Home Recording Act, then those revenues should be collected only from transmissions to consumers, not transmissions to businesses.

Conclusion. Finally, let me be perfectly clear about Muzak's principled support for an equitable performance right. Although today's Muzak is not transmitted to consumers, is not digital and is not interactive, someday Muzak will be digital, Muzak may be transmitted to consumers, and Muzak could even be interactive. We doubt that Muzak business customers will ever want interactivity, because they are generally too busy tending to their business or too nervous about what music their employees would select if they had an interactive service. Nevertheless, we expect that regardless of the scheme that Congress enacts, that one day Muzak will be subject to its obligations. We hope, however, that such obligations will only attach to the services that upset the current economic balance by displacing sales of prerecorded music, and that the new obligation will not be imposed on existing non-threatening services. Moreover, we sincerely hope that the fee is not imposed only on music services that are not sufficiently powerful to protect themselves politically.

Until the time that Muzak extends its business to the home, Muzak transmissions to businesses are essentially listener-supported broadcasts, another "long-established business practice" like those that Chairman Hatch described in his January 13 floor statement as effectively functioning and not worthy of upset. We respectfully suggest that S. 227 be amended to focus on those services that demonstrably threaten recording companies and the existing economic balance between creators and users, rather than on the technology itself, or whether the transmission is funded by listeners or advertisers.

Thank you for the opportunity to appear before this distinguished Committee.

The CHAIRMAN. Thank you so much.

Mr. Murphy.

STATEMENT OF EDWARD P. MURPHY

Mr. MURPHY. Thank you, Senator Hatch. First, I would like to thank you for the opportunity to be here today, and I am going to depart from my prepared comments and just go to some direct discussion I would like to have with you.

First, I represent the music publishers of the United States and, as such, we have over 600 members. The interest of music publish-

er's, of course, is to protect the rights of our partners. Our partners are songwriters. Many of our songwriters are artists, and as an association we support the introduction of this bill and we are grateful that you have brought the bill forward. We think it is a long-awaited, positive introduction of such a payment to artists and performers.

We do have some concerns, and I would like to just jump right to what they are since you have heard a lot of the dialogue already. I think that we had reached a consensus back in May, and that May 11 consensus was fraught with a lot of discussion and heartache. We supported very much that consensus and we would hope that we would be able to go back to that May 11 consensus.

In the May 11 consensus, there were a number of issues which we all gave and took, and so forth. It came down to a point where we thought we could live with it. What has been put forth today in S. 227 does represent a good effort, but does narrow down the rights which we had agreed upon previously.

I am very concerned about the comments Mr. Bruce Lehman put forth today about doing away with the compulsory Copyright Act. I think, just to understand from the point of view of how the business truly operates, in America we have a very successful business, as we all know, and we are exporting American music. I think in large part it is because of the system that Congress has helped put together; that is, to make it fully accessible to the public. Music is fully accessible around the globe, and particularly here in America.

The old adage, if it ain't broke, don't fix it—I think it works, and I frankly am very concerned and might be somewhat afraid to take apart something that has worked so effectively in the United States today in this particular area.

Now, when I say we represent songwriters, we have a lot of songwriters who are not hooked up, if you will, with recording companies and it is important that their works have access. It is also important that in the new interactive services that may be put forward by on-line services that, again, people have access to it. That means that the consumer needs access to it, and I think a compulsory license system does that. It makes sure that people have access and are not in any way subject to any gatekeeping process.

So the message that I would like to leave you is we do support, obviously, the work that has been done today. We are very concerned that we could maybe go back to the May 11 agreement. We are hopeful that we can give additional information, if you wish, on that topic. The compulsory license, I think, is something that works well in America, and in Europe where there is no compulsory act, as you know, there are other safeguards that have been put in place to emulate a compulsory license a great deal. If one were to eliminate it here, I would hope that these other things that emulate a compulsory license are put into effect because, in effect, they have somewhat of a different process, but in many ways it does emulate what we have here in the United States.

Thank you very much for your time.

[The prepared statement of Mr. Murphy follows:]

PREPARED STATEMENT OF EDWARD P. MURPHY

Good morning, Mr. Chairman and members of the Committee. I am Edward P. Murphy, president and chief executive officer of the National Music Publisher's Association, Inc. ("NMPA"). I consider it a privilege to appear before you to provide NMPA's views on S. 227, the "Digital Performance Right in Sound Recordings Act of 1995."

NMPA is a trade association representing more than 500 American music publishers, businesses that nurture the process of creating by providing financial and artistic support for writers, by promoting those writers and their songs, and by generating royalty income through the issuance of copyright licenses. The association's mandate is to protect and advance the interests of music publishers and their songwriter partners in matters relating to the domestic and global protection of music copyrights.

NMPA's licensing subsidiary, The Harry Fox Agency, Inc. ("HFA"), represents more than 13,000 music publishers and licenses a large percentage of the uses of music in the United States on records, tapes on CDs. HFA also licenses music on a worldwide basis on behalf of its publisher principals for use in films, commercials, television programs, and all other types of audio-visual media.

In the United States and throughout the world, music publishers and writers earn income from two principal sources: public performances and the reproduction and distribution of recorded music in tapes, CDs and other formats. Because the subscription digital transmission services which are the subject of S. 227 have implications for both streams of income, the opportunity to address the Committee today is particularly important to us. In the interest of conserving time, my colleagues representing the performing rights societies will address our industry's concerns as they relate to the right of public performance. I will limit my remarks to reproduction and distribution issues, but wish to express NMPA's support for the recommendations offered by the societies.

As the bill's sponsors have noted, S. 227 is based, in part, on a consensus approach to sound recording performance rights legislation negotiated between music publishers and writers, represented by NMPA, ASCAP,¹ and BMI,² on the one hand, and performers and the record companies, represented by AFM,³ AFTRA,⁴ and RIAA,⁵ on the other. NMPA and its music community allies view the compromise of May 11, 1994 ("May 11 compromise" or "compromise") as an important achievement for the future of all who contribute to the making of American music. We believed then, as we do now, that the compromise would give sound recording copyright owners a needed measure of control over the use of their works in subscription-based digital transmission services, as well as a significant new source of revenue. At the same time, we are satisfied that the May 11 compromise contains adequate measures to safeguard existing rights and existing streams of revenue that are vital to writers and music publishers, including the rights of reproduction and distribution and income derived from their exercise.

NMPA applauds the efforts of the S. 227's sponsors, Chairman Hatch and Senator Feinstein, to bring into focus the implications of digital transmission services not only for record companies and performers, but also for music creators and copyright owners. More particularly, we view S. 227's inclusion of amendments to section 115 of the Copyright Act as an important step toward ensuring that legal rights and remedies that apply to the delivery of recorded music via the "real" record store of today will be maintained for the "virtual" record store of tomorrow.

The section 115 amendments contained in S. 227, as introduced, however, differ in several significant respects from the provisions agreed to by RIAA and the other parties to the May 11 consensus and omit entirely one concept that was central to the agreement. In NMPA's view, these differences may result in unintended gaps, with unintended, negative consequences for music creators and copyright owners.

By way of background, section 115 of the Copyright Act—commonly referred to by the music and recording industries as the "mechanical" compulsory license—establishes the framework for a legal and business relationship between music copyright owners and record companies that covers the "making and distribution" of phonorecords. "Phonorecord" is the Copyright Act's short-hand for material objects in which sounds, including sound recordings embodying musical works, are fixed.

¹ American Society of Composers, Authors and Publishers.

² Broadcast Music, Inc.

³ American Federation of Musicians of the United States and Canada.

⁴ American Federation of Radio and Television Artists.

⁵ Recording Industry Association of America.

Audio cassettes, compact discs, the mini-disc and the vinyl LP are all examples of phonorecords.

The May 11 compromise reflected the understanding—shared by music copyright interests and record company representatives alike—that some digital transmission services will provide record companies with a new technological means of distributing phonorecords, and that writers and music publishers should receive mechanical royalties based on such digital distribution. In keeping with this understanding, the compromise confirmed the applicability of “mechanical” rights and the availability of the section 115 compulsory mechanical license where phonorecords of sound recordings are distributed by means of a “digital phonorecord delivery.” NMPA viewed this aspect of the compromise as essential to promote consumers’ access to the benefits of new technologies while ensuring that writers and music publishers will receive compensation for the new ways of “selling” music that digital technologies will make possible.

S. 227 uses the term “digital phonorecord delivery,” but substantially modifies the way that term was defined and employed by the parties to the May 11 compromise. Under the agreement between writers, music publishers and the RIAA, “digital phonorecord delivery” referred to the digital transmission of a sound recording of a musical work that results, or can be reasonably expected to result, in a reproduction—or phonorecord—of the recording being made.

The parties envisioned two general ways in which digital phonorecord delivery could be accomplished. First, the parties agreed that the section 115 compulsory license would be available, and that mechanical royalties under the license would be paid, when a transmission resulted in an identifiable digital phonorecord delivery. The term “identifiable” was carefully chosen to encourage the inclusion of copyright management information in pre-recorded music and transmissions of it, and to promote the use of technological means and measures for determining that a copy has, in fact, been made. For each identifiable digital phonorecord delivery, the compromise provided that the section 115 license terms and royalty rate would be the same as that provided for traditional phonorecord sales.

The parties further agreed that mechanical rights would be triggered and mechanical royalties paid in cases where a specific digital phonorecord delivery, although not identifiable, can be reasonably expected to result in the reproduction of a phonorecord from an individual digital transmission. Parties to the May 11 compromise discussed at length how the licensing practices of a record company, as well as the marketing practices of a digital transmission service, its technical characteristics and other ascertainable service characteristics could—and, they agreed, would—serve as a basis for determining an appropriate license rate for such deliveries, either through negotiation or, if necessary, arbitration.

NMPA, RIAA and other parties to the May 11 compromise intended that the two types of digital phonorecord delivery, taken together, should cover the universe of digital transmission services whose delivery of phonorecords to the home subscriber effectively substitutes for the retail sale of cassettes and CDs. S. 227’s definition of digital phonorecord delivery is much narrower than that agreed by the parties, and, we fear, would leave a “black hole” in the digital service universe.

S. 227’s approach to digital phonorecord delivery limits the application of the section 115 compulsory license to “each individual digital transmission of a sound recording which results in a specifically identified reproduction by or for any transmission recipient of a phonorecord of that sound recording. . . .” As I mentioned earlier, parties to the May 11 compromise agreed that “each individual digital transmission of a sound recording which results in the identifiable delivery to any transmission recipient of a phonorecord . . .” should be covered. S. 227 further omits, in their entirety, the provisions of the May 11 agreement that dealt with digital transmissions that can reasonably be expected to result in the delivery of a phonorecord.

NMPA strongly urges the Committee to restore the scope of digital phonorecord delivery contained in the May 11 compromise. By limiting the application of the section 115 mechanical license to digital phonorecord deliveries that are “specifically identified,” S. 227 stands to discourage the use of copyright management information and technical measures for monitoring and identifying when a reproduction has been made and a mechanical royalty payment is due. In practice, the limitation could provide unintended economic incentives for record companies and subscription services to structure their agreements and related operations to avoid the obligation to pay mechanical royalties.

Failing to make provision for digital transmissions that can reasonably be expected to result in the delivery of phonorecords stands to widen the loophole further. Related provisions in the May 11 compromise were designed to address the impact of digital transmission services that actively promote their use as a means of digital phonorecord delivery through marketing practices or by offering to subscribers

equipment or devices that facilitate copying. For example, a service might offer a day-by-day playlist that details what songs will be transmitted, the exact time of the transmission, and its precise duration. Even though individual transmissions resulting in the delivery of a phonorecord may not be identifiable, the parties to the May 11 compromise recognized a record company's ability to negotiate with the service provider for a level of compensation, beyond compensation for the public performance of its works, that would take into account the impact of the service on the record company's exclusive rights of reproduction and distribution. To promote balance, the compromise provided a mechanism for music creators and copyright owners also to obtain compensation for the exercise of their independent rights of reproduction and distribution in their circumstances.

In arguing for the restoration of these important provisions of the May 11 compromise, writers and publishers are not attempting to create new rights for ourselves. We are simply seeking to hold our own as technology rapidly advances.

Nor are we seeking to impose any new or unfair burden on the transmitters of music. In fact, the section 115 provisions of the May 11 compromise would minimize the burden on transmitters by placing record companies in a position to license their own performance and digital distribution rights directly and to cover the reproduction and digital distribution rights of music publishers and writers by complying with the terms of the compulsory mechanical license.

In sum, the amendments to section 115 compulsory mechanical license agreed to by all parties to the May 11 compromise are aimed at confirming and clarifying the application, in the digital environment in which we will all soon conduct our business, of long-standing licensing relationships and practices between music publishers and record companies. Writers and music publishers have an unambiguous right to receive mechanical royalty payments when cassettes and CDs embodying their works are made and distributed to the public. To the extent that digital transmission services are employed as a means of distributing pre-recorded music, publishers and writers should continue to receive mechanical royalties, just as they do today. NMPA respectfully urges the Committee to assure this result by incorporation in S. 227 the changes I have outlined.

On behalf of the Board of Directors and members of the National Music Publishers' Association, I again thank you for the opportunity to testify today. NMPA looks forward to the Committee's further consideration of issues raised by S. 227 and to participating in any formal or informal dialogue that may ensue under the Committee's auspices.

The CHAIRMAN. Well, thank you, Mr. Murphy.

Mr. David, welcome to the committee again. We appreciate you and look forward to hearing from you.

STATEMENT OF HAL DAVID

Mr. DAVID. Thank you very much. I appreciate the opportunity to appear before you and your committee. I am here on behalf of ASCAP's more than 65,000 American writers and publishers. I am a member of the ASCAP board of directors and I was a former president of ASCAP.

Let me say at the outset how much we appreciate the support you have given to America's musical creators over the years. We are especially grateful for your keen sensitivity to our unique problems, such as your introduction of S. 483, the Copyright Term Extension Act, which was to protect America's intellectual property trade surplus against changes made in the European copyright law.

On the question of the creation of a performance right in sound recordings, I reiterate here ASCAP's public and oft-stated support for this concept. We applaud your efforts and those of your colleagues, particularly Senator Feinstein, who have cosponsored S. 227 to address this issue.

That having been said, we wish to avail ourselves of your offer in your introductory statement to work with those who may have concerns with S. 227. We wish to discuss the effects which certain provisions of S. 227 would have on America's writers and music

publishers. I would like to explain those concerns and suggest ways in which this otherwise sound legislation can be strengthened so that the benefits to one segment of America's music community are not enacted at a cost to other segments. I would add that ASCAP fully supports the NMPA statement.

After you introduced performance right legislation in the last Congress, you and other members called upon America's music community to get together and come up with legislation we all could support, and I am happy to say we did so. ASCAP, BMI, NMPA, RIAA, AFM, and AFTRA engaged in long, arduous discussions which led to the legislation that we all could support, the now famous May 11 agreement.

We were quite proud of our accomplishment, which we presented to the chairman of the House subcommittee, and I think I can safely speak for all the parties when I say we were shocked by his rejection of our efforts. The May 11 agreement was rejected by Chairman Hughes. Chairman Hughes decided to write his own bill, which the RIAA unilaterally chose to support. ASCAP did not break the May 11 agreement. We still support it, and we invite the RIAA to come back to it.

I would like to explain briefly what the May 11 agreement did, why it was important to us, how S. 227 differs, and why the elements of that agreement still make sense.

The guiding principle which is so important in the May 11 agreement is that the record companies should not be gatekeepers over the use of our music. Sound recordings are, by definition under the Copyright Act, derivative works based on the songs they embody. Simply put, the song can and does exist without the record, but the record cannot exist without the song. I say this even though I have been a record producer over the years, as well as a songwriter.

As the Supreme Court has noted, as a practical matter writers and publishers must license their nondramatic performing rights through performing rights societies like ASCAP and BMI, but ASCAP and BMI cannot say no to music users. Any user who wants a license and is willing to pay a reasonable fee, as determined, if need be, by a third party, is entitled to a license.

But if the record companies are given an exclusive right to the public performance of sound recordings, they can say no to users. It would put them in the position of being gatekeepers over our right. In that case, copyright law would be turned on its head. The derivative works would be mightier than the underlying works on which they are based, and that should not be.

The record companies note that many foreign countries grant performance rights in sound recordings. However, they omit the fact that the major uses of music with the longest copyright tradition grant only a neighboring right of equitable remuneration rather than an exclusive right.

Less than 10 months ago, the record companies agreed to a statutory license, provided certain minimum requirements were met to prevent the loss of record sales, and subject to an initial window of exclusivity for market purposes. Unfortunately, S. 227 departs from that agreement. It establishes a statutory license only for noninteractive digital subscription transmissions and gives an exclusive right for interactive digital subscription transmissions. This

makes the record companies gatekeepers over our music and this would be devastating to songwriters and publishers because we all envision a future centered on interactive services, the electronic information highway. We therefore urge in the strongest terms that the agreement on this point reached on May 11 be restored in S. 227.

I could continue on, but essentially what we really are seeking is to return to the agreement we discussed and argued about, the May 11 agreement, and we hope all of us can come back to that because that seems the fairest to everyone in the industry.

Thank you.

[The prepared statement of Mr. David follows:]

PREPARED STATEMENT OF HAL DAVID

The American Society of Composers, Authors and Publishers submits this statement on S. 227 on behalf of its more than 65,000 writer and publisher members.

We support the concept of a performance right in sound recordings. We applaud the efforts of those who have co-sponsored S. 227 to address this issue and make an important contribution to our copyright law.

Senator Hatch's introductory statement on S. 227 offered to work with those who have concerns about S. 227. ASCAP wishes to avail itself of that offer, for certain provisions of S. 227 pose certain risks for America's writers and publishers of music. This memorandum will explain those risks, and suggest ways in which this otherwise sound legislation can be strengthened, so that America's entire music community can get behind S. 227 and wholeheartedly support its enactment.

I. BACKGROUND—THE ENTIRE MUSIC INDUSTRY'S AGREEMENT ON LEGISLATION

When legislation to grant a performance right in sound recordings was introduced in both houses in the last Congress, many members of Congress called upon America's music community to get together and come up with legislation all could support. ASCAP, Broadcast Music, Inc. (BMI), the National Music Publishers Association (NMPA), the Recording Industries Association of America (RIAA), and the performing artists' union, AFM and AFTRA, engaged in long, arduous discussions, which led to the draft of legislation all could support—the now-famous "May 11 agreement." (A copy of that agreement is attached as an Appendix.)

We were quite proud of our accomplishment, and presented the May 11 agreement to the then-Chairman of the House Subcommittee, only to see him reject our efforts. We believe he was mistaken. This memorandum will set forth how S. 227 differs from the May 11 agreement and why the agreement we reached should be restored. (References are to sections of Title 17 as they would be amended by S. 227; we do not address the differences between the May 11 agreement and S. 227 concerning § 115, dealing with mechanical rights, which are addressed by NMPA.)

II. HOW S. 227 DIFFERS FROM THE MAY 11 DRAFT

A. Exclusivity

The guiding principle of extreme importance to us which the May 11 agreement embodied is that the record companies should not be "gatekeepers" over the use of music. Sound recordings are, by universally-accepted definition in the Copyright Act, derivative works, based on the songs they embody. 17 U.S.C. § 101 (definition of "derivative work.")¹ Simply put, the song can and does exist without the record, but the record cannot exist without the song.

As the Supreme Court has noted, writers and publishers must license their non-dramatic performing rights through performing rights societies like ASCAP and BMI, if their rights are to be given practical effect. *BMI v. CBS*, 441 U.S. 1 (1979). But ASCAP and BMI cannot say "no" to music users. Any user who wants a license and is willing to pay a reasonable price (as determined, if need by, by a neutral third party) is entitled to a license. See, e.g., *United States v. ASCAP*, Civ. Action No. 13-95 (S.D.N.Y. 1950), Section IX.

But if the record companies were given an exclusive right in the public performance of sound recordings, they could say "no" to users for whatever reason they

¹The definition reads: "A 'derivative work' is a work based upon one or more preexisting works, such as a . . . sound recording. . . ."

wished, even if those users were willing to pay reasonable license fees. That would put them in the position of being "gatekeepers" over our rights, for they could spike any deal we might make with users by simply refusing to license those users. That would severely harm the writers and publishers of the underlying works—user might be willing to pay ASCAP and BMI, and the record companies, but if the record companies said "no" (as would be their right under an exclusive right), the user could not then perform any music, so would not enter into a license with ASCAP and BMI, and the result would be to deprive writers and publishers of license fees they otherwise would receive. In that case, copyright law would be turned on its head—the derivative works would be mightier than the underlying works on which they are based!

That cannot be. Indeed, although the record companies note that many foreign countries grant performance rights in sound recordings, the fact is that the foreign countries which are the major users of music grant a "neighboring right" of equitable remuneration, rather than an exclusive copyright right. (E.g., Austria, Denmark, Finland, France, Germany, Ireland, Italy, Norway, Sweden and Switzerland.) That, we believe, should be the model here as well.

To put the record companies on at least the same footing as the writers and publishers—of not being able to say "no" to willing users—all the parties, including the record companies, agreed to make a statutory license available to all digital subscription services, in the May 11 agreement. The May 11 agreement provided that all digital subscription transmissions—both interactive and noninteractive—would be subject to this statutory license. The statutory license would become available after an initial "window of exclusivity," designed to allow record companies to "roll out" to market their releases of sound recordings initially as they saw fit. The "window of exclusivity" would have lasted the shorter of three months from the first public performance by means of a digital transmission, or four months after the first distribution of phonorecords to consumers.

Unfortunately, S. 227 differs from the May 11 agreement. It establishes a statutory license only for noninteractive digital subscription transmissions. It deletes the statutory license for interactive digital subscription transmissions, and replaces it with an absolute exclusive right. This would establish exactly the regime writers and publishers fear—putting the record companies in the position of "gatekeepers" over the licensing of the underlying musical works. This would be devastating to songwriters and publishers, because we all envision a future centered on interactive services—the "electronic information superhighway," or National Information Infrastructure, so much discussed these days. (And it should not be forgotten that there is a hierarchy of rights—the song can and does exist without the recording, but the recording cannot exist without the song. Thus, putting the record companies, as owners of derivative works, in a superior position to writers and publishers, as owners of underlying works, is doubly egregious.)

We therefore strongly urge that the agreement embodied in the May 11 agreement be restored in S. 227.

B. Sound recording performance complement

The May 11 agreement provided a limitation on the availability of the statutory license for all digital subscription transmissions, called the "sound recording performance complement." The complement consisted of either two selections from the same album, or three selections by the same artist or a compilation set; in the case of noninteractive transmissions, the complement could not be performed consecutively; in the case of interactive transmissions, the complement could not be performed within a week. The intent was to prevent home taping of albums or significant parts of them by means of transmissions made under the statutory license, for that was seen by the parties as a direct substitute for record sales.

However, S. 227 limits the time period for performance of the complement for both interactive and noninteractive transmissions to a day, and entirely eliminates the requirement that the performances be consecutive. This means that if a non-interactive subscription service wants to perform four Bruce Springsteen songs during the course of a day—one at 12:15 AM, one at 6:00 AM, one at 4:00 PM, and one at 10:00 PM, it will lose the right to a statutory license. This will severely hamstring users, and negatively affect writers and publishers, because it will interfere with the legitimate artistic choices of programmers who might want to perform songs in a manner for which there is no reasonable threat of depriving a record company of a record sale. The May 11 agreement language should be restored.

(The RIAA has said that it is concerned that digital subscription services might circumvent the "consecutive" requirement by playing some brief interstitial music between selections. That concern is easily met by defining "consecutive" in such a way as to preclude such circumvention.)

C. Business transmission exemption

The May 11 agreement embodied an understanding that established user industries which have fully developed in an economic context which does not call for payment for performing rights in sound recordings and should not incur payments for those rights now. It also recognized that new uses, in industries which are nonexistent or nascent, would not present the same problem, for their economic context has yet to be set.

Examples of industries which should therefore be exempt from any payment requirement are the broadcasting and background music (typified by Muzak) industries, and the May 11 agreement provided exemptions for both. However, although S. 227 includes an exemption for broadcasters, it eliminated the exemption for industries like the background music industry. That exemption should be restored. Indeed, what the introductory statement for S. 227 said about the broadcasting industry's exemption has equal force here: "long-established business practices within the music and broadcasting industries represent a highly complex system of interlocking relationships which function effectively for the most part and should not be lightly upset."

D. Savings clauses

The May 11 agreement embodied language in several places which was designed to make it absolutely clear that the new rights being granted did not in any way derogate from existing performing rights in underlying musical compositions, and could not be used as a basis for diminishing the royalties paid for the performance of underlying musical works. Again, the theory is a simple and equitable one—if record companies are to benefit from new rights, they should not do so on the backs of the songwriters and music publishers who created and own the underlying songs without which the sound recordings would not exist at all.

Hence, in one savings clause (appearing in identical language in two places in the May 11 agreement), all preexisting rights and remedies were said to continue to exist to their fullest extent; in another, agreed-upon language provided that royalties for underlying works would not be diminished as a result of the new rights granted. (Note that this did not mean that such royalties could not be diminished for other reasons having no relation to the new rights, such as the normal economic circumstances which affect industries.)

However, although S. 227 includes some savings clauses, it deletes both of these vital provisions. They should be restored.

E. Encryption

The May 11 agreement contained a provision—requested by the record companies and readily agreed to by the other parties—that prevented transmitters from deleting any encrypted information, contained in the sound recordings, which would allow the identification of the works being performed.

However, inexplicably, this provision was deleted from S. 227. It should be restored.

F. Performances in transmissions in the NII

An integral part of the May 11 agreement was agreed-upon language for the legislative history of the bill. Writers and publishers were concerned that the analysis of the copyright law then being undertaken by the Patent and Trademark Office, as part of the Interagency Task Force (IITF) studying the National Information Infrastructure, might call for a change in existing law, which provides that all transmissions or communications to the public of copyrighted musical compositions constitute public performances of those works. This was especially important when the future held forth the prospect of transmission of music in compressed time, for example. Although writers and publishers wanted this language in the statute, they reluctantly agreed that it could be put in legislative history.

When the IITF Preliminary Draft Report—the "Green Paper"—subsequently came out in July, 1994, the fears of writers and publishers were realized in the preliminary recommendations of that report. We should note that there is no dispute among all the parties over this principle—the record companies explicitly agreed to it. The only question was, and is, whether it should be reaffirmed in legislative history or in the language of the statute. We think it should be the latter.

III. CONCLUSION

ASCAP supports the granting of this new right, provided the rights of our songwriter and music publisher members are not weakened in the process. The May 11 agreement, to which the entire American music industry, including the RIAA, agreed, provided the security we needed. We hope that S. 227 can be strengthened

as we suggest. Then we can wholeheartedly support S. 227 and work diligently for its enactment into law.

The CHAIRMAN. Thank you, Mr. David.

Mr. Kurt Bestor, we are happy to have you here.

STATEMENT OF KURT BESTOR

Mr. BESTOR. Thank you. Good afternoon, Mr. Chairman, members of the committee. My name is Kurt Bestor and, as was noted, I am a resident of the State of Utah. I have been a professional composer and songwriter for over 16 years and am an affiliate of Broadcast Music, Inc., BMI, a performing rights organization which licenses to users of music the public performing rights for over 3 million compositions, and represents over 150,000 songwriters, composers, and music publishers.

I make my living writing music for film, television, and sound recordings, and since Senator Leahy probably doesn't hum any of my tunes yet, let me give you just a couple of credits. My credits include the ABC Movie of the Week theme, the underscore for the ABC broadcast of the 1988 Winter Olympics, the Monday Night Football theme—now, there is one you can hum—and albums ranging from contemporary to Christmas music, as well as numerous sound track albums.

Senator LEAHY. I might say Mr. David has actually heard me sing before and he wouldn't foist that on anybody; I sing so far off key. [Laughter.]

Mr. BESTOR. I will give you the music. You can practice.

BMI and I want to thank Chairman Hatch and Senator Feinstein for their foresight in looking to the future era of digital transmissions and seeking to protect the interests of creators, artists, and copyright owners of music. I do appreciate the opportunity to come to Washington to testify today regarding S. 227, legislation that we support, with certain modifications.

First, let me say that as a composer, I certainly am in favor of expansion of copyright protection to other creative persons and copyright owners. I do support protection under the law for the creators of sound recordings. Performing artists, such as Mr. Henley and others, and producers contribute greatly by putting what we compose and create on records, tapes, and CD's, and their contribution should entitle them to be paid, just as mine do me.

However, I do have some concerns about S. 227. I know that Congress does not intend to deprive me of what I rely on to support my profession and my family. However, S. 227 has the potential for doing just that. I know that was a compromise mentioned by Mr. David that all interests of the music industry had arrived at last year which has been referred to as the May 11 compromise, on which we stand with ASCAP and the National Music Publishers in supporting. It seems that the compromise addressed the concerns I have about S. 227, and I would urge the committee to take another look at it in light of my remarks today.

Since Mr. David has touched on many of the issues and I have submitted my written testimony, let me deviate for a moment from my planned statement and just touch on a few points that concern me.

I am particularly troubled by the provision in S. 227 creating an unconditional, exclusive sound recording performance right with respect to interactive subscription services. It is generally expected that interactive computer on-line and interactive satellite-delivered subscription services will play a major part in the way that music reaches the public in the future. It is exciting and a challenging world for me as a composer to have my music reach millions of people around the world at the touch of a button.

As a result of this new technology, I hope my royalties for public performances will increase as the audience for my work increases. However, by giving record companies the ability to exclusively control music digitally transmitted over interactive services for an unlimited time as part of their performance right, a situation is created where they could, for a variety of reasons, protect my music from being freely performed. If that were to happen, there could be a negative impact on my livelihood.

A vast number of musical works which are performed are those which have been recorded on records, tapes, and CD's, and soon, as has been mentioned many times today, via computer. The public likes to hear its favorite songs performed by its favorite artists. This may not happen in the future. In the new digital era, the party who controls the performance sound recording would have the ability, at least indirectly, also to control the performance of my music. Presently, I know that regardless of which recorded version of a song is performed, I am entitled to public performance royalties.

Unlike the current situation where a broadcaster simply plays a recording he thinks his audience will like, under this bill the interactive service provider will need permission from the record companies to perform my work. Under S. 227, with respect to interactive services, record companies are able to deny to perform the sound recording. In essence, this gives the record companies control over whether or not music is ever transmitted over those services. This situation is of great concern to me as a songwriter because the potential for my performance rights to be diminished increases exponentially, unless you build in a safeguard, and I appeal to you today for such a safeguard.

In the May 11 compromise, the record companies agreed to a 3- or 4-month window of exclusivity, also mentioned by Mr. David, with respect to interactive services, which we understand they need to control dissemination and market their product. After that period expired, they would be subject to statutory licensing, which would assure that they would be compensated for their product, but also that there would be the widest dissemination possible of the music contained on those recordings. This ensures that composers and songwriters would continue to earn their performance income.

Just one final concern I have and I would like to address today as a songwriter who depends on public performance royalties as a major portion of my livelihood—I do a small amount of performing, but I really am here as a composer. I make most of my money on performance royalties.

There is currently no legislative history language which sets forth that all digital transmissions to the public represent public

performances. The May 11 compromise contained such language. In the coming era of digital transmissions, this is extremely important to most songwriters.

When a new right such as the one proposed in this bill is introduced, it is very important that the legislative history clearly state that the new right is in addition to my current rights and is not a replacement for what I already have. Without this clarification, my rights could be trampled by these new rights-holders. On behalf of all songwriters, I hope you will not let that happen.

I urge this committee to adopt the language of the May 11 compromise agreed to by composer colleagues, music publishers, recording artists, and record companies, so that all of us in the music industry can enter the new technological world knowing that our respective rights are protected.

Thank you very much for your time.

[The prepared statement of Mr. Bestor follows:]

PREPARED STATEMENT OF KURT BESTOR

Good morning, Mr. Chairman and Members of the Committee. My name is Kurt Bestor. I am a resident of the State of Utah, I live in the town of Provo. I have been a professional composer and songwriter for over 16 years. I am an affiliate of Broadcast Music, Inc., BMI, a performing rights organization which licenses to users of music the public performing rights of over 3 million compositions and represents over 150,000 songwriters, composers and music publishers.

I make my living writing music for film, television and sound recordings. My music has been performed on radio, television and cable. My credits include the ABC Movie of the Week theme, which I wrote with another Utah resident, Sam Cardon; the underscore for the ABC broadcast of the 1988 Winter Olympics; the Monday Night Football theme, and albums ranging from contemporary to Christmas music, as well as numerous soundtrack albums.

BMI and I want to thank Chairman Hatch and Senator Feinstein for their foresight in looking to the future era of digital transmissions and seeking to protect the interests of creators, artists and copyright owners of music. I appreciate the opportunity to come to Washington to testify today regarding S. 227, legislation that we support with certain modifications.

First, let me say that, as a composer, I certainly am in favor of the expansion of copyright protection to other creative persons and copyright owners. I support protection under the law for the creators of sound recordings. The performing artists and producers contribute greatly by putting what we composers create onto records, tapes and CDs, and their contributions should entitle them to be paid, just as mine do me. However, I do have some concerns about S. 227. I know that Congress does not intend to deprive me of what I rely upon to support my profession and my family. However, S. 227 has the potential for doing just that.

I know there was a compromise that all interests of the music industry had arrived at last year, which has been referred to as the May 11th compromise. It seems that the compromise addressed the concerns I have about S. 227, and I would urge the committee to take another look at it in light of my remarks today. I will not attempt to review the entire bill, but would like to raise a few areas of concern, if I may.

I am particularly troubled by the provision in S. 227 creating an unconditional, exclusive sound recording performance right with respect to interactive subscription services. It is generally expected that interactive computer on-line and interactive satellite delivered subscription services will play a major part in the way that music reaches the public in the future. It is an exciting and challenging world ahead for composers, songwriters, and music publishers to have their music reach millions of people around the world at the touch of a button. As a result of this new technology, I hope my royalties for public performances will increase as the audience for my work increases. However, by giving record companies the ability to exclusively control music digitally transmitted over interactive services for an unlimited time as part of their performance right, a situation is created where they could, for a variety of reasons, prevent my music from being freely performed. If that were to happen, there could be a negative impact upon my livelihood.

A vast number of musical works which are performed are those which have been recorded onto records, tapes, and CDs, and, soon, via computer. The public likes to hear its favorite songs performed by its favorite artists. This may not happen in the future. In the new digital era the party who controls the performance sound recording would have the ability, at least indirectly, also to control the performance of my music. Presently, I know that, regardless of which recorded version of a song is performed, I am entitled to public performance royalties.

Unlike the current situation where a broadcaster simply plays a recording he thinks his audience will like, under this bill the interactive service provider will need permission from the record companies to perform my work. Under S. 227, with respect to interactive services, record companies are able to deny the right to perform the sound recording. In essence, this gives the record companies control over whether or not music is ever transmitted over those services. This situation is of great concern to me, because the potential for my performance rights to be diminished increases exponentially, unless you build in a safeguard. I appeal to you today for such a safeguard.

In the May 11th compromise, the record companies agreed to a three to four month window of exclusivity with respect to interactive services, which we understand they need to market and control dissemination of their sound recordings. After that period expired, they would be subject to statutory licensing which would assure that they would be compensated for their product, but also that there would be the widest dissemination possible of the music contained on those recordings. This ensures that composers and songwriters would continue to earn their performance income.

Another concern of mine is that of the "sound recording performance complement." The May 11th compromise provided that any delivery service would be subject to the record company's exclusive right if it exceeded what was termed the "sound recording performance complement." Under that compromise, there had to be performances of more than two consecutive cuts of an album or more than three consecutive cuts of one artist or a compilation. S. 227 changes the complement and states that the performed cuts need not be performed consecutively. Instead, a 24 hour time frame was established. It seems that the underlying rationale for the complement has been distorted, with the programming of a service being severely constrained. For example, the performance of one cut from an album at 10 A.M., another cut at 4:30 p.m., and a third at 11 p.m. would exceed the permitted complement. That restriction on free dissemination of my music is most upsetting, because not only would my income suffer, but so would the audience for all musical works.

Let me address another concern. The May 11th compromise contained language which assured that my rights would not be diminished as a result of the amendment of the Copyright Law to provide a performance right in sound recordings. For example, the May 11th compromise provided ". . . that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6)." S. 227 does not include this language. While S. 227 does contain some language in this regard, I feel that the language of the May 11th compromise was much clearer. I would urge you to study the language agreed to in the May 11th compromise and would hope that you would adopt this language in the proposed legislation.

A final concern I would like to address today as a songwriter who depends upon public performance royalties as a major portion of my livelihood, is that there is currently no legislative history language which sets forth that all digital transmissions to the public represent public performances. The May 11th compromise contained such language. In the coming era of digital transmissions, this is extremely important to most songwriters. When a new right, such as the one proposed in this bill, is introduced it is very important that the legislative history clearly state that the new right is an addition to my current rights and is not a replacement for what I already have. Without this clarification, my rights could be trampled by these new rightsholders. On behalf of all songwriters, I hope you will not let that happen.

I urge this committee to adopt the language of the May 11th compromise agreed to by composer colleagues, music publishers, recording artists and record companies so that all of us in the music industry can enter the new technological world knowing that our respective rights are protected.

Thank you for listening to my concerns.

The CHAIRMAN. Thank you, Kurt. We appreciate it. These groups know how to put pressure on me, bringing Kurt and Steve Randall here to put pressure on me.

Let me start with you, Mr. Rubinstein, because I am concerned about some of the things that you are concerned about. Your statement notes that your company is now expanding its network into Europe, Canada, Central and South America, and Africa. I know that Zaire, for instance, does not require the payment of a performance right in sound recordings, but I believe that virtually every other country in which you do business does.

Mr. RUBINSTEIN. Except for Canada.

The CHAIRMAN. Except for Canada, OK. Now, I am sure you anticipate turning a profit in those countries. Why is it only in the United States that you are—you are not really objecting to paying the performance right to the copyright owners, but for some reason—I am not quite understanding why you have difficulty paying the same performance right royalty here as you do in those countries where you do.

Mr. RUBINSTEIN. I have no problem paying the same copyright performance. As I said, I support performing rights, and have for many, many years.

The CHAIRMAN. Right.

Mr. RUBINSTEIN. The differentiation I have between the way the bill proposes to apply here and the way it is applied in other countries is, No. 1, as has been discussed, it exempts broadcasters. No. 1, it hangs its hat on the digital transmission, which doesn't necessarily mean that it will be quality transmission. You could have digital transmission that is actually inferior to some analog transmission.

Then the way it is applied with the complement rule, it really pre-determines programming. I understand the need for protection from home taping that a complement provision would have, but this is so restrictive, unlike last year's bill, as to almost be impossible to administer.

Then, lastly, on the vertical integration issue where a competitor of mine is owned by record companies, the bill addresses a way that maybe I could get fair treatment, but, in fact, the way it is written doesn't assure me of fair treatment at all from a competitor that is owned by record companies.

The CHAIRMAN. Well, this bill does look to the future. That is why it is more concerned with subscription and cable transmission than it is with broadcasting.

Mr. RUBINSTEIN. But the future of broadcasting will be digital as well.

The CHAIRMAN. That is right, and we will have to face that problem if that is what happens. But digital is the delivery method of the future. That is what you are saying. You are saying that broadcasting shouldn't be excluded because ultimately they are going to become competitors and if they are excluded, then it makes it uncompetitive for you. That is basically your argument?

Mr. RUBINSTEIN. That is correct.

The CHAIRMAN. Well, I think that one of our problems in legislating is doing the art of the possible and, as you know, we have been through lots of problems in these areas and we are trying to get everybody together as best we can. I am not sure we are ever going to get that done, but we are interested in any suggestions you

might have; the same with you, Steve; the same with you, Kurt; all of you, as a matter of fact.

Mr. DAVID, we have admired your music through the years, but yours has been primarily in the movie industry, where you have gatekeepers there, too, if you stop and think about it. They determine which movie theaters they get into; how far they go, what the distribution rights are, et cetera, et cetera.

Mr. DAVID. Well, not quite in the same way because you make your agreement with the motion picture people on a contractual basis and you are paid x number of dollars and whatever percentage of royalties you may get. The film comes out, like a song comes out, and it is a success or a failure. So they don't act as gatekeepers for us.

The CHAIRMAN. But they do, in a sense, because they decide which theaters are going to show "Butch Cassidy," when it is going to be released on video cassette, what its foreign distribution and TV rights are, or when syndication will be. They can withhold the entire picture from release if they want to, if they choose, and all of these are rights that copyright owners normally have.

Mr. DAVID. Well, it is unlikely, it seems to me, for a motion picture company to withdraw a film. We have great concerns with the record companies seeking agreements with the subscription services and using that leverage of the exclusive right which may affect us adversely. We feel very threatened by it.

The CHAIRMAN. I see.

Mr. DAVID. We also feel very threatened that digital transmissions, as enumerated in the thinking today, may not be considered the performances that they truly are. In this whole business of reforming copyright law, which needs to be done, we are just concerned that we will be losing our rights. Actually, all the performing rights societies are asking for is to reaffirm their rights. We are not asking for anything different that we do not have.

The CHAIRMAN. Well, I don't want you to lose any rights, as you know.

Mr. DAVID. Right.

The CHAIRMAN. In fact, I am a very strong advocate for your rights. Well, let's just look at this very carefully, which we will do. Frankly, I would prefer it to be a much broader bill. It is just I don't think we can get it through, and this is a step in the right direction. I would think that most songwriters would look at that in that manner that this is a step in the right direction. It is certainly not going to be the last time that this is debated, so I just want you to keep that in mind.

Without this, if we don't move forward—I mean, I was a little bit shocked last year, too, and felt badly about it, although I have high respect for then Chairman Hughes. Well, we are just going to listen to all of you and just look at it very carefully, but this is about as good as we have been able to come up with at this point. As you can see, both the Commissioner and the leader on copyrights would like us to go a lot further, too, and personally I wish we could. I just want you to know that.

Senator FEINSTEIN.

Senator FEINSTEIN. I would just echo the chairman's statements. The question is what can we do to get concurrence. I remember

when I sat around that table and I went around and looked at what I figured to be the per diem of all of the attorneys at the table representing the different sides, I thought, wow, trying to figure a way out.

Ms. Peters, I know you are here, and you are an effective, impartial, technical person. If you can come up with any remedies, I think we would be very appreciative. If the principals—and I know attorneys can make life more difficult, being one of the few non-attorneys on this committee.

Senator LEAHY. Oh, no. [Laughter.]

Senator FEINSTEIN. If the principals have any suggestions—Mr. Bestor, if you have any precise suggestions, please feel free. If the parties can sit down at the table and go at this thing again, please feel free.

But I think what the chairman has said is correct and I think that we have to move this thing forward. We have to provide our people with protection in what is a growing technology and a growing international marketplace, and not to do so would be deleterious. Now, we have tried to protect everybody as best we can in this. Obviously, it is less than perfect, but I think there are some practical solutions to some of the problems.

Mr. Randall, what you said representing Muzak—when we worked on it, the broadcast industry was involved in this bill, and yet there are some that think that if they were included today, it could put out of business some of the struggling new broadcast companies, and we don't want to do that.

Mr. RANDALL. We don't want to do that either.

Senator FEINSTEIN. So it becomes a very difficult measure, and so if Ms. Peters or Commissioner Lehman have any specific recommendations as to how we might be able to amend this legislation, I would certainly welcome them, but I think we have to push ahead.

I thank you gentlemen very much for being here.

Mr. BESTOR. Well, Senator, if I could take you up on your invitation to interject for a second, I don't think we need pay that per diem again because we did meet on May 11, and I think that once upon a time—and I wasn't there, but from what my counsel tells me, at that time there was concurrence. I think really the simple solution is to go back to the May 11 compromise because once upon a time we had that.

The CHAIRMAN. But I can tell you there wasn't concurrence. That was the problem. We had no way of getting that through, and the chairman pulled it. Frankly, I was willing to push it on that basis, but that is the problem. I feel very strongly that this is probably going to have to be an incremental approach because we don't have the votes to put it through as broadly as a lot of us would like to do it. But if we don't do this, there won't be any rights and we won't be making the marker; we won't be establishing those rights.

Look, it comes down to this: Are we going to have the music of the future, are we going to have the opportunities, are we going to have the incentives there, are we going to be supporters of creativity in our society? Unfortunately, you know, I have to say that I personally believe that if I could just make all these decisions myself, you would all be a lot better off. [Laughter.]

I mean, I know that that is true.

Senator LEAHY. We thought you did, Orrin; we thought you did.

The CHAIRMAN. But to make a long story short, we have to deal with reality around here and that is our problem, and right now if we don't make this incremental first step, we will never get there and then some of the rights that folks at ASCAP and BMI really want protected just won't be there either.

I admit this isn't perfect and I am concerned about Mr. Rubinstein's concerns, and certainly Mr. Randall's concerns, and, Mr. Murphy, yours. Mr. David, I am always, I think, on the side of the creators of art.

Mr. DAVID. You certainly are.

The CHAIRMAN. And I want to stay there because I want to see incentives to lift us in this country, and you folks do that better than almost anybody. So I am very concerned, and we are going to look at this as strongly as we can, but I hope that if we decide this is the way we have got to go, we will have some unified support. I commit to you that we are not going to let injustice become the rule in this area; we are just not going to let that happen as long as I am here, and others on this committee. So that is what it comes down to.

Senator FEINSTEIN. I think Mr. Murphy wanted to say something, Mr. Chairman.

The CHAIRMAN. Sure, sure.

Mr. MURPHY. Mr. Chairman, just to go back to your question about the film industry versus the recording industry, and just to elaborate on that point a bit, there is a great deal of difference between how the motion picture industry operates and how the recording industry operates.

The CHAIRMAN. Oh, sure.

Mr. MURPHY. As you know, the film industry is mostly author to hire, and that is an entirely different situation. In the recording industry, more than half the income today—since I license through the Harry Fox Agency about 80 percent of the music sold in America, I think I am in a position to tell you with accuracy that more than half of the songs recorded today are songs that belong to each other. In other words, Hal David's song is being recorded by one recording company and then another one. They are all coverers of songs, so that the way the structure has been evolved, I think, is a very strong structure that allows for free market access to products, and I think it is extremely important.

Maybe the success of our music and the system that you helped put in place is the very thing that I think we want to keep together again, to keep the system in place.

The CHAIRMAN. We do.

Mr. MURPHY. The film business is quite different. Again, its roots are different and its structure is quite different, and you have to really look at it in detail. I would be happy to give you the information at another time. I know you are pressed for time.

The CHAIRMAN. We would be happy to have you send it to us.

Mr. MURPHY. I would be happy to give you that information or anything that you may like.

The CHAIRMAN. Well, thank you.

Senator Thompson.

Senator THOMPSON. Mr. Murphy, another distinction is those recording residuals are much higher than those movie residuals. [Laughter.]

Mr. David and Mr. Bestor, maybe you can help me understand this a little bit better. I was sitting here wondering how this gatekeeper thing really kind of worked and why the recording industry's interests would not be basically the same as the publisher's and the writer's and why the record company would not want the widest distribution.

You referred to deals, maybe, between the record company and the distributor that might restrict that somehow, but how does that work? If that was better for them, would it not be better for you, still? Would that not flow through? What is the difference in the interest there as to how that would work?

Mr. DAVID. Where the writer or the publisher has an exclusive right, it is an exclusive right in name only. It would be virtually impossible to license your music individually, so we must do it through a performing rights society. Both ASCAP and BMI operate under consent decrees. Anyone who requests a license we must give that license to. They have to pay a reasonable fee.

If the fee we suggest is not acceptable to the potential user, he may still use the work, and then we have to go to court to decide the fee. But we cannot unilaterally say you cannot use our music. The exclusive right in the sound recording performance bill will allow the record company to say you cannot play our record, and if they say that, you cannot play our record—if, on that recording, they happen to have songs by Mr. Bestor, Don Henley, myself, our songs cannot be performed. That is the big difference.

Senator THOMPSON. Why is it to their interest to say that?

Mr. DAVID. I can't give you—if it is not to their interest, why are they so strong about having it?

Mr. BESTOR. I think it comes down to why have you heard of Mr. Henley and not heard of Mr. Bestor. I mean, certain people you hear about—but you will—certain people have interests in different areas. We simply want to say that our rights as composers shouldn't be subservient to any other rights, and that is the crux of the problem. We would like the public to decide who they want to listen to, not what anybody else says they need to listen to.

Senator THOMPSON. In other words, what you are saying is that it might make sense for them to exercise those rights, but they would still have those rights nonetheless and they might do something that didn't make good sense to you.

Mr. BESTOR. Sure. I have no idea what they will do. I just want to protect my own rights as a composer.

Mr. DAVID. If they wanted to make a better deal, they obviously could use that right, and that is part of being in business very often.

Senator THOMPSON. Senator Leahy.

Senator LEAHY. Thank you.

Mr. Rubinstein, let me ask you a couple of questions to make sure I characterize your testimony correctly. You feel that subsection (h) of the bill, S. 227, provides inadequate protection against anticompetitive conduct. That is the way you feel?

Mr. RUBINSTEIN. That is correct.

Senator LEAHY. What type of anticompetitive conduct are you referring to? Can you give me a couple of examples?

Mr. RUBINSTEIN. Is the subsection you refer to the complement section or is it the—OK, it is the vertical integration section. The vertical integration section would allow record companies to license my competitor, as an example, and not license me under the same provisions. It starts off by talking about the same treatment if the record company is in control of the digital transmitter.

However, it is a case in point where there are several record companies in control of my competitor, and therefore any one of them would not be and it could, in fact, be applied unfairly between digital cable radio and our own service, DMX.

Senator LEAHY. And your own service?

Mr. RUBINSTEIN. Yes.

Senator LEAHY. Our own antitrust laws or the enforcement protection—you don't feel they are specific enough to protect you?

Mr. RUBINSTEIN. Well, I know there is an investigation right now going on by the Justice Department on this very issue and I don't know what the conclusions will be. I am really not an expert in anticompetitive law, so I can't answer the question, but to date I don't feel it could protect me.

Senator LEAHY. So how would you improve protections both for your competition on your part, but also for the consumers?

Mr. RUBINSTEIN. I would, simply stated, have a favored-nations type of legislative clause in this bill so as to make it a requirement that once a license is issued to a service that the same license on the same conditions would be available to another similar type service for similar type use.

Senator LEAHY. Similar type service?

Mr. RUBINSTEIN. Yes.

Senator LEAHY. Thank you.

Senator THOMPSON. Senator Feinstein, do you have anything else?

Senator FEINSTEIN. No, I don't. Thank you, Mr. Chairman.

Senator THOMPSON. Well, in that case, I just want to thank everyone for coming here. It is certainly very helpful to me and others who perhaps have not been at this a very long period of time in clarifying the issues. Thank you very much.

The committee is adjourned.

[Whereupon, at 12:34 p.m., the committee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

RESPONSES OF JASON S. BERMAN TO QUESTIONS SUBMITTED BY SENATOR LEAHY

Question 1. As you know, there is concern that the copyright interests of the composer and songwriter in the musical composition will be adversely affected by the establishing of a performance right in the sound recording. What aspects of the bill can you point to reassure your colleagues in the songwriting community that such adverse consequences are not intended and will not occur?

Response to Question 1. There is no evidence to support the premise that the granting of a performance right in a sound recording adversely affects the interests of composers, songwriters and other rightsholders in musical works. That was the conclusion reached by the Intergovernmental Committee to the Rome Convention when it examined the issue in the 1970's and remains equally valid today. Indeed, in numerous instances examined by the Intergovernmental Committee, the level of royalties paid to musical works rightsholders increased after enactment of a sound recording performance right. Notwithstanding, as an accommodation to the fears generated by representatives of composers and songwriters, S. 227 takes extraordinary steps to assure that composers and songwriters will not be adversely affected by the establishing of a performance right in the sound recording.

1. Broadcasters are exempted. The composers and songwriters demanded that radio and television broadcasters—who pay the lion's share of music performance royalties—be totally exempted from liability under the sound recording performance right. They are. And this exemption remains even if these broadcasters convert to digital transmissions.

2. Only digital transmissions are covered. From the outset, composers and songwriters demanded that the new right apply only to digital transmissions. Analog transmissions are excluded from the scope of the new right under S. 227, again to ensure that all of the existing musical work royalty pie is preserved. So are all performances through means other than transmissions, such as performances in bars, taverns, restaurants, discos, etc.

3. Most digital transmissions are subject to statutory licensing. Composers and songwriters insisted that the digital transmission right be subject to statutory licensing, to guarantee that record companies are not able to act as "gatekeepers" and foreclose licensing opportunities. In deference to their concerns, S. 227 mandates statutory licensing applicable to most noninteractive subscription transmissions even though: (a) record companies are in the business of licensing their works widely and have no incentive to foreclose licensing opportunities, (b) statutory licensing is contrary to the worldwide trend, which is to avoid limitations on exclusive rights, (c) statutory licensing is contrary to the position taken by the United States in international intellectual property negotiations, (d) the statutory licensing provision is opposed by the Administration, and (e) the composers' and songwriters' own performance rights are not subject to statutory licensing, but are exclusive. In essence, because composers and songwriters have voluntarily chosen to license their rights collectively (which may well change in the future), they have insisted that recording artists and companies be statutorily required to do the same.

4. The statutory license procedure is modelled after ASCAP's and BMI's licensing procedures. Since ASCAP and BMI are required by the Department of Justice to grant licenses immediately upon application, the composers and songwriters insisted that recording artists and companies must do so, too. S. 227 so provides. And if reasonable royalty rates cannot be negotiated thereafter, the government is to step in and mandate an appropriate royalty.

5. If a record company licenses performances by an affiliated transmitter, it must license similarly-situated transmission services on similar terms. This provision in S. 227 was included at the insistence of composers and songwriters to provide still further guarantees that record companies cannot refuse to license performances of their works.

6. Existing rights are not impaired. Statutory provisions in S. 227 confirm that the new sound recording performance right does not impair any of the composers' and songwriters' copyright rights in musical works under existing law.

7. Existing licensing fees are not impaired. S. 227 declares that royalties paid under a sound recording performance right may not be taken into account in proceedings to set or adjust royalties paid to composers and songwriters.

8. The "mechanical rights" of composers and songwriters apply when phonorecords are sold to consumers by digital transmission. In response to demands of composers and songwriters, and over the objection of the Administration, S. 227 amends the mechanical compulsory license to confirm that payment must be made for "digital" phonorecord deliveries."

As the above list should make abundantly clear, S. 227 has been carefully crafted to respond to composer and songwriter concerns.

Question 2. We have heard a good deal about a May 11, 1994 compromise negotiated in connection with House proceedings last session. Did RIAA agree last year to include the following statement in the legislative history of performance right in sound recording legislation?

"Under existing principles of copyright law, the transmission or communication to the public of a musical work constitutes a public performance of that musical work. In addition, the digital transmission of a sound recording that effectively results in the delivery to the transmission recipient of a phonorecord of that sound recording implicates the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein. New technological uses of copyrighted sound recordings are arising which require an affirmation of those principles to the digital transmission of sound recordings, to encourage the creation of and protect rights in those sound recording and the musical works they contain."

Response to Question 2. To fully understand the May 11, 1994 proposal, one has to understand the events leading up to it. In essence, the RIAA was told last year that no Congressional action was possible without an industry-wide agreement. This meant that there were those in the industry who were in the enviable position of dictating the terms of the "compromise," having in effect a veto over whether or not the process went forward.

The negotiations were like efforts to save a drowning man. Those in possession of the life-raft were positioned to achieve their objectives regardless of whether such objectives were grounded in good public policy. The draft "legislative history" referred to in your question is but one such example.

Question 3. Is the above-quoted statement a correct statement of RIAA's understanding and intent in connection with this legislation, S. 277?

Response to Question 3. The RIAA believes that whether a transmission or communication of a work constitutes a public performance and/or implicates the exclusive rights to reproduce and distribute the work is dependent upon the facts associated with the particular transmission.

Question 4. There is also a concern that record companies are becoming involved in providing digital subscription and interactive services. Section 3 of the bill includes adding a new subsection (h) to section 114 of title 17, United States Code. That new subsection is premised upon ownership interest or the exercise of a controlling influence.

Can you be any more precise about the types of joint ventures you believe would be covered by this language?

How will the rule in subsection (h) operate in the real world of competitive business?

How will it be policed and by whom?

Is it intended to create a private right of action on behalf of a competitor, for example?

Is subsection (h) intended to provide any basis for a defense to an action under any antitrust or other laws protecting competition and consumers?

Response to Question 4. As noted above, this provision is intended to assure that if a record company licenses performances by an affiliated transmitter, it must license similarly-situated transmission services on similar terms. One would expect this provision to be interpreted in a manner similar to a comparable provision in the Cable Act.

Question 5. What companies that own record companies are now involved in or are planning to be involved in the field of digital transmission services?

Response to Question 5. EMI Music, Sony Music and the Warner Music Group each have an interest in Digital Cable Radio. By the way, each of the above-named companies have music publishing affiliates as well as record company affiliates. The RIAA has no information on any record companies that may be "planning to be involved in the field of digital transmission services."

Question 6. The bill is very precise about how the performance royalty will be divided among recording artists and the record companies, with the featured artist to receive 45% and musicians and back up singers another 5%, leaving 50% of the royalty for the record company. Can these percentages that are fixed in the law be waived, renegotiated or altered by contracts among the parties?

Response to Question 6. It is RIAA's belief that the percentages fixed in the law are not intended to be waived, renegotiated or altered by contracts among the parties. You may wish to also direct this question to artist representatives to confirm this belief.

Question 7. I would be very interested to know what the royalty rates are likely to be for various services. The bill does not say, leaving the matter for negotiations. What is your sense of the likely licensing fee per recording in various settings? Will it be in the range of a few pennies a recording or more? What can consumers anticipate having to pay for this new performance right?

Response to Question 7. Anything beyond expectations that the licensing of sound recording performance rights would reflect the proper functioning of an efficient marketplace would be pure speculation. Thus, the RIAA is unable to comment on any specific level of royalty rates likely to be payable for various services.

RESPONSES OF HAL DAVID TO QUESTIONS SUBMITTED BY SENATOR LEAHY

Question 1. Did the May 11, 1994 compromise provide songwriters and music publishers with adequate protection for their existing rights? On what issues did you continue to differ with record companies in connection with that May 11 compromise?

Answer. Yes it did. We were protected because the May 11 agreement did not allow the record companies to become "gatekeepers" over our rights, did not threaten existing uses by established industries, and contained "savings clause" language which ensured that the new right granted to record companies could not erode our rights.

As to the second part of the question, we believed that this most important principle of performing rights under existing law be reaffirmed in statutory language: "All transmissions of copyrighted musical works to the public are public performances of the works." The RIAA strongly resisted including this statutory language on the grounds that it could aggravate political opposition, but their representative conceded that we already enjoyed this legal principle and should continue to do so. Eventually we compromised on a reaffirmation of this principle in legislative history.

Question 2. How would limiting the performance right in sound recordings to a nonexclusive right for interactive services "level the playing field" for songwriters, in your view?

Answer. By law, and as a practical matter, we cannot say "no" to a user who wants a license and will pay a reasonable fee. The record companies should be in the same position. But if they have an exclusive right over interactive services, they will be able to spike any deal we make. They could say "no" while we could not. That's why making their right nonexclusive levels the playing field.

Question 3. Why are you so concerned about reaffirming composers' and publishers' rights if they are already contained in existing law?

Answer. Because the PTO's "Green Paper" might be read to question our existing rights. We cannot be put in a situation where the record companies have rights and we do not. By reaffirming our rights—the only thing we ask for ourselves in this legislation, by the way—we will be secure that we will not lose out in the digital world by having to fight for our already existing rights in court or having any commercial uncertainty about our rights.

ADDITIONAL SUBMISSIONS FOR THE RECORD

ARTS MANAGEMENT INTERNATIONAL,
New York, NY, March 4, 1995.

Re S. 227 Public Performance Right in Sound Recordings Act of 1995.

Hon. ORRIN HATCH,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: Please accept this submission as a written statement for the Judiciary Committee hearing scheduled for March 9, 1995 on S. 227. Arts Management International (AMI) is a small non-profit organization in New York committed to education, research and analysis of legal and business issues affecting creative talent. The attached mission statement goes into more detail about how we attempt to identify issues of concern to all creators and work across traditional industry market segments with various other creators' organizations to ensure a presence on behalf of an exploited and poorly represented class, and to identify the public's interest in industry issues.

BACKGROUND

The mergers and acquisitions of the eighties have consolidated the prerecorded music market to a current handful of dominant multinational media companies unfortunately wielding what would seem to be both collective monopoly power (evidenced for example by artificially high early CD prices) and collective monopsony power (evidenced by blatantly unfair contract terms) against consumers on the one hand, and individual composers, recording artists and musicians on the other. We welcomed initiatives by the Department of Justice and the Federal Trade Commission to investigate some of the abuses that apparently stem from monopolization of music industry distribution channels by a few dominant companies. It is the latter contractual problems, however, that AMI is particularly concerned about as inequities at the bargaining table continue to create a plethora of contractual abuses across the industry.

Members of the creative community have remained divided and unfortunately remain conquered in their contracts. Artists—generally individualists—have seldom effectively joined together to collectively enforce fairness in their business dealings and have suffered not only in their individual contracts and business dealings, but also on Capitol Hill, when legislation detrimental to creators' rights has been signed into law.

DIGITAL RECORDINGS AND SYSTEMS

Over the last decade in the U.S. we have seen a steady deterioration in the level of individual artist contracts across the publishing, music, film and television industries, in varying degrees. Current debate and resulting legislative and contractual definitions of digital electronic uses and payment schemes will impact the livelihood of creators for many years to come in all the entertainment industries, both in the U.S. and across the globe. Incidental to the creation of new commercial customs is an opportunity to focus on creators' rights and address certain longstanding inequities in the domestic market. Technological convergence of the television, cable, and telephone industries, (a natural phenomenon of digital media and transmission), on the heels of a decade of unprecedented consolidation within markets, will yield powerful new players, with the complementary need for vigilant oversight and guidance by the Federal government to balance diverse private interests and always preserve the public interest.

Among other things, it is woefully unclear at present whether making available a song on-line, or posting on a network for paid access, is a "public performance", a "distribution", a "display" or other action defined under current copyright law; and what constitutes "publication" in the new digital media. Differing levels of compensation are associated with each category of use. Congress should ensure that li-

censing of new digital transmissions accurately reflect the value of the creative work in the marketplace, with undiluted royalty streams making it back to the creators. Where the transmission replaces a sale, (whenever a copy is to be made or retained), the level of compensation should be at least that of manufacture, distribution and sale of a sound carrier, rather than the relatively small royalty associated with public performance or broadcast. Care must be taken not to allow definitions of use (with their accompanying traditional ranges of compensation) to be adopted by legislation, when those definitions are financially convenient only to one interest group at the economic expense of the other. Furthermore, it is reasonable to expect a much, much greater share of digital use proceeds, if not all, to go to the artist (and composer) as there are none of the manufacturing costs, nor packaging costs, nor distribution costs nor other costs normally associated with a sale.

It is unsettled whether contractual clauses consistently found in recording agreements ostensibly assigning "all rights in any media now known or hereafter devised throughout the universe in perpetuity" is consistent with public policy or should be unenforceable or illegal due to (1) a lack of consideration, (2) impossibility of valuation, at the time of the making of the contract, of a non-existing future right, or (3) the tendency to undervalue the right early on, only to become locked out of fair renegotiation or adjustment of compensation due to an earlier imbalance of bargaining power.

While many may disagree, it is our view that assignability of copyright may be inconsistent with separability of rights, recognized in the '76 Act. In any case, experience has since shown us how retention of unrestricted assignability in the statute has allowed record companies with superior bargaining power to, for example, manipulate an assignment of copyright in sound recordings as a common contract practice rather than secure a license, thereby thwarting creators' control over uses of creative works as intended by the Act. Such contract practices have complicated the transition to new technologies and made more difficult the development of efficient licensing mechanisms to handle quickly changing and growing digital media and systems.

THE MUSIC INDUSTRY

The assignment of sound recording copyrights, found in virtually every recording agreement, is unfair in light of the fact that artists alone bear the costs of producing these master recordings. These assignments are merely the product of an imbalance of bargaining power at the negotiating table. Moreover, the new artist is often not represented at all. As you know, many artists sign agreements without reading them nor understanding what they are signing. A new artist is often happy only to know that their music will be released at all, and leaves the details up to a smiling record executive, or to an untrained manager. If you have ever attempted to read a recording agreement, you know that it is rife with carefully drafted accounting devices, licenses and assignments impenetrable to the untrained eye. Such agreements tend to cover several years and several albums, and can include an artist's entire useful career.

All recording costs are treated as loans to the artist, in most recording agreements, and are required to be paid back from the artist's royalty stream. This brilliant contractual device allows the record company to escape actually paying for "their" products, and is the reason so many artists do not receive royalties until the recording costs are "recouped" by the record companies from the artist's share of proceeds from record sales and licenses. Furthermore, artists are completely cut off from many licensing arrangements for their own recordings, by contractual clauses providing that no further compensation will be paid for particular sales and licenses. The litany of inequities goes on to include under-reporting of sold units and under-accounting of royalties, among other things, all supposedly agreed to or waived by the artist.

The music industry has a long history of abusing artists via heavy handed contractual practices that will be overlooked if the currently proposed legislation is passed in its present form. But only the most brave and independent artist will speak up, for fear of ruining their reputation with the few multinational companies that dominate the industry, or risking offending the dealmakers on whom they rely to make a living. However, the recording agreements speak for themselves, and should be examined.

Further evidence of the imbalance of bargaining power between artists and record companies can be found in the ubiquitous so called "controlled composition" clause written into most recording agreements, where artists routinely waive the minimum statutory mechanical royalty and allow record companies to pay only a fraction (generally $\frac{3}{4}$) of what was originally intended by your Congressional colleagues as a min-

imum rate. In addition, most recording agreements still provide that the number of units sold on which royalties will be paid is a fraction (generally 85%) of the actual total. This seems to be left over from the days of vinyl records that were brittle and were broken in shipments. Today there is little or no breakage in CD shipments, and no destruction is involved in digital transmission, yet this reduction inexplicably remains in recording agreements for all media. Superstar's agreements should not be used as indicative of the average recording agreement, and it is urged that analysis be made of median recording agreements, as a prerequisite to final drafting of this legislation. The arbitrary one sided nature of industry agreements plainly suggests closer examination and adjustment of the royalty collection and distribution proposed.

Recent trends by the major labels in the music industry away from development of new artists, toward production and distribution deals with smaller production companies and independent labels who now serve the development function, and take more of the risks, further underscores the unfairness of allowing record company collection and retention of market generated royalties that will be further diluted before reaching the artists, if ever. The prospect that digital transmission will someday replace or supplant sale of physical units, or sound carriers, has the record companies scrambling to maintain their stake in the industry, and solidify their hold on copyrights transferred from artists. The potential that digital network distribution and on-line licensing may obviate the need for current record company functions, even marketing and distribution, gave rise to the present legislative agenda by the recording industry to cut off artists from control of their creative works and to insinuate the major labels into future licensing and royalty streams. All of this, of course, runs counter to the spirit of copyright law.

On its face, passage of the current bill will simply allow the performance right in sound recordings royalty money to be paid to the owners of the copyrights to sound recordings, but the original copyright owners assigned them away (when they were less valuable) to the record companies. Who are the intended beneficiaries of the exclusive terms of the Copyright Act? Artists, not multinational companies, businessmen or distributors. Who will be paid the royalties, and where will those royalties stop, but the record companies? The paltry sums ostensibly going to artist unions or other organizations are merely a token to lend legitimacy to a blatantly unfair plan. The currently proposed bills before Congress have inadequate royalty distribution provisions to avoid such a windfall that unfairly capitalizes on existing inequities in the marketplace to pay clever draftsmen rather than the original creators themselves.

Appropriate legislation will grow out of continued careful focused deliberations and study, supplemented by research by experienced objective copyright experts familiar with the nuances of the music industry and drafting to fashion appropriate interpretations and royalty distribution that is consistent with fairness.

CONCLUSION

AMI stands ready to help in any way it can and welcomes the work of the Congress in this vital effort. However, like most creators' groups we are not well funded and have comparatively few resources. Such was made plain by the creative community's inability to match the extremely strong and well funded lobbying effort to kill the Copyright Reform Act in the last Congress, despite the overwhelming reasonableness and necessity for the legislation.

We hope the new Congress intends to embrace the underlying principles of the Copyright Act, and recognize the exclusive copyright term, provided pursuant to constitutional mandate, is not to be in any way sacrificed in the name of public access or corporate efficiency, but that a "balance" has already been struck in the Constitution's copyright clause where the exclusive copyright term is a means to achieve present proliferation of creative works for future public access and free use after expiration of the term. No aspect of control by creators over the use of their own works during the term can be undermined nor compromised nor limited in any way without running afoul of this principle. It is clear that unfortunately several groups are easily confused on this specific point.

We refer you generally to the history of contractual abuses and absence of real compensation for the assignments of sound recording copyrights, and look forward to working with you in any way deemed appropriate to reach a more evenhanded plan, in recognition that this area is vital to any real progress of the information infrastructure, digital media and systems, and telecommunications in general. As technical developments speed ahead to deliver other forms of digitized intellectual property, bad precedent, at this critical early stage, is to be avoided in favor of more

equitable solutions that will stand the test of time and that are designed for the long term. Thank you for your time and attention to this matter.

Respectfully submitted,

CHRISTOPHER HYUN,
Director.

ABOUT AMI

Arts Management International, Inc. (AMI) is a not-for-profit, charitable and educational organization dedicated to empowering artists—book authors, trade writers, other authors, composers, musicians, dancers, other performing artists, sculptors, painters, graphic artists, print makers and other fine artists—through legal and business education. AMI offers educational presentations and lectures on pertinent legal issues for the creative community; conducts contract workshops and seminars; provides answers to general legal and business inquiries via written materials and correspondence; assists with information on the filing of copyright and trademark applications; files amicus curiae briefs on cases of fundamental importance to artists; and, by appointment, opens its resource center and assists artists with information. AMI's small professional staff is highly trained in entertainment law, working largely in the areas of copyright, free expression, management, contracts, royalties, intellectual property assignments, licenses and policy. AMI prepares creators, most of whom are unrepresented and unfairly exploited, to make business and legal decisions about their careers. AMI does not engage in personal legal representation.

AMI sponsors projects that provide the individual creator with a working knowledge of contractual and constitutional rights. AMI generally benefits the public not only by directly supporting an artist-class traditionally uninformed and over-exploited in their legal and business affairs, but by providing universal public access to specific information, objective research and analysis. Such access is limited, and comprehension of complex issues and accompanying analysis, difficult. AMI works to provide essential information on the arts, in the public interest, in areas where readily accessible resources are scarce.

ELECTRONIC INDUSTRIES ASSOCIATION,
March 8, 1995.

Hon. ORRIN G. HATCH,
*Chairman, Committee on the Judiciary,
Dirksen Senate Office Building, Washington, DC.*

DEAR CHAIRMAN HATCH: On behalf of the Consumer Electronics Group of the Electronic Industries Association and the Home Recording Rights Coalition, I write to share our concerns about the potential implications of the Digital Performance Rights in Sound Recordings Act of 1994 (S. 227) for consumers and consumer electronic products manufacturers. Our principal concern is that the enactment of digital performance rights legislation might be construed by a court as altering existing rights and policy issues settled in the Audio Home Recording Act of 1992 (AHRA). In describing the AHRA on the floor, you stated that "The primary beneficiary of the agreement that this legislation embodies is the American music consumer," and "I believe that this legislation is a fair solution to a complicated problem. It has benefits for all involved, including, first and foremost, the consumer." Accordingly, we hope that you do not intend to affect any existing rights through enactment of the proposed legislation.

Based on our analysis of copyright law, the most reasonable interpretation of S. 227 is that it gives owners of copyright in sound recordings the right to negotiate with, and withhold authorization from, anyone who would digitally transmit sound recordings to the public. Once such authorization has been given, the right would *not* extend to limiting or otherwise affecting the circumstances under which the performances are received and enjoyed by the public. Thus, for example, consistent with the AHRA, consumers generally could make first-generation copies of digital transmissions for private, noncommercial use.

Under an alternative, aggressive interpretation of the legislation, however, it might be argued that S. 227 conveys to a record company the right to control the equipment purchased by consumers who receive digitally transmitted works and consumers' private, noncommercial use of that equipment. It might be argued, for example, that the right to authorize digital transmission of a work includes the right to collect payments for this exclusive right from consumers, and, further, that companies may transmit a signal using SCMS coding to block private, noncommercial

cial first-generation copying contrary to what was explicitly envisioned by the AHRA. Moreover, if this interpretation were adopted, it might subject to litigation companies producing receivers built in conformity with the SCMS requirements of the Act. According to those SCMS standards, receivers produce a code in the output when receiving a digitally transmitted work that permits a first-generation copy to be made. A rights holder might argue that such a product violates the exclusive right to public performance of the digital transmission by negating the customary means of protection and assisting the consumer in enjoying the performance contrary to the means that were authorized.

Given the potential for confusion and risk of negating what you, the Committee, the Congress, and the industry worked so hard to achieve in settling the audio home taping issue in 1992, we respectfully suggest that it would be helpful to include either statutory or report language that amplifies these points.

Sincerely,

MATTHEW J. MCCOY,
Staff Vice President, Government & Legal Affairs,
Consumer Electronics Group.

MARCH 9, 1995.

Hon. ORRIN HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: We are grateful for this opportunity to express our support for the "Digital Performance Right in Sound Recordings Act of 1995" (S. 227), legislation to allow recording artists and record companies the right to authorize the public performance of their works via digital interactive and subscription transmission. We understand that Don Henley is testifying today in support of the legislation and would like to publicly note our support as well.

This legislation is critical to the interests of American recording artists and performers—of every style of music and from every part of the country. While we have each been fortunate enough to have had many successes as recording artists, we are concerned about the future of the industry and our ability to ensure opportunities for young artists who have yet to record their first song.

The bill is simple in its intent and narrowly crafted, granting to record companies and performers the right to control the digital transmissions of their works—a right currently enjoyed by every other copyright owner under U.S. law. Songwriters and music publishers can control how their musical works are transmitted. Record companies and artists should have the same rights with respect to the sound recording—the other copyrighted work in the record. We should note that recording artists in 60 other countries currently enjoy this right.

Our nation has already entered a new digital era, with technologies available that broadcast or deliver music to consumers faster, with CD-quality sound via the cable or telephone wire or broadcast receiver. It is not exaggeration to say that a consumer can soon access the entire collection of all the music ever recorded with the touch of a keyboard. As artists, we welcome technological advancements. As these technologies continue to develop, however, we ask only for fairness in being granted the same protection as is afforded every other U.S. copyright holder. Without any ability to control how the works that we record and create are disseminated and with no ability to be compensated for their transmission, we fear that there will soon be no financial ability or incentive to make and distribute music.

In short, this legislation is critical to the vitality of American music and to future generations of young artists. We ask for the support of the Committee.

Sincerely,

Billy Joel; Bette Midler; Paul Simon; Faith Hill; Mary Chapin Carpenter;
Kathie Lee Gifford; Amy Grant; Diane Schuur; and James Naughton.

NATIONAL CABLE TELEVISION ASSOCIATION,
Washington, DC., March 13, 1995.

Hon. ORRIN HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The National Cable Television Association, which represents cable companies serving more than 80 percent of all cable subscribers in the United States and more than 60 cable programming networks engaged in creating and distributing a broad range of programming, appreciates the opportunity to offer

the cable television industry's views regarding S. 227, the Digital Performance Right in Sound Recordings Act of 1995. S. 227 would enact into law, for the first time, a measure of copyright protection for the public performance of sound recordings.

THE CABLE INDUSTRY SUPPORTS FAIR AND EVEN-HANDED LEGISLATION RECOGNIZING AND PROTECTING INTELLECTUAL PROPERTY RIGHTS

At the outset, NCTA wishes to make clear that the cable industry supports the recognition and protection of intellectual property rights. Digital audio cable networks providing high quality transmissions of sound recordings directly to the home represent one of the many exciting and innovative programming services recently developed and invested in by the cable industry. As both a distributor and a producer of programming, the cable industry is keenly aware of the critical role played by copyright in rewarding and encouraging the creative process that makes such ventures possible. The cable industry also supports the use of statutory licensing mechanisms to protect newly recognized intellectual property rights. In the case of performance rights in sound recordings, as is the case with the Section 111 cable compulsory license, a guaranteed license is necessary to minimize administrative costs and potential disruption to consumers.

In principle, therefore, the cable industry does not oppose the adoption of a statutory license to compensate record producers and performers for the public performance of sound recordings. However, we strongly believe that any new copyright obligations relating to the performance of sound recordings must be imposed in a fair and even-handed manner. In this regard, we are extremely troubled by the fact that S. 227 effectively carves out a broad and unwarranted exemption from licensing and royalty payment obligations for the broadcast industry. Moreover, S. 227 further singles out non-broadcast subscription services, such as those distributed by cable, for undue restrictions on their choice of programming formats in transmitting sound recordings to the public. And while the bill is not intended to alter the existing copyright obligations of subscription video programming services we note that it is not expressly limited to audio-only transmissions. As a result of these unfair distinctions, S. 227 will seriously distort the marketplace.

S. 227 SINGLES OUT CABLE-DELIVERED SERVICES EVEN THOUGH BROADCASTERS MAKE MORE MONEY COMMERCIALY EXPLOITING SOUND RECORDINGS THAN ANYONE IN THE WORLD

Specifically, the performance right proposed in S. 227 is limited to performances of sound recordings by means of digital transmissions. The only services currently providing the public with digital transmissions of sound recordings are cable services (most notably DMX and Music Choice). The number of sound recording public performances engaged in by these services is a mere fraction of the number of performances engaged in by the broadcast industry. Yet, because the broadcast industry currently uses analog technology, the lion's share of public performances of sound recordings will remain unprotected under S. 227. Indeed, the broadcast industry makes more money commercially exploiting the public performance of sound recordings than anyone in the world. The asserted justification for distinguishing analog and digital transmissions is the assumption that the latter poses a greater threat of home taping. Apart from the fact that the quality of digital transmissions can vary considerably, depending on the particular technology utilized, the issue of home taping already has been addressed through the enactment of the Audio Home Taping Act of 1991.

Even more troubling to the cable industry than S. 227's digital/analog distinction is the fact that the bill also differentiates among digital transmissions, exempting those digital transmissions made by "non-subscription" services (i.e., broadcasters). As a result, even after the broadcast industry converts to the same digital technologies currently being utilized by cable services, the broadcasters—and only the broadcasters—will continue to have no copyright obligations with respect to the public performance of sound recordings. There simply is no justification for this distinction between subscription services and non-subscription services and the resultant competitive imbalance. Non-subscription broadcasters and subscription cable networks both make commercial use of the creative effort represented by a sound recording. And while broadcasters and cable networks rely on different sources of remuneration for their commercial uses of sound recordings (advertising v. subscriber fees), copyright law should not be used to pick winners and losers in the competitive struggle between these two technologies. As the Copyright Office concluded in its 1978 Report to Congress, the purported benefits provided to record producers and performers by "free" broadcast airplay of sound recordings does not warrant an exemption from the fundamental principle that creators of intellectual property are

entitled to protection and compensation when their works are used for the commercial benefit of others.

THE PROPOSED "SOUND RECORDINGS COMPLEMENT" IS UNWORKABLE AND WILL EXACERBATE THE COMPETITIVE ADVANTAGE THAT S. 227 CONFERS ON BROADCASTERS.

The unfair competitive advantage accorded broadcasters by S. 227 is exacerbated by the requirement that, as a condition of the statutory license allowing subscription digital services to publicly perform sound recordings, such services must comply with a "sound recordings complement" requirement. The sound recordings complement in S. 227 prohibits a subscription service from performing in any one day more than two selections from a single recording or three selections by the same "featured artist" or from a multiple unit "box set" of recordings. While the cable industry is sensitive to the recording industry's fears regarding the promotion of home taping as a substitute for sales of sound recordings, the sound recordings complement restriction is unjustifiably burdensome and will unduly limit the availability of music to the public. For example, Rhino Records has released a four-disc "box set" containing 101 "doo wop" recordings by various artists from the 1950s and early 1960s. Under S. 277, a subscription digital audio service offering an "oldies" format would effectively be barred from playing more than three of these classic songs in any one day. Other examples of the problems created by the sound recordings complement restriction are enumerated in the testimony presented to this Committee by Mr. Jerold H. Rubenstein, Chairman and CEO of International Cablecasting Technologies, Inc. As Mr. Rubenstein points out, it is no answer to suggest that digital subscription services can, outside the terms of the statutory license, negotiate for the right to exceed the sound recordings complement. The statutory license is not the first option, it is the safety net. Digital services should not have to pay a premium over the statutory license simply to continue offering the kinds of programming formats that they have previously offered.

Moreover, even if a more reasonable sound recordings complement can be fashioned, it will still serve to exacerbate the competitive imbalance between broadcasters and cable delivered services. S. 227 requires a subscription service both to obtain a license *and* to limit the way in which it programs its playlists; in contrast, broadcasters have no obligation to obtain a license or to comply with any sound recording complement limitations. As a result, broadcasters will remain exempt from the performance right even when they offer their subscribers "Beatles' Brunches" and other popular formats focusing on a particular artist or genre; in contrast, subscription services will be able to offer these same formats only upon receipt of a license and, in many cases, only when they have paid a premium over the statutory license fee. At very least, any exemption from copyright liability created for broadcasters should be conditional on compliance with the same sound recording complement restrictions as are imposed on subscription services.

S. 227 SHOULD BE LIMITED TO TRANSMISSIONS BY AUDIO-ONLY SERVICES

NCTA shares some of the other concerns expressed by Mr. Rubenstein about S. 227, including concern that all services that cater to commercial establishments be treated the same and that the potential for record companies to unduly discriminate in favor of vertically-integrated transmission services be limited.

In addition, however, the cable industry has one other concern not raised by Mr. Rubenstein—the potential application of S. 227 to video programming networks. The Copyright Act differentiates between sound recordings and audiovisual works. Audiovisual works already are protected by a performance right and video programmers (whether broadcast or cable) currently obtain the requisite licenses to perform such works. Because the intention of S. 227 is to change only the rights applicable to sound recordings, NCTA strongly urges that the bill, on its face, should be limited to audio-only services. Concerns that some video programming might somehow be sound recordings rather than audiovisual works are too speculative and ill-defined to warrant the expansion of S. 227 to potentially encompass video programming services. Furthermore, because the broadcasters' exemption in S. 227 encompasses broadcast television as well as radio, the only video programming services that would be at risk of having this new obligation imposed upon them are cable services. As we have discussed, there is no public policy justification for the disparate treatment of broadcasters and cable services in this area.

Thank you for the chance to comment on S. 227 for the record. NCTA looks forward to continuing to work with you and the Committee in pursuit of a fair and

evenhanded approach to the recognition of a public performance right in sound recordings.

Sincerely,

DECKER ANSTROM, *President and CEO.*

PREPARED STATEMENT OF COMPUSEVE, SUBMITTED BY M. CHRIS VARLEY

I. INTRODUCTION

CompuServe is one of the world's largest, most comprehensive interactive online information service providers. It was founded in 1969 in Columbus, Ohio and today has over 2.25 million residential, business, nonprofit, and governmental subscribers, who have access to over 2,000 online information and data base services.

Every month over 100,000 new subscribers sign on to CompuServe's information service, now available in over 140 countries. CompuServe currently employs 2,600 people.

Among many other types of information services, CompuServe provides a CONGRESSgrams opinion file, which provides information on all members of Congress and allows users to send messages to them, and to the President and Vice President. CompuServe also provides a Government Publications area, which catalogues government publications, books and subscription services, allowing users to order any Government Printing Office publication, and which permits access to consumer information articles issued by the government.

II. SUMMARY OF CONCERNS

As detailed below, CompuServe's principal concerns regarding S. 227 are as follows:

Due to existing legal ambiguities regarding the meaning of the term "performance," the bill as drafted might create a performance right as applied to online information services such as CompuServe for the transmission of sound recordings that, by the nature of the technology, are necessarily copied onto the equipment of their users, but that cannot simultaneously be played. Owners of copyrights in sound recordings appear to be adequately protected already under these circumstances by the exclusive reproduction and distribution rights that currently exist under Section 106 of the Copyright Act.

Rather than attempt to clarify the definition of "performance" in the Copyright Act, an additional category in the list of exemptions already contained in the bill should be drafted for transmission of digital copies that cannot be played simultaneously with their transmission.

S. 227 constitutes the first bill considered by the Judiciary Committee addressing potential copyright obligations of online service providers since the issuance of the Green Paper on Intellectual Property and the National Information Infrastructure. It represents CompuServe's first occasion to raise with this Committee concerns regarding the copyright infringement liability of online service providers generally for those acts of their users which they have no knowledge of and over which the online service providers have no control.

Because online information services such as CompuServe have an extremely limited ability to monitor the transmissions generated by their users, and because they have no ability to control materials originating on the Internet, the bill should be revised to exempt interaction services from liability unless they have actual knowledge of infringing transmissions and the ability to prevent them.

III. HOW THE SERVICE WORKS

At the outset, it must be emphasized that CompuServe does not presently have the technology to transmit an entire CD's worth of sound recordings to users. To date, the best that CompuServe can offer most of its users is the opportunity to download very short clips of recordings (usually 30 seconds or less in length). The transmission time for these brief clips, however, can be fifteen minutes or longer using the typical transmission speeds available to most consumers. At that rate, a typical three-minute single would require ninety minutes to transmit. Of course, CompuServe is working to enhance its technological ability in this area. Nevertheless, to the extent S. 227 might apply to online service providers at all, it appears to be looking forward to a substantial period of time into the future.

It is important to understand, too, that CompuServe and its forum managers (the actual content providers for much of the information available on CompuServe) have already established business relationships with numerous record companies in order

to provide the short recording clips now available. CompuServe expects and hopes that these relationships will grow and flourish as the importance of sound recordings to the online services industry grows.

CompuServe's concerns regarding S. 227 are grounded fundamentally in the nature of the new technology on online information service providers. In simplest terms, CompuServe operates by providing its users, by means of their personal computers, the ability to receive *and* send information of all types—text, pictures, music, sounds, software, data—in fact, information of virtually any type that can be transmitted in digital format. CompuServe provides users with many files from which they can choose to obtain information. Users themselves can also contribute their own content to the system. In addition, the contents of the Internet (whose originators have no relationship to CompuServe whatsoever) may now be accessed through CompuServe. Similar capabilities are provided by most of the other major online information service providers.

It is quite important, in understanding the technology of online services as it relates to this bill, to distinguish between two modes in which information can be provided to users. In one mode, received information is shown on the screen of the user's personal computer at the moment that it is received. In the second mode, the nature of the transmission is such that a user cannot have it shown on his or her monitor (or played back, in the case of sound)—the information can only be copied onto the user's computer memory for subsequent access.

Of considerable importance is the fact that CompuServe cannot presently transmit sound recordings in such a way that a user can receive them and "hear" them simultaneously, nor is Compu Serve planning to offer such a capability. Playback is not possible until an entire copy of the sound recording is transmitted and copied onto the user's computer. In the future, CompuServe (together with its business partners, the forum managers and the record companies) plans to adhere to the same model: ultimately to provide users with choices of sound recordings which they can copy, or download, onto their system for subsequent playing on their computer or other audio equipment, but without concurrent playback.

Another key aspect of interactive online technology is that users may send private electronic mail ("e-mail") transmissions to which digital information of any type may be attached. By law, CompuServe and other online service providers may not monitor or scrutinize the contents of such e-mail, including any attachments. In addition, among the services offered by CompuServe and its forum managers are "bulletin boards," popular areas where information and content of all sorts may be posted for public access without any review by CompuServe or its forum managers.

IV. ONLINE SERVICE PROVIDERS SHOULD BE SUBJECT TO A LIMITED EXEMPTION FROM THE PROPOSED DIGITAL PERFORMANCE RIGHT

S. 227 should be revised to exempt clearly from its scope online information services which transmit sound recordings solely for the creation of a permanent copy in the equipment of the user but that do not permit contemporaneous playback of the sound recordings.

The importance of this exemption to the drafting of the language of S. 227 hinges on two points. First, copyright law is ambiguous as to whether the term "performance" (which is employed in proposed subsection (6) of Section 106 of the Copyright Act) encompasses the transmission of a copy only without simultaneous playback. Second, the recording industry is already adequately protected by their exclusive reproduction and distribution rights in the context of the type of service potentially to be offered by airline service providers.

The ambiguity concerning the term "performance," as applied to digital transmissions of sound recordings without simultaneous playback, has been noted in many sources. Of course, some authorities believe that such transmissions do not constitute performance. Copyright authority and commentator David Nimmer has written in his well-known treatise that "the act of broadcasting a work is itself a performance of that work [but] the mere act of in-put into a computer or other retrieval system would not appear to be a performance." Nimmer on Copyright, Section 8.14[B].

There are contrary points of view, as discussed at length in the Green Paper on Intellectual Property and the National Information Infrastructure, which notes that a digital transmission of a work may be a transmission of a performance of the work, instead of a transmission of a reproduction of the work. The Green Paper itself, however, recommends a "primary purpose or effect" test for distinguishing between those transmissions that transmit copies and those which transmit performances. CompuServe is not urging the adoption of the Green Paper's test, which would seem to be beyond the scope of this proposed legislation. However, if the

Green Paper's test were applied to the type of transmissions of sound recordings that CompuServe's technology can or will be able to accommodate, then CompuServe's transmissions would clearly not be performances, but would be transmissions that create copies in the users' equipment.

In light of the potential ambiguity as to whether CompuServe's "reproduction-only" transmissions constitute performances, an exemption for this type of transmission would be most appropriate, and in keeping with the recommendations of the Green Paper.

Absent such an exemption, the inclusion of "reproduction-only" transmissions within the scope of S. 227 would create a redundant right in the context of CompuServe's activities, because the recording industry would appear to be fully protected by the copyright owner's exclusive right to reproduce sound recordings. The industry may also be protected, although this is less certain, by the exclusive right of public distribution. (The ambiguous applicability of the right of distribution was also addressed in the Green Paper.)

The simple truth is that, under current law and without any addition to the exclusive rights of copyright owners such as that proposed in S. 227, the recording industry will necessarily be the business partner of the online services industry when and if those service providers offer entire sound recordings transmitted by digital transmission to users. Indeed, as mentioned before, several entities in the recording industry are already business partners of CompuServe and its forum managers, including Warner Brothers Records, Polygram Records, Virgin Records, Justice Records, Capricorn Records, Giffen Records, RCA Records, Rhino Records, Arista Records, Racer Records, Push Boy Records, Kudos Records, Ardent Records, and Buzz Factory Records.

V. ONLINE SERVICE PROVIDERS SHOULD BE EXEMPTED FROM LIABILITY FOR THE ACTS OF THEIR SUBSCRIBERS

S. 227 constitutes the first copyright bill considered by the Judiciary Committee addressing potential copyright obligations of online service providers since the issuance of the Green paper on Intellectual Property and the National Information Infrastructure. Because S. 227 raises concerns for CompuServe and other online service providers that they might be held strictly liable for the acts of their users and information providers over whom they have no control, the bill provides the first occasion to bring to the Committee's attention the concerns of the online service providers in this regard.¹ Of course, the concerns expressed here are applicable to the standards for infringement liability in the larger context of other exclusive rights of copyright holders. CompuServe looks forward to the time when it can present its views to the Committee on copyright infringement liability for online service providers in that larger context.

CompuServe is concerned that S. 227 as drafted appears to render CompuServe and other online service providers liable for infringement under circumstances where they are essentially acting as mere conduits for their user's communications.

Providers of online services simply cannot review and monitor all data that is transmitted over or stored on their networks or bulletin boards. Trillions of bits of data—representing millions of individual messages—travel across the country and around the world each day. Aside from when they are themselves the information provider, providers of online services do not know what is being uploaded onto, transmitted through, stored on and downloaded from their systems. These materials are uploaded real-time by subscribers, and providers cannot and do not monitor or review all this information to determine whether the messages infringe copyright, defame any individual or otherwise may violate the law. Conversely, if they were required to do so, the burden would result in no less than bringing their businesses to a halt almost immediately, cutting off the flow of information and communications to millions of people.

The inability to review all information accessible through CompuServe is even more pronounced now that CompuServe, like many other online service providers, has opened a portal to the Internet. CompuServe subscribers can now communicate with, and obtain information from, tens of millions of Internet users and computers worldwide. Virtually none of these newly accessible persons and computers has any business or other relationship to CompuServe. The sheer quantity of information

¹The views of CompuServe and other principal online service providers regarding this and other Green Paper-related issues were filed with the U.S. Patent and Trademark Office (which supervised the preparation of the Green Paper) in comments dated September 7, 1994 and reply comments dated September 28, 1994.

available and distributed through the Internet would utterly overwhelm the ability of CompuServe's (or any other online service provider) to monitor.

CompuServe and other providers of online services are, in many respects, analogous to distribution companies, such as truckers or airlines, or to the post office, or to communications companies. They essentially provide the means by which individuals can exchange information or communicate. They are not themselves responsible for originating, managing, or reviewing content. Like bookstores and libraries, or communication and other distribution companies, because providers do not know the contents of the messages that they are transmitting or distributing on a real-time basis, they are unable to use content as a basis for limiting users' access to their systems unless they have actual knowledge that the material is infringing or otherwise unlawful.

CompuServe and other online service providers can and do cooperate with law enforcement personnel when illegal behavior, such as a threat of violence, is brought to their attention by the authorities. When, however, the information on the system is alleged to infringe a copyright, it may be much more difficult for providers to know if action is needed. Except in the most obvious of cases (or where sufficient information describing the material is uploaded with it), providers would not be able to determine whether information that has been uploaded and stored on their systems infringes the work of another, is original with the uploader, is in the public domain or whether the subscriber's upload otherwise falls within defenses such as fair use.

At least one court, recognizing these operational realities, already has applied an appropriate, knowledge-based standard of liability. In *Cubby, Inc. v. CompuServe Inc.*, 776 F.Supp. 135 (S.D.N.Y. 1991) the court correctly concluded that the standard should be whether CompuServe, as the system provider, "knew or had reason to know" that the statements at issue were defamatory. *Id.* at 140-41. The circumstances acknowledged by that court should be the basis for adopting an analogous, knowledge-based standard for determining whether providers should have liability for copyright infringement for material transmitted or stored electronically. Certainly, a similar rationale was compelling to the United States Supreme Court, in its decision in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), which held that contributory liability could attach only where the alleged infringer was in a position to control the infringing activity and, absent such control over or actual knowledge of infringing conduct, that manufacturers of products that are used for a wide variety of legitimate uses should not be held liable for copyright infringement.

CompuServe believes that holding providers of online services to a strict standard for copyright liability threatens their industry and the ability of users to exchange information on a real-time basis that is affordable and ubiquitous. Full responsibility for compliance with the intellectual property laws should rest on the subscriber or other information provider responsible for generating information and making it available on the system or on any provider that has actual knowledge of infringing material on its system, is able to remove such material and fails to do so within a reasonable time thereafter.

Originally, the standard of "innocent infringement is infringement nonetheless" may have been properly applied to publishers and broadcasters, who have control over the content of the material that they disseminate. For system providers, however, identification of infringing or other material uploaded in violation of the law is technically and practically impossible. In contrast to traditional publication and broadcast—"one-to-many" or "few-to-many"—media, information and interactive services are based on a "many-to-many" model enabling essentially "all-to-all" interactivity among users.

In considering S. 227, the Committee on the Judiciary should recognize that providers of online services and bulletin board operators perform a spectrum of functions. At one end of the spectrum, they serve as information providers, sponsoring the creation of information resources containing selected copyrighted works. At the other end of the spectrum, the online service providers serve as mere conduits for materials generated or selected for transmission by users. When they carry out functions that do not enable them to control content on a real-time basis, they should be treated more like contributory actors because their connection to any act of infringement is, at most, tangential. Accordingly, providers of online services propose that, in connection with S. 227, the Committee adopt a standard of liability that is grounded on contributory infringement: actual knowledge of infringement is required for copyright liability.

To effect this result, CompuServe recommends amendment of S. 227 to embody the following concepts:

A provider of online services² should not be liable for infringement of the digital performance right in sound recordings unless: (1) the provider has actual knowledge that a transmission of a sound recording on or through its system is infringing; (2) the provider has the ability and the authority to stop such transmission and knowingly allows such work to be transmitted.

This proposed standard is consistent with current practices in the industry and would not be disruptive of practices that are being established. It would recognize that except when online services are acting as information providers or publishers and are, therefore, responsible for content, they should be held to an actual knowledge standard. The standard is a logical extensive on the prevailing standard for contributory liability, is consistent with constitutional values and it promotes the broader goals and objectives of S. 227, to facilitate appropriate economic development of the emerging technological ability to transmit digital sound recordings.

VI. CONCLUSION

In conclusion, CompuServe respectfully urges the Committee to adopt revisions to S. 227 as discussed herein for the purposes of (a) exempting the application of a new performance right to the context of online information providers offering a "reproduction only" transmission service, and (b) exempting online service providers from liability for the acts of users or other entities that may infringe the new performance right except under circumstances where the provider has actual knowledge of infringing transmissions and has the ability and the right to prevent such transmissions.

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION OF BROADCASTERS, SUBMITTED BY EDDIE FRITTS

Mr. Chairman, I am Eddie Fritts, President and CEO of the National Association of Broadcasters (NAB), which represents the interests of those who own and operate America's radio and television stations, including most major networks. I appreciate the opportunity to provide written testimony in conjunction with the Committee's consideration of S. 227, The Digital Performance Right In Sound Recording Act of 1995.

Mr. Chairman, let me say, at the outset, that we are pleased that S. 227 intends to exempt broadcasters. While there are some important elements of the exemption that we believe need fine tuning, we are working with the Committee and the recording industry to address those concerns. We appreciate the fact that you have been willing to work with us, and we are equally pleased that the House Judiciary Committee leadership has indicated strong support for a broadcaster exemption.

Legislation incorporating a clear and unequivocal broadcaster exemption recognizes the mutually beneficial relationship that has existed for more than sixty years between the broadcast and recording industries. Broadcast airplay of recordings provides hundreds of millions of dollars in free promotion for artists and record companies. Broadcasters currently pay over \$300 million in licensing fees, much of which goes to the same companies and individuals who would benefit from a new digital performance right.

In the digital world, many broadcasters will continue to operate as they do today. Unlike other digital audio service providers, digital broadcasting service will be provided free to all Americans. We are pleased that this Committee recognizes broadcasters' unique role in a digital world, and look forward to a prompt resolution of our technical concerns.

Mr. Chairman, a number of witnesses that have testified in conjunction with S. 227 have questioned the need and justification for exempting broadcaster public performances from the scope of the bill. Still other witnesses, some "Johnny come latelies" in my view, have argued that the digital subscription audio services they provide, or might provide, are essentially no different than traditional broadcasting and, hence, their services should also exempt from the new performance right. Mr. Chairman, I would like to devote the remainder of my testimony to addressing these two categories of attacks on your legislation.

²The definition of "provider of online services" would need to exclude the provider that is also acting as the information provider for the copyrighted work.

Why broadcasters should be exempt from performance rights in sound recordings

A. Broadcasters provide extraordinary benefits to a thriving recording industry

Mr. Chairman, American broadcasters have long played a central role in bringing music to the American people. We have done so within the framework that provides huge benefits to the recording industry as well as to broadcasters and to the public.

The extraordinary benefits the current system provides the record industry are unquestionable. Exposure of musical recordings to the buying public through free broadcasting is a critical part of the promotion of records, tapes, CDs, music videos and concert tickets, not to mention "spin off" goods and service marketed under the names of star performers. Absent such free exposure, sound recording and music videos sales, and the sale of endorsed goods and services would plummet. This is confirmed by many sources in the recording industry. Just within the last month, in accepting their Grammy award, the phenomenally successful group "Boyz II Men" thanked radio stations as being essential elements in their new found prosperity. Similar recording industry acknowledgments to the radio industry abounded at the recent Country Radio Seminar in Nashville, Tennessee. For example, Jack Purcell, a Warner Records executive stated that "without radio support, there's no chance of a record becoming a commercial success."

These recent acknowledgments and recognitions of the essential role broadcasters play in the success of the recording industry are hardly new. Other examples include:

1. Pam Tillis, country music star, commenting on the importance of "radio tours" where artists tour the country making personal appearance at radio stations: "They are unbelievably important"; "invaluable"; "I only regret I couldn't do it more and do it longer"; "You guys are so important to us." Also commenting on the importance of radio tours, BNA recording artist, Lisa Stewart added ". . . I'm really glad I had the opportunity to do that (go on radio tours). Because I feel that it has really, really helped me. . . ." ¹

2. Jack Lameier, Vice President/Promotion, Epic Records (a 30 year veteran of the recording industry) commenting on the importance of radio airplay—"We are in this business to sell product. You sell product by airing it, liking it and going out and buying it. Our exposure of this product is controlled by the people in this room (at the Country Music Seminar, Nashville) and in this industry. Without the airplay nobody knows what it sounds like. If they don't know what it sounds like why would they want to buy it? Certainly not because they've read it or they might have enjoyed the video. I really don't know what video does for it. It is the repetition that's the reason for the chart numbers (a ranking of records receiving airplay), the heavier the rotation, the more exposure the more likely someone is to buy the product." ²

3. The value broadcasters provide the recording industry was conceded in a lawsuit filed in 1991 by Motown Records against MCA alleging MCA's failure adequately to promote Motown's records, in which Motown states that: "sales of new records to the public are generated largely by air play on various radio stations throughout the United States" and that "pop radio air play is a critical factor in the success of a record label." ³

4. The 1991 Country Music Awards included six awards to disc jockeys and radio stations for their contribution to the success of country music, and radio was acknowledged by the winner of the "entertainer of the year" award.

5. The recording industry spends millions of dollars promoting their product to broadcasters, including distribution of free copies of their recordings, in an attempt to encourage air play. The critical importance of this effort sometimes has led to abuses, which in turn engendered the payola laws of the 1960's.

6. Bob Sherwood, the President of Phonogram/Mercury Records: "I, like every other head of a record company, need and want radio to play our records. Without airplay, we'd all be in the door-to-door aluminum siding sales business." ⁴

7. Stan Corman, a former Warner Records Executive: "What would happen to our business if radio dies? If it weren't for radio, half of us in the record business would have to give up our Mercedes leases . . . we at Warner won't even put an album out unless it will get airplay." ⁵

¹"Meet and Greet and More: Enhancing Artist-Label-Radio Relationships", Country Music Seminar, Nashville, TN, March 3-7, 1993.

²"Hot Seat: Real Answers to the Questions You Always Wanted to Ask", Country Music Seminar, Nashville, TN, March 3-7, 1993.

³*Motown Record Company v. MCA, Inc.*, Supreme Court of the State of California, filed May 14, 1991 (Complaint, ¶¶ 20-21).

⁴*Billboard*, December 22, 1979, p.20.

⁵*Daily Variety*, March 4, 1975.

8. Bobby Colomby, drummer in the rock group "Blood, Sweat & Tears" (in answer to the question, How important is radio to you?): Well, that is it . . . What you're doing is . . . you're advertising." (emphasis added).⁶

9. One record manufacturer's survey found that over 80 percent of rock albums are purchased because people have heard cuts off the album over the radio. A 1984 Office of Technology Assessment study verified this finding.⁷

10. The attached advertisement for a country music album (Appendix A) says it all: "Country radio heard it. Country radio liked it. Country radio played it. Country music fans heard it. Country music fans LOVED IT! And on May 6, 1991 Country music fans can BUY IT."

Under these circumstances, it simply makes no sense to require broadcasters to pay record companies and performers for the right to "perform" sound recordings.

Indeed, broadcasters already pay approximately \$300 million annually to composers and publishers for the rights to publicly perform the music incorporated into the sound recording. These royalties frequently go to performing artists who are also composers and to record companies who also often have music publisher subsidiaries.⁸ Accordingly, payments to many artists and record companies required by a performance right in their sound recordings often would result in a double payment for the same public performance.

There is clearly no economic need or justification for transferring wealth from broadcasters to the recording industry by establishing a performance right in sound recordings that would apply to broadcasters. Between 1985 and 1989, the recording industry experienced a 47 percent increase in the total dollar value of shipments, and between 1989 and 1990, another 15 percent increase.⁹ The dollar value of shipments, described by some as relatively flat in 1990 and 1991, continued its upward trend in 1992 with a 15.2 percent gain over 1991, reaching \$9.024 billion. 1993 saw an 11.8% dollar value increase in unit shipments and an 11.3% increase over 1992, with sales reaching \$10.5 billion.¹⁰ In 1994, the recording industry continued its sustained double digit growth, with increases over 1993 of 17.5% in units shipped and 20.1% in dollar value. Dollar value from 1993 to 1994 jumped from \$10.05 billion to \$12.07 billion.¹¹ RIAA's president noted that his industry's market "has nearly tripled in the last decade" and that "there's still no limit to possible heights conventional music CD can climb."¹²

It is significant to note, Mr. Chairman, that the record industry's \$12 billion plus in revenues from U.S. sales, went primarily to just six huge conglomerates, that together control well over 90% of the market,¹³ which translates to average revenues for each company of roughly \$1.8 billion. Five of the six are foreign owned. As one American record industry executive bemoaned, "You can't make any deal without first checking with somebody in London or Tokyo or Holland or Frankfurt."¹⁴

Were a performance right in sound recordings created that applied to broadcasters, many stations would have to reallocate resources devoted to news and public affairs programming to pay for additional license fees. It cannot be assumed that radio stations could simply pass on the additional expense to advertisers.¹⁵ The local advertising market is highly competitive, and is made more so by the increase in local spot advertising sales by cable operators, for whom it is a low-cost supple-

⁶ Radio Program "The Politics of Pop"—June 5, 1975.

⁷ Office of Technology assessment, *Copyright & Home Copying: Technology Challenges the Law*, OTA-CIT-422 (October 1984) (hereinafter "OTA Study") at Table 8-11. Of those polled in a more recent Vullie/Gallop survey, 50% said their most recent purchase of a CD was based on hearing it on the radio.

⁸ Thorn-EMI and Warner/Chappell alone own the rights to over one million songs.

⁹ OTA Study at 92; *Billboard*, March 24, 1990 at 1, 73; *Billboard* Oct. 30, 1990 at 1, 87.

¹⁰ *TV Digest* February 28, 1994 at 18. (Source RIAA)

¹¹ *TV Digest*, February 20, 1995 at 16. (Source RIAA). While radio stations have recently experienced a resurgence in revenue growth, they are much more prone to the vicissitudes of economic conditions. In 1993, some 300 radio stations were off the air. Over half of all radio stations lost money in 1990, as did almost 60 percent in 1991. FCC Report "AM and FM Stations Silent For Six Months or More" (as of January 1, 1993, 88 FM stations silent as of 1/1/93); FCC Memorandum "AM Stations Silent" (as of March 4, 1993, 220 AM stations); 1991 NAB/BFM Radio Financial Report at pp. 27, 32, 43 & 65; 1992 NAB/BFM Radio Financial Report at pp. 27, 31, 42 & 64.

¹² *Id.*

¹³ See Testimony of Jason S. Berman, Hearings on S. 227, March 9, 1995 at 4. *New York Times*, March 19, 1990, p. 2-17; *Billboard*, December 8, 1990; *Los Angeles Times*, November 4, 1990; *The London Times*, March 6, 1992.

¹⁴ *Id.*

¹⁵ Mr. Rubinstein from DMX is simply wrong in asserting that broadcasting would be better able to pass on the costs of performance right than would subscription services. DMX could simply raise its subscription fee which the subscriber would have to pay based on the assumption that cable will not offer competing audio services.

mentary revenue stream, at or below radio spot prices. No, the new added wealth for the six extraordinarily wealthy record companies would come directly out of the bottom lines of American radio stations at the expense of the American listening public.

B. Any need to provide enhanced compensation to performing artists does not justify imposing a new performance right with respect to broadcasters

Mr. Chairman, some have argued, that a new performance right would benefit artists and performers whose work is embodied in the sound recordings to which they contribute. But if past experience is any guide, there is no assurance that a new sound recording performance royalty would flow to artists and performers. Record companies have established contracting practices that maximize the benefits to them as opposed to the artists. A 1992 Billboard article written by an attorney in the wake of Art Buchwald's litigation victory over Paramount described them as follows:

Contractually mandated royalty accounting methods and recoupment practices used in the recording industry raise questions similar to those in Buchwald. While superstars like Madonna or Michael Jackson have the bargaining power to negotiate favorable economic terms, aspiring acts and even ascending stars lack the clout to negotiate many standardized royalty and accounting terms.

The royalty rate for newcomers (including the producer's royalty) is typically 10%-20% of retail sales, as opposed to a range approaching twice these rates for established talent. Royalty calculations based on domestic-unit sales are also often significantly less for new artists. Advances made by record companies to performers for recording costs usually must be fully recouped before the performers see any distribution of royalties. If an artist's first recording does not recoup its production costs, the losses are usually carried over and deducted from royalties earned on the next recording. No other business, including the film industry, requires the cost of creating to be fully recouped by the creator.

The royalty calculations in standard record industry contracts, as in the film industry, contain numerous clauses guaranteed to assure profits or minimize financial exposure to the company before payment to the artist. For example, through so-called "packaging deduction" clauses, record companies generally reduce the base price, on which the artist's royalty is calculated, by 25% for the cost of producing CDs and up to 20% for producing cassettes. Recording contracts also frequently require a lower royalty to performers on CDs (35%-85% of normal rates) to reflect increased manufacturing costs incurred when CDs were first introduced as a new technology. In light of Buchwald, serious consideration must be given to whether these clauses can be economically justified as being based on actual costs.

So called "free goods," promotional recordings, and reserves also raise contractual questions. Record companies pay royalties on less than 100% of their sales to reflect discounts given to distributors; therefore performers' royalties are often paid on only 85%-90% of records sold. Additional promotional copies for recordings may be deducted before royalties are calculated. Royalty reserves as high as 25%-35% of sales are withheld from the artist for as long as two years, interest free, against possible record returns from distributors. Standard contracts require artist/writers to be paid writers' royalties on no more than 10 songs per-unit released, although CDs often contain more than 10 songs, or provide for a mechanical royalty at less than the statutory rate established by Congress. Finally, contracts generally do not obligate the company to promote recordings and provide that the performers themselves are financially responsible for touring costs, which are essential to record promotion.¹⁶

Given the extraordinary wealth generated by the recording industry, if there is any current imbalance in the compensation for studio musicians and lesser known artists, the answer is a redistribution of the wealth within that industry, not the composition of a new royalty payment structure designed to have broadcasters compensate performers. There would be no assurance that such royalties would not simply make the rich richer, leaving the struggling artist's lot unchanged. If record company megadeals, such as the 1991 deals reportedly netting Michael Jackson a \$65 million guarantee for six albums plus a share of profits, his own record label and other compensation, and his sister Janet Jackson's \$40 million for 3 albums plus a 22 percent royalty on retail sales,¹⁷ are not trickling down to backup musicians and others contributing to those albums, the remedy should lie within the industry.

¹⁶ *Buchwald Case Has Stern Message For Labels*, Billboard, April 18, 1992, at p. 8; See "What's not to love?", Forbes, September 30, 1991 at p. 108.

¹⁷ *Keeping Up With the Jacksons*, Los Angeles Times, June 16, 1991 at Calendar, p. 8.

You have also heard testimony to the effect that the lack of a performance right in sound recordings is particularly unfair and harmful to older performers whose recordings are still popularly broadcast but whose records no longer sell. Mr. Chairman, I have two responses to this point.

First, the unjust contractual and accounting practices by record companies with respect to many of these "old performers", particularly many of the rhythm and blues acts of the 1940s, '50s and '60s, is a matter of public record. While I commend a number of companies that are finally making amends for these past injustices, my initial reaction regarding concern for harm suffered by these performers is that they should look to the record companies, not radio, for relief.

My second point on this issue, is that, in fact, recordings of many of the older performers that continue to be broadcast are still being sold. Re-releases of many of these classics on CDs, minidisks, and digital compact cassettes are producing millions in revenues. Walk into any record store and you can find whole collections of "golden oldies." Watch late night television and you are bound to see ads for classic collections that can be ordered from direct mail subsidiaries of the record companies. These direct mail and record clubs were responsible for \$1.5 billion in sales in 1994.¹⁸ Time Life Music, a subsidiary of Time Warner, ships 5 million units annually of such compilations as "Sounds of the '70s," "Rock 'n Roll Era" and "Twenty-Five Years of Essential Rock."¹⁹

In response to the suggestion that broadcasters should compensate performers for publicizing their works, I would refer you to Appendix B containing examples of the appreciation performers expressed to radio for their success at a recent country music seminar. Perhaps the most notable of these was Sawyer Brown who said "Thanks, radio for making country music the success it is yoday and for making Sawyer Brown a part of it." For this we should pay a royalty?

C. International copyright considerations provide no justification to create a U.S. performance right in sound recordings applicable to broadcasters and it is unlikely that a broadcaster exemption from such a right will adversely affect U.S. recording interests

Mr. Chairman, in your remarks introducing S. 227, you referenced the need to create a performance right for sound recordings in this country on the grounds that in the absence of such a right, U.S. recording companies and artists were losing, and would continue to lose, hundreds of millions of dollars in foreign royalties from countries that used the lack of a U.S. performance right as an excuse not to pay U.S. recording interests for public performances of their works. With all due respect, Mr. Chairman, this argument provides no basis to apply a performance right for sound recordings to broadcasters, not does it provide a basis to challenge the broadcaster exemption in S. 227.

First, performance rights for sound recordings are most often found in countries where broadcasting organizations are owned by governments. When such government owned broadcasters pay into a fund for public performance, it is in effect a transfer from the accounts for one government entity to that of another. These payments are often intended as a subsidy to encourage *domestic, not foreign*, cultural activity. We do not believe that our members should be asked to subsidize U.S. cultural industries. If such subsidies were determined to be appropriate, it would be fundamentally unfair to require broadcasters to bear the costs. In short, we believe that importing public performance rights applied to broadcasters from abroad into the United States, rights which are essentially alien to ways we have conducted our business for over 60 years, would be enormously disruptive and harmful.

Second, many countries already make these monies available to U.S. recording interests. Among these are several of the major European countries. With respect to those "countries" that do not provide royalties for the performance of "American" works, closer scrutiny is required. You must remember, Mr. Chairman, that more than 80 percent of the international trade in recorded music is controlled by the six major record companies,²⁰ five of which are foreign owned. It is my understanding that performance rights in sound recording royalties in most countries are negotiated, collected, and distributed by associations called "copyright societies" consisting of these companies or their subsidiaries. If this is true, and if Time Warner's or Sony's French subsidiary choose not to share performance royalties with their American sister companies, the solution would not seem to require a change in U.S. copyright law.

¹⁸ *TV Digest*, February 20, 1995, at 16.

¹⁹ *Washington Post Business*, January 25, 1993, at 9.

²⁰ *Washington Post*, November 12, 1994, at C1.

Third, I believe that foreign countries operating under reciprocity may well be unprepared to distribute these moneys to U.S. interests under *any* circumstances, and the mere enactment of a public performance right will not change their policies. Let me give you an example. In 1992 the Congress enacted the DART bill. Part of the logic for its enactment was that U.S. persons would not be permitted to collect from foreign private copying levy schemes unless we enacted a system in the United States. Well, we did. Our system is, however, limited to digital format, because the Congress determined that is the area where the advent of new technologies posed a threat. Despite these legislated changes, a number of senior European officials have stated that U.S. interests may none-the-less be denied benefits under certain European levy systems because our system is not "the same" as theirs in that it does not cover both digital and analog formats.

We raise these examples to illustrate the point that many other countries realize that full recognition and distribution of funds to U.S. recording interests in the same manner that their own nationals are treated would result in a considerable negative trade balance and, accordingly, will always find loopholes to avoid this result. So-called "cultural integrity" provisions are but one example. Simply stated, if foreign countries do not want to provide benefits to U.S. interests, it does not matter what we do, they will find a way to deny us the money.

Fourth, many countries recognizing performance rights in sound recordings are also much less generous than this country in protecting sound recordings in other respects. For example, while U.S. law generally protects sound recordings for anywhere from 70 to 100 years,²¹ France generally protects them for only 50 years, and Germany for only 25 years. Moreover, U.S. law prohibits unauthorized rental of sound recordings and the laws of many other countries do not. The point here is that you cannot simply and fairly extract a public performance right in sound recordings from the intellectual property rights scheme of another country, and insert it in U.S. copyright law without considering the context in which such right fits into the entire intellectual property scheme of both countries.

Some advocates of public performance rights argue that we need to enact these rights in the United States to successfully negotiate new international law in the areas of copyright and neighboring rights. As I understand it, these matters are now under consideration in the World Intellectual Property Organization, and its ongoing work on a protocol to the Berne Convention and the possible drafting of a new treaty on rights of performers and sound recording producers. These new international laws will, the advocates of public performance rights argue, substantially advance the interests of U.S. authors, producers and performers.

We are not convinced. The WIPO deliberations, and the issues now pending, would not advance in any way the interests of U.S. broadcasters. Our industry operates primarily domestically. While some NAB members have international operations, the vast majority of our members operate and serve in local communities. We cannot see how any of the issues pending in these international forums would in any way advance our members interests. Moreover, certain of the changes being considered, such as a requirement to enact a public performance right applied to broadcasters, would cause U.S. broadcasters great economic harm.

We raise these points, Mr. Chairman, to illustrate that enacting a public performance right in sound recordings applied to broadcasters would not necessarily enhance the ability of the United States to negotiate successfully new international law or treaties in these areas. Moreover, adoption of such a right will provide no assurance that the intended result of greater recognition in other countries of performing rights in U.S. sound recordings will be achieved. Finally, the notion that the entire well established U.S. allocation system among music composers, publishers, record companies, recording artists, performers and broadcasters should be reconfigured to accommodate foreign copyright and neighboring rights laws would be the classic example of the tail wagging the dog. To ask U.S. broadcasters to pay new royalties to the recording industry so that it can go abroad to obtain still more royalties would be unfair and inequitable. Overall, U.S. interests are more likely to be harmed than helped. If, as the Register of Copyrights and the Commissioner of Patents and Trademarks suggest, performance right in sound recordings applied to broadcasters is the price that must be paid for so-called international copyright "harmonization", that price, for the 100% domestic broadcasting interests, is too high.

D. A broadcaster exemption poses no threat to retail sales of sound recordings

Some have expressed concern that the advent of digital broadcasting (DAB), with its enhanced sound quality, will result in massive individual copying of prerecorded

²¹ 17 U.S.C. §302(c).

music. There is, of course, no evidence that this phenomenon will occur. Similar unfounded fears were expressed with the advent of FM stereo, cassette recorders and other technical advancements. Moreover, the implementation of DAB for broadcasters is years away at best. Finally the Audio Home Recording Act of 1992 imposes royalties on the sale of digital recording equipment to be paid to record companies and artists, and is designed to redress digital copying concerns.

Free, Over-the-Air, Commercially Supported Broadcasting is Significantly Different From Subscription Digital Audio Services

Mr. Chairman, I would like now to turn to the complaints raised by Digital Music Express, the National Cable Television Association, and perhaps, others representing subscription digital audio services, that they are indistinguishable from broadcasters, and should enjoy the same exemption from the new performance right in sound recordings, as are broadcasters with whom they compete.

Let me first say, Mr. Chairman, that NAB takes no position on the relative merits relating to the basic question of whether the exemption section of S. 227 should be modified to include other non-broadcast businesses and, if so what they might be. If other non-broadcast businesses can establish legitimate policy reasons for an exemption covering their particular activities, they should be considered, notwithstanding the fact that some of these parties have, by and large, remained silent during the past three years during which this issue has been debated.

What you should not do, Mr. Chairman, is accept the somewhat disingenuous claims of some of these parties that they are entitled to a broadcaster type exemption because they are, in all material respects, indistinguishable from broadcasters. They clearly are not, and here are some of the key distinctions:

1. The primary distinction between these services and those offered by broadcasters is that broadcasters offer their services free to all members of the public, while the subscription digital audio services are available only to those willing or able to pay for them. These services charge for, and profit directly from, the sale of the public performance of the sound recording. That function, and only that function, is the reason these subscription services exist. They do not provide news, sports, weather, and public affairs programming. They do not provide public service announcements. They do not provide DJ patter which, while some listeners find annoying, others find entertaining, or a panacea for boredom or loneliness. And they do not provide what Mr. Rubinstein of DMX refers to as "annoying commercial announcements" which serve as a vital link in the commerce and economy of the markets which broadcast stations are licensed to serve.

2. None of the present or potential digital audio subscription services offer sound recordings as part of an overall statutory obligation to serve the needs and interests of the communities to which they are licensed. Significantly, these obligations are tied to the renewal of the broadcasters' license. Therefore, if a broadcaster fails to fulfill these requirements, their license is subject to revocation. None of the subscription services face this possibility. Further, local broadcasters are uniquely qualified to respond to the needs of their local communities. Every year they spearhead on and off-air public service activities to meet these needs. These campaigns include AIDS awareness, alcohol abuse, literacy and homelessness, to name a few. Attached as Appendix C is a list of some of the public service and other statutory requirements unique to broadcasters.

3. A third key distinction between broadcasting and DMX and other cable and satellite delivered subscription digital audio services was suggested by you, Mr. Chairman, in your floor statement introducing S. 227.

[L]ong-established business practices within the music and broadcasting industries represent a highly complex system of interlocking relationships which function effectively for the most part and should not be lightly upset.²²

Indeed, Mr. Chairman, the highly complex economic and contractual relationships between and among record producers and performers, music composers and publishers, and broadcasters date back some sixty years. In this regard, broadcasters were publicly performing sound recordings for decades before they enjoyed any copyright protection which was first granted in 1972. DMX, by contrast, which did not commence operation until 1991, can hardly make the claim that application to it of a performance right would fundamentally, and unexpectedly, alter the way it has done business for decades.

4. DMX, and others, take great pains to suggest that, like radio, their services promote the sales of sound recordings, and that they could not, and would not, pose a threat to such sales. NAB has no quarrel with the notion that, thusfar, such services appear to have stimulated record sales. Indeed, NAB has cited that fact in ques-

²²Cong. Record, January 13, 1995, at S. 948.

tioning the need for a new performance right. It is, however, incorrect to suggest that subscription digital audio services pose no greater potential threats to sound recording sales. In another venue, DMX's Mr. Rubinstein states:

We offer a lazy man's approach to listening to great music. You might have a fabulous CD collection, but it's not easy picking out an evening's worth of music. We do it for you.²³

Mr Rubinstein comes perilously close to suggesting that his service does, or could, supplant the need to obtain an expensive "fabulous CD collection", by subscribing to his CD quality commercial free prerecorded music service. Advertiser supported radio poses no such threat. Moreover, whole DMX apparently does not currently play entire uninterrupted albums or preannounce that it is doing so, as a subscription service it certainly could provide such a format. If commercial radio engaged in such practices, the public would listen to the uninterrupted album, switch off at the commercial breaks, and the station would soon be out of business.

5. While it may be true, as DMX suggests, that some subscription digital music services promote the sales of sound recordings, the level and significance of the publicity and exposure for sound recordings provided by such services can hardly be compared to that of broadcasting. I don't recall, for example, seeing any survey indicating that, like radio, fifty to eighty percent of record sales result from subscribers' hearing the recording on DMX. Nor do I remember any record company executive saying something like "Without play on DMX, we'd all be in the door-to-door aluminum siding sales business"; or a recording artists saying "Thanks DMX for making country music the success it is today and for making Sawyer Brown a part of it."²⁴

Again, let me reiterate, Mr. Chairman, the NAB takes no position on the merits of whether exemptions from the new performance rights should be extended to DMX or any other non-broadcast business. What we do object to is these services' assertion that they are entitled to an exemption because they are no different than broadcasters.


Mr. Chairman, the issue of whether this country should adopt a performance right in sound recordings and, if so, what the scope of such a right should, has been the subject of countless hours of debates and hearings and thousands of pages of reports, commentaries, and testimony. It has been debated before numerous sessions of Congress, the Copyright Office, the American Bar Association, the Administration's NII Working Group on Intellectual Property and its NII Advisory Council. And, it continues to be the subject of debate and discussion at the World Intellectual Property Organization. Mr. Chairman, the time has come to resolve this issue once and for all. We hope that S.227, with its broadcaster exemption that is fully justified, achieves that goal.

Thank you Mr. Chairman.

²³"Cable Radio Searches for Subscribers," New York Times, January 25, 1993, p. D8.

²⁴DMX is also not alone in offering an 800 number service allowing listeners to purchase CDs heard on its channels. Radio stations KACD/KBCD, Santa Monica, California offer a similar service.

APPENDIX A

nce upon a time,
 in the not too distant past, a
CLINTON GREGORY single*
 was released.

* ...the ever popular title cut from a forthcoming album...

Country radio heard it, Country radio liked it.

Country radio played it.

Country music fans heard it.

Country music fans **LOVED IT!**

and on **MAY 6, 1991** Country music fans can **BUY IT**
 (the album, that is)

AT CAMELOT, CAT'S DISC JOCKEY, ERNEST TUBB RECORD SHOPS, HARMONY
 HOUSE, HASTINGS, MUSICLAND, PEACHES, PEPPERMINTS, PICKLES, SAM GOODY,
 SOUND SHOPS, SOUND WAREHOUSE, TARGET, TOWER, TURTLE'S, WAL-MART

**CLINTON
 GREGORY**

(IF IT WEREN'T FOR COUNTRY MUSIC)

I'D GO CRAZY

(SON 0064)
 1142



APPENDIX B



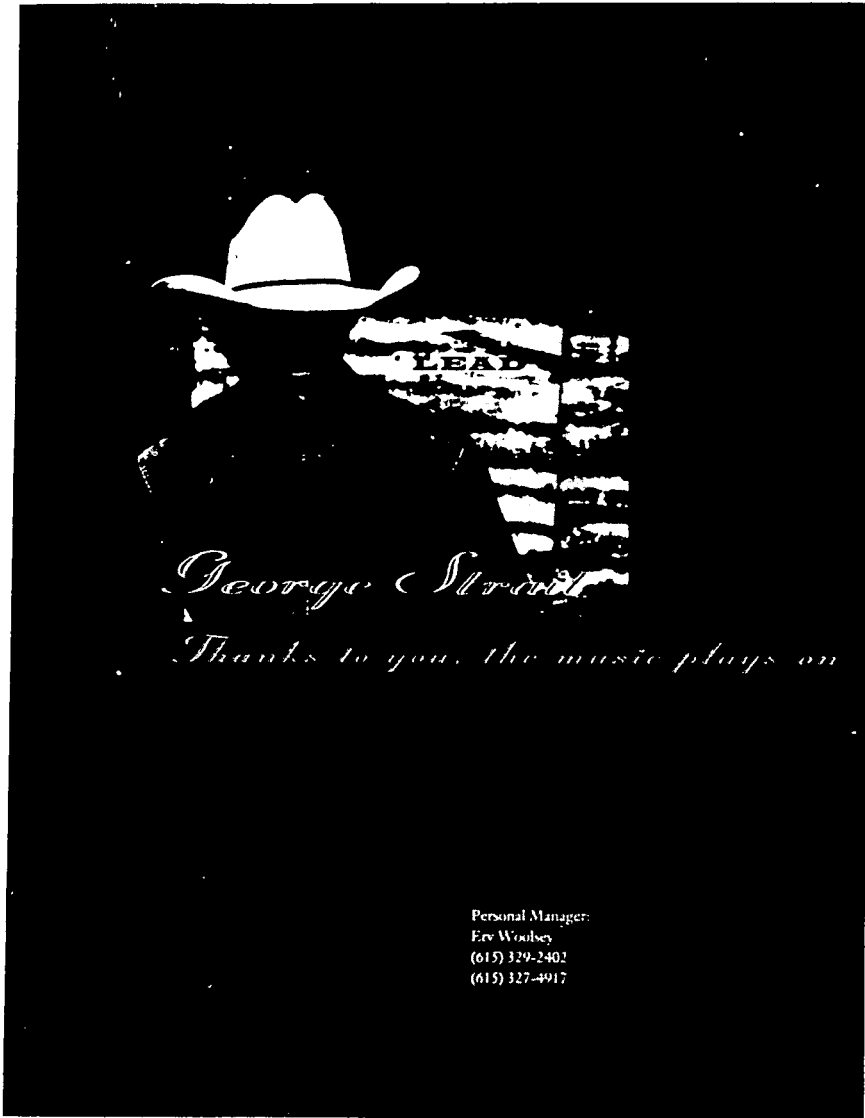
THANK YOU

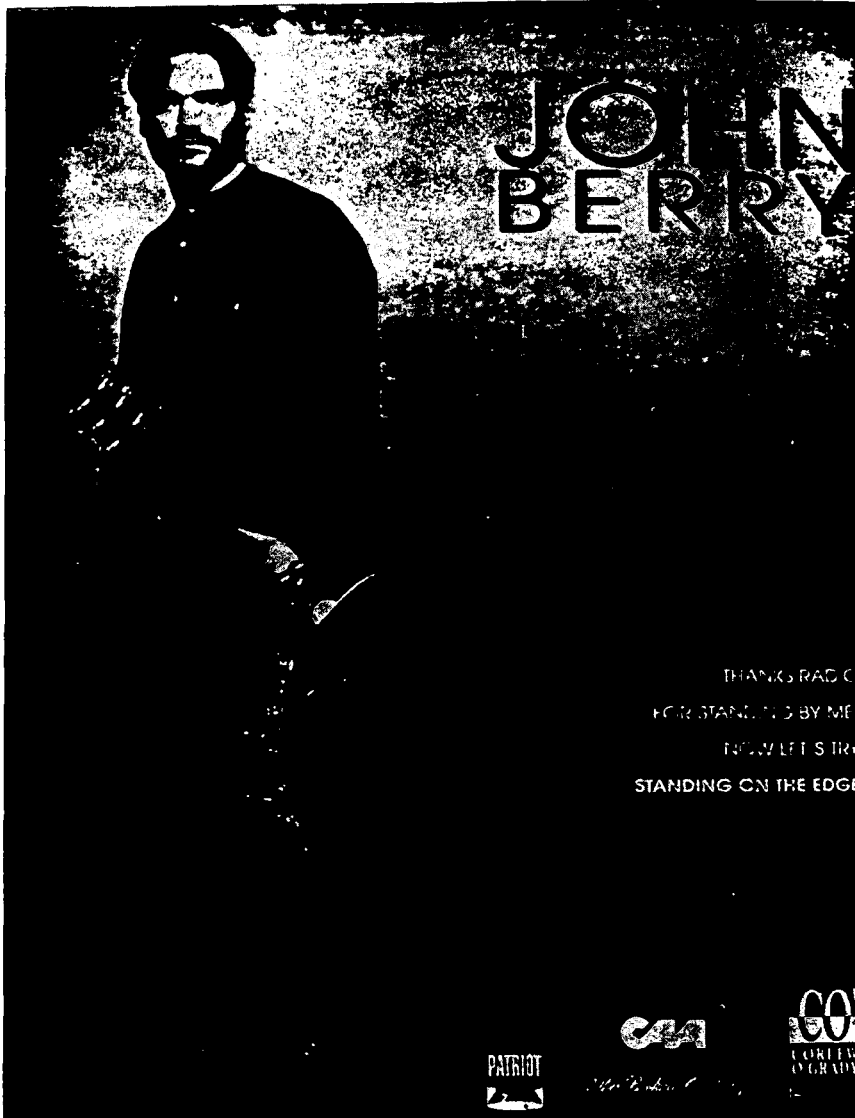
ALABAMA


DALE MORRIS
ASSOCIATES, INC.

174 1/2 Ave. Avenue 11, 30
P.O. Box 1111111111111111
11111 11111
FAX: 011 111 0111

Personel Manager
DALE MORRIS
Exclusive Booking
BARBARA HARDON







Country Radio

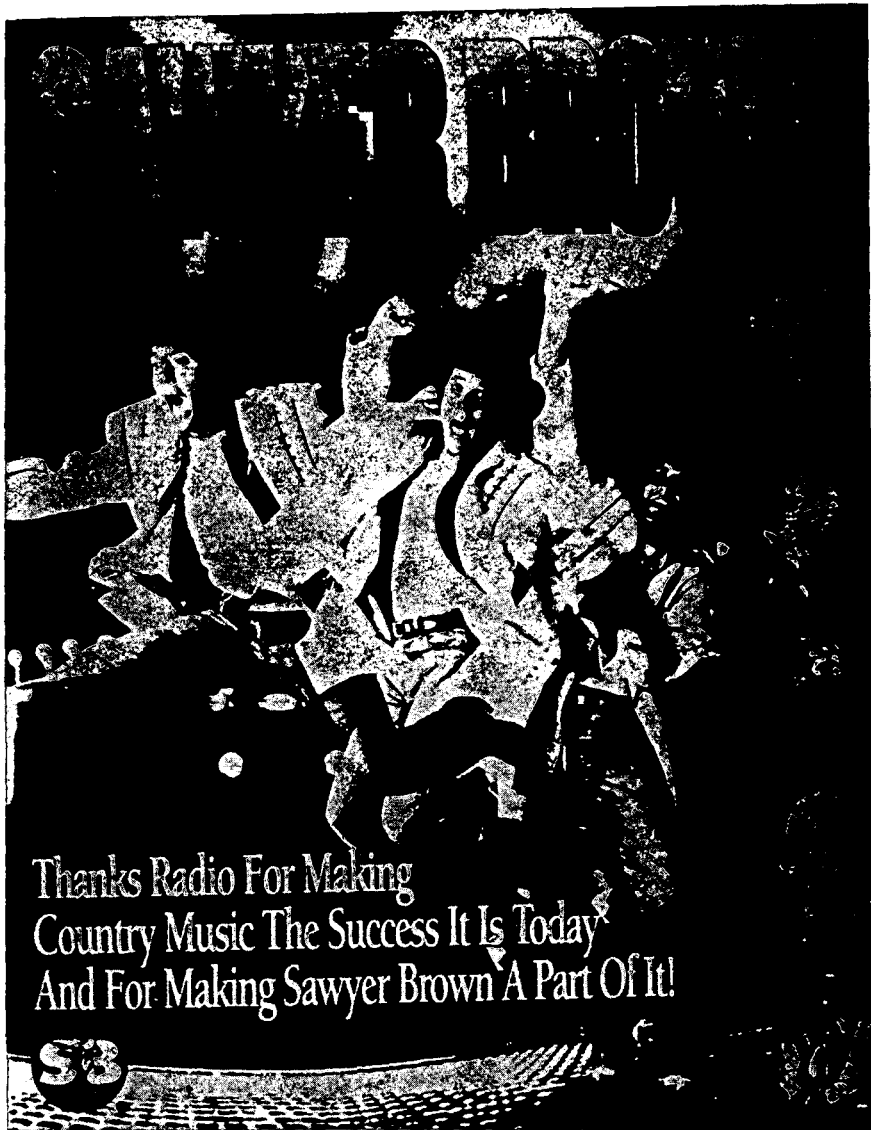
CLAY MORRIS 824 19th Avenue South
Nashville Tennessee 37203
LASZLO JENKES (615) 327-3400 FAX (615) 327-0331

IMS 818 19th Avenue South
Nashville Tennessee 37211
ONLINE MUSIC SERVICE (615) 321-1-26 FAX (615) 327-0112

We're Proud to be a part of
"The Country Radio Family!"

COAL MORRIS
& ASSOCIATES, INC.

IMS



DOUG STONE



*Thanks Country Radio for
Your Continued Support!*

Management

STONE AGE PRODUCTIONS
208A 8th Ave. East
Springfield TN 37172
(615) 384 6335

Record Label

COLUMBIA RECORDS
Sony Music
33 Music Square East
Nashville TN 37203
(615) 742 4321

Booking Agency

BUDDY LEE ATTRACTIONS
38 Music Square East
Suite 300
Nashville TN 37203
(615) 244 4376

Printing

STONE AGE PRODUCTIONS
208A 8th Ave. East
Springfield TN 37172
(615) 384 6335

APPENDIX C

**In the Public Interest:
A Survey of Broadcasters' Public Service Activities**

by

**Brenda K. Helregel
Research & Planning Department**



• Copyright, May 1991
National Association of Broadcasters, Washington, DC
All rights reserved

Executive Summary

Public affairs activities are an integral part of broadcast stations' community involvement. Through public affairs activities, stations invest both programming and non-programming time and effort to educate and involve their communities. A nationwide survey of randomly selected television and radio stations was conducted by the NAB Research and Planning Department in early 1991. The purpose of the study was to gather information regarding stations' public affairs activities. Below are the major findings from this study.

- Over ninety percent of the radio (93.9%) and television (91.8%) stations surveyed report they aired public service announcements before election day to encourage people to vote. Additionally, half of the radio (46.4%) and television (50.6%) stations offered to sponsor candidate forums, including debates among political candidates running for office during the 1990 elections.
- Stations report that many of the campaigns they are currently running are concerned with Medical and Community Oriented Fund-raising drives, as well as campaigns related to Health matters.
- Radio and television stations report locally producing and airing public service announcements in the past month on a multitude of topics ranging from Substance Abuse to Minority and Women's Issues. In addition, stations report airing locally produced public affairs programs in the past month on topics from AIDS to Local Community Oriented Information and Fund-raising Drives.
- Besides programming, broadcasters also report investing non-programming time and efforts to educate and involve their communities. Community outreach activities reported for the past month cover topics from Hunger/Poverty/Homelessness to Education and the Environment.

v

- When asked to name the three biggest campaigns in the *past year*, campaigns concerning Charitable Fund-raising, Substance Abuse and Health issues were mentioned most often. Among the most often mentioned campaigns that stations are *planning* are campaigns concerning Charitable Fund-raising and Health issues.
- Over four-fifths of the radio and television stations report that they have been involved in campaigns related to the U.S. troops stationed in the Middle East.
- Half of the stations report that they have been involved in campaigns to aid the victims of a disaster.
- Station investments in non-programming or off-air public affairs efforts to serve their communities are evident in that well over half of the stations report that their next campaign would include both programming and community outreach aspects. In addition, four-fifths of the stations report tying promotional activities to community public service campaigns and involving other local businesses in their campaigns.
- Three-fourths of the stations report that in 1990 they helped charities, charitable causes and needy individuals by fund-raising. Of the radio stations, the average amount collected was \$37,075, while the television stations averaged \$286,352.
- The average radio station donated \$128,319 and the average television station donated \$262,501 worth of free air time in 1990 to public service announcements alone. For 1990 alone a total of \$1.5 billion worth of air time for just public service announcements was donated by radio and television broadcasters nationwide.
- Stations run public service announcements throughout the day with the highest concentration running between 6 am and 12 noon.

SUMMARY OF BROADCASTERS' PUBLIC INTEREST OBLIGATIONS

The Communications Act establishes broadcasters' general obligation to operate consist with the "public convenience, interest, and necessity." Traditionally, the FCC has granted broadcasters wide discretion in meeting these obligations, in keeping with their First Amendment rights. The Act and FCC regulations, however, do set out some specific obligations that help to define elements of broadcasters' public interest responsibilities. While many unnecessary or outmoded regulations were eliminated by the FCC, beginning in the 1970s, the core public interest obligations remain largely unchanged. Below is a summary of the most important of these obligations.

1. PROGRAMMING

A. General obligation to provide issue-responsive programming

- * Quarterly issues/programs lists -- licensees must prepare quarterly lists of community issues station addressed during last 3 months; and programming that gave "significant treatment" of those issues. Must be kept in station's public file. Broadcasters "run" on this list at renewal time.

B. Children's television

- * Obligation to provide educational and informational programming; restrictions on amounts of advertising.

C. Obscenity/Indecency

- * Communications Act and Criminal Code prohibit "obscene, indecent or profane" broadcasts.

D. Lotteries

- * Criminal Code restricts broadcasts of certain lottery information

E. Station IDs

- * Licensees must broadcast stations identification announcements at beginning and close of broadcast day, plus hourly.

F. Sponsorship Identification

- * Licensees must identify sponsors of broadcast.

G. Payola/Plugola

* Licensees and employees may not accept direct or indirect consideration for broadcasting songs or other material without disclosing sponsorship.

2. POLITICAL

A. Reasonable Access

* Licensees must provide "reasonable access" to federal candidates for political messages.

B. Equal Opportunity

* Licensees must provide all legally-qualified candidates with equal opportunities for their political messages.

C. Lowest Unit Charges

* Licensees must provide all legally-qualified candidates with lowest unit charges during campaign "window;" must provide "comparable rates" at all other times.

D. Political editorial, personal attack rules

* Stations that editorialize in favor of or in opposition to candidates must provide other candidates with notice and reasonable opportunity to respond; similar rules apply to identifiable person or persons "attacked" during discussion of controversial issues of public importance.

3. OWNERSHIP

A. National limits

* No person may have licenses for more than 20 AM stations, 20 FM stations , and 12 TV stations. (25% nationwide reach limit for TV; slightly higher numerical and reach caps for minority ownership interests.)

B. Foreign ownership prohibited

* Licenses may not be granted to aliens; alien corporate ownership limited to 20-25%.

C. One-to-a-market

- * General prohibition on ownership of two TV station in same markets.

D. Cross-ownership

- * Ownership of broadcast stations and newspaper in same market, or TV Station and cable system in same market is prohibited.

E. Anti-trafficking

- * One year restriction transfers of licenses obtained in comparative proceeding or through minority ownership policies.

4. ENGINEERING

A. Minimum hours of operation

- * All broadcast licensees must operate a minimum number of hours per week.

B. EBS

- * Emergency Broadcasting System regulations vary for participating and non-participation stations. TV stations must provide captioning of EBS messages for the deaf.

C. Transmitter/Tower

- * Stations must operate within specified power and frequency parameters, and keep logs. The FCC also regulates tower lighting and painting.

D. RF Radiation Safety

- * New station, modification and renewal applicants must certify compliance with FCC RF rules protecting public and station employees form excessive exposure.

E. FAA

- * Stations must meet FCC/FAA requirements for non-interference/obstruction to air navigation.

5. MANAGEMENT

A. EEO

* Broadcast licensees are covered by FCC EEO policies, as well as general provisions of civil rights laws. Under FCC policies, all licensees must have EEO policy that prohibits discrimination and must take positive steps to recruit, hire, and promote women and minorities. FCC reviews licensees' EEO record on periodic basis; all stations' records reviewed at renewal.

B. Renewal

* Stations undergo renewal proceedings every 5 years for TV, every 7 years for radio. Renewal applications must include certification regarding compliance with rules.

C. Ascertainment

* Licensees must identify community needs and problems by any reasonable means in order to prepare and maintain issues/programs lists.

D. Network affiliation

* FCC imposes restrictions on TV network affiliation agreement -- agreements may not extend more than 2 years, may not bar licensee from affiliating with 2 or more networks, may not prohibit licensee from rejecting network programming. TV licensees must file copies of network affiliation agreement with FCC.

E. Public File

* Licensees must maintain files available for public inspection. Files to include any applications filed with FCC, ownership material, affiliation agreements, citizenship agreements, EEO reports, political information, issues/programs lists, and letters from public.

PREPARED: STATEMENT OF THE SONGWRITERS GUILD OF AMERICA, SUBMITTED BY
GEORGE DAVID WEISS

On behalf of the over 5,000 creators who are members of The Songwriters Guild of America (SGA), I welcome the opportunity to share with the Judiciary Committee our views on S. 227, "The Digital Performance Right in Sound Recordings Act of 1995." SGA is a voluntary organization representing songwriters throughout the United States, as well as the estates of deceased SGA members. SGA provides contract advice, royalty collection and audit services, and catalog administration, as well as other benefits. SGA and its Songwriters Guild Foundation are also committed to aiding and educating beginning songwriters through scholarships, grants and specialized Guild programs.

Although I have been the nonsalaried President of SGA for more than a decade, I am a working songwriter, not a copyright attorney or legislative expert. You may be familiar with some of my music. I collaborated on "Can't Help Falling in Love," which Elvis Presley made a hit; "What a Wonderful World," recorded by, among others, the great Louis Armstrong, which was the featured song for the movie "Good Morning Viet Nam"; "Stay with Me," by Bette Midler; and "That Sunday, That Summer," originally recorded by Nat King Cole and featured on his daughter Natalie's top selling album "Unforgettable." You may also know "The Lion Sleeps Tonight," "Lullaby of Birdland," and "Mr. Wonderful."

The issues surrounding a performance right in sound recordings are exceedingly difficult and have a potentially wide-ranging effect not only on my writer colleagues but on the music industry as a whole. Because of that, I commend Chairman Hatch and Senator Feinstein for their leadership in crafting legislation and wrestling with the problems it raises. More importantly, I want to thank the Committee for the time it has committed to the issues relating to the advent of digital technology. You have recognized that the digital world is a new world, which will profoundly impact the music industry. Obviously, the Digital Audio Recording Technology legislation was a landmark first step in responding to the rush of new technology; with the Committee's guidance, we believe we can find as equitable a solution to the complex issue of digital performance rights.

SGA strongly supports the concept underlying S. 227—that performers and record companies should receive compensation when their works are digitally transmitted by subscription services. But we have serious concerns about some of the specific issues raised by the bill. We songwriters earn our incomes almost solely from two sources: "mechanicals" (that is, payments from the distribution of our music in CDs, tapes and other formats) and public performance. S. 227 would affect both these sources of income, and we want to make certain that the new rights given to record companies and performers do not diminish the current compensation of writers and our publisher partners. At bottom, we do not want to lose what little we have now and may earn in the future through legislation that has laudable goals but may have unintended consequences.

I would emphasize that we seek no new or expanded rights for ourselves, only the preservation of our current rights. At the same time, we recognize that the record companies market our creations and their revenues are potentially threatened by digital technology. And, performing artists, like writers, are creators and deserve to be compensated for their efforts.

Because we believe in the concept of a performance right, The Songwriters Guild—along with other segments of the music industry—has worked for some time to reach a consensus on the performance right issue that could receive the support of everyone. As the members of this Committee are well aware, last year representatives of songwriters, music publishers, performers and the recording industry negotiated such an approach, the so-called "May 11 agreement."

One key element of the May 11 agreement was the understanding of all parties that the record companies could not act as "gatekeepers" over the public performance of sound recordings. Our concern was that, if the record companies had an exclusive public performance right in sound recordings, they could refuse to license prospective users of our creations without any explanation. The rights in our music would be meaningless—or worthless—if the necessary licenses in sound recordings were denied, and our income would be diminished.

S. 227 would establish a statutory license only for non-interactive digital subscription transmissions and would give the record companies an exclusive right for interactive digital subscription transmissions, in effect making the record companies "gatekeepers" over the latter. With respect to interactive transmissions, therefore, this new performance right would "trump" our rights under current law and allow the record companies effectively to control the use of our creations. This would present an intolerable situation for songwriters, since we all see the future in terms

of interactive services on the electronic information superhighway. SGA would urge the Committee to return to the language of the May 11 agreement on this issue.

Yet another troublesome change from the May 11 agreement concerns the "sound recording performance complement," which provided that any transmission service would be subject to a record company's exclusive right of public performance if it exceeded two consecutive cuts from an album, or more than three selections by the same artist or from a compilation set.

S. 227 would change the complement by making the time frame for performances—either interactive or non-interactive—a 24-hour period and eliminating the requirement that performances be consecutive. For example, if a non-interactive service wanted to perform four songs by the same composer during a day, it would lose the right to a statutory license. This would once more raise the "gatekeeper" problem and would be devastating to both users and songwriters. Again, we feel that the language of the May 11 compromise should be restored.

We also find troubling the section of S. 227 that deals with the "digital delivery" of phonorecords. All parties to the May 11 compromise foresaw two primary ways in which the digital delivery of phonorecords could be achieved. First, it was understood that a compulsory license would be available, and mechanical royalties under the license would be paid, when a digital transmission resulted in a technologically "identifiable" reproduction. Second, mechanical rights would be implicated and royalties would be paid when a digital transmission, even though not identifiable, could be "reasonably expected" to result in a reproduction.

S. 227 would limit the compulsory license to "each individual digital transmission of a sound recording which results in a specifically identified reproduction by or for any transmission recipient of a phonorecord of that sound recording" Thus, S. 227 changes the May 11 agreement in two significant respects. First, by using the term "specifically identified" (i.e., technologically monitored) instead of "identifiable," to restricts the coverage of the transmissions to situations in which a reproduction has been tracked, and second, it omits entirely the language of the May 11 agreement regarding the "reasonably expected" situation.

SGA urges the restoration of the "identifiable" concept of the May 11 agreement on digital phonorecord delivery since the bill as written could encourage record companies and subscription services to structure their agreements to avoid the obligation to pay mechanical royalties. For example, a record company or service provider could easily conclude that it was not in its interest to use available technology to track the recording of particular works since it would obligate them to pay mechanical royalties. In other words, it would be cheaper for them to avoid utilizing tracking technology, since without it a mechanical royalty arguably would not be due. The bottom line is, to the extent record companies structure their agreements with providers based on the assumption that the service will displace sales, writers should receive compensation to reflect a mechanical royalty—just as we do today.

Despite our reservations about S. 227 as drafted, SGA is hopeful—and confident—that, with the Committee's leadership, the parties can reach an agreement that is fair to all of us and that is in the public interest. We believe that even the issue that has divided our industry since the conclusion of the May 11 agreement—whether all transmissions of music to the public constitute public performances—can be resolved in a way that would protect our rights in the digital age. We are an industry of creators, and I have to believe that, if the Committee insists that we return to the bargaining table, we will find innovative solutions to the few issues that divide us. We all reached an agreement on May 11, 1994 and there should be no reason why it cannot serve as the basis for a just solution today.

In sum, my sole request of the Committee is that you protect my brother and sister songwriters, who create the wonderful words and melodies on which our whole industry is based. I freely admit to being emotional about this; not only because it is my craft and because these writers are my colleagues, but precisely because, without our songs, there would be no music industry.

As I said at the outset, however, we recognize that all of us—the writers, the performers, the publishers, the record companies, the service providers—are dependent on one another and each must be fairly compensated for our efforts. We are pleased that the Committee, with S. 227, has brought the performance right and digital transmission issues to the forefront of the legislative agenda, and we believe the May 11 agreement can provide a balanced and equitable response. This matter is of such consequence, and the parties are so close, that we must not—and should not—fail to reach an agreement.

Thank you.

