Thank you Chairman Tillis. And thanks as well to your Senate colleagues and the Subcommittee’s professional staff for holding this briefing. While the subject of “the scope of exclusive rights in sound recordings” may seem far from the minds of Americans during this time of a pandemic, I assure you the issue is timely, especially as our fellow citizens turn to music to get through this crisis.

As the Chair and interim CEO of the Recording Academy, as well as a record producer and songwriter myself, I feel qualified to tell you about the state of recording artists in the wake of COVID-19. American musicians are struggling right now; among the first to feel the brunt of closures and cancellations, we will certainly be among the last to return to normalcy—if that is even possible. The situation is similar for artists all over the world, with one glaring and inexcusable exception.

Let’s pick any developed country and gauge the artist’s plight. In the U.K, artist income has been drastically reduced as social distancing has shuttered venues and canceled performances. But people can still listen to music on the radio and thus British artists get paid for that airplay. In Canada too, live music is canceled, but artists still can earn some income from their music on the radio. In Germany, France, Mexico, Japan….every country in the world with a developed economy pays performers when their work is played on the radio. This income is not charity; it is paid to them as a fair economic transaction.

Which brings me back to that glaring and inexcusable exception, the United States of America: the one country in the world that should be a leader in free market transactions, a leader in protecting intellectual property, and a leader in assuring fair pay for one’s work. Yet sadly, we are the one country that does not recognize a performance right for sound recordings.

Not only are we out of step with the rest of the world, we’re out of step with our own values.

Radio is the only business in America that can use someone else’s intellectual property without permission or compensation. Fixing this copyright anomaly should be a priority of the Senate Judiciary Committee.

For years, we have worked with the National Association of Broadcasters to try to resolve this historic injustice. We have passed legislation out of committees in the House and Senate, we have engaged in years-long negotiations, and we have had business-to-business conversations. We want to treat radio as partners, just as we partner with every other music platform. Ultimately, the NAB has opposed every effort.
But the game changed this Congress with the introduction of the Ask Musicians for Music Act, or the AM-FM Act.

Previous efforts to resolve this issue focused on bringing radio into the same legislative regime as internet and satellite radio—including a compulsory license that allows them to play any recording for a fee determined by a rate court—but faced persistent objections from the broadcasters. So Senator Marsha Blackburn and Representative Jerry Nadler introduced the AM-FM Act to address these objections. The bipartisan, bicameral bill simply allows the marketplace to find the solution.

The NAB objected to previous legislation because they said radio was promotional. OK, the AM-FM Act allows musicians to give their music to radio for free if they want.

The NAB objected to previous legislation because they said it was a “tax.” OK, the AM-FM Act dismisses this absurd argument as any fee paid would be a private transaction.

The NAB objected to previous legislation because they said it would put small stations out of business. OK, the AM-FM Act caps music royalties for small stations at less than one dollar and fifty cents a day.

With all of the NAB objections addressed, you might think they would support the legislation and be willing to let go of their historic anti-free market loophole.

On the contrary, instead of meeting artists halfway, particularly in our greatest time of need, they oppose the AM-FM Act. They turn to Congress not to seek mutually beneficial solutions, but to seek new unfair advantages—asking Congress for access to small business loans for some of the largest media companies in the country and having government advertising directed to their companies over their competitors.

Any future relief package should get people back to work, not give industries unfair advantages. Unfortunately, musicians will not be able to get back to live performances soon, so the next stimulus should ensure they get paid fairly for their music that has been a lifeline for our fellow citizens. As the Section 512 study showed last week, there are many ways Congress can do more to help the music community, such as including the AM-FM Act in the next COVID-19 bill.

Certainly, fairness and economic logic dictate that no “giveaways” for broadcasters should be included in the next stimulus bill unless their historic injustice to artists is ended once and for all. The radio industry is celebrating its 100 anniversary this year. Can we all agree that a century is long enough for radio to join every other platform and every other country in paying fairly for the music that drives their business?

Just two weeks ago the NAB CEO, Gordon Smith, told his members: “We don’t know how long this pandemic will last, or what the lasting effects of it might be on our economy. But there is one thing I do know… broadcasters endure.”

I wish I could tell our members the same thing.

In this crisis, many workers are sadly not getting paid because their work is not needed at this time. But on radio, musicians are not getting paid while their work is needed more than ever. The current crisis has shone a bright spotlight on this injustice. And the time to fix it is now.

Thank you.
Chairman Tillis, thank you so much for convening this panel discussion today and for offering me this opportunity to share the small and medium sized enterprise perspective of independent record labels and the recording artists they work with regarding the scope of music rights within the Digital Millennium Copyright Act. Thank you also to Ranking Member Coons and all the staff for members of the subcommittee for shedding some light on this crucially important issue to my members.

My name is Dr. Richard James Burgess, and I am the President and CEO of A2IM, the American Association of Independent Music and the voice of independent record labels.

As you know, COVID-19 has placed enormous strain on music creators of every genre, in every state across the country. A2IM represents more than 700 record labels in 33 states, including Merge Records, a small label founded in 1989, and operated since then in Chapel Hill, North Carolina. You may have heard some of their great acts like Durham, North Carolina based Hiss Golden Messenger, or Alejandro Escovedo, a punk rock pioneer and our Independent Icon award winner for this year, who records his music in Hillsborough, NC headquartered, Yep Roc Records.

A2IM members are true small businesses. Of our record label members, more than 140 make less than $1 million a year, and several dozen are sole proprietors.

Musicians are struggling more than they should during COVID-19 mainly because of the largest blind spot in the DMCA, its failure to create a performance right for sound recordings when publicly performed on terrestrial radio.

The DMCA expanded the statutory license created by the Digital Performance in Sound Recordings Act of 1995 so that as a result both interactive and non-subscription, non-interactive digital radio has to pay sound recording copyright owners for the content they use. But terrestrial radio was exempted - given a free pass. Any rationale by which they could justify this in 1998 is completely gone more than twenty years later when there are virtually no physical sales to promote.

But before I dive further into A2IM’s views on the terrestrial performance right, I feel obligated to discuss the DMCA’s safe harbor and notice-and-takedown provisions and how they harm music creators.
The Digital Millennium Copyright Act was a boon to artists and labels alike when it was enacted in 1998. Unfortunately, the systematic abuse of the law makes it necessary for it to be rebalanced to lift the insurmountably one-sided burden that currently falls on music creators and copyright owners.

Designed for a dial up, pre-streaming, pre-social media, and pre-UGC world, the DMCA’s original purpose was to promote a healthier balance in the online music market, to allow nascent digital services to thrive while protecting creators rights, but the safe harbor component of the legislation is not adequate for today’s market realities and it now shields companies who act in bad faith and make profits on the backs of creators. “Safe harbors” have been wrongly manipulated to protect businesses that use unlicensed music to attract visitors and profit off them.

My members lose money every day as a result of piracy, making a fair system of compensation for licensed works all the more important. Negotiations on licensing agreements often turn on two questions: the price the service will pay for music, and the steps they will take to police the rampant piracy. The DMCA safe harbors leave very little room to negotiate on the latter, and as to the former, Congress’s failure to enact a terrestrial sound recording performance right creates an artificial floor of $0 on any market rate negotiation. Attempting to compete with “free” is at the root of the systematic undervaluing of recorded music that has persisted since the Napster era.

In inflation adjusted dollars, music industry revenues hover at around half of what they were in the year 2000. And despite what you may hear from other witnesses today, broadcast radio is incredibly profitable and will remain so for some time to come. According to Nielson, 272 million Americans listen to AM/FM radio each week, and time spent listening to radio is on the rise from 45 minutes a day to 58 minutes a day in the last year, among AM/FM listeners. More than $10 billion of advertising revenue generated by the U.S. terrestrial radio business came from music dominated formats—79% of all revenue in 2018, which is more than the $9.8 billion, was earned that year by the creators and owners of the very same music. I don’t know of another industry that is forced by law to hand over its primary product for zero compensation so that another industry can profit from it.

At the most basic level, our copyright system is built on the premise that by creating a property right Congress could live up to its constitutional mandate to promote the progress of science and useful arts. Just two-years ago, with enactment of the Music Modernization Act, Congressional leadership showed that there is room for compromise in decades old music licensing fights. The same should be true with the terrestrial sound recording performance rights issue.

But first, we must accept some stunning trends and basic facts. It is smart politics for the National Association of Broadcasters to talk about localism and their mom and pop members. But the truth is that when the NAB speaks in opposition to instituting a sound recording performance right for terrestrial radio, they are doing so on behalf of mega radio conglomerates that are driving a trend of consolidation, layoffs, and regulatory power grabs that is about anything but localism.

At least 75 nations have a performance right, which means that foreign broadcasters pay royalties to songwriters, composers, and performers. But since there is no equivalent right in the U.S. under certain applicable treaties, foreign performance rights societies are not required or can simply
choose not to distribute these royalties to American recording artists and copyright owners of sound recordings. Low-side estimates suggest that this forces American artists and record labels to leave $70 to $100 million dollars on the table overseas every year.

According to data presented by Inside Radio, the five largest radio conglomerates in the country - iHeartMedia, Cumulus, Townsquare, Entercom and Saga Communications – own more than 1,900 AM/FM stations. And Salem Media Group, the number six station group in the country, where my fellow panelist Scott Hunter works as Vice President and Senior Counsel, owns 109 additional stations and generated more than $250 million in revenue last year.

And, according to several media reports, the largest of these conglomerates could soon be bought by the mega conglomerate that owns or controls SiriusXM, Pandora, Ticketmaster, and Live Nation.

COVID-19 has been hard for everybody, and the present conditions may not be conducive to selling advertising, which is how broadcasters make money, but that will turn around soon. On their last quarterly earnings call, iHeart Media CEO Bob Pittman disclosed that “May bookings are slightly up over April and we see June being better than May.”

It’s critical to look at the shocking trend away from localism when considering the unbalanced bargain that the lack of a terrestrial sound recording performance right represents. We have heard time and again that royalty free radio play is appropriate and not a diminution of recording artists’ intellectual property rights because of the inherent promotional value of airplay. They used to claim that it helped sell records but since the sales of music on a physical medium died, they now talk about promoting live shows and touring acts. Setting aside the painful and obvious truth for artists and music fans that live shows won’t resume any time soon and ignoring the fact that not all artists can tour, it is impossible to justify any claim that national radio mega conglomerates can help promote local shows when programing is beamed in from Los Angeles, New York, or elsewhere.

Consumers simply aren’t turning to AM/FM radio for music discovery as they may have long ago. Consumers learn about new music through personalities they follow on Twitter and Instagram, Pandora and Spotify continue to grow their followings, and large-scale consolidation in the radio industry means that fewer and fewer new artists are breaking through via radio.

In January, long before the economic impact of COVID-19 could be known, iHeart Media laid off somewhere around a thousand local station employees, many of whom were on-air personalities and DJs. This represents a concerted effort to shift away from local programming, homogenize radio play, and cut costs at the expense of jobs. This trend is especially damaging to the regional acts that used to start out locally on the independent labels I represent.

This comes on the heels of intense lobbying by the NAB in 2017 that got the Federal Communications Commission to reverse the main studio rule, which had required local radio stations to actually have an employee on the ground in the markets they serve. And last month, the NAB was at it again, appealing to the FCC to relax the ownership caps that stop radio conglomerates from owning unlimited radio stations in many markets. Overt anti-localism. Eliminating true local radio ownership.
As explained in the independent comments filed at the FCC by true small broadcasters, lifting these caps would only help mega conglomerates whose portfolios of stations now bump up against the caps. In their filing to the FCC, the Multicultural Media, Telecom and Internet Council did an analysis of 2018 Nielson reports and found that only two groups bump up against the five station FM subcap and two groups bump up against the eight-station cap.

Taxi Productions, Inc., owner of Compton-based KJLH-FM for over 40 years, stated to the FCC in 2019 that “No one has shown that adding a few more stations to a conglomerate mix will make the difference between survival and going out of business for companies constrained by today’s caps, but independent broadcasters like KJLH know that adding those stations could break the backs of small station owners.”

This is the backdrop upon which we ask the subcommittee to consider the terrestrial sound recording performance right. Current law says to recording artists that what they create has no value. We know that the broadcasters demand payment for the content they create when it’s distributed by cable and satellite video distributors, and in fact they won a big fight in Congress last year to further strengthen their hand in negotiations to get paid. What is good for the goose should be good for the gander.

I’m begging this subcommittee to take into account the interests of my small record label members. There have been many legislative attempts (dating back to the 1920s) to create a terrestrial sound recording performance right. The current AM-FM Act, introduced by Senator Blackburn and House Judiciary Committee Chairman Nadler, exempts truly small broadcasters, non-commercial radio stations, and college radio stations.

It’s time for this unfair and exploitative practice to end, and for artists to be paid when radio plays their music, just as satellite radio, internet radio, and streaming services do. That can only happen if Congress makes it so. My members need your help, and we will be a partner in finding a resolution.

Thank you again for the opportunity to testify as a part of this forum, and I would be happy to answer any questions.
Briefing on

“Scope of Music Rights within the DMCA”

United States Senate
Committee on the Judiciary
Subcommittee on Intellectual Property

May 27, 2020

Statement of Curtis LeGeyt
Chief Operating Officer
National Association of Broadcasters
I. Introduction

Good afternoon, Chairman Tillis, Ranking Member Coons and staff of the Subcommittee on Intellectual Property. My name is Curtis LeGeyt, and I am the chief operating officer of the National Association of Broadcasters (NAB). I am proud to testify today on behalf of our more than 6,000 free, local, over-the-air radio members who serve your constituents across the United States.

When it was enacted 22 years ago, the Digital Millennium Copyright Act (DMCA) updated copyright law to account for sweeping marketplace changes brought about by the emergence of the internet. As it relates to music licensing, the law created a new framework to allow for the then-nascent streaming industry to lawfully license sound recordings. Wisely, the law, in tandem with its predecessor, the Digital Performance Right In Sound Records Act, was narrowly crafted to account for copyright’s application to this new and emerging method of music consumption without upsetting years of successful music licensing relationships between the music community and incumbent licensees, including broadcasters.

Two decades later, these changes in the music licensing laws are an incredible success story. They enabled the growth of lawful music streaming services to the benefit of recording artists whose revenues hit record highs in 2019, all while preserving a broadcast radio model that continues to benefit those same performers and serve the public interest. Moreover, radio stations’ critical role as first informers, emergency lifelines and entertainment mediums is especially valuable to Americans – and that has never been more apparent than today, during the coronavirus pandemic. In the face of decimating and unprecedented losses in advertising revenue – as well as risk to their own health and safety – local radio stations and their employees are
reporting for duty every day during this crisis, providing the latest local information that listeners need, saving lives and keeping communities connected.

I look forward to discussing today the enduring value of broadcast radio, the importance of the legal framework that governs it in support of the public interest and one area of law that should be modernized to better enable consumer access to broadcast radio programming in the digital space.

II. Broadcast Radio Remains Unique Among All Communications Mediums

This year marks the 100th anniversary of broadcast radio. Over our storied history, radio stations have served our listeners in countless beneficial and significant ways. From President Franklin D. Roosevelt’s fireside chats to Martin Luther King Jr.’s speeches, from the first U.S. commercial broadcast on Election Day 1920 to the current coronavirus coverage, radio is part of the fabric of American life.

More than 272 million listeners tune into U.S. radio stations every week\(^1\) because our programming, service and cost remain unique among all entertainment mediums. Our locally focused content informs, educates and alerts listeners to important events impacting their communities. Our resilient architecture ensures that listeners will not lose access to their hometown team in the bottom of the ninth inning, or – more importantly – to an emergency alert during a time of crisis. Local radio broadcasters do all of this through a service that is completely free to listeners, requiring no monthly subscriptions or expensive data charges.

\(^1\) [https://www.musicbusinessworldwide.com/272m-americans-listen-to-the-radio-each-week-7m-more-than-in-2016/](https://www.musicbusinessworldwide.com/272m-americans-listen-to-the-radio-each-week-7m-more-than-in-2016/)
As a result of its massive popularity, radio continues to be an engine of local economic activity. Local radio stations employ more than 130,000 people nationwide and contribute more than $475 billion to the U.S. economy through our broad stimulative effect.²

Radio also continues to be anchored in its ethos of local public service. Over the course of this pandemic alone, radio broadcasters have donated airtime to NAB-produced public service announcements (PSAs), running these spots 395,415 times for an estimated ad value of $63,035,305. These NAB-produced PSAs include both messages on coronavirus prevention and, more recently, mental wellness and hope, and are in addition to campaigns that many stations are conducting on their own. Yet these PSAs only scratch the surface of the contributions that our local radio stations make to their communities as they organize food bank and blood drives, broadcast church services and high school graduations, enhance children’s educational programming, promote carry-out options for local restaurants and main street businesses and fundraise in their hometowns.

The following are a few recent examples of local broadcast public service in the midst of the current pandemic that will be familiar to members of this committee:

- Radio personality Tim Greene of WSGE-FM in Charlotte, North Carolina, realized that some students didn’t have access to computers to be able to do their schoolwork from home, so he bought computers for them.³

- Forever Media in Delmarva has been innovating to find different ways to help their listeners and communities. They are selecting a listener each day to receive up to $200 to pay a monthly bill during the stay at home emergency, from April through July. Through the “Forever Cares” page on their website, businesses can post information about their

hours of operation, contact information, products or services and safety measures they have implemented for their employees and customers, all for free. And they’ve created another page where parents can post information about their graduating seniors in a virtual yearbook. They can list the school, student activities, future plans and a favorite quote, again for free.⁴

- Broadcasters in Charleston, South Carolina, came together to raise over $387,000 for the Lowcountry Food Bank (LCFB) in a single week in April. LCFB says it can provide six meals from every $1 donated – meaning the possibility of over 2.3 million meals for those in need from this effort.⁵

- WGMT-FM in St. Johnsbury, Vermont, is teaming up with local schools to give kids “quests” to do while out of school.⁶

- More than a dozen local broadcasters in Austin, Texas, joined together on April 3 to raise over $4 million for All Together ATX, a relief fund created to assist those suffering in central Texas.⁷

- WDKN-AM/FM in Dickson, Tennessee, produced a five-part series of radio programs focused on coronavirus-related mental health issues. The hour-long programs ran over a three-week period during mid-day and are also available online. The programs feature experts and professionals in a variety of mental health fields, including student health, substance abuse and suicide prevention.⁸

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⁴ https://www.foreverdelmarva.com/
⁸ https://www.wdkn.com/podcasts/
• Illinois broadcasters, in partnership with Feeding Illinois and the Illinois Broadcasters Association, raised more than $1.5 million for local food banks across the state through their Uniting Against Hunger campaign.9

• Neuhoff Media created an initiative designed to connect central Illinois students, teachers and parents while schools are closed, providing educators daily access to local radio stations to present lessons and read books on air.10

• Radio Keokuk (WCEZ-FM and KOKX-AM) in Keokuk, Iowa, has created a special section on its website for local businesses to advertise their current availability. The section highlighting local bars and restaurants contains current information, hours, phone numbers and modes of contact along with their menus for carry out and delivery. The stations are offering free on-air ads to local businesses.11

• iHeartMedia’s East Hartford, Connecticut stations distributed N95 face masks to firefighters and police officers, in addition to providing face masks and meals to the public. In two weeks, these stations helped local partners provide more than 21,000 pounds of food to those in need.12

• KHTK-FM in Sacramento, California, has teamed up with local partners to deliver nutritionist-approved “Ready to Eat” bags to home-bound seniors who are in self-isolation.13

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9 https://marketshare.tvnewscheck.com/2020/05/07/illinois-broadcasters-unite-to-raise-1-5-million-for-food-banks/
11 http://www.radiokeokuk.com/2020/03/supporting-each-other-local-businesses-offering-curbside-delivery-services/
13 https://www.sacrepublicfc.com/news_article/show/1101422
• Bonneville’s Salt Lake City, Utah, stations launched “Stronger Together Utah” to promote local businesses that are remaining open and highlight individual efforts to support businesses and communities during this time.14

These local efforts sit separate and apart from the significant nationwide initiatives on which our radio groups are also leading to support those in need during this crisis. For example:

• Beasley Media Group, Cox Media Group, Alpha Media, Neuhoff Media and Townsquare Media this month partnered with BMI and country music’s top songwriters – including Luke Bryan – for a nationally broadcast concert to benefit the MusiCares COVID-19 relief fund.15

• iHeartMedia has partnered with an incredible collection of entertainers, business leaders and athletes to produce and air commencement speeches for 2020 graduates across its on-air and digital platforms.16

• Cumulus Media and other independent radio groups – over 10,000 radio stations in all – came together as part of the Radio Cares Campaign to raise over half a million dollars for Feeding America and 200 member food banks across the country.17

• Univision launched its “Unidos Por Los Nuestros” multimedia campaign, which aims to close the in-language information gap that has emerged for Hispanic Americans during the pandemic.18

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15 https://musicrow.com/2020/05/luke-bryan-to-co-host-a-salute-to-the-songwriters-radio-concert-benefit/
17 https://www.wivk.com/2020/05/04/radio-cares-feeding-america-emergency-radiothon-raises-more-than-500000/
Of course, you cannot talk about broadcast radio without highlighting the countless artists whose careers were made when their first song played over our airwaves or our listeners whose memories are indelibly intertwined with a song playing on their favorite station. Performers consistently acknowledge the value of their songs being played on the radio. Turn on any award show and you will hear artists thanking radio for giving them their start. Just last week, emerging country artist Drew Baldridge posted about his first time being played on The Big 98 in Nashville. He wrote, “This is what I’ve always dreamed about” and linked video of himself listening to his song being played, barely able to put together a sentence, repeating “this is a dream.” So many new artists share Drew’s dream, and our radio broadcasters are just as delighted to help them achieve it.

III. The Music Licensing Framework Governing Broadcast Radio Promotes the Public Good

Radio’s place in the fabric of American culture is not accidental. It is the product of policy choices and a resulting legal framework that enables broadcast radio to remain completely free and dedicated to local communities. Anyone in the country can access local radio without needing a subscription or internet connection. In emergencies and at times when other forms of communication fail, radio is there to deliver critical information to listeners across America.

For a century, while the world around radio changed dramatically – including since the enactment of the DMCA – the popularity of broadcast radio has not. Its enduring listenership is testament to consumers’ continued demand for a free listening alternative, populated by familiar personalities who are part of their local communities. As the music industry grows and streaming offerings expand, broadcast radio remains as popular as ever, the number one source for music
listening and discovery year after year. As a result, the mutually beneficial relationship between performers and radio – free airplay for free promotion – continues to thrive, and the laws governing that relationship continue to serve the public interest.

When 272 million listeners hear a new artist or song they like on the radio, consumers then engage with that artist in other ways, whether it’s streaming, through social media, or by attending live events – all of which adds up to significant income for successful performers through the promotional value of radio. To put the reach of local broadcasting in context, a single song played during the morning drive on Urban One’s adult contemporary station WBAV-FM in Charlotte, N.C., is the equivalent of more than 14,300 unique streams on Spotify or Pandora.

Some of my fellow panelists have suggested that despite broadcast radio’s time-tested benefits to both performers and listeners, Congress ought to overhaul the current music licensing laws that apply to local radio. Specifically, they suggest the imposition of a new sound recording performance royalty on local radio stations.

Such an abrupt change in law that governs relationships between incumbent rights holders and users would be wholly inconsistent with Congress’s long-held approach to copyright policy. Whether it was the emergence of player piano rolls, copy machines, VHS recordings, streaming services or search engines, Congress has consistently focused its major copyright reforms on updates to law that are needed to account for new or emerging technologies – not mediums that have existed for nearly a century. It would be unprecedented for Congress to upend copyright laws that have governed decades-long relationships, on which entire industries have been built to the mutual benefit of both as well as the public, and where the fundamental nature of each remains intact.

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19 [https://www.musicbusinessworldwide.com/272m-americans-listen-to-the-radio-each-week-7m-more-than-in-2016/](https://www.musicbusinessworldwide.com/272m-americans-listen-to-the-radio-each-week-7m-more-than-in-2016/)
Moreover, the imposition of a new performance royalty is simply economically untenable for local radio broadcasters. While our critical lifeline service is free to listeners, it is not to those who provide it. The current pandemic has demonstrated not only how important broadcast radio is, but also the narrow margins with which radio owners operate. Contrary to what certain of my fellow panelists have asserted in recent public statements, this financial reality is true for radio stations of all sizes and in all markets.

Radio stations invest considerable amounts of money in producing content, employing on-air talent and updating the equipment they need to run successful stations. They also pay substantial FCC license fees, and hundreds of millions of dollars in royalties to performing rights organizations like ASCAP and BMI and streaming collectives like SoundExchange. Without reliance on the subscription fees that are paid to streaming services and satellite radio, broadcasters cover these costs entirely through advertising revenue. Those in the radio industry know that during tough times, businesses’ advertising expenditures are the first thing to be cut and the last to return. During this pandemic, that revenue source is on life support, and this situation further illustrates the policy interest in keeping broadcast radio’s costs down.

Meanwhile, thanks in large part due to the continued exposure given to artists on radio, the American recording industry is the largest in the world, whether measured in terms of revenue or creation and export of music. Others on the panel today will likely refer to other countries that impose performance royalties on playing songs over the air as a justification for changes to U.S. law. But the music and broadcast industries incentivized by our copyright framework surpasses all others in the world, and many of those foreign countries combined.

For these reasons, Senators John Barrasso (R-WY) and Martin Heinrich (D-NM) introduced the Local Radio Freedom Act (S. Con. Res. 5/H. Con. Res. 20), which opposes any
new performance royalty on broadcast radio. NAB thanks those Senators and the combined 237
Senate and House cosponsors of the resolution for their support of local radio, and we look
forward to working with members of this committee in support of that legislation.

The recording industry is well aware that NAB has in the past and continues to welcome
the opportunity to discuss alternative music licensing frameworks that might enhance the mutual
benefit of performers and broadcasters while furthering the public interest. However, any
performance royalty unilaterally imposed on local radio stations is not justified as a matter of
copyright policy and will further stress the economics of the current free and local broadcast
radio model.

IV. Current Webcasting Laws Stifle Radio’s Digital Innovation

While the laws governing public performances on broadcast radio have worked to the
mutual benefit of recording artists and broadcast listeners, the application of the current
webcasting laws\(^{20}\) to local broadcasters’ digital offerings have not. Music audiences today
demand a variety of platforms, and broadcasters have widely sought to come up with innovative
ways to meet those desires. However, for broadcasters who strive to serve their listeners by
offering simulcasts of their terrestrial programming through online platforms, there is simply no
formula for offsetting the significant webcasting rates set by the Copyright Royalty Board (CRB)
with digital revenues. For this reason, many broadcasters currently choose either not to stream or
to limit streaming. This does not serve the public interest.

Even outside of broadcast, the non-interactive webcasting space lacks effective
competition to maximize consumer choice. Today, the only companies that can attempt to take

\(^{20}\) 17 U.S.C. 114(f).
on the challenge of a non-interactive streaming service (as distinct from on-demand platforms like Apple Music, Spotify, and YouTube) are those that are successful in other businesses – whether it be broadcasting, satellite radio, internet search or consumer electronics. Those entities can leverage that success to subsidize a long-term investment in music distribution. For example, SiriusXM radio acquired Pandora in 2019, making it the largest audio company in the world. But even after the acquisition, Pandora continued to shed thousands of subscribers. This leaves a limited pool of competitors in this space and little opportunity for new entrants, harming both the music industry and consumers.

For broadcasters, the digital space offers an opportunity to expand the footprint of the public benefits highlighted above, such as locally focused weather, AMBER Alerts, emergency information and other public service announcements. It also provides the chance for exciting new innovations that improve the listening experience, like radio feeds that automatically transition from terrestrial to streaming as a driver leaves a local market. But the current rates set by the CRB undermine this possibility. This is true whether you are a large broadcaster or small broadcaster, or your station is based in Washington, D.C., Raleigh or Dover. The revenue that can be generated on the digital side of the radio business simply does not, and cannot, offset those streaming costs.

As a result, the current non-interactive webcasting royalties set by the CRB remain significant impediments to broadcasters’ ability to innovate in the digital arena and diminish the possibility of our increased service to your constituents.
V. Conclusion

Thank you for inviting me to testify today. The role of local broadcast radio in your communities is as important today as ever. We are extremely proud of role we play both in serving your constituents and supporting our music industry partners.

I look forward to answering your questions.
Statement of
C. Colin Rushing
Chief Legal Officer
SoundExchange, Inc.

United States Senate Committee on the Judiciary
Staff Briefing on
The Scope of Music Rights within the DMCA

May 27, 2020
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

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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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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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
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. 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.

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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.