Statement of
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Staff Briefing on
The Scope of Music Rights within the DMCA

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Thank you, Chairman Tillis for the opportunity to appear before you and the staff of Senate Judiciary Committee members to discuss the scope of music rights in the DMCA as part of your subcommittee's review of that two decade-old law.

My name is Colin Rushing, and I am the Chief Legal Officer of SoundExchange. SoundExchange is the collective management organization formed to administer the statutory license that Congress created in the late 1990s for digital radio. We are an outgrowth of Congress's vision for what was then the new digital music licensing framework for sound recordings. This was a legislative success story that produced an explosion in dynamic new radio services that have fundamentally reshaped how we experience music.

Today, SoundExchange administers royalties paid by more than 3,100 digital music services. We collect and distribute royalties to over 200,000 registered accounts for featured artists, background singers and vocalists, and record companies – big and small. Building on our commitment to serve the industry, we have developed a wide array of tools and services that help music creators and licensees, many of them available for free or as part of the statutory license. We are efficient and relentless in our work, one of the few collectives to pay royalties out monthly to our members. Nearly 90% of the royalties we collect are processed within 45 days of receipt, and we are more efficient at this than anyone else in the world, with an administrative rate in 2018 of only 3.8%. Since our founding in 2003, we have paid out more than $7 billion in royalties.

We are also ardent advocates for the music creators we represent. There is a single core principle driving that work: We believe that **all creators should receive fair pay, on all platforms and technologies, whenever their music is used.** That is what brings us here today.

The Value of Music

The power of music is immense. A lot has been written, spoken and sung about it. In our present circumstances, with much of the country still under stay-at-home orders, we've seen individuals and communities turn to music as a means to combat stress and anxiety and relieve feelings of isolation. You can look almost anywhere on social media platforms and see people finding comfort in music creators who continue to play and perform online, bringing people together and offering strength, humor and kindness in difficult times.

In commercial terms, music has value because it holds people's attention. It's the reason music is played everywhere -- bars, stores, doctors' offices, and the radio. Music pulls people in, and it keeps us engaged. Music "draws a crowd" better than anything else. It is this

power of music to draw an audience and shape our moods and feelings that has tremendous economic value.

There is no question then how music became the lifeblood of radio. Music captures the attention of people in their cars and offices and homes and is the reason we listen to music radio stations – and sit through advertisements. The business of radio is straightforward: Draw an audience with music and sell advertising against that audience. That is the formula that has made over-the-air radio the largest music delivery service in the world.

It is also why it is so astounding that there is still one music platform in America that refuses to compensate recording artists for their work, and it is AM/FM/HD Radio.

To understand the effects of the limited scope of music rights for sound recordings in the DMCA, it is important to examine the long legislative history of sound recording performance rights on either side of the 1998 law, the effect the forced subsidization of radio has on the modern music delivery marketplace, and the significant impact the lack of an FM performance right has on the treatment of American performers in the rest of the world. We welcome the opportunity to examine those points further in this testimony, as well as to provide forward-looking thoughts on how to remedy the negative impacts on the music ecosystem in the last two decades and protect it from further injury.

From the DMCA to the MMA

Because Congress limited the performance right for sound recordings in the DMCA to digital audio transmissions, AM/FM radio broadcasters transmitting over-the-air retained the ability to use sound recordings with no limit and at no cost to the broadcaster, with no financial compensation for the music creators who made the recordings. But 1998 was not the start of this injustice. From where we sit today, it was merely a recent step in what has been an eight-decade fight for a performer's right to be paid when another business seeks to profit from the public performance of their work.

Historically, sound recordings have received less protection under federal copyright laws than other works of authorship. It was not until 1971 that sound recordings were afforded any type of federal copyright protection.[1] When Congress finally granted copyright protection to sound recordings, opposition by broadcasters caused Congress to deny sound recording

[1] Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391 (1971)

copyright owners the exclusive right to perform their works publicly. Thus, sound recordings remained the only performable copyrighted work for which there was no performance right.[2]

During the debate leading to the passage of the Copyright Act in 1976, the Copyright Office recommended that sound recording copyright owners be granted a performance right.[3] However – again - pressure from broadcasters resulted in the 1976 Act being enacted without a sound recording performance right.

In 1978, the Copyright Office completed a thorough study, as required by Congress under the 1976 Act, about the lack of an FM sound recording performance right. The report filled *1100 pages*, reciting repeated recommendations across decades that a sound recording performance right should be added to the Copyright Act and citing Congressional studies and legislative efforts to that effect that dated as far back as 1940.[4] The report was delivered to the House Judiciary Committee by the Register of Copyrights, Barbara Ringer, who had recommended enactment of a sound recording performance right numerous times.

In the late '80's, music performers formed a group called the Performers Rights Society of America that revived the effort to pass a performance right for sound recordings.[5] Again, the broadcasters pushed back, and regrettably Congress did nothing.

All of these efforts preceded the arrival of digital music services. In the 1990s, members of Congress became concerned that the advent of new technologies such as digital audio broadcasts and cable audio services might prevent sound recording copyright owners from recouping their creative investment as such performances of sound recordings increasingly replaced traditional record sales. The Copyright Office was thus asked to study the implications of these new technologies for the copyright protection of sound recordings. The Copyright Office again included in its recommendations that Congress should enact a sound recording performance right.[6]

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[2] Chapter 8: The Digital Performance Right in Sound Recordings Act of 1995, Arnold & Porter, (1997) *available at* *https://www.arnoldporter.com/en/perspectives/publications/1997/01/chapter-8-the-digital-performance-right-in-sound*

[3] See Statement of Barbara Ringer, Register of Copyrights, before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, pursuant to S. Res. 72 on S. 111, July 24, 1975, at 11("July 1975 Statement of the Register of Copyrights"). *available at* https://www.copyright.gov/reports/annual/archive/ar-1975.pdf

[4] Performance Rights in Sound Recordings, House Committee on the Judiciary, Subcommittee on Courts, Civil Liberties, and the Administration of Justice (June 1978) at p.505, *available at* *https://www.copyright.gov/reports/performance-rights-sound-recordings.pdf*

[5] "Sinatra Heads Group Seeing Legislation for Performers' Royalties," *Los Angeles Times,* by Zan Stewart, January 11, 1989. *available at* https://www.latimes.com/archives/la-xpm-1989-01-11-ca-195-story.html.

[6] Register of Copyright, Report on Copyright Implications of Digital Audio Transmission Services (October 1991) *available at* https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1012&context=monographs

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act (DPRSRA), which for the first time granted copyright owners of sound recordings an exclusive right to perform their works publicly—although the right was limited only to digital audio transmission of their sound recordings.[7] Once again yielding to broadcaster pressure, the law specifically exempted traditional over-the-air radio broadcasts from the newly created right to control digital public performances of sound recordings, requiring only new music services competing with the incumbent service, AM/FM radio, to pay royalties.

In 1998, when the Digital Millennium Copyright Act was passed, Congress clarified the digital performance right first established in DPRSRA by giving sound recording copyright owners a right to royalties from performance by digital audio transmission, but – again yielding to broadcaster pressure— excluded other traditional forms of public performance including AM/FM radio broadcasts.[8]

In 2009, bipartisan legislation, the Performance Right Act, was introduced in the House and the Senate, and eventually the bills were reported favorably by each body's Judiciary Committee.[9] After intense negotiations over several months in 2010, the parties at the table appeared close to resolution, but once the negotiated terms were presented to various constituencies, a final agreement failed to emerge. It was during these negotiations that the broadcasters broached an attempt to require device manufacturers to shoehorn their old format into new technology platforms by including an FM chip in their products.

Most recently, in 2018 music creators sought to secure a performance right for sound recordings on terrestrial radio in the Music Modernization Act (MMA).[10] The MMA laudably addressed many of the ancient inequities in copyright laws that stood between music creators and fair compensation—making clear that artists and copyright owners must be compensated for the use of recordings made before February 15, 1972 and leveling the standard for setting music royalties rates at fair market value across the Copyright Act. But on the matter of the terrestrial performance right for sound recordings, the longest-standing inequity, Members of Congress asked the impacted parties to try to come to agreement in private negotiations before attempting to move legislation. Those negotiations did not prove fruitful, however, and at the end of the day, the broadcasters continue to enjoy the status quo.

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[7] Digital Performance Right in Sound Recordings Act (DPRSRA), Pub. L. No. 104-39, 109 Stat. 336 (1995)
[8] Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2286 (1998)
[9] (H.R.848),Performance Rights Act, Reported Favorably by the Committee on the Judiciary (21-9) (May 13, 2009) *see* Report on Performance Rights Act, House Committee on the Judiciary, (December 2010), at p10, *available at* https://www.congress.gov/111/crpt/hrpt680/CRPT-111hrpt680.pdf; (S.379), Performance Rights Act, Reported Favorably by the Committee on the Judiciary (voice vote without written report) (October 15, 2009)
[10] Orrin G. Hatch-Bob Goodlatte Music Modernization Act (Music Modernization Act) (MMA), Pub. L. No. 115-264, 132 Stat. 3676 (2018)

Sound recording artists have waited for Congress to act through nearly 80 years of studies, hearings, reports, stalled legislation, and consistent recommendations from government policy experts calling for the establishment of an FM performance right for sound recordings. Private negotiations have failed for two related reasons: (a) AM/FM radio holds all of the cards as the negotiating party that is able to use someone else's work without cost; and (b) Sound recording artists, who have no legal right to limit the use of their own work, have no meaningful standing at a table negotiating their compensation. Until Congress establishes a baseline public performance right in sound recordings for terrestrial radio, there cannot be serious "free market" negotiations with the broadcasters on rates.

That is precisely what S. 2932, the **Ask Musicians for Music Act (AM-FM) Act** would do. Introduced by Senator Blackburn, the bill would require terrestrial radio broadcasters that wish to transmit other people's sound recordings to obtain the consent of the artist and copyright owners of those sound recordings. This is not unfamiliar to broadcasters: cable systems and other distributors of broadcast programming must obtain the consent of broadcasters to retransmit their programming, even when broadcasters do not own the underlying shows. Special provisions for small commercial broadcasters and noncommercial broadcasters limit their exposure for transmission consent fees to $500 per year for commercial stations with less than $1 million in revenue, and $100 per year for noncommercial stations. The bill sets the table for meaningful marketplace negotiations and ends the current market distortion in our laws that forces artists to subsidize the multi-billion-dollar FM radio broadcast industry.

The View from 2020

Contrary to some popular conceptions, the vast majority of recording artists are middle-class musicians, working hard to make a living. Of the 200,000 registered accounts at SoundExchange only about 1/100th of 1% of our payees earn more than $1 million a year in SoundExchange royalties. The majority of SX members earn royalties in an amount that is an annualized equivalent that falls below minimum wage.

Critically, artists must stitch together revenue from a wide array of sources, but much of the balance of an artist's income has been put on hold indefinitely. As the coronavirus pandemic landed in the United States earlier this year and public venues were forced to close, artists' live performance income disappeared overnight. Like so many industries worldwide, the music community is struggling against the impacts of the coronavirus pandemic, with live performance venues closed for the foreseeable future, tours canceled, and album releases postponed. Income from digital radio has been a core part of artist revenue for over a decade, and it's now more important than ever.

Congress Should Eliminate the Distortion in the Sound Recording Licensing Market Caused by the Exemption for AM/FM Broadcasting

Throughout the 80 years that the terrestrial radio performance right has been under discussion, broadcasters have argued in many ways that they are special and deserve different treatment than other business interests. Their arguments that their special status should result in them not paying performers– never valid – have now also been overtaken by events. They say AM/FM radio is important because it is free, but they are no different than any other free ad-supported music platform available to consumers. They argue that providing public service announcements and news information is a reason to require music to subsidize their platform, and yet many music platforms provide these same services, not to mention that most digital music platforms are delivered over devices that provide local emergency notifications. To the extent that AM/FM radio may be promotional, this is not a trait that sets them apart from other music services that compensate performers. Nor does it justify an uncompensated "taking" of musicians' property. Rate-setting proceedings and licensing negotiations take promotional value into account as a matter of course, along with many other variables. The potential for promotion exists in a lot of licensing arrangements. Television broadcast of a professional basketball game may promote a local team, but no one would suggest that the NBA should surrender the broadcast rights for free because of that "promotional value." Why should music be any different?

Today, AM/FM radio is the largest ad-supported music service in a flourishing music distribution marketplace. Over-the-air broadcasters claim a monthly audience well in excess of 200 million listeners. The five largest broadcasters combined in the U.S. own over 2000 radio stations across the country. Forecasts put 2019 FM radio industry revenue at $14.5 billion.[11] Ending the terrestrial radio exemption is critical not just to performers and record labels, but to leveling the playing field for digital services too. Right now, digital radio sits alongside terrestrial radio in cars, boats, and homes – yet those modern innovators pay for the music recordings they use while AM/FM broadcasters pay nothing for their over the air transmissions, even when their broadcasts are played through the same speakers to the same audience. The government should not be picking winners and losers in this way or propping up particular technologies or business models when there is no principled public policy reason to do so. In the case of terrestrial radio, Congress's lack of action meddles in the marketplace in a way that requires one actor to subsidize another, and the subsidized actor happens to be the largest and most profitable.

[11] "How Much Ad Revenue Will Radio Get This Year?," *Radio Ink*, July 9, 2019 https://radioink.com/2019/07/09/how-much-ad-revenue-will-radio-get-this-year/

In addition, by perpetuating the effective subsidy for this one platform in the music service marketplace, Congress is undermining technological advances for the industry. The lack of a performance right incentivizes AM/FM radio broadcasters to maintain their present method of transmission at all costs in order to preserve their exemption from paying for sound recordings. In the last decade, we have seen the NAB announce an endless list of initiatives ranging from the FM chip to so-called "hybrid radio." These programs are designed to preserve AM/FM radio's special place in the dashboard (and wherever else is possible) while at the same time making the AM/FM radio experience appear as "interactive" as possible. And yet, none of this is necessary; the same content that is delivered over the air can already be sent digitally – where AM/FM radio broadcasts in fact sit side by side in the same user experience.

For an example of the unfair treatment in action, you must look no further than the recently launched Sonos Radio, which features new, online only Sonos-branded stations side by side with FM stations streamed online. In the case of that platform, of course, FM radio must pay – because it is streamed online. But, in car dashboards, digital and terrestrial radio also increasingly sit side by side in the same user interface. And yet there, because FM radio signals are sent over the air instead of online, broadcasters can take advantage of their exemption. Indeed, if broadcasters have their way, listeners won't know when they are listening to FM stations online and when they are listening to them over the air: "hybrid radio" technology is designed, among other things to sense the strength of a terrestrial signal, and seamlessly switch to the same content being simulcast over the internet when the terrestrial signal weakens. [12] The listener won't know when these signal switch occurs; the experience of the two signals is identical, and yet current law requires payment to performers for use on only one of them. In other words, the same listener will receive the same content in the exact same context – sitting in the car – and yet the royalty consequences to the artists will be profoundly different. It makes no sense for these platforms to compete under a different sets of rules.

Enacting an FM performance right would change this behavior. Instead of resisting broad innovation in order to preserve the advantage of the royalty exemption, radio would be forced to innovate its business model like all other businesses. However, to the degree that broadcasters are successful in their efforts to cram their older technology into modern devices before Congress has enacted a performance right, Congress must act quickly to protect the domain of digital platforms and pass legislation to limit the scope of the broadcast exemption by platform and not mode of transmission. Where FM radio inserts itself into digital platforms, it must be required to compensate for the use of sound recordings just like other services on those platforms.

[12] https://nabpilot.org/hybrid-radio-coming-to-the-us/

What we are left with now is an illogical system that determines whether content is worthy of compensation based entirely upon the method of transmission, even though that method has absolutely nothing to do with the programming. AM/FM radio itself is the strangest illustration of this existing policy framework. If an FM station broadcasts both over the air and simulcasts on a digital platform, current law attributes value to the transmission from the digital simulcast and none to the identical transmission coming from a radio tower, even if both identical transmissions are heard through the same car speakers by the same ears. There's nothing special about means of transmission via FM towers versus cell phone towers versus fiber optic cables delivering internet access. Protection of intellectual property rights shouldn't be determined by method of transmission. The value is in the content.

Impact of FM Radio Exemption on American creators' Compensation Worldwide

Adding insult to injury, the special status Congress has allowed FM broadcasters to retain in the United States results in discrimination against American performers and record labels all over the world. The United States stands alone among democratic, industrialized nations in failing to recognize a performance right for sound recordings on terrestrial radio. Because the United States persists in this limited scope of rights for sound recordings, countries that do collect royalties for radio airplay, with very little exception, refuse to send terrestrial radio royalties to U.S. performers for the use of their work.

American music is by far the most popular, and thus most valuable in the world. It is played ***everywhere***. Estimates show U.S. music representing 30 percent of global music consumption. So the impact of this lack of reciprocal or "national treatment" is significant. It means that American performers and record labels are denied close to $200 million every year in royalty income that they have rightfully earned under the laws of other countries. To be clear, international law does not prohibit distribution of these royalties to Americans, but the imbalance in the scope of rights for sound recordings in the U.S.—specifically, the lack of an AM/FM performance right for recordings— is relied upon broadly as the basis for this discriminatory treatment.

It is important to note that when sound recording performance royalties are distributed in the United States, the performer's nationality is not taken into consideration. We afford full national treatment to foreign nationals. So, SoundExchange pays digital performance royalties earned by performers and record labels whether they are Americans or natives of another country. We firmly believe that royalties collected for the use of sound recordings should go to the performer and rights owner of that recording. That practice and the significant value of the US digital performance right give us credibility when we pursue national treatment for

Americans in other countries. Despite that, the limited scope of rights in U.S. law is not an obstacle we can overcome without action by Congress.

SoundExchange has battled discrimination against our American payees for years. We are happy to report that some progress has been made. Germany, Brazil and Spain have recently chosen to implement national treatment principles. The recent trade agreement between the U.S., Mexico and Canada (USMCA) included provisions requiring national treatment for U.S. sound recordings, and after significant effort by both USTR and the music community to bring focus on the issue, the agreement was implemented with those rights intact last month. We hope that USTR will be successful in achieving the same outcome in the recently initiated US-UK negotiations. We are grateful to have seen some success in these efforts, but trying to achieve this relief country-by-country, free trade agreement by free trade agreement is an inefficient and painstaking pursuit. Enacting an AM/FM performance right is the more certain path to relieving Americans from facing this very costly discrimination.

Conclusion

SoundExchange's mission is to ensure that music creators share fairly in the value that they bring to businesses that rely on music. For nearly a century, Congress has delayed efforts to address the unusual gap in our copyright law that forces artists to allow a multi-billion-dollar industry to profit from a business model that is based upon music creators' work. Artists have no right under law to withhold their work from AM/FM broadcasters and no cause of action to force a broadcaster to desist using their creations for profit. We have been unable to find a parallel case in which our government allows such a taking without compensation-- a requirement that an individual forfeit their intellectual property to a business. Even in the instance of eminent domain, government gives the property owner a semblance of fair market value. It bears repeating: Protecting the rights of recording artists to their own work is the unfinished business of the DMCA, of the MMA, and of every copyright law passed since the advent of technology that allowed music performances to be preserved in a recording. It leaves American performers and record labels open to discrimination abroad and results in real and significant loss of income every year. We urge you to lift American music creators out of this uniquely oppressive condition in which they are compensated by modern digital music services, but still forced by their government to subsidize FM radio, an older technology that unfairly competes with the services that do pay for the use of their work.