Testimony of David M. Israelite
President and Chief Executive Officer
National Music Publishers' Association
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Good morning Mr. Chairman, Ranking Member Nadler and Members of the Subcommittee. I appreciate the opportunity to appear before you today to discuss the impact of current copyright law on music publishers and their songwriter partners and to support legislation that would begin to remedy the pay inequity that today's law creates.

I serve as President and CEO of the National Music Publishers' Association (NMPA), the principal trade association of music publishers and their songwriter partners in the United States. The NMPA's mandate is to protect and advance the interests of music publishers and songwriters in matters relating to the domestic and global protection of music copyrights.

I urge the Subcommittee to consider several important points as you review the music licensing landscape.

First, copyright law today contains antiquated regulations that unfairly distort the value of creators' work. Provisions of the law – some of which were enacted more than a century ago – are in dire need of reevaluation to determine whether they are still necessary in the digital age. The copyright in a song is a property right, and should not be regulated by the government unless there is a compelling reason to do so. There should be a presumption that a property right should be valued in a free market.

Second, if any part of a songwriter's creative process must be regulated by government, then at a minimum creators deserve to be paid a fair market value. Congress should look first and foremost at ways to eliminate government regulation in the songwriting business. But in the absence of a free market, the processes that determine what creators are paid must be improved to attempt to reflect fair market compensation.

Third, Congress should reject any attempt to expand compulsory licenses, which would further erode the ability of creators to negotiate the terms under which their works are used. The music industry operates in a dynamic marketplace and Congress should exercise restraint when it comes to any additional regulation that could have long-term consequences for creators. Instead, Congress should allow private negotiations to dictate the terms of existing and future music offerings. There will be a great deal of debate about what would make it easier for a licensee who wants to use the works created by a songwriter. Those interests should be subservient to the property rights of those who create the works.

Finally, I thank Representatives Doug Collins and Hakeem Jeffries as well as the members of the subcommittee – including Chairman Coble – for supporting H.R. 4079, the "Songwriter Equity Act" (SEA). The introduction of this bill marks an important step to ensure that the interests of songwriters and publishers – which are too often overlooked – are at the fore of the discussion on music licensing. I will discuss the details of the legislation later in my testimony.

Two Separate Copyrights

As you know, there are two separate and distinct copyrights involved in music.

- The first copyright is for the underlying musical composition created by one or more songwriter, and often owned or represented by a music publisher. I am here representing that half of the music industry;

- The second copyright is for any recording of that song – commonly known as the sound recording copyright – and often represented by a record label.

It is crucial to appreciate that these two different copyrights are controlled and represented by different interests, and are often treated very differently under the law and through government regulation.

As the Subcommittee continues to review the Copyright Act, I trust you will recognize and address the inherent unfairness of today's status quo on songwriters and publishers. That gross unfairness is reflected in two simple yet striking data points:

- Seventy-five percent of the income for songwriters and publishers is regulated by outdated laws and antiquated government oversight, which has for too long resulted in devalued intellectual property rights and undervalued royalty rates;

- We estimate that songwriter and publisher revenues are significantly below what they would be if fair rate standards and free market negotiations were used to determine such royalties.

It is long overdue for Congress to consider seriously why the price for other forms of intellectual property such as movies, books, video games, magazines, television shows and recorded music are all properly negotiated in the free market, while songwriters remain uniquely singled-out and subject to heavy regulation. If this does not change, the ultimate outcome will be fewer professional songwriters and fewer songs, as many established songwriters will simply stop writing. Others will never start.

The Role of Music Publishers

A music publisher is a company or individual that represents the interests of songwriters by promoting and licensing the use of their songs. Music publishers are often involved at the very beginning of a songwriter's career. After signing a writer to a publishing deal, a publisher will do everything from helping the writer find co-writers to securing artists to record the writer's songs. Frequently, when a songwriter enters into a relationship with a publisher, the publisher will advance desperately needed money to the writer to help pay living expenses so the writer can focus on what he or she does best: write music.

Songwriters and music publishers attempt to earn a living through three primary means of utilizing their separate copyright – mechanical reproductions, public performances, and audio-visual synchronizations. The ratio of how much each contributes to the bottom line has been in flux in recent years as listeners move away from ownership models such as CDs and downloads toward streaming and video as their preferred mode of music consumption.

It is important to note that songwriters and publishers depend on royalties for their livelihood. Unlike recording artists, most songwriters cannot supplement their income through touring, merchandise sales, or endorsements.

Mechanical Reproductions – Section 115

The mechanical reproduction right affords songwriters and publishers a royalty when a musical composition is embodied in a physical format such as a record, CD or – more commonly in the digital age – when a consumer downloads a song from iTunes or streams music through an interactive service like Spotify.

The mechanical reproduction right is regulated by Section 115 of the Copyright Act, which imposes a compulsory license system that dates back to 1909. At that time, Congress

chose to regulate the mechanical reproduction of musical compositions embodied on player piano rolls to prevent exclusive deals between music publishers and player piano makers that might lead to a monopoly in the player piano roll market. While player piano rolls disappeared long ago, this outdated regulation continues to undermine the exclusive rights of music publishers and songwriters. As a result of this Congressional decision that pre-dates World War I, songwriters and music publishers have been denied the ability to negotiate the value of their intellectual property in a free market.

Instead, this statutory mechanism allows anyone who wants to use a musical work to obtain a license to reproduce and distribute copies of the work, in exchange for paying a royalty set by the government. In 1909, the rate for mechanical licenses was set directly by Congress at 2 cents per song. Today, rates are set by a three-judge panel called the Copyright Royalty Board (CRB). Based on the initial price set in 1909, today's mechanical rate would be more than 50 cents if adjusted for inflation. Remarkably more than 100 years later, the current statutory rate stands at only 9.1 cents.

This paltry increase is due to the fact that the law directs the CRB to apply an antiquated, below-market standard when setting mechanical rates. This standard – known as an 801(b) standard – requires the CRB to ensure "[the] copyright user a fair income under existing economic conditions," and to "minimize any disruptive impact on the structure of the industries involved...." In other words, the law not only dictates that songwriters and publishers must license their songs to everyone, but also imposes the price they will receive based on what the CRB thinks potential licensees can pay without any disruption to their businesses. Without question, the law's emphasis on the interests of users depresses the rate that music publishers and songwriters might otherwise be able to negotiate in a free market.

On the other side of the music business, the recorded music industry has been able to thrive in the marketplace and negotiate freely without suffering under the burden of a compulsory license regime. When it comes to the use of master recordings to make and

distribute CDs or digital downloads, there is no compulsory license or obligation to license whatsoever. As a result of exercising their unfettered right to license master rights for reproduction and distribution, a record label receives approximately 81 cents of the $1.29 charged by Apple for the typical iTunes download. This is approximately nine times as much as the 9.1 cents that a songwriter and publisher must split when the very same song – the song that they wrote – is downloaded.

It is fundamentally unfair for the law to continue to subject songwriters and music publishers to BOTH a compulsory license and a below-market rate standard. This review presents the perfect opportunity for Congress to consider getting rid of the section 115 compulsory license. As former Register of Copyrights Mary Beth Peters so eloquently argued during her tenure:

> A fundamental principle of copyright law is that the author should have the exclusive right to exploit the market for his work, except where doing so would conflict with the public interest. While the Section 115 statutory license may have served the public interest well with respect to a nascent music reproduction industry after the turn of the century and for much of the 1900's, it is no longer necessary and unjustifiably abrogates copyright owners' rights today.

If Congress does not eliminate section 115, it should at the very least require that the CRB apply a fair market rate standard when determining the statutory rate.

Public Performance Right

Songwriters and publishers also receive royalties for the public performance of their works. Examples include when their music is publicly performed on the radio, via streaming services, and in many public venues, including restaurants and bars. Because of the large number of entities that use music, obviously it would be a challenge for songwriters and

publishers to negotiate individual licenses directly and effectively monitor all public performances of their music. Instead, songwriters and publishers generally affiliate with a performing rights organization (PRO) – ASCAP, BMI or SESAC – which negotiates blanket licenses, collects royalties, and enforces rights on their behalf.

While the performance right is not explicitly regulated by law, the onerous Department of Justice consent decrees that have governed ASCAP and BMI since 1941 result in songwriters and publishers also receiving below-market compensation for performance of their music. Under these World War II-era consent decrees, songwriters and music publishers do not get to negotiate the value of their intellectual property in a free market. Additionally, the consent decrees allow for a period of free-rate licensing during which the property of songwriters and music publishers is utilized without compensation for vast lengths of time as the parties attempt to negotiate a license. If an agreement cannot be reached voluntarily by the parties, a federal judge decides the terms of the license.

As streaming continues to cannibalize the mechanical royalties traditionally received from CD sales and downloads, compensation from the public performance right has become an increasingly larger portion of a songwriter's income. Unfortunately, the current royalties paid by digital webcasters cannot sustain songwriters who are trying to pay their rent and put food on the table for their families. To provide some perspective regarding how little songwriters and publishers are compensated by Internet radio, NMPA hosted an event on Capitol Hill in conjunction with the Subcommittee's last hearing on music licensing issues. The event featured five songwriters whose five well-known songs had been streamed on Pandora more than 33 million times in the first quarter of 2012. In return for the use of their works those writers and their publishers collectively received $2,033.

This week the Department of Justice announced it is undertaking a review to examine the operation and effectiveness of the consent decrees. It is our hope that the DOJ will act quickly to lift or significantly modify the consent decrees to ensure that publishers can continue

to affiliate with ASCAP and BMI without having to sacrifice fair market compensation. Arguably, collective licensing benefits licensees as much – if not more – as the licensors, so all parties have an interest in finding a new model that works for everyone.

In addition to the Justice Department amending the consent decrees, Congress can also help by amending section 114(i) of the law, which currently prevents the federal rate courts from considering the rates paid to SoundExchange for digital performances of sound recordings as evidence when setting rates. NMPA believes that those rates, which can be more than 12 times greater than what songwriters and publishers receive, would help the federal rate courts to determine more accurately fair rates for the performance of musical compositions.

Synchronization (Sync) Rights

The use of music synchronized with video is the third significant source of revenue for songwriters and publishers. Traditionally this has included the use of music in movies, television, and commercials. Newer forms of this right include music videos and the use of music in user-generated content such as on YouTube.

For songwriters and music publishers, this is a free market right not regulated by law. Because the sync market is unregulated, NMPA believes it is a useful barometer for assessing the fair market value for mechanical reproductions and performances of musical compositions. If an automobile company wants to use a popular song in a commercial for its new car, it must negotiate with the music publisher and the record company for the use of their respective copyrights. Not surprisingly, given that both copyrights are then negotiated in a free market, the common industry practice is to pay both copyright owners under the same terms. This free market benchmark suggests that the 9:1 split that record companies receive for downloads and the 12:1 split they receive for webcasting are simply a product of the regulation that publishers are subject to in those areas.

Some have called for compulsory licenses to include sync rights. This is the wrong approach and would only discourage investment in songwriting. The sync licensing market is operating efficiently without government regulation and currently compensates songwriters fairly for their creativity and publishers for their investment. In addition, for those who would use scare tactics regarding what would happen if regulation were lifted in other areas, the efficiency and smooth operation of the synchronization market provides a perfect illustration of how the music industry can thrive in the absence of unnecessary regulation.

The Songwriter Equity Act (SEA)

The SEA addresses two significant inequities under current copyright law that prevent songwriters and music publisher from receiving compensation that reflects the fair market value of their intellectual property.

The SEA would ensure that the government applies a market-based rate standard when setting licensing rates for the mechanical reproduction of musical compositions - the same rate standard enjoyed by artists and record labels for non-exempt businesses in the digital sound recording performance right. The SEA would also allow the federal courts that set rates for the public performance of musical compositions to look at relevant evidence, which they are currently prohibited by law from considering.

These modest changes to the law will help level the playing field in the rate setting proceedings that are currently undeniably stacked against songwriters and publishers.

Proposals to Devalue the Rights of Songwriters/Publishers

The RIAA's recent submission to the Copyright Office regarding music licensing issues suggests that licensing would be more efficient if songwriters and publishers simply allowed record labels to administer our copyrights for us. This is not a realistic or constructive proposal.

Songwriters and publishers value the ability to determine how their works are used and to negotiate the terms for their use. Having a direct relationship with licensees is also frequently an important component of understanding and advancing mutual interests. While NMPA believes strongly in a more efficient and effective licensing system, the answer is not to subjugate the rights of songwriters and music publishers to record labels.

The elimination or, at the very least, modification of the government-mandated compulsory license and consent decrees in favor of a licensing structure that more closely resembles free market negotiations favors not only music publishers and songwriters, but music services, consumers and the music market generally. The CRB proceedings that set the Section 115 compulsory license rates and categories for mechanical rights occur once every five years, far slower than the development of new technology for digital music distribution.

The government-enforced consent decrees that govern the licensing of public performance rights restrict the ability of both the PROs and music publishers to bundle the multiple, global rights that new digital music services now require to operate and compete on a world-wide scale. These restrictive and antiquated regulations result in a slow and reactive market for the licensing of songs, and do not provide the necessary flexibility to license rights properly and proactively in an ever-evolving, dynamic online music world. Only in the free market—or in a system that closely approximates free market conditions—can new music services obtain all of the rights needed as that technology develops, allowing those music services to enter the market and the ears of music-loving consumers more quickly.

Conclusion

As our global digital marketplace rapidly evolves, songwriters and music publishers will continue to embrace new delivery models and technology, but much of the copyright framework is outdated. A copyright update should build upon a foundation of intellectual property rights that enable a vibrant, legal music marketplace. Not just for songwriters, but for

all creators. Congress should review the law with a presumption against regulations that severely limit creators' property rights.

Most importantly, we must ensure that future business models fairly compensate songwriters. Licensing new business models efficiently does no good if such new business models do not allow a songwriter to earn a living. Without updates to the law songwriting as a profession will give to way songwriting as a hobby and an important American treasure will be in jeopardy.

NMPA looks forward to participating in discussions on how to work together to improve our copyright law.