Statement of
Cary Sherman
Chairman and CEO, Recording Industry Association of America
on "Music Licensing under Title 17, Part Two""
Subcommittee on Courts, Intellectual Property, and the Internet
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Introduction

Chairman Coble, Ranking Member Nadler, Chairman Goodlatte, Ranking Member Conyers, and members of the Subcommittee, my name is Cary Sherman and I serve as the Chairman and CEO of the Recording Industry Association of America. RIAA is the trade organization that supports and promotes the creative and financial vitality of the major record companies (often called the "majors"). Its members include iconic incubators of musical talent such as the Columbia, Motown, Capitol and Atlantic labels, to name a few, that together comprise the most vibrant record industry in the world. I greatly appreciate the opportunity to participate in this continued hearing on music licensing.

RIAA's members have worked hard over the past two decades to build a viable, diverse and consumer-friendly digital music marketplace. Millions of music lovers now listen to billions of recordings every single day. They can find whatever music they want, whenever and wherever they want it, in whatever format they choose. Undoubtedly, we have come a long way. Digital models now account for more than two thirds of our U.S. revenue. There are numerous new business models that could not even exist just a decade ago. We are light years ahead of other content-based industries in fully adapting to digital models.

But despite our efforts to meet consumers' demands in the modern music space, there remain serious systemic issues to address before the music marketplace can realize its full potential in the 21st Century. I would like to discuss what we see as our role in this evolution and highlight the challenges that remain.

The Role of the Sound Recording in the Music Licensing System

Record labels are the venture capitalists of the music industry. They invest tremendous resources in developing, marketing and promoting artists, and serve as the industry's economic engine. Yesterday, we released a report that details the major record companies' investment in music. As the report states, major record companies have embraced the digital age in every facet of the music business, giving recording artists, and the songwriters whose works they record, broader reach, finding new ways for them to earn a living from their craft, and helping fans take full advantage of innovative ways to find, access and enjoy their favorite music. Consumers have told record labels how they want to access music, and they have listened, with

offerings on numerous platforms from downloads, to on-demand streaming services with low subscription fees to ad-supported video streaming models that are free-to-the-consumer.

In the process of embracing digital distribution, record labels have revolutionized the business, streamlining their operations and allocating a higher proportion of their revenues to investing in artist career development. Record labels provide the investment on which everyone in the music value chain depends, "seeding" the entire music ecosystem with $22.6 billion in U.S. talent investment – including artists, songwriters and music publishers - in just the last decade (and that's just from the major labels). The majors also invested an additional $6 billion over the same period to market recordings in the U.S.

There can be no doubt that songwriters and music publishers are our partners in this business. As Lee Miller, one of today's most prolific songwriters and the President of the Nashville Songwriters Association International stated at the first session of this music licensing hearing on June 10th, "I do not succeed if my songs are not recorded, sold and played." The job of record labels is to help creators succeed, by investing in them and their talent, marketing and promoting the recording and the artist, while at the same time partnering with today's and tomorrow's music service providers to expand the existing marketplace for music. Record labels make heavy investments in the artist's brilliant way of bringing a song to life, and ensure that this creativity reaches and captivates generations of fans, allowing everyone to reap the rewards of their contributions.

And even in tough times, our investments in creators have been significant. As a percentage of U.S. net sales revenue, over the last decade major label payments for artist advances and royalties have increased by 36% and mechanical royalties for songwriters and music publishers have increased by 44%.

Records are the economic engine that drives the entire music industry, from songwriter/publisher royalties to earnings from broadcasters and music services. If the song isn't recorded, and invested in by record companies through marketing and promotion, there is no real revenue for a songwriter, for an artist, for a broadcaster, for a digital music service. And many other types of income, from concert ticket sales to merchandising and endorsement opportunities, rely on the risks taken by record labels through investments that benefit not just well-known recording artists and songwriters but engineers, background musicians and many others.

Needless to say, investing in the careers of artists is an inherently unpredictable business, given the elusive nature of consumer taste. According to data from Nielsen SoundScan, 80% of new albums sell less than 100 copies and 94% sell less than 1,000 copies. Out of 8 million digital tracks sold in 2011, 7.5 million sold less than 100 copies. In 2011, only one-half of one percent of all albums that sold even a single copy sold more than 10,000. Professor Anita Elberse has concluded that most record companies "recovered their investments in only one out of every five or six new albums." And it goes without saying that record labels must be able to receive a fair return on their investment, or they cannot take the necessary risks. If record labels cannot

license their products widely and efficiently, they cannot sustain the investment needed to keep the economic engine running smoothly. Impediments to licensing – be they rights that are more limited than other copyrighted works, rate-setting processes that result in less than fair market value, or inefficient systems for licensing musical works – all impact the ability for record labels to drive the future of the music business for the benefit of all stakeholders.

Overall Goals

So why are we here today? Why is this Subcommittee holding a hearing on the system for music licensing and not movie licensing, or book licensing, or software licensing? Well, because behind the seamless experience provided to consumers lurks an antiquated, inefficient and, frankly, broken system. Modern media must pair with today's and tomorrow's technologies to meet consumers' demands and expand consumer choice; foster rapid and frictionless innovation; and provide fair market value to creators, entrepreneurs and investors across the ecosystem. Unfortunately, the current music licensing system is not achieving these goals.

Issues

Music licensing is uniquely a product of its history – a series of legislative, regulatory and industry measures designed to address particular needs at particular points in time. Each of these measures may have made sense when enacted but, taken together, they now make little sense. The resultant fraying patchwork has produced a number of anomalous consequences. For example:

- Recordings, inexplicably, and unlike any other copyrighted work, are excluded from a full performance right, which means AM/FM radio does not pay for their use;

- Recordings are protected by Federal copyright law only if made after February 15, 1972, and some large digital radio services that benefit from a compulsory license are refusing to pay for recordings created before that date;

- Three digital radio services which are each now more than 20 years old still pay for recordings based on a below-market rate standard that was first established on the theory they were start-ups in need of a break;

- Unlike any other kind of copyrighted work delivered to consumers, the considerable investments in recordings are encumbered by a complicated regulatory regime for licensing musical compositions incorporated in the recording;

- Separate licensing entities exist for each of the underlying rights in musical compositions (i.e. performance, reproduction/distribution), so that digital music services that want to use our music are encumbered by the need to obtain multiple licenses from multiple sources for the same commercial use; and

- Musical compositions can be simultaneously subject to (1) free market negotiations, (2) compulsory licensing, and (3) judicial consent decrees, all at the same time, for inclusion in the same product or for the same commercial use.

It's no wonder everyone finds music licensing arcane and complex and dysfunctional. The system is simply not fit for the needs of the current marketplace. If we were to devise a licensing system from scratch, the one we've got today would not even be on the table. So we've got to rethink the system to more closely resemble other modern licensing frameworks, and we need to do it together – to achieve consensus from recording artists, record labels, songwriters and music publishers, along with the rest of the music community.

What specifically do we need to achieve? Our music licensing system should:

- Ensure that everyone in the value chain receives fair market value for their works, and for all of uses of their works, regardless of platform;

- Simplify musical work licensing by aggregating works under a blanket license, such as those already offered by ASCAP and BMI and the Section 114 compulsory license for recordings.

- Cover all the rights needed to bring to market all modern music releases, not just the audio-only products of yesterday.

Solutions

Fortunately, we do not need to reinvent the wheel to come up with a system that could actually achieve these specific priorities, and the overall goals listed above. We can simply look to the rights and licensing regimes already in place for most other copyrighted works.

First, **grant a broadcast performance right for sound recordings**. Every other copyrighted work has the same full set of rights. Only recordings have been denied the comprehensive rights enjoyed by every other copyrighted work – namely the right of public performance. That's why AM/FM radio is able to profit from the public performance of recordings without paying artists or record labels a dime. This has to be fixed.

This loophole in the law, which is unique among developed nations, costs artists and rights holders – and the U.S. economy – millions of dollars as foreign countries refuse to pay for radio performance of U.S. music since the U.S. doesn't pay. This anachronistic exemption didn't make sense in the past, and it certainly doesn't make sense in the current broader music industry landscape. If we're talking about modernizing music licensing, it only makes sense to finally put an end to the nearly century-old economic government subsidy provided to terrestrial broadcasters.

Second, **make sure artists who recorded before 1972 are paid**. Compulsory licenses in the law apply to copyrighted works regardless of when they were created. Only sound recordings are paid, or not paid, under a compulsory license depending on the date of their creation. This too has to be fixed.

While recordings made on or after February 15, 1972 are covered under Federal copyright law, those made before that date are protected by state law. Unfortunately, some digital radio services operating under a compulsory license have abused this bifurcation by refusing to pay for use of "pre-72" sound recordings under either state or federal law. The result is that many legacy artists are not compensated for the classic music that not only stands on its own (and inspires entire dedicated stations like Sirius XM's "60s on 6"), but helped pave the way for the hits of today.

Reps. Holding and Conyers have proposed legislation, H.R. 4772, the RESPECT Act, that would create a condition for use of the compulsory license. Services that benefit by using the compulsory license to stream sound recordings without permission and by paying one check for all music to one entity, would have to also pay for pre-72 music under the same system. Modernizing the modern music landscape cannot overlook and leave behind these cherished artists and their invaluable contributions to our country's musical heritage.

Third, **allow rights to be bundled and administered together**. Those who develop and own every other type of copyrighted work are able to license all the copyright rights necessary for the uses to be made by the licensee. A movie streaming service doesn't have to go to one entity to license the performance and a different entity to license the making of a server copy. So it should be with musical compositions.

Right now, the antiquated consent decree under which ASCAP operates prohibits that organization from offering licenses to any rights other than the public performance right, and another consent decree prohibits BMI from offering other rights such as synchronization licenses. That may have made sense in the 1940's, but in an age where multiple rights are implicated when music is downloaded and streamed online or consumed on video services like YouTube and Vevo, these restrictions have become an impediment. This must be changed. All licensing entities must have the ability to license all the rights needed for the use of the musical composition.

Fourth, **create an across-the-board market-based rate standard**. It goes without saying that every rights holder deserves fair market value for their work. Their livelihoods depend on it. We should have one rate standard for uses of music that remain under a compulsory license.

For example, three mature digital radio services – Sirius XM, Music Choice and Muzak – have enjoyed below-market royalty rates for their use of sound recordings. Rather than using the "willing buyer/willing seller" rate standard that applies to every other service, these three services still operate under the "801(b)(1)" standard that they were "grandfathered" into before 1998. For these services, that standard has been interpreted to set royalty rates that

are less than fair market value, effectively forcing artists and record labels to subsidize these services' business models on a continuing basis.[1] They were "grandfathered" into the lower rate standard because of concern for the business expectations of start-up companies, but Congress never intended this to produce permanent below-market subsidies on the backs of artists and record labels. These services are no longer nascent businesses. All services that take advantage of the statutory licenses should be subject to the same willing buyer/willing seller rate standard.

Similarly, musical work owners must be guaranteed fair market value for their works by basing royalty rates on the same "willing buyer/willing seller" rate standard when mechanical royalty rates are set under Section 115 of the copyright law. We support the revision of that provision to reflect the fair market value standard as part of comprehensive revision of music licensing law (which would include updating the standard for the "grandfathered" services under Section 114).

The consent decrees under which ASCAP and BMI operate must also be revisited to ensure that musical work rights holders are paid fair market value for their compositions.

Finally, **consider a one-stop shop for musical work licenses**. We have filed with the Copyright Office (in response to their request for comments) an idea laying out one possible way to license music in this manner. It would have the music publishing and recorded music sides of the industry negotiate, in the free market, an overarching allocation of royalties between them for the exploitation of sound recordings. It is a potential path toward simplifying the complicated way musical works must be licensed today.

The goals of any solution should be to align the economic interests and incentives of music creators; ensure that songwriters and publishers receive a fair portion of revenue from the licensing of the sound recording; avoid competition between record labels and music publishers for the same dollars from licensees; vastly simplify and speed the licensing process, making it quicker and easier for consumers to enjoy new music services; and make royalty payments to songwriters and publishers more efficient and more transparent.

There are undoubtedly many approaches to address today's broken system, and we are ready to discuss them with our industry colleagues.

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[1] *See, e.g., SDARS II*, 78 Fed. Reg. at 23,058 (rejecting marketplace benchmark for preexisting subscription services as "so far from the current rate" and basing new rates on below-market rates previously established; selecting a lower SDARS rate because of cost structure); *SDARS I*, 73 Fed. Reg. at 4087 (selecting a lower SDARS rate because of concerns about profitability and cash flow); Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 Fed. Reg. 25,394, 25,399-25,400, 25,405-09 (May 8, 1998) (rates to be based on policy considerations, not the marketplace; sustaining low rate based on service risk exposure and perceived precarious financial position).

Ultimately, what remains at the center of this exercise is music and its intrinsic value in our lives. Music – and fans' engagement with music – is more important than ever in this digital age. Music is at the core of our culture and it is often the connective tissue of the Internet. The most talked about topic on social media is music, the most watched videos on YouTube are music videos, the most followed people on Twitter are recording artists, and iTunes is still called i**Tunes**. Just last week, Mashable published a story documenting how music is the essential draw for advertisers, for charitable organizations, for technology companies, for social media, you name it. Technology firms recognize they need to be part of the music space because they know that's where their customers are. Our members are proud to invest in the development of a diverse array of products that are so universally enjoyed, and they want to continue to be the engine behind this cherished art form. The music business has reinvented itself, but our work is not done. It can only be made easier if our complex licensing system is simplified and music creators are paid fairly.

Again, we thank the Subcommittee for holding this hearing and for its interest in modernizing music licensing. It's not easy to reform a system as deeply rooted as our music licensing system, and undoubtedly there will have to be give and take by every interested party if we are to succeed. But we believe, given the increasing dysfunction under our current system, that the time is ripe to make the changes that can truly transform music licensing for the better. And we hope, by working together with our music community colleagues, that we can find the consensus we think is necessary to establish a system that works for everyone.

Thank you.