Testimony of

Mr. Alex Alben

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RealNetworks as a Pioneer of Streaming Audio and the Leading Platform for Webcasting

RealNetworks, founded in Seattle, Washington in 1994, is a pioneer in the development of digital media technology and services that enable people to create, deliver, discover, and play digital audio and video content over the Internet and within intranets, both through downloading and through a method RealNetworks developed called "streaming." Streaming allows digital media files to be compressed and broken into packets, then delivered and decompressed in sequence, so that consumers can enjoy uninterrupted, real-time broadcasts over the Internet.

In 1995, RealNetworks developed the first streaming media player and the first computer software--or server--to enable streaming of audio over the Internet. Consumers rapidly embraced the RealPlayer software and it quickly became the standard for the transmission of audio on the Internet. This gave birth to "Webcasting"-- the transmission of radio style programming from an Internet server to an end user's RealPlayer. RealNetworks' enabled the very first Internet broadcast in April of 1995 - a Seattle Mariners baseball game. RealNetworks' software was used by Radio B-92 in Belgrade to webcast its government-suppressed programming during the war in Yugoslavia. When NPR suffered a satellite failure in 2000, communications were enabled via webcasting to local outlets. Webcasting has served the important function of promoting new and independent voices and recording artists via the public Internet. Thousands of unique webcast events, ranging from the first Papal Mass transmitted via the Internet to audio coverage of United Nation's sponsored Net Aid have demonstrated the public value of this new medium.

Today, we estimate that over 4,000 radio stations webcast programming around the world in RealNetworks' RealAudio format. Over 270 million unique registered users of the RealPlayer are able to access this programming from all over the world. As bandwidth increases for connected users, the quality of audio will only become more appealing to end users, promoting further growth of this vibrant communications medium. As the cost to own major media outlets such as radio and television stations continues to escalate, web radio represents one of the few media outlets with very low economic barriers to entry, enabling a wide variety of individuals to communicate their distinctive messages to a global audience.

However, the future growth of webcasting is clouded by the tangled rights picture in the United States. As you are aware, a Copyright Arbitration Royalty Panel convened to set rates for non-interactive non-subscription services (the "Webcast CARP") recently recommended a set of flat rates for Internet transmission of digital sound recordings that have evoked a storm of protest. Not only are these rates several orders of magnitude greater than the rates that terrestrial radio pays to perform musical compositions, but the panel's failure to recommend a percentage of revenue alternative immediately threatens the viability of low-revenue webcasters, who primarily are small stations that provide diverse local programming or alternative voices. As a result, a relatively new medium with a fragile economic model is now potentially subject to disparate economic treatment.

In addition to the Webcast CARP recommendation, assertions by various parties that temporary copies in RAM buffers, server copies, and network copies should each bear distinct copyright royalties also threaten this nascent industry.

This Testimony will endeavor to explain the landscape of webcasting in light of these imbalances in our copyright laws.

Webcasting serves the public interest in unique ways, by allowing diverse voices and musical genres to find outlets for distribution before a global audience of connected users.

Webcasting is a potentially thriving industry, taking advantage of the interactivity of the Internet and its ability to carve out unique audiences and communities of listeners. This "narrowcasting" serves the public interest, as it affords expression to formats and voices that don't find distribution on terrestrial radio.

We live in a terrestrial radio world that is increasingly format driven and remotely programmed according to mass market surveys of user listening tastes. Virtually every major radio market in the United States now provides radio listeners with an "oldies" format, an "80's" format and a "current hits" format. While these stations garner top ratings and clearly please many radio listeners, they contribute to a national trend of homogenizing available over-the-air choices. Increasingly, few markets offer jazz, gospel, Broadway tunes or classical formats.

Webcasting, by contrast, allows a local classical format station such as King-FM in Seattle to reach a national and international audience by transmitting its broadcast signal over the Internet. This not only creates a new business opportunity for local stations to find new audiences, but serves Americans who don't have access to classical music programming in their local FM or AM markets. Thus, webcasting fills an important gap in the diversity of programming across the United States.

Similarly, webcasting has given birth to distinct gospel, Cajun, Hawaiian, blues, ska, electronica and swing formats, to list only a few of hundreds of musical genres available on the Internet. These formats promote the work of music writers and performers whose work does not find free airtime on pure terrestrial radio. This promotion leads to greater exposure and CD sales for these artists and writers, thus compensating them directly through the sale of records, tapes and CD's.

The recent study from Jupiter/NPD Group, dated May 2, 2002, underscores that online music fans constitute 58% of the online population and tend to purchase more music (both online and off-line) based on their online listening habits. As a consequence, there is increasing evidence that web radio is an ideal sampling medium and stimulates sales of music, boosting revenue for both record labels and songwriters.

The DPRSRA and DMCA were intended to promote a new medium, but the dual royalty structure proposed under the CARP imposes unique economic burdens on webcasters.

When Congress enacted the Digital Performance Right in Sound Recordings of 1995 ("DPRSRA") and Digital Millennium Copyright Act ("DMCA") in 1998, it intended to pave the way for a robust webcast industry through the statutory license. The legislative history of these laws make it abundantly clear that in creating a new copyright in the digital performance of sound recordings, Congress intended to foster a new marketplace. The compulsory nature of the license was designed to eliminate the burden on webcasters to negotiate separate voluntary agreements with the owners of tens of thousands of sound recordings. Rather, the compulsory license was envisioned as a vehicle to create a "frictionless" licensing process, stimulate investment in webcast operations and allow for the rapid expansion of programming via the Internet.

The compulsory license marked a new precedent in American copyright law, by recognizing a digital performance right in a sound recording. While terrestrial radio has operated in the United States for eighty years with an obligation to pay only for the performance of the underlying musical composition, Congress was now requiring a new class of radio programmers to pay two distinct royalties: 1. To songwriters for the performance of the musical composition; and 2. To the owners of sound recordings for the performance of sound recordings.

This dual royalty structure created an uneven playing field between webcasting and traditional radio. In addition, webcasters were given statutory requirements to display artist and title information, employ feasible technical protection measures, and restrict programming to make it difficult for users to access multiple songs from the same record album within a three hour time period.

Rather than equating the value of musical compositions and sound recordings, the proposed CARP rate is nine times higher than rates paid to songwriters for radio performances.

The webcasting community, hosting services such as RealBroadcast Networks, and RealNetworks as the leading technology provider to the industry widely anticipated that the performance rate for the sound recording would roughly equate with the performance rate for the underlying music composition paid by terrestrial radio--traditionally licensed as a percentage of advertising revenue. This assumption stems from the observation that both a sound recording and musical composition are embodied in each performance of a song. A song would not exist without the creative genius of the composer and lyricist. Similarly, musical recording artists bring their unique vocal and instrumental qualities to the creation of a sound recording that embodies the underlying notes and lyrics.

The economic models of many webcasters anticipated a percentage of revenue royalty for the web performance of sound recordings that would approximate the revenue percentages paid by radio stations. In fact, evidence was introduced at the CARP that in flat dollar terms, terrestrial radio pays songwriters approximately $300 million every year, which equates to .22 cents per listener tuning hour for music performed over the airwaves.

In light of this well established economic baseline, to many observers the Webcast CARP result defies explanation. The proposed CARP rate of .14 cents per listener per song is on its face nine times higher than the terrestrial radio rate for the performance of songs.

The proposed CARP rate would result in a 100% differential between retransmission of broadcast signals and web-originated transmissions.

Further, the CARP proposed that terrestrial broadcasters pay one half the rate of webcast- only operations for the performance of songs. If this result is upheld, FCC licensed broadcasters would have a legally mandated 100% price advantage over webcasters who do not also terrestrially transmit their signal. While it is true that FCC licensed broadcasters must pay writers for the performance of musical compositions within their terrestrial signal area, there is no public policy justification to give them a 100% break on a separate royalty obligation, payable to the owners of sound recordings. In addition, it is very difficult to geographically "map" the Internet user audience of a terrestrial stations, for the audience may vary widely week to week and with different programming. Any rationale for this price reduction based on the station somehow "double paying" to serve the same copyrighted work to the same audience, only logically applies to the royalty for the performance of the musical work, payable to ASCAP, BMI and SESAC. It is not connected to the royalty for the performance of the sound recording, which was the subject of the Webcast CARP.

The CARP apparently extrapolated the "willing buyer--willing seller" standard from only one marketplace agreement.

Evidence introduced at the CARP suggested that webcasting is a nascent industry, saddled with start-up costs and the bandwidth cost of serving each unique listener. In contrast to traditional radio, which is a "one to many" medium, webcasters bear the cost of bandwidth to transmit each stream to each unique user. In addition, webcasters bear the costs of complying with the DMCA statute, and the unique burdens it places on webcasters' ability to offer programming.

While 26 agreements reached between the RIAA and webcasters were disregarded by the CARP on the grounds that these webcast services either never launched or quickly went out of business, the CARP placed great weight on the precedential value of the "rate" agreed to between Yahoo and the RIAA in the context of a legal settlement. As we were not a party to this legal settlement, we will limit our observation to the concept that settlements reached for past practices (in this case, the performance of music over prior years by stations owned by the entity Broadcast.com acquired by Yahoo) are often not intended as an expression of a volitional market rate. In particular, a rate set by a single "willing seller"-- who controls 80% of copyrighted works in a market segment--with a single "willing buyer" is severely flawed, especially as evidence before the CARP indicated that only ten percent of Yahoo's music transmissions were originated on the Internet. For a variety of legitimate reasons specific to their unique business model, Yahoo was not seeking to establish a rate for webcasters, yet the CARP panel relied on this single agreement as if it were representative of party's reasonable economic decision to establish a going-forward rate for webcast activities.

We must conclude that either the "willing buyer- willing seller" standard specified by the DPRSRA for the Webcast CARP rate is the wrong test, or it was misapplied by this particular panel due to their reliance on a single non-fair market data point.

Congress should pro-actively address the problems raised by the current statute, because broadband and growth of the Web hold great promise for this new medium.

While the economics dictated by the CARP result are oppressive to webcasters, webcasting still has great promise as a news and entertainment. Distribution of RealPlayers and other media players are free and ubiquitous throughout the world. Webcasting also will drive demand for consumers' use of broadband, as sound quality of webcast music is much better at 96kbps streams and higher and encourages more sustained use. RealNetworks sees evidence of this in the appetite of our broadband audience for richer media streaming content. As the global audience expands, webcasters will find sustainable audiences and sell these audiences to advertisers who want to target their programming to unique demographic groups. However, at a critical moment for the industry that corresponds with the difficult financial environment created by the collapse of the Internet "bubble," webcasters find themselves confronted with the inflexible and unworkable CARP rate.

Not only should Congress revisit the payment standard and consider a moratorium on the webcast rate, but it should clarify for the Library of Congress that burdensome record-keeping obligations would also penalize the industry, imposing costly and expensive record-keeping requirements that do not apply to terrestrial radio stations. Moreover, the information sought by the record labels with respect to record-keeping for the webcast royalty goes well beyond the required data to direct payments to artists and copyright owners and crosses the "privacy" line by seeking data on the location of individual users who access webcast streams.

Congress has facilitated direct payment to artists for the performance of sound recordings via webcasting and Congress must therefore strive to establish record-keeping procedures designed to facilitate this goal. The interest of artists will be served if webcasting is allowed to grow and thrive under a reasonable rate structure, affording webcasters the chance to showcase unknown and new artists and promote their songs to the Internet audience. As mentioned above, traditional FM and AM stations, increasingly programmed by national firms, have less and less airtime to devote to showcasing new talent and niche genres of music.

In sum, RealNetworks pioneered the streaming audio format that enables webcasting and continues to see huge consumer demand for this diverse programming over the Internet. Public policy should aim to create stable economic environments that allow for the fair taxation of content across diverse media. Congress has frequently stated that there should be no discrimination against a medium due to the technical means of distribution. This is especially true where the medium promotes diverse voices and freedom of speech. Webcast music transmitted over a digital network should be treated consistently with the same music transmitted over the airwaves via terrestrial radio. The result of the Webcast CARP, unfortunately, saddles the industry with an unfair and uneconomic rate structure, thus limiting the promise of this vibrant new communications medium.

Congress has the opportunity to act in a timely way to prevent damage to the industry and to implement the public policy goals of the DPRSRA and DMCA by promoting a webcasting industry that promotes new artists, allows a diversity of radio programming to reach a global audience and sets rates that fairly compensate the owners of sound recordings for the digital performance of their works.