November 19, 2012

Honorable Bob Goodlatte
Chairman of the Subcommittee on
Intellectual Property, Competition, and the
Internet
House Committee on the Judiciary
2240 Rayburn House Office Building
Washington, DC 20515

Honorable Mel Watt
Ranking Member of the Subcommittee on
Intellectual Property, Competition, and the
Internet
House Committee on the Judiciary
2304 Rayburn House Office Building
Washington, DC 20515

Re: November 2012 Music Licensing Reform Hearing

Dear Chairman Goodlatte and Ranking Member Watt:

We are writing on behalf of the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC, the three American performing rights organizations (collectively, the PROs) and the Nashville Songwriters Association International (NSAI), representing the public performing right in musical works of America s songwriters, composers and music publishers. We understand that your Committee intends to hold a hearing focused on the Internet Radio Fairness Act of 2012, H.R. 6480 (IRFA), and in that regard we must voice our concerns regarding both the purported rationale behind IRFA and several of its key provisions. On a more global basis, the narrow focus of IRFA completely ignores a much greater problem in the online music licensing world: the undervaluation of the public performing right in musical works. This undervaluation of the public performing right runs contrary to global practices which often yield two times the fees generated by US license rates or more, when compared to equivalent economies, and represents a trend that is harmful to both America s music creators and the larger economy. Any Congressional examination of online music licensing issues needs to address this serious issue to ensure that the interests of writers and publishers the very foundation fueling the music industry are not further deteriorated.

Background

Before we address the substance of our thoughts and concerns, it would be useful to distinguish the separate and distinct copyrights that benefit different music rights owners, and which, as a group, are differentially impacted by H.R. 6480. To illustrate this distinction, consider the classic song, Baby I Need Your Loving. Most people know the song through the Four Tops recording of the work. However, the song itself the words and music were written by the songwriting team of Eddie Holland, Lamont Dozier and Brian Holland (known professionally as Holland-Dozier-Holland). Indeed, many hit songwriters focus on the craft of songwriting, never stepping on a stage.

As PROs, we represent songwriters, composers and music publishers who create and own the underlying musical works. In the case of Baby I Need Your Loving, the performing right organization representing the writer and publisher of the song (in the case of this song, BMI) licenses the public performance of the work the performance of the Holland-Dozier-Holland-composed song

(no matter who performs it) on radio, on television, on cable, on the internet, and in bars, restaurants and clubs, among many other places.[1]

By contrast, Motown Records, the owner of the specific Four Tops sound recording of Baby I Need Your Loving, licenses the public performance of the sound recording by digital transmission on a variety of online digital platforms through SoundExchange (or directly, if they choose to do so). For such performances of the sound recording, the owners of the sound recording and the performing artists-- but not the separate musical work s writers (here, Holland-Dozier-Holland) or publishers-- are compensated through this type of license.

Or consider the eponymous theme to the new James Bond movie, Skyfall. The composition was written and performed by the well known British pop star, Adele (formally, Adele Laurie Blue Adkins) and co-written by Paul Richard Epworth, in this case an ASCAP writer. Mr. Epworth is not a performer, but he is a well-known music writer and producer, and a top Grammy winner. No matter whether Adele performs Skyfall, or some other performer goes on to perform it, as writers, Adele and Paul Richard Epworth, and their associated publishers, have the right to be compensated for the public performance of their musical work through licenses issued by their affiliated PROs (or directly if they choose to do so). Again, by contrast, the owners of the sound recording of Skyfall would in the U.S. license the public performance of the sound recording by digital transmission through SoundExchange (or directly, if they choose to do so), and compensation would flow as mentioned in the paragraph above.

It is important to keep these different rights in mind; while there may be a tendency to conclude that the interests of these separate rights holders would be identical, that is not the case.

The current bill under consideration, H.R. 6480, demonstrates the potential divergent interests as well as any example. Pandora, the online music service provider and one of the chief proponents of this bill, seeks to substantially lower the fees paid to SoundExchange for the digital transmission of sound recordings. However, any discussion of rate standards needs to address as well the remarkable disparity in license fees paid by webcasters to songwriters and publishers for the use of the underlying musical works (e.g., the compositions of Holland-Dozier-Holland, and Adele and Paul Richard Epworth, respectively) that are incorporated into the sound recordings performed (e.g., the Four Tops and Adele, respectively).

To further illustrate this point: Pandora s 2012 annual report stated that it paid 49.7% of its revenue in royalties to SoundExchange, and 4.1% of its revenue in royalties to the US PROs, namely, ASCAP, SESAC, and BMI. In other words, from the total pool of monies paid for the performance of music and sound recordings, almost 92% of the money paid by internet radio flows to record labels and performing artists through SoundExchange, and only 8% of it is paid to songwriters and publishers. Another way to view this example is that the owners of the sound recording and the recording artists (e.g., the Four Tops and Adele, as performers, and their record labels) receive $92 out of every $100 in total music royalties paid by internet radio providers, with 50% of this $92 in sound recording fees going to the labels and 50% to the performers.[2] The individual songwriters and publishers (e.g. Holland-Dozier-Holland, and Adele and Paul Richard Epworth as writers and their publishers), through the PROs, receive only a small fraction -- $8 -- of the total $100 paid by Pandora for its performance of music, with 50% of that $8 going to the writers and 50% to the publishers under normal US PRO distribution rules. This almost 12-to-1 disparity in SoundExchange and PRO

[1] The separate consent decrees with the United States that govern the business practices of BMI and ASCAP each provide for a rate court through which the separate PROs and their music-using licensees can seek the determination of a reasonable license fee.

[2] To be precise, of the 50% to performers, 5% is split between non-featured performers (such as background singers and musicians), and the remaining 45% is paid to the featured recording artist(s) on the sound recording. 17 U.S.C. (g)

payments is unprecedented in the global music marketplace. Around the world, the opposite occurs; the public performing right in the underlying music composition is paid at far higher rates than the public performance right in the sound recording. In fact, the latter right is sometimes referred to as a neighboring right, in recognition that rewarding the creators of the musical work -- when it is publicly performed -- is a central tenet; without the creation of the underlying musical work, there would be nothing to record.

There are many reasons for this disparity, including (a) the mandatory nature of performing rights licenses as required by the BMI and ASCAP consent decrees; and, most critically, (b) the refusal of our rate courts to even consider SoundExchange royalties (pursuant to Section 114(i) of the copyright law). These constraints impact even voluntarily-negotiated licenses between PROs and music users. We welcome the opportunity, at a future point in time, to explore these factors in greater detail.

We believe as a general matter that copyright owners are entitled to fair market value rates. Accordingly, we support the willing buyer/willing seller standard in Section 114. However, this rate disparity illustrates our point that different rights holders are subject to disparate treatment, and identifies an inequity that should be remedied by Congress after reviewing how this gross and anomalous disparity in remuneration received by these distinct sets of rights holders has evolved in the U.S.

As a result, there is in the PROs view a gross disparity between the fair market royalties paid to SoundExchange and the nominal license fees paid to songwriters, and the trend, as a consequence, has significantly diminished the value of the musical work copyright below what ought to be its true, fair market value.

Concerns regarding H.R. 6480

While the lion s share of H.R. 6480 is focused on altering the standard for rate-setting for the digital transmission of sound recordings -- so as to achieve a lower rate -- the bill contains a number of additional provisions that are so broad that they might have unforeseen consequences on the business practices of PROs or to the musical works the PROs license. Our concerns with each of these provisions are as follows:

- H.R. 6480 would prohibit the use of collective licenses as benchmarks in Copyright Royalty Board rate proceedings, by only permitting the introduction of agreements with a licensor that does not possess market power resulting from the aggregation of copyrights, either by a licensing collective or individual owner.[3] While this provision would not impact PRO rate court proceedings directly, the language could be perceived at treating as inherently suspect the model of collective licensing, a licensing method that the United States Supreme Court, in the CBS case, recognized as an efficient means of providing blanket access to a wide-ranging musical repertoire.[4] The suggestion, implicit in this bill, is that collective licenses (which often represent the product of negotiations between rights organizations and sophisticated and well-funded business conglomerates)

[3] See H.R. 6480, Sec. 3(a)(3)(B) (definition of Competitive market circumstances, and Sec. 3(a)(1)(B) and Sec. 3(a)(2)(A)(II)(placing burden of proof of competitive market circumstances on the copyright owners).

[4] The Supreme Court, in the same case, rejected the notion that blanket licenses were a per se violation of the antitrust laws. Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979) (CBS).

are inherently untrustworthy instruments of market power. Such a suggestion is unfounded and would preclude the Copyright Royalty Board from even considering (and, in its discretion, giving the weight it chooses) to any industry-wide collective voluntarily negotiated license.

♥ H.R. 6480 prohibits owners of sound recordings, or their agents, from taking any action that would prohibit, interfere with, or impede direct licensing by copyright owners of sound recordings. This language, particularly with its prohibition against impeding direct licensing, is both unduly broad and vague.

♥ H.R. 6480 calls for the establishment of a federal government-facilitated or established global music registry. This is wholly unnecessary, particularly in light of ongoing international database initiatives led and funded by the world s PROs, with the participation of music publishers and music users, to establish just such a registry. The contribution of the federal government s energies and resources are not needed, and Congress should allow the ongoing privately-driven initiative to proceed without government interference.

Conclusion

In sum, the U.S. PROs welcome the Committee s review of music licensing reform, beginning with H.R. 6480, and in that regard, we have some specific concerns, identified above. However, we fear that the Committee s focus is too narrow, examining only one group with interests in the sound recordings of musical works, and not taking into account a more balanced view and the impact on other groups with interests in the musical works underlying these recordings -- those of America s music creators and publishers and our members.

As demonstrated above, there are significant disparities in remuneration for different rights, and an undervaluation of the public performing right in music works in the U.S. This result, counter to global practices, is harmful to America s music creators and impedes their ability to continue to enrich America s musical heritage and contribute to America s economy. PROs represent the creators of this most valuable cultural export, and any discussion of the music licensing landscape needs to include our perspective.

We look forward to working with your Committee in this Congress and next.

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cc: Members of the Subcommittee on Intellectual Property, Competition, and the Internet, Congressional House Committee on the Judiciary