

**WRITTEN STATEMENT OF MITCH BAINWOL
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BEFORE THE
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET,
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES
ON
H.R. 5353, THE INTERNET FREEDOM PRESERVATION ACT OF 2008
May 6, 2008**

Thank you Chairman Markey and Members of the Subcommittee for the opportunity to testify here today regarding H.R. 5353, the Internet Freedom Preservation Act of 2008.

My name is Mitch Bainwol. I am the Chairman and CEO of the Recording Industry Association of America, the trade association representing the U.S. recording industry. RIAA members create, manufacture and/or distribute 90 percent of all legitimate sound recordings in the United States.

We are pleased that we have been invited to testify on H.R. 5353. Chairman Markey and Congressman Pickering have properly recognized the important distinction between lawful and unlawful content, and we applaud them for making this distinction. Our view is that the marketplace is generally a better mechanism than regulation for addressing such complex issues as how to address online piracy, and we believe the marketplace should be given a chance to succeed. We are encouraged by some of the recent dialogue between content companies and ISPs about this problem. If effective marketplace solutions cannot be reached soon, however, then government regulation may well be necessary.

At the outset, let me stress that we are excited about the opportunities that the Internet provides to expose the public to new artists and offer consumers new choices in the way they get and consume our music. We encourage and applaud any innovation for the lawful consumption of music over different digital platforms, and caution against taking action that would stifle the innovation of legitimate business models. We agree with Chairman Markey and Congressman Pickering that “the Internet has had profound benefits for numerous aspects of daily life for millions of people throughout the United States and is increasingly vital to the economy of the United States.”

However, the elephant in the room – piracy – cannot be ignored. Internet piracy of our music continues to have devastating effects on the entire music community. Let me give you a few statistics to illustrate this:

- During the past two years, music acquisition has jumped 15%. During the same two year period, the share of legal acquisition of music has

plummeted from 56% to 42% - now less than half of the music is acquired legally.

- In 1999, the recorded music industry had \$14.6 billion in revenues – all from physical sales. By 2007, revenues had dropped to \$10.4 billion, of which only \$8 billion was from physical sales and \$2.4 billion of this was from digital sales.
- In 2000, the ten top-selling albums in the United States sold a total of 60 million units. Last year, they totaled just 25 million, less than half of the 2000 sales.
- At any given moment, over 10 million users are online offering well over 1 billion files for copying through various peer-to-peer (p2p) networks or other online sources.
- As many as half of the staff songwriter jobs in Nashville have disappeared. Thousands of other artists, songwriters, musicians, and music retailers have been forced out of the business.

Online piracy has now spread to other copyright industries, such as movies, software and video games. This is a point of national importance, as the copyright industries constitute nearly seven percent of the Gross Domestic Product and copyrighted works are the single largest United States export.

Today, online piracy has become so severe that it is causing significant congestion over our broadband networks, degrading the online experience for consumers and imposing unnecessary costs on ISPs. Both AT&T and Time Warner Cable have acknowledged that the overwhelming majority of p2p traffic involves the unlawful transfer of music and video files. This piracy hurts all digital consumers by slowing down their networks, and law-abiding consumers are being forced to subsidize the users who abuse the network.

We, as a society, must address the root cause of these problems – piracy – and not just the current symptoms, such as traffic congestion. A strategy aimed only at congestion and not at piracy is just dealing with the symptom, not the disease. Sensible public policy mandates that any solution address the piracy problem.

Clearly, for the music industry, the digital era has produced huge losses, yet affords opportunity for our brightest day. Our future will be far more complex than a model that relies solely on unit sales. Increasingly, the economic foundation of the music industry will be augmented by performance royalties and by payments for bundled access to music through subscription services, mobile platforms, and even ISPs.

It is precisely because the digital environment has become so vital to our industry that we find today's hearing so significant. Net Neutrality and network management are critical issues not only to ISPs and technology companies, but to the men and women who create the content that make broadband and devices so desirable.

Thus, we are heartened by Chairman Markey's and Congressman Pickering's examination of these issues and by the emerging consensus recognizing that Internet freedom isn't synonymous with a Wild West in which the taking of our property is accepted or, at best, ignored. H.R. 5353's distinction between lawful and unlawful activity must be the cornerstone of both private market discussions and public policy.

If we leave you with only one concept, it is the following: The Internet ought not be a place where chaos in the name of freedom is allowed to reign supreme. Rather, the Internet should be a place where freedom coexists comfortably with respect for property – with respect for order. Order means safety on the Internet, it means tools for parents to do their job raising their kids, and it means consumers enjoy the high speed pipes they purchased without degradation because someone in their neighborhood is downloading obscenity or child pornography, or stealing huge amounts of music. It means having an online environment that encourages innovation for legitimate commerce and social discourse and at the same time also has appropriate deterrents for online theft and other illegal behavior.

As we have stated in the past, we strongly prefer that society address these problems through marketplace solutions. The marketplace is uniquely capable of responding quickly and flexibly to the problems posed by the rapidly-changing Internet. The music industry continues to work creatively with other companies to create legitimate online avenues for the dissemination of music. And in recent months, RIAA and our member companies have been engaged in constructive discussions with a number of ISPs about ways to address the piracy problem, including mechanisms like graduated response policies, longer-range technological approaches, and business solutions through negotiations between individual music companies and ISPs that can capture the value of the music being consumed by subscribers. We are cautiously optimistic that such discussions will lead to tangible results.

At the same time, however, we note that too many ISPs have turned a blind eye to online theft, all the while benefiting from the many subscribers who pay for broadband access primarily to steal music and other content. These ISPs would just as soon pretend that congestion was not fundamentally a problem directly connected to theft. And some prefer to cure congestion with greater efficiency – solving their problem but compounding ours.

As the Federal Communications Commission noted at the February hearing on network management practices, access to music was an early driver of broadband adoption. Unfortunately, this turned into massive, large scale piracy that is decimating the recording industry and leaving uncertain whether legitimate content distribution can survive on the Internet. We believe that policy makers in Washington should encourage all ISPs to step forward now and proactively address the issue of piracy.

Certainly, the Markey-Pickering bill is one such way to get ISPs to focus on the piracy problem. Its distinction between “lawful” and “unlawful” content is the necessary predicate to any discussion about net neutrality or network management. It is the

difference between right and wrong. And believe it or not, that important distinction has been overlooked or set aside too often in these kinds of discussions. It is good to see that Chairman Markey and Congressman Pickering have made it the touchstone of their bill, and we applaud them for that.

We continue to believe, at least right now, that a marketplace solution with the ISPs to the piracy problem is viable, and certainly such a solution could be devised and implemented far more quickly than a regulatory proceeding. As the numbers tell you, however, the state of our industry requires action. If we cannot resolve this problem quickly in the private sector, regulation may be a necessary alternative. And should that be necessary, then H.R. 5353 lays out a good, thoughtful framework for establishing such regulation.

If such regulation is necessary, a central tenet must be that the rule of law is respected online. Such regulation should give ISPs the latitude to discriminate against illegal content and other unlawful traffic, just as ISPs currently take action against viruses, malware and other harmful traffic. At the same time, however, actions taken by the ISPs to deter piracy should be applied evenly over all types of pirated content to the extent technologically feasible. Just as ISPs should not unfairly discriminate against lawful traffic for anticompetitive purposes, ISPs should not be able to target only certain forms of piracy that may compete with their legitimate content offerings and not other forms of piracy.

In sum, society should not accept the invitation of certain stakeholders to turn a blind eye to piracy, and only address some of its symptoms. Our policymakers should foster marketplace solutions to address piracy. However, if effective marketplace solutions do not become a reality in the near term, regulation may indeed be necessary to address the rampant piracy that is the cause of network congestion and ensure that ISPs take steps to reduce piracy in a non-discriminatory manner. Most important, any such regulation should be faithful to the distinction between lawful and unlawful content. The recording industry applauds the sponsors for this important recognition that we believe is central to both the underlying reasons for this debate and any ultimate solution.

Thank you.