

August 11, 2009

The Honorable Patrick Leahy  
Chairman of the Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Jeff Sessions  
Ranking Member of the Committee on the Judiciary  
152 Dirksen Senate Office Building  
Washington, DC 20510

Re: S. 379/ H.R. 848 – Performance Rights Act

Dear Chairman Leahy and Ranking Member Sessions:

This letter responds to questions raised by the Digital Media Association (“DiMA”) about the savings clause language in the Performance Rights Act. This language is intended to protect the economic interests of songwriters and music publishers from any adverse impact caused by the expansion of the performance right in sound recordings to terrestrial radio broadcasting. As you know, for many decades, songwriters, composers and music publishers, through their respective performing rights organizations (PROs), have implemented a well-established regime for licensing the public performing right in musical works to terrestrial radio broadcasters. The radio performing right royalties earned by songwriters are crucial to their economic well-being, and it is imperative that any legislation not jeopardize this existing licensing regime and revenue stream. To that end, our position is that the Performance Rights Act must include ironclad -- and enforceable -- language guaranteeing that songwriters’ and publishers’ livelihoods will not be harmed as a result of the proposed new public performance right in sound recordings for terrestrial radio.

To ensure against any such harm, the songwriters have offered certain amendments to Section 114 regarding the relationship between the established public performance right in musical works and the proposed new public performance right in sound recordings. In 2008, ASCAP, BMI, SESAC, SGA, NMPA and NSAI (the songwriter and publisher groups) and the RIAA reached an agreement on language in the Performance Rights Act that protected songwriters’ interests. Songwriter and publisher groups agreed that as long as the songwriter protection language is included in the legislation we would not oppose the creation of any new performance right for sound recordings. Attached is the Songwriter/Publisher letter dated May 15, 2008 relaying this agreement to Congress last year. The letter proposed savings clauses in Section 114(i) and (f)(6) that are in substance the same as the language currently included in the House bill (H.R. 848). H.R. 848 does not include all of the amendments we proposed in 2008, however; at the urging of House staff, songwriters and publishers agreed earlier this year to drop the important “willful infringement” language that was included in our original requested amendments (demonstrating the reasonableness of our approach to this legislation).

Our proposed savings clauses in Sections 114(i) and (f) are similar to the provision currently found in Section 114(i). That provision was adopted by Congress in the Digital Performance Right in Sound Recordings Act of 1995. It intended to protect PROs by

disallowing their rate courts (or other judicial bodies) from considering evidence of license fees payable for sound recordings in setting the rate or fees payable for public performances of a PRO's musical works. The intent for the current 114(i) was in 1995 – as it remains now – to protect songwriters' income against the argument that payment of new fees for sound recordings should adversely impact the PROs' important royalties in any way. Indeed, Congress clarified its intention in 114(i) itself: "It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6)." The savings clauses contained in H.R.848 [and S. 357] are more specific than the 1995 language regarding this important point, but the intent is the same - they provide expressly that the sound recording performance rates or fees cannot be cited for the purpose of *adversely affecting* the rates and/or fees payable for musical works.

DiMA apparently believes that the language would prevent them from disputing that the rates or fees payable for sound recording royalties should serve as any kind of benchmark for the musical work royalties. This is incorrect; the proposed legislation says no such thing. The "adverse" effect language is intended only to foreclose or forestall the anticipated arguments of DiMA, the radio industry and other new media music users that payment of sound recording fees themselves should come at the expense of, or should be the basis for lowering or "capping", PRO license fees or rates.

In short, we believe DiMA's concerns about the savings clauses are ill-founded. These clauses are necessary because DiMA, the broadcasters, and others have made numerous public statements that songwriters' existing fees or rates should decline precisely because fees would now be payable for the performance of sound recordings. The performing right for musical works has a long history; its independent existence and value should not be impeded or lessened by gatekeepers, financial or otherwise. The savings clauses ensure that such independence is maintained.

The amendment to Section 114(i), the songwriter/publisher protection provision of the current Section 114, is directed at comprehensively ensuring that payments for the performance right in sound recordings by all affected music users should have no adverse impact on the existing fees paid for musical works. The amendment to Section 114(f)(6) is directed specifically at avoiding any arguments that the new license rates paid to SoundExchange by terrestrial radio broadcasters should be the basis to "reduce or adversely affect the license fees payable" to songwriters and music publishers. Songwriters' and music publishers' non-opposition of the bill is conditioned on the proposed protective clauses being included in the final bill.

Very truly yours,

Songwriter, Composer, Lyricist and  
Publishing Groups

(list follows on following page)

August 11, 2009  
Responding Letter of Songwriters, Composers and Music Publishers

AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS & PUBLISHERS ("ASCAP")

BROADCAST MUSIC, INC. ("BMI")

NATIONAL MUSIC PUBLISHERS  
ASSOCIATION ("NMPA")

NASHVILLE SONGWRITERS  
ASSOCIATION INTERNATIONAL ("NSAI")

SESAC, INC. ("SESAC")

SONGWRITERS GUILD OF AMERICA  
("SGA")

THE HARRY FOX AGENCY, INC. ("HFA")

Attachment (Songwriter/Publisher Letter Dated May 15, 2008)

cc: Honorable Dianne Feinstein (as chair of hearings on August 4, 2009)

SONGWRITER/COMPOSER/PUBLISHER GROUPS LETTER

May 15, 2008

Honorable Howard L. Berman  
Chairman of the Subcommittee on Courts,  
the Internet, and Intellectual Property  
Committee on the Judiciary  
2221 Rayburn House Office Building  
Washington, D.C. 20515

Honorable Patrick Leahy  
Chairman of the Senate  
Judiciary Committee  
433 Russell Senate Office Building  
Washington, D.C. 20510

Re S. 2500/H.R. 4789

Dear Chairmen:

This letter is to advise you that the undersigned organizations do not oppose recognition of a public performing right in an audio radio broadcast of a copyrighted sound recording, and in particular, as was set forth in S. 2500 and H.R. 4789 (the "Legislation"), as those bills were originally introduced, provided such proposed Legislation is amended to add certain protections of interest to the undersigned, in the form attached hereto. This letter shall not prevent the undersigned from objecting to any differences or changes made to this Legislation or subsequently proposed legislation that would have a material adverse effect on the undersigned, as determined by the undersigned in our sole reasonable discretion.

The attached amendments replace a prior six party statement of position previously submitted by all of the undersigned organizations in December of last year. Notwithstanding the replacement of that statement of position, we reserve for future consideration the opportunity to seek, in separate legislation, a law confirming, clarifying and recognizing the existence of a public performing right in copyrighted musical compositions that accompany, and are embodied in the digital delivery or transmission of digital audiovisual works as well as a public performing right and/or a mechanical right in the delivery of an interactive digital stream ("Rights Sought"). For the avoidance of doubt, if any person other than the undersigned proposes an amendment to the pending Legislation to include the Rights Sought, as enumerated above, or proposes inclusion in subsequent legislation of such Rights Sought along with a public performance right in a copyrighted sound recording embodied in an audio radio broadcast, the undersigned shall not be precluded from supporting any such proposal.

We take this position because we support recognition of the concept of harmonization, that is, bringing the law of the United States into closer alignment with international practices and further, because we recognize that performers, whose performance is embodied in a sound recording, including recording artists, musicians, vocalists, and the copyright owners of such sound recordings, should be fairly compensated for such copyrighted works.

Very truly yours,

Songwriter/Composer/Publisher Groups  
(Signatories follow on next page)

NATIONAL MUSIC PUBLISHERS'  
ASSOCIATION

By: David M. Israelite  
Title: President & CEO

SESAC, INC.

By: Pat Collins  
Title: President & COO

THE HARRY FOX AGENCY, INC.

By: Gary Churgin  
Title: President & CEO

SONGWRITERS GUILD OF AMERICA

By: Rick Carnes  
Title: President

THE AMERICAN SOCIETY OF  
COMPOSERS, AUTHORS AND  
PUBLISHERS

By: John A. LoFrumento  
Title: CEO

NASHVILLE SONGWRITERS  
ASSOCIATION INTERNATIONAL

By: Steve Bogard  
Title: President, Board of Directors

BROADCAST MUSIC, INC.

By: Del Bryant  
Title: President & CEO

Attachment (Proposed Amendments)

cc: Mitch Bainwol, CEO and Chairman,  
Recording Industry Association of America

**ATTACHMENT TO MAY 15, 2008 LETTER OF  
SONGWRITER/COMPOSER/PUBLISHER GROUPS  
REQUESTED AMENDMENTS TO S. 2500/H.R. 4789**

The following provisions, drawn from the Joint Suggestions for Amendments to Possible Performance Right in Sound Recordings Legislation, Submitted by ASCAP, BMI, NMPA, NSAI, SESAC and SGA, are jointly proposed to be incorporated in the sound recording performance rights legislation:

Section 114(i) would be changed to read:

License fees payable for the public performance of sound recordings under section 106(6) shall not be cited, taken into account or otherwise used to set or adjust the license fees payable to copyright owners of musical works or their representatives for the public performance of their works for the purpose of reducing or adversely affecting such public performing right license fees for musical works in any administrative, judicial, or other governmental forum or proceeding, or otherwise. Public performing right license fees payable to copyright owners of musical works for the public performing right of their works shall not be reduced or adversely affected in any respect as a result of the rights granted by section 106(6).

A new Section 114(f)(6) would read:

Notwithstanding any other provision of this Section 114, in no circumstances shall the rates established by the Copyright Royalty Judges for the public performance of sound recordings be cited, taken into account, or otherwise used to reduce or adversely affect the public performing right license fees payable to copyright owners of musical works or their representatives by terrestrial radio broadcasters in any administrative, judicial, or other governmental forum or proceeding, or otherwise, and such public performing right license fees for musical works shall be independent of license fees paid for the public performance of sound recordings.

Section 114(d)(3)(C) would be modified to strike "an interactive service" and in its place add the new language in **boldface**:

Notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6), **a music user** may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording: Provided, That such license to publicly perform the copyrighted musical work may be granted either by a performing rights society representing the copyright owner or by the copyright owner.

After the first sentence of section 504(c)(2), a new sentence would be added as follows:

In any action brought by the copyright owner of a musical work for infringement of the right to perform that musical work publicly, in which the court finds infringement of that right and the copyright owner elects to recover statutory damages under this subsection, evidence that the infringer is licensed to perform publicly a sound recording of that musical work shall sustain the copyright owner's burden of proving willful infringement.

NATIONAL MUSIC PUBLISHERS'  
ASSOCIATION

By: DM2  
Name: DAVID ISAACITE  
Title: PRES + CEO

SESAC, INC.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

THE HARRY FOX AGENCY, INC.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

SONGWRITERS GUILD OF AMERICA

By: \_\_\_\_\_  
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Title: \_\_\_\_\_

THE AMERICAN SOCIETY OF  
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By: \_\_\_\_\_  
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ASSOCIATION INTERNATIONAL

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NATIONAL MUSIC PUBLISHERS'  
ASSOCIATION

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

SESAC, INC.

By: P. Collins  
Name: PAT COLLINS  
Title: PRESIDENT & COO

THE HARRY FOX AGENCY, INC.

By: \_\_\_\_\_  
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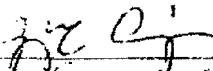
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By:   
Name: Gary F. Chagnier  
Title: President & CEO

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Songwriter/Composers/Publisher Groups Letter to Hon. Berman & Hon. Leahy, page 2

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By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

SONGWRITERS GUILD OF AMERICA

By: *Rick Carnes*  
Name: RICK CARNES  
Title: PRESIDENT

THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
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THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By: *John A. LaFurcata*  
Name: John A. LaFurcata  
Title: CEO

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Title: *President and CEO*

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