



January 19, 2021

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairmen and Ranking Members:

We write to express the support of the United States Copyright Office (Copyright Office) and the United States Patent and Trademark Office (USPTO) for amending the Copyright Act to require radio stations to provide fair compensation to copyright owners and performers when their sound recordings are broadcast “over the air.”

Section 106 of the Copyright Act sets forth the exclusive rights of copyright owners, including public performance rights for all performable works. Section 106(6) stipulates that copyright holders in sound recordings have a public performance right, but that right is limited in scope to only digital audio transmissions. This right was added pursuant to the Digital Performance Right in

Sound Recordings Act of 1995, which also created a statutory license for sound recordings for non-interactive, subscription-based digital transmissions (where the listener cannot control the songs that are played), such as those offered by Sirius XM. Later, the Digital Millennium Copyright Act of 1998 expanded the statutory license to include non-interactive, non-subscription digital transmissions such as the ad-supported services offered by Pandora and iHeart Radio. Both statutes, however, exempted terrestrial—or “over the air”—broadcasts of sound recordings from the public performance right.

Both the Copyright Office and the Department of Commerce (Department) have long endorsed providing a broad public performance right for sound recordings. When the Copyright Act was revised in 1976, Congress directed the Register of Copyrights to make recommendations on such a right.¹ In 1978, the Register recommended that Congress enact a public performance right for sound recordings, stating, “[t]o leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.”² Since that time, the Copyright Office has consistently supported such a right.³ The Department testified in 1978 in support of the Copyright Office’s recommendation and has subsequently testified and written in support of establishing a public performance right in sound recordings on several occasions.⁴

¹ Copyright Act of 1976, Pub. L. 94-553, § 114(d) (1976).

² U.S. Copyright Office, *Performance Rights in Sound Recordings* 1063 (Comm. Print 1978), <http://copyright.gov/reports/performance-rights-sound-recordings.pdf>.

³ See, e.g., *Oversight of the U.S. Copyright Office: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Intellectual Property*, 116th Cong. 13 (2019) (written statement of Karyn A. Temple, Register of Copyrights); *Register’s Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 52-53, 68 (2015) (statement of Maria A. Pallante, Register of Copyrights); U.S. Copyright Office, *Copyright and the Music Marketplace* 138-39 (2015), <https://www.copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>; *The Performance Rights Act and Parity Among Music Delivery Platforms: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 117-18 (2009) (statement of Marybeth Peters, Register of Copyrights); *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 13-30 (2007) (statement of Marybeth Peters, Register of Copyrights); *Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners With Those of Broadcasters: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 108th Cong. 8-22 (2004) (statement of David O. Carson, General Counsel, U.S. Copyright Office); *Performers’ and Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Intell. Prop. and Judicial Admin. of the H. Comm. on the Judiciary*, 103rd Cong. 3-5 (1993) (statement of Ralph Oman, Register of Copyrights); U.S. Copyright Office *Report on Copyright Implications of Digital Audio Transmission Services* 157 (1991); U.S. Copyright Office, *Performance Rights in Sound Recordings* (Comm. Print 1978), <http://copyright.gov/reports/performance-rights-sound-recordings.pdf>.

⁴ The Department has weighed in, through testimony, letters, and/or policy papers, under the Carter, Clinton, G. W. Bush, and Obama Administrations. See, e.g., Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity And Innovation in the Digital Economy* 12, 38, 100 (2013); Letter from Cameron Kerry, General Counsel, U.S. Department of Commerce, to Senator Patrick J. Leahy (Apr. 1, 2010); Letter from Lily Fu Claffee,

At the national level, a public performance right in sound recordings furthers the goals of U.S. copyright law and the Constitution to incentivize authors to create and disseminate new works. As the Supreme Court has observed, the “encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . . ”⁵ This rationale for copyright supports assuring fair compensation to America’s performers and record companies through a broad public performance right in sound recordings. In today’s digital music marketplace, where performers and record labels face both unprecedented challenges and opportunities, providing such incentives for America’s performing artists and recording companies is particularly important.

At the international level, such legislation would remedy a long-standing omission in U.S. copyright law that has harmed American performers and record companies. The United States stands alone among industrialized nations in not recognizing a public performance right for the broadcasting of sound recordings.⁶ American performers and producers do not benefit from the protection afforded to such broadcasts in most other countries because of the lack of a reciprocal right in U.S. copyright law. As a result, substantial royalties due for the public performance of U.S. sound recordings abroad (estimated at approximately \$200 million per year)⁷ are not paid to American performers and record companies. Correcting this

General Counsel, U.S. Department of Commerce, to Representative Howard Berman (June 10, 2008); Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure, the Report of the Working Group on Intellectual Property Rights 222 (Sept. 1995); *Digital Performance Right in Sound Recordings Act of 1995: Hearing Before the Subcomm. on Courts and Intell. Prop. of the H. Comm. on the Judiciary*, 104th Cong. 156 (1995) (statement of Bruce A. Lehman, Assistant Secretary of Commerce) (endorsing the establishment of a limited public performance right when sound recordings are transmitted by digital means, but only as a step in the direction of providing a full public performance right in sound recordings); *Performance Rights in Sound Recordings Act of 1995: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 32-34 (1995) (statement of Bruce A. Lehman, Assistant Secretary of Commerce); *Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice*, H. Comm. on the Judiciary, 95th Cong. 179-81 (1978) (statement of Louise Wiener, Special Assistant to the Secretary of Commerce).

⁵ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

⁶ Instead, we keep company with other countries such as China, Iran, and North Korea, which also do not afford a sound recording broadcaster right. We note, however, that China’s recently enacted copyright amendments, which will go into effect on June 1, 2021, will require broadcasters to remunerate the copyright owners of the sound recordings that they broadcast, bringing China into the mainstream ahead of the United States.

⁷ See SoundExchange, *Closing the AM/FM Radio Royalty Loophole*, <https://www.soundexchange.com/advocacy/closing-the-amfm-radio-royalty-loophole> (last visited Dec. 14, 2020) (“[B]ecause U.S. radio broadcasters refuse to pay artists when they use their recordings on the air, American artists and record labels are denied the estimated \$200 million in performance royalties annually that would be paid to them in nearly every other nation.”); MusicFIRST, *Music Creators Put a Mic to the Fair Play Fair Pay Act* (Oct. 26, 2017), <http://musicfirstcoalition.org/music-creators-put-mic-fair-play-fair-pay-act> (“Passage of the [Fair Pay Fair Play Act] has the potential to bring home more than \$200 million left overseas due to global standards in royalty payments, which are not reciprocated in the United States.”).

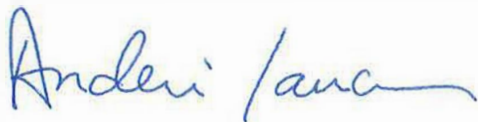
omission in our law would better allow the United States to lead by example in the international copyright community.

In recent years, the sound recording marketplace has shifted from a distribution model to a performance model, and consumption has shifted from purchasing products to purchasing access. Until recently, sales of physical records, and then downloads, made up the vast majority of the recording industry's revenues. Music revenue has now shifted to a marketplace dominated by streaming services, including satellite and cable, as well as internet streaming services like Apple Music and Spotify. Streaming services now account for approximately 79% of U.S. recorded music revenues, while digital downloads and physical products (*i.e.*, sales) only account for approximately 18%.⁸ In this marketplace, broadcast radio stations should also pay sound recording performance royalties, just as satellite, cable, and internet streaming services do. We recognize the impact on broadcast radio stations, and we understand that Congress will have to balance that impact with the ongoing hardships that artists face by not having received these royalties for many decades.

In sum, at a time when performers' and record labels' livelihoods depend heavily on the public performance of sound recordings, and when new digital services must pay royalties to transmit such performances, we believe over the air radio broadcasters should be required to do so as well.

USPTO has been advised by the Office of Management and Budget that the Administration has no objection to the submission of this letter.

Sincerely,



Andrei Iancu
Under Secretary of Commerce for
Intellectual Property and
Director of the United States
Patent and Trademark Office



Shira Perlmutter
Register of Copyrights and Director of
the United States Copyright Office

⁸ Joshua P. Friedlander, *Year-end 2019 RIAA Music Revenues Report 3* (Feb. 25, 2020), <https://www.riaa.com/wp-content/uploads/2020/02/RIAA-2019-Year-End-Music-Industry-Revenue-Report.pdf>.