MEMORANDUM November 28, 2012

To: Senator Ron Wyden
Attention: Jayme White

From: Kathleen Ann Ruane, Legislative Attorney, 7-9135

Subject: **First Amendment Concerns raised by Section 5 of the Internet Radio Fairness Act of 2012**

This memorandum responds to your request for an analysis of whether Section 5 of S. 3609, the Internet Radio Fairness Act of 2012 [IRFA] raises First Amendment concerns.[1] This memorandum is provided on a rush basis and, therefore, may not address each possible argument that may be made regarding this question.

According to the sponsor of companion legislation in the House of Representatives,[2] Representative Chaffetz, IRFA is intended to "level[] the playing field for Internet radio services" and reform the current

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[1]Section 5 provides:

SEC. 5. PROMOTION OF A COMPETITIVE MARKETPLACE.

(a) Limitation of Antitrust Exemptions-

(1) EPHEMERAL RECORDINGS- Section 112(e)(2) of title 17, United States Code, is amended--

(A) by inserting `, on a nonexclusive basis,' after `common agents'; and

(B) by adding at the end the following: `Nothing in this paragraph shall be construed to permit any copyright owners of sound recordings acting jointly, or any common agent or collective representing such copyright owners, to take any action that would prohibit, interfere with, or impede direct licensing by copyright owners of sound recordings in competition with licensing by any common agent or collective, and any such action that affects interstate commerce shall be deemed a contract, combination or conspiracy in restraint of trade in violation of section 1 of the Sherman Act (15 U.S.C. 1).'.

(2) DIGITAL SOUND RECORDING PERFORMANCES- Section 114(e) of title 17, United States Code, is amended by adding at the end the following:

`(3) Nothing in this subsection shall be construed to permit any copyright owners of sound recordings acting jointly, or any common agent or collective representing such copyright owners, to take any action that would prohibit, interfere with, or impede direct licensing by copyright owners of sound recordings in competition with licensing by any common agent or collective, and any such action that affects interstate commerce shall be deemed a contract, combination or conspiracy in restraint of trade in violation of section 1 of the Sherman Act (15 U.S.C. 1).

`(4) In order to obtain the benefits of paragraph (1), a common agent or collective representing copyright owners of sound recordings must make available at no charge through publicly accessible computer access through the Internet the most current available list of sound recording copyright owners represented by the organization and the most current list of sound recordings licensed by the organization.'.

[2] H.R. 6480.

royalty rate calculation system.[3] Section 5 of IRFA would amend the antitrust exemptions granted to copyright holders. The exemptions allow copyright holders to collectively bargain for copyright royalty rates without violating the antitrust laws. These exemptions[4] have allowed copyright holders to form organizations like SoundExchange. SoundExchange is a non-profit entity, originally created by the Recording Industry Association of America, that collects royalty payments under the compulsory license for digital transmissions of sound recordings.

Section 5 would preserve the existing antitrust exemptions and add new language to both. This language would provide that copyright owners acting jointly (e.g., member-based royalty collection entities like SoundExchange) may not "take any action that would prohibit, interfere with, or impede" individual copyright owners from entering into direct licensing negotiations with prospective users of their sound recordings. The IRFA would deem any such action to be an antitrust violation. In other words, it appears that Section 5 would allow copyright holders to continue to associate and collectively bargain royalty rates through entities like SoundExchange; however, in its most basic reading, it also would prevent these member-based royalty collection entities from interfering with the rights of individual copyright holders to negotiate direct licensing agreements by making such interference a violation of Section 1 of the Sherman Antitrust Act.[5]

David Lowery, writing for the Thetrichordist.com, has argued that "Section 5 of IRFA is perhaps the most pernicious part of the bill, for it would make it illegal for anyone to criticize digital sound recording licensees. If IRFA becomes law, artists and artist organizations will need to watch what they say in public in opposition to [certain licensees'] direct licensing efforts."[6] It seems that Lowery takes issue with the

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[3] Press Release, Reps. Chaffetz and Polis Introduce Bi-Partisan Internet Radio Act, Sept. 21, 2012, available at http://chaffetz.house.gov/press-release/reps-chaffetz-and-polis-introduce-bi-partisan-internet-radio-act.

[4] 17 U.S.C. §112(e)(2) and §114. 17 U.S.C. §112(e) currently reads:

> (2) Notwithstanding any provision of the antitrust laws, any copyright owners of sound recordings and any transmitting organizations entitled to a statutory license under this subsection may negotiate and agree upon royalty rates and license terms and conditions for making phonorecords of such sound recordings under this section and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

17 U.S.C. §114(e) currently reads:

> (1) Notwithstanding any provision of the antitrust laws, in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments.

[5] 15 U.S.C. §1 prohibits contracts or conspiracies in restraint of trade. This Section is usually interpreted to prohibit collective action that would restrain the marketplace. For example, an agreement among competitors to fix prices would likely violate the Sherman Act. See Dept. of Just., Antitrust Resource Manual, Elements of the Offense, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title7/ant00007.htm. Unilateral action in violation of the antitrust laws is normally covered by Section 2 of the Sherman Act which prohibits monopolization and attempts to monopolize. 15 U.S.C. §2; see Dept. of Just., Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act (2008), available at http://www.justice.gov/atr/public/reports/236681.pdf. Section 5 would make impeding or interfering with contract negotiations a violation of Section 1, but does not mention Section 2.

[6] David Lowery, Muzzling Free Speech by Artists: IRFA Section 5 Analysis, (Nov. 8, 2012) available at http://thetrichordist.com/2012/11/08/irfa-section-5/. Lowery also argues that licensees, such as Sirius XM, currently are attempting to suppress this type of speech. He cites a March 2012 case that Sirius XM has filed against SoundExchange and A2IM (the American Association of Independent Music). Complaint of Sirius XM Radio, Sirius XM Radio, Inc., v. SoundExchange, Inc., Docket No12-CV-2259 (S.D.N.Y. Mar. 2012). Sirius XM is arguing that SoundExchange and A2IM violated the antitrust laws and alleges that SoundExchange and A2IM conspired to interfere with Sirius XM's attempts to directly negotiate royalty rates with record companies (and thereby bypass SoundExchange and A2IM). Part of the evidence offered by (continued...)

use of the words "any action" that would "prohibit, interfere with, or impede" negotiations. He argues that these terms are too broad and could apply even to those who would criticize licensees for attempting to negotiate direct licenses with copyright owners. Another concern cited by Lowery in opposition to Section 5 is the ambiguity inherent in the language "any copyright owners acting jointly." This language does not necessarily seem to be limited to large member-based royalty collection organizations like SoundExchange. It may be broad enough to encompass, for example, the members of an individual band, who might be considered to be individual copyright owners, acting jointly. Under this broad reading of the language, an argument could be made that a band, posting its criticisms of direct licensing negotiations between a licensee and a copyright owner, would be taking an action that would interfere with a direct licensing negotiation, thereby violating Section 5.

Though this hypothetical presents a broad interpretation of the language of Section 5, it is not an implausible one. It is possible that the language may be broad enough to cover a blog post by a band expressing their opinion regarding contract negotiations between a licensee and a copyright owner. Nonetheless, it seems unlikely that, in practice, Section 5 would impinge upon First Amendment rights for a few reasons.

First, a court may interpret Section 5 to only restrict speech insofar as Congress's authority to regulate interstate commerce might extend. Section 5 states, in part, that:

> Nothing in this paragraph shall be construed to permit any copyright owners of sound recordings acting jointly, or any common agent or collective representing such copyright owners, to take any action that would prohibit, interfere with, or impede direct licensing by copyright owners of sound recordings in competition with licensing by any common agent or collective, and any such action that ***affects interstate commerce*** shall be deemed a contract, combination or conspiracy in restraint of trade in violation of section 1 of the Sherman Act (15 U.S.C. 1).[7]

This requirement that any such action taken "***affects interstate commerce***" in order for a violation of the Sherman Act to occur could be read by a reviewing court to narrow the scope of the application of Section 5 to only those actions that Congress may constitutionally regulate pursuant to its authority to regulate interstate commerce.[8]

Congress may enact generally applicable laws prohibiting a particular activity when "it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."'[9] Congress exercised this power when it enacted the antitrust laws, which are content neutral and generally applicable statutes that further the substantial government interest of maintaining a free market.[10] The Department of Justice has argued that "[t]here is no question of Congress' power under the

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Sirius XM in its complaint are open letters and blog posts issued by SoundExchange and A2IM laying out the opinion of the organizations regarding royalty rate negotiations. Sirius argued that these documents were attempts to coerce record companies to refuse to negotiate directly with Sirius XM. Both SoundExchange and A2IM have moved to dismiss the case for failure to state an antitrust claim. The court has yet to render its decision.

[7] S. 3609, §5 (emphasis added).

[8] U.S. Const. art. I, §8.

[9] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 n.47 (1982), quoting, United States v. O'Brien, 391 U.S. 367, 376-377 (1968).

[10] Larry V. Muko, Inc. v. SouthWestern Pennsylvania Bldg. and Construction Trades Council, 609 F.2d 1368, 1375 (3d Cir.

(continued...)

Commerce Clause to enact antitrust laws, and the government interest in promoting competition and regulating restraints on trade is unrelated to the suppression or regulation of free expression."[11] The antitrust laws are generally considered to comport with the First Amendment, because though the Sherman Act may restrain speech on occasion, the restraint is incidental to Congress's legitimate goal of maintaining a free market.

In the case of Section 5, Congress would arguably be creating a similar prohibition, particularly since the bill specifically references the antitrust laws. As noted above, Section 5 would generally prohibit copyright owners acting jointly from taking any action to interfere with direct licensing negotiations. This provision appears to be intended to further the government's interest in preserving the rights of individual copyright owners to negotiate directly with potential licensees without interference from entities like member-based royalty collection organizations. It could be argued that this is similar to Congress's intent to preserve a free market by enacting the antitrust laws. Under Section 5 an individual copyright owner would have the option, as she always has, of negotiating royalty rates individually or collectively, but with an added protection from interference on the part of groups of copyright owners that might seek to prevent her from exercising her individual rights. If the provision is read to prohibit activity and speech similar to, and not broader than those prohibited by the Sherman Act, Section 5 likely would not violate the First Amendment for similar reasons that the antitrust laws do not violate the First Amendment. The restrictions on speech may be interpreted to be incidental to a valid exercise of Congressional authority to regulate interstate commerce.

Second, as noted above, the concerns raised by critics of Section 5 are based on a broad, but potentially valid reading of the legislative language of Section 5. If Section 5 were enacted, as is, and a court were to find that it applied to a broader range of speech than the speech in restraint of trade constitutionally restricted by the antitrust laws, Section 5 may be found to be unconstitutional as applied to particular cases.

There are two general ways to claim that a law is unconstitutional.[12] First, one may claim that a law is invalid on its face. In general, a finding that a law is facially invalid would mean that a particular provision is not, and never could be, applied in a constitutional fashion.[13] Since it seems that Section 5 would prohibit interfering with copyright royalty negotiations as a violation of the antitrust laws, and Congress has broad discretion to regulate commerce, Section 5 may have a number of constitutional applications, similar to those of the antitrust laws, that would allow it to survive a facial challenge.

An as-applied challenge, on the other hand, acknowledges that while there may be many circumstances under which this law may be constitutionally applied, something about a particular case makes the application of the law unconstitutional.[14] For example, the Supreme Court has held that, though a defendant had clearly violated a prohibition against desecrating a venerated object when he burned an

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1979).

[11] Brief for the U.S. as Amicus Curiae, Mass. School of Law at Andover v. American Bar Association, Docket No. 96-1792 (3d Cir. Oct. 28, 1996) available at http://www.justice.gov/atr/cases/f0900/0964.htm#4IIA, citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)(regulation is content-neutral as long as it is justified without reference to the content of the regulated speech).

[12] Timothy Sandefur, The Timing of Facial Challenges, 43 AKRON L. REV. 51 (2010).

[13] See *Id.*, citing United States v. Salerno, 481 U.S. 739, 745 (1987). "Facial invalidity means 'that no set of circumstances exists under which the Act would be valid.' *Id*."

[14] Sandefur, *supra* note 12, citing Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 1084 (Cal. 1995).

American flag during a protest, the defendant could not be held criminally liable for the violation because he was engaged in the First Amendment protected activity of political protest when he burned the flag and the state had not asserted a valid interest, unrelated to the expression of speech, to justify his conviction.[15] A similar scenario could occur under Section 5. If a court construed Section 5 to apply to a blog post or other speech by copyright owners expressing their opinion regarding royalty rate negotiations, the court might find that the application of Section 5 in that circumstance would be an impermissible restriction on the free speech rights of the copyright holders in those circumstances.

While Congress has broad powers to prohibit restraints of trade, that power has limits. It could be argued that the application of Section 5 to a blog post expressing the opinion of an association of copyright owners would not sufficiently serve the interests of Congress in prohibiting restraints on direct licensing negotiations, and, instead, unnecessarily impinged on the free speech rights of the copyright holders to express their opinions or ideas regarding such negotiations. Participants in a market do have a First Amendment right to speak, even on issues in which they have a vested economic interest.[16] The line between expressing a constitutionally protected opinion that is in service one's own economic interests and illegally interfering with direct licensing negotiations under Section 5 may be one that courts will be asked to draw if Section 5 is determined to encompass a broader range of speech than that covered by the antitrust laws.

[15] Texas v. Johnson, 491 U.S. 397 (1989).

[16] Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (finding that a prohibition on lawyers engaging in truthful advertising for their services violated the First Amendment).