Testimony of

Rob Glaser

Chairman and CEO
RealNetworks, Inc.
July 12, 2005

United States Senate
Subcommittee on Intellectual Property
Committee on the Judiciary

Hearing on "Music Licensing Reform"
July 12, 2005

TESTIMONY OF ROB GLASER
Chairman and CEO, RealNetworks, Inc.

Chairman Hatch, Senator Leahy and Members of the Subcommittee,

On behalf of RealNetworks and the Digital Media Association, thank you for inviting me to testify today regarding one of the most significant issues facing legitimate royalty-paying online music services today: outdated music licensing laws that are creating significant legal and business uncertainty and complexity, and inhibiting our ability to innovate and win consumers away from pirate networks. Simply put, it is time to move our 1909-era licensing system into the digital age to help legal services compete effectively with illegal services.

Thanks to the U.S. Supreme Court's Grokster decision, all Americans enjoy greater clarity regarding the boundaries of lawful and unlawful behavior. At the same time, anti-piracy enforcement and education efforts have recently been enhanced by stronger laws, larger budgets, and focused attention.

Following those successes, it is timely and necessary for this Subcommittee to turn its attention to a last important component of a comprehensive anti-piracy legislative effort - modernizing our outdated and ineffective music licensing statutes. By clarifying and simplifying the compulsory composition mechanical license and the statutory sound recording performance license, this Subcommittee and the Congress will provide RealNetworks and the entire online music industry with business and legal certainty and dramatically reduced complexity. Modernizing these statutes will significantly enhance our ability to offer exciting royalty-paying online music services that will win even more consumers away from pirate networks.

RealNetworks pioneered Internet media when we released the first streaming media software in 1995. Since then we have developed technology and services that offer creators and consumers opportunities to connect with high quality digital sound and video as never before - over the Internet, in real-time or on-demand, in secure formats or with the ability to make copies according to the copyright holder's wishes. RealNetworks provides online music and video subscription services to millions of Americans. Our music offerings include Internet radio (both non-interactive webcasting and on-demand streaming, digital download sales, and music subscription services that allow users to rent music and even take it with them on portable devices. Our fellow members in DiMA provide similar services to millions more Americans. Collectively we represent the future of legal digital media.

Why am I testifying today about arcane music licensing laws? Because these laws, some enacted as early as 1909, are so outdated and broken that they are backfiring - rather than helping innovators grow the music business and grow artists' revenue, the laws are inhibiting innovative new services as we try to work with our creative partners to defeat piracy. That cannot be what Congress intended, so today I ask the Subcommittee to repair and modernize the Copyright Act's music licensing provisions - Section 115 which concerns music distribution and Section 114 which concerns Internet radio - to help royalty-paying online music services gain legal certainty and cut down on wasteful Kafka-esque paperwork, and thereby to grow faster, and win even more consumers away from pirate networks.

Specifically, there are four concrete measures Congress can take to supercharge the online music industry, dramatically reduce piracy, and substantially enhance songwriters' and recording artists' income, as well as music publisher and recording industry revenue:

1) Replace the dysfunctional Section 115 compulsory mechanical song-by-song license with a simple, comprehensive statutory blanket license that can be administered digitally and triggered on one notice, just like the blanket composition performance rights licenses that are administered by ASCAP and BMI, and just like the blanket sound recording performance rights licenses administered by SoundExchange. Not surprisingly, rules written in the analog world of 1909 simply do not work for licensing the millions of compositions needed to compete today.

2) Confirm that songwriters and music publishers' deserve full-value payment for online services' use of their creative works, but that the payment due when a composition is streamed is entirely in the form of performance royalties, and the payment due when a composition is distributed as a download is entirely in the form of mechanical royalties. RealNetworks should not be required to pay double publishing royalties for our Rhapsody Internet radio and digital download offerings while our broadcast radio and CD retail competitors pay only one royalty.

3) End years of confusion and litigation by clarifying that the definition of "interactive service" in Section 114, with regard to sound recording performance rights, ensures that Internet radio programming based on user preferences falls squarely within the statutory license so long as the service complies with the generally applicable programming restrictions for the statutory license and so long as users are not permitted to control how much a particular artist is heard or when a particular song is played.

4) Equalize sound recording performance royalty standards so that all radio competitors - broadcast, cable, satellite and Internet - pay the same royalty to artists and recording companies.

RealNetworks' Rhapsody and other DiMA members' online music services compete every day against free music available on illegal pirate networks. We also compete every day with terrestrial, cable and satellite music services. To compete effectively we must offer a comprehensive music catalog and be user-friendly, feature-rich and fairly priced on a level playing field that does not discriminate against the Internet. The amendments I suggest today will accomplish these goals, and in doing so will promote certainty, reduce litigation and risk, and ensure more royalties to creators.

I. Section 115 of the Copyright Act is an Enormous Roadblock to Online Music Services' Success and Our Ability to Defeat Piracy in the Marketplace.

Congress established the Section 115 compulsory "mechanical" reproduction license in 1909 to facilitate the licensing of musical works. Congress's goal at that

time, and during the nearly 100 years since, has been to promote the development of new music markets by making copyrighted compositions widely available, while also ensuring that copyright owners get paid for the use of their works.

Fast-forward almost 100 years and the underlying goals and principles remain the same. Royalty-paying online services are precisely the type of new music market that Congress intends to promote; and the Section 115 compulsory mechanical license should play an important role by facilitating online music services' efforts to license broad catalogs of music that are needed to compete with online black markets. Unfortunately, Section 115 as currently written is not very useful to online services, because (i) the licensing process is unworkable for digital music services; and (ii) its ambiguous scope causes uncertainty and risk, which results in excessive double-dip royalty payments.

The §115 licensing process is dysfunctional because:

(a) it imposes outdated paper-based and traditional mailing requirements that hinder prospective licensees' ability to efficiently identify copyright owners, license their works and pay royalties. Today's law requires each music service to separately identify the publisher of each of the millions of songs it wants to make available on a service, which is nearly impossible as no comprehensive database exists with such information. Services must then locate and notify by certified mail each publisher, and regularly inform each publisher of every individual work that is deployed on the service. While this process was acceptable for licensing a dozen works at a time for piano rolls and compact discs, it cannot support an online music service that requires more than a million songs to be viable. We need a system that recognizes the advent of computers and the Internet;
(b) its procedural requirements are based upon antiquated modes of doing business. The statute does not permit adequate modernization to be accomplished by regulation and the penalties for noncompliance are draconian: infringement liability plus disqualification from ever obtaining a compulsory license for that work. Please do not underestimate the chill in the online music industry created by the Copyright Act's combination of a strict liability standard with extraordinarily high statutory penalties. Though intended to protect copyright owners and punish thieves, this combination of strict liability and high monetary damages when combined with outdated procedural requirements is creating massive and wasteful complexity which promotes fear and uncertainty rather than innovation and development of new markets.

There are also significant disagreements about the scope of §115's application to legal, royalty-paying digital music services, the impact of which is exacerbated by the threat of strict liability and statutory damages:

(a) there is disagreement about whether on-demand Internet radio services which merely perform music require mechanical reproduction licenses, even though such services do not provide users with copies that the users can control and use as they see fit. DiMA and the Register of Copyrights believe that on-demand performances may justify a higher performance royalty than pre-programmed radio services (and ASCAP and BMI charge almost a 50 percent surcharge for on-demand performances), however, the server-based and ephemeral incidental reproductions that are technically required to render performances should be either royalty-free fair use or should be exempted from royalties under the ephemeral recording exemption that is provided to terrestrial broadcasters in §112 of the Copyright Act;
(b) there is disagreement about whether the §115 license extends to so-called "tethered" downloads made as part of subscription services for which consumers pay a monthly fee, in contrast to permanent downloads, for which consumers generally pay a per-song fee;
(c) there is disagreement about whether the §115 license extends to all the incidental reproductions that are technically required to be made in the course of the distribution of one song to one purchaser (e.g., by a download store), or whether the incidental network and transient reproductions and server copies require an additional license and payment;
(d) there is disagreement about whether the delivery to one purchaser of the same download (i) in two different audio formats, or (ii) to two different locations (e.g. to a work and a home computer) triggers more than one mechanical royalty; and whether the delivery of fully encrypted "locked content" that can not be heard by anyone triggers the payment of a mechanical royalty before it is decrypted and "unlocked" and becomes accessible to the user. For all practical purposes, without the key there is no music, just a jumble of ones and zeroes.

Though the law and its shortcomings are complex, the result of this antiquated system is simple: legal services are critically handicapped and we are forced to incur significant administrative expenses that should be completely unnecessary in our modern, computerized world. We can not obtain licenses for the broad catalog of songs we need to compete with pirate services and we do not know the final licensing royalty costs of providing our own services. The compulsory, guaranteed-to-be-available publishing license that Congress intended to be a meaningful alternative to negotiating direct licenses with tens of thousands of music publishers is instead so administratively burdensome and of such uncertain scope that it is shackling legal services and undermining rather than promoting innovation and new royalty-paying markets. Meanwhile, illegal services continue to serve their "customers" at light speed across the Internet.

II. A modernized Section 115 will provide necessary clarification for digital services and benefit songwriters and music publishers.

A modern, efficient composition license would provide innovative online music services a practical and efficient means to offer consumers all the music that has been previously recorded and distributed. It would also ensure full-value royalty payments to songwriters and publishers. In testimony and in industry discussions that have occurred under the auspices of the House Judiciary Committee, one solution has been proposed that would meet these goals: a statutory blanket license.

1. The Preferred Solution: A Statutory Blanket Mechanical License Coupled With Clarification On The Scope Of Such License.

The most effective legislative reform would create a statutory blanket license that would provide digital music services the ability to obtain easily the publishing rights they require. Music services would be required to report music usage and pay royalties to an agent designated by rightsholders, who would in turn distribute royalties to songwriters and publishers.

Section 115 currently makes available licenses on a song-by-song basis, because in 1909 when the license was developed, and in 1976 when it was modified, licensees typically required only a handful of compositions to produce a piano roll, composition book or record album. Today, however, online services such as RealNetworks' Rhapsody require more than a million licenses simultaneously, as we seek to offer consumers the most comprehensive music selection possible.
? Only a blanket license can offer modern music services non-infringing access to all available music for purposes of lawful commercial distribution, which was precisely Congress's goal when creating the original compulsory mechanical license.
? Only a blanket license can eliminate legitimate services' unreasonable legal risk, which would permit us to unleash additional resources for marketing, customer service, and improving systems to deliver royalties electronically.
? Only a blanket license will result in the development of one comprehensive database of all copyright ownership information so services can accurately, electronically and efficiently report all music usage and songwriters can accurately, electronically and efficiently be paid.
Imagine a modern marketplace where we can provide songwriters instant access from any computer to information regarding how their songs were used and how much they will paid. A modernized system will dramatically improve transparency for the artists, remove administrative overhead costs, and with electronic payment systems, will result in much faster payment.

A statutory blanket license does not mean that royalties are discounted, nor that music services are free of reporting obligations. Instead the blanket license would be similar to those provided today by SoundExchange, ASCAP and BMI - the collective agent grants licenses on a non-discriminatory basis for the use of all copyrighted compositions. Royalty rates for the blanket mechanical license would be determined just as mechanical royalty rates have been determined since the 1976 Copyright Act - by industry-to-industry negotiation with an arbitration process available if the parties fail to reach agreement. And music services would be

required to pay full-value mechanical royalties and to submit usage reports detailing which compositions have been used and how they have been used, so as to assist the process of ensuring that songwriters and publishers are paid accurately.

Confirm Legal Authority to Set Percentage-of-Revenue Royalties. As music offerings today are much broader than traditional "mechanical" products, royalty structures must also broaden to accommodate industry development. For example, time-based subscription services such as Rhapsody that permit unlimited downloads of songs within a given month, do not lend themselves to traditional cents-per-song royalties. Some rightsholders, however, claim that Section 115 does not permit mechanical royalty rates to be set as a percentage of music service revenue, but rather must be set on a cents-per-reproduction basis.

RealNetworks and DiMA disagree that percentage of revenue royalties are prohibited by current law, but we urge Congress to resolve the confusion around this issue and confirm that percentage-of-revenue royalties are permissible under a modern 115 license. Some rightsholders are concerned that percentage royalties will underpay them as services give music away or as the value of music becomes increasingly lower. But percentage royalty structures have worked well for U.S. performance royalties and for European publishers for several decades.

Clarify that §115 Does Not Apply to Digital Performances, and That it Does Apply to Limited Download Subscription Services. As discussed earlier, ambiguities regarding the scope of Section 115 have put online music services in the unprecedented situation of being asked for multiple publishing royalties when services appear to not require them. Music publishers assert that online music services need mechanical licenses for on-demand performances or "streams" even though we have already obtained performance licenses from ASCAP, BMI and SESAC. They seek mechanical licenses for the server copies and ephemeral "buffer" copies that technically are required to be made solely in order to facilitate the delivery of the performance to the user; but these copies are not controlled by, and have no economic value to, the user. The Copyright Office concludes that on-demand performances should require only performance royalties, and has recommended that Congress confirm this conclusion with clarifying legislation. We urge the Committee to act on this recommendation, and similarly to clarify that digital downloads, whether permanently sold or rented by subscription, do not implicate performance rights unless the download is rendered as music and is audible simultaneous to its transmission.

2. An Interesting Alternative: The "Unilicense" Proposed by the Songwriter/Publisher Community.

In recent months, songwriters, music publishers and their collective licensing agents have recognized that online music services face unique challenges, and that it is in the music community's greater interest to help online services compete against pirate networks. This has resulted in a legislative proposal for a new statutory blanket license that would bundle all performance, reproduction and distribution rights that online services need in order to offer innovative services such as Rhapsody and those of our DiMA colleagues. Though still a conceptual proposal at this point, the proposed "unilicense" has important qualities that RealNetworks and DiMA support:

1) It covers the entire repertoire of U.S. copyrighted music, thus ensuring that online services can offer consumers the most complete repertoire available and thereby compete against pirate networks.

2) It creates a central clearinghouse enabling music services to pay all publishing royalties for all songs in one place and enabling music publishers to collect all digital royalties owed to them from one place. The collective designated agent would also create a mechanism for publishers to identify the compositions they own in one system which is available and transparent to all parties involved. This significantly reduces the transaction costs for both publishers and music services.

3) It limits online services to a single license obligation for each offering, even if the rightsholders and services disagree regarding the scope or value of those rights. This would eliminate double-dip licensing and focus attention instead where it belongs: on determining the value of the music use without regard to how the "rights" are characterized.

4) It recognizes that percentage-of-revenue royalties are an important alternative for modern royalty rate negotiations.

There are, however, continuing disagreements regarding certain aspects of the Unilicense. Some publishers desire the right to opt out of the unilicense, which would essentially make the license voluntary and completely destroy its value. For any blanket license to work it must be comprehensive, encompassing all music that has otherwise been available through the traditional Section 115 license. Additionally, industries disagree as to whether Congress should legislate a royalty rate. Songwriters and publishers have asked Congress to set a rate 2 - 3 times higher than rates currently being paid by Internet radio services and digital download stores. DiMA prefers that prices not be set by Congress, and that instead we maintain the traditional rate-setting process of statutory and compulsory licenses: industry-to-industry negotiations followed by arbitration if the parties cannot agree.

Additionally, DiMA supports music publisher and songwriter legislative proposals that would recognize that new consumer music offerings that merge digital and physical attributes should not implicate traditional reproduction rights and royalties. Specifically,

? Technologically protected "locked content" that is delivered to consumers in ways they cannot access, e.g., without any key present, should not trigger a royalty until a consumer affirmatively accesses the music;
? Anti-piracy protected multi-session CDs that enable consumers to play the music on multiple devices but which limit their ability to upload the music to the Internet, should only trigger a single mechanical royalty per musical work rather than one royalty for each copy or "session."

3. Eliminating Section 115 will create turbulence and risk, and hinder royalty-paying services' growth.

As Register Peters testified today, the Copyright Office agrees with DiMA that the current Section 115 compulsory license does not work. In past testimony she has recommended that Congress either repair the compulsory mechanical license or discard it entirely. Most recently, however, she has testified in favor of eliminating the compulsory license entirely, and instead requiring that each musical work's digital performance, distribution and reproduction rights be administered in a bundle; and that songwriters and publishers have unlimited choice regarding third-party administration of those bundled rights.

RealNetworks and DiMA disagree strenuously with the Copyright Office recommendation because eliminating the compulsory license would dramatically increase the administrative burden on Internet music services. We believe that the Copyright Office's proposal is certain to impede, rather than assist, our ability to license the broad catalog of musical works necessary to compete with pirate services

We are deeply concerned that the proposed Music Rights Organizations would not likely develop as the Copyright Office suggests, as the uncertainties associated with the Copyright Office proposal are extraordinary. Experience teaches us that each MRO is likely to impose different and inconsistent royalty and reporting structures - this is exactly what is happening in Europe and it has slowed the roll-out of legal music in Europe. In addition, the proposal does not ensure that the smoothly-operating ASCAP and BMI licensing processes would extend to reproduction and distribution rights. Though it is of course possible that the PROs would voluntarily extend to distribution and reproduction rights their existing operational procedures (i.e., blanket licensing on request and then negotiating price), it seems unlikely that publishers and songwriters would approve this practice. It seems more likely to us that the mere possibility of blanket licensing on request would incentivize publishers and songwriters to create many more MROs than the Copyright Office predicts. Absent the rate court backstop discussed above, nothing would inhibit the PROs (or any newly formed MRO) from preventing legitimate online services' access to blanket licenses that are necessary to build a

music service that is competitive against black market networks. Moreover, the federal district "rate courts" which today oversee PROs' performance rights licensing and act as a backstop against anticompetitive conduct, would have no jurisdiction over the PROs' management of reproduction and distribution rights. Waiting for years, possibly decades, of antitrust enforcement activity to work out these issues will be too little, too late to make a difference for today's on-line music industry.

As a result of the unlimited number of new MROs, the Copyright Office proposal would not resolve online services' administrative burden associated with current Section 115, but instead would substitute new, and likely much greater burdens. There is nothing in the proposal to fix today's administrative impossibility - song-by-song licensing combined with the multi-million dollar burden of determining who owns each song in a multi-million song library. Nothing in the proposal prevents MROs from licensing all works on a song-by-song, format-by-format basis as the Harry Fox Agency and the 115 license require today. Moreover, the Copyright Office proposal could spawn hundreds of Music Rights Organizations, and DiMA members would have to obtain licenses from each and every one. And perhaps worst, DiMA services would be forced to match composition licenses obtained from a myriad of publishers and MROs in different data formats and structures with sound recording licenses obtained from record companies in order to ensure that each individual work's license is complete, an extraordinarily complex requirement that has not been successfully accomplished to date by any one, not even by the Harry Fox Agency which has been at this for years.

Rather than destroying the compulsory license altogether, DiMA urges the Subcommittee to fix it - to simplify and modernize the license so that all stakeholders benefit and none are harmed in the process. The statutory blanket license structure has been embraced by all stakeholders in this discussion - including songwriters and music publishers and their representatives, recording companies, online services, and retailers. This Subcommittee should not permit disputes about details to overwhelm the much broader consensus in support of structural reform rather than wholesale destruction.

III. Clarify and Simplify Internet Radio Laws to Level The Playing Field, Promote Service Growth and Increase Royalties to Record Companies and Artists.

Since the Internet radio sound recording performance license was enacted in 1998 as part of the Digital Millennium Copyright Act, Internet radio services have paid several millions of dollars in royalties to recording companies and recording artists. These payments evidence widespread consumer adoption of Internet radio, but also underscore how the law discriminates against RealNetworks and our DiMA colleagues in the Internet radio business based solely on our choice to deliver music to consumers via the Internet, rather than broadcast, cable or satellite radio technologies.

Today, we ask the Subcommittee to fix the Section 114 statutory sound recording Internet radio license in two significant respects:

1) Clarify when an online radio service's consumer-influence features fall within the scope of the Section 114 statutory sound recording license and when a service is "interactive" and thereby outside of, and not eligible for, the statutory license. This issue has spawned several court cases and a Copyright Office proceeding, and has dramatically reduced innovation in online radio offerings. The Subcommittee can end this legal quagmire and fix the definition of "interactive" service so that it reflects Congress' intention to promote rather than inhibit innovative royalty-paying Internet radio services.

2) Level the playing field among competing radio providers, or at least among digital radio providers. Internet radio, broadcast radio, cable radio and satellite radio compete directly against one another for a limited universe of listeners and advertisers. Unfortunately, as discussed below, Internet radio services are subject to higher royalty rates and a less favorable royalty rate-setting standard than our satellite, cable and broadcast competitors, and we are also limited by more programming and functionality limitations.

1. Confusion Over the Definition of "Interactive Service" Hampers Growth of Services and Royalties.

RealNetworks and DiMA urge the Subcommittee to clarify the definition of "Interactive" Internet radio service so we know when services are eligible for the statutory license and when they are not, without spending millions of dollars in litigation and without risking millions more in damages.

Whether a particular Internet radio service qualifies for the statutory license is dependent on several statutory factors -- most notably the radio service must:

? comply with programming restrictions known as the "sound recording performance complement", e.g., that limits the number of songs of a single artist or album that can be played in a 3-hour period, and

? not be an "interactive service" as defined in the statute.

The 1995 Digital Performance Right in Sound Recordings Act defined an "interactive" service as "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient." This definition was clear, and there was never any question (or litigation regarding) whether a service was or was not interactive. In 1998 Congress amended the definition of "interactive" service, changing it from a fairly straightforward and objective test to one requiring a complex subjective analysis. Nevertheless, in both 1995 and 1998 Congress also specified that services may permit some consumer influence in their statutory license programming.

Relying on this safe harbor and their interpretation of the "interactive" restrictions, several companies developed Internet radio services in 1999 and 2000 that permitted varying levels of consumer influence. These services' features included permitting consumers to rate songs, artists and albums, and to request that specific songs or artists' recordings be performed (but not at a specific time or in any specific order). Recording companies complained that these services did not qualify for the DMCA license and threatened to sue. Seeking clarification, DiMA petitioned the U.S. Copyright Office for regulations interpreting the definition, but the Copyright Office declined to propose regulations or to delineate specific features that individually or in combination would disqualify programming from the statutory license. The Copyright Office did, however, affirm unequivocally that services can incorporate consumer influence in their programming without making the service "interactive."

In May, 2001, several recording companies filed a copyright infringement suit against Listen.com, Inc. (now owned by RealNetworks), Launch Media (now Yahoo!), and several additional DiMA companies, seeking to disqualify consumer-influenced radio from the statutory Internet radio license. A few DiMA companies settled by agreeing to pay extraordinarily high royalties and maintain some consumer influence features; others agreed to eliminate all consumer influence features; still others went out of business.

The "interactivity" dispute creates a very straightforward business and competitive problem that should be recognized by the entire music community. Internet radio pays millions of dollars in royalties every year to artists and the recording industry. Broadcast radio - even digital broadcast radio - pays zero. If Internet radio is saddled by rules forcing our programming to be exactly like broadcast radio, or forcing direct label-by-label negotiations regarding royalties that our broadcast competitors are not even required to pay at all, then how are we to compete, succeed, and generate even more royalties for sound recording companies and artists?

Today RealNetworks and many DiMA companies have developed compelling and innovative consumer-influenced radio offerings that we have chosen not to introduce because the risk of litigation is too great. This harms the entire music industry community, because the goal of these services is to win consumers away

from black market networks, to generate royalties and introduce them to new music, thereby promoting music purchases and subscriptions that grow royalty revenue even more. These services do NOT substitute for on-demand services. They simply enable music lovers to find stations tuned to their desires rather than programmed by a monolithic radio station holding company.

To compete against broadcast radio - which is subject to no royalties - and cable and satellite radio - which are subject to lower royalty rates, Internet radio must be free to create, introduce and promote innovative consumer-influenced offerings using the power of our technology. And let's not forget the artists. The statutory license requires that 50% of royalties paid by statutory license Internet radio services be paid directly to recording artists. The recording companies' efforts to restrict the scope of the statutory license by defining all innovative services as "interactive" directly decreases the amount of royalties paid to artists by Internet radio services.

Instead of holding back the royalty-paying medium, we urge the recording industry, and Members of Congress who believe that sound recording and artists companies should be paid, to unshackle Internet radio's programming restrictions and promote the medium that pays. In furtherance of fully-licensed litigation-free royalty-paying online music, DiMA urges the Subcommittee to amend the "interactive service" definition to ensure that programming based on user preferences falls squarely within the statutory license, so long as the generally applicable programming restrictions for the statutory license are not violated and so long as users are not permitted to control when a particular song might be played. RealNetworks and other DiMA companies want to focus our energy on developing exciting royalty-paying products and services that combat piracy, rather than on lawyers and litigation.

2. All Radio Services, or At Least all Digital Radio Services, Should Pay the Same Royalties and Play by the Same Rules.

i. Sound Recording Performance Royalty Should be Equalized.

On behalf of the Internet radio industry, RealNetworks today renews a longstanding request: that the Committee equalize the sound recording royalty rates paid by radio services, and particularly by digital radio services. This includes, of course, equalizing the legal rate-setting standard used by CARPs when determining the royalty rates of various types of digital radio services. Setting aside the legalese and the history of how we got to today's disparity, let's focus today on fairness - fairness to competing services, fairness to artists and fairness to recording companies. We note that Register of Copyrights Marybeth Peters also has suggested that the Congress reconsider the rate-setting standards that apply to essentially competitive digital radio services.

All competitors deserve a level playing field, particularly when an obligation is structured by government. As technologies and new competitive services develop, government should not favor or disfavor a single technology or distribution medium absent compelling circumstances, which do not exist in the radio programming market. The Committee is familiar with cable and satellite television programming royalties and the basis for equity in that marketplace. The same is true in radio - broadcast, cable, satellite and Internet radio.

At minimum, RealNetworks and DiMA implore the Committee to reconsider why Internet radio services are saddled with a royalty rate-setting standard that differs from cable and satellite radio, and that resulted in arbitrators setting our percentage of revenue royalty rates more than 50% higher than our competitors' royalty rates. Putting aside which of the many possible standards should prevail - and whether the right choice already exists in current law or whether a new standard should be developed - basic fairness requires that competitors pay the same royalties to the same providers of the same content. Similarly, fairness to consumers compels a level playing field to ensure fair, robust competition that in the long run favors the most innovative and efficient radio services wins, rather than the services most favored by Congress. Consumer choice free of legal bias, and not Congress, should determine which services thrive and which do not.

ii. The Inequity is Multiplied by the "Aberrant" Ephemeral Sound Recording Reproduction Royalty.

As the Copyright Office noted in a 2001 Report to Congress, there is an imbalance between the legal and financial treatment of so-called ephemeral copies of compositions in the broadcast radio context, and similar copies of sound recordings utilized by Internet radio.

Since 1976 broadcast radio has enjoyed a statutory exemption to make reproductions of compositions so long as the reproduction remains within the radio station's possession and is used solely to facilitate licensed performances of the same music. Internet radio services also require ephemeral recordings to enable their webcasts, but while broadcast radio typically requires a single ephemeral copy, webcasters require several copies to accommodate competing consumer technologies (e.g., RealNetworks or Windows Media formats) and services (e.g., dial-up or broadband Internet access). Each of a webcaster's ephemeral recordings functions precisely like the copy exempted for radio broadcasts, but Internet radio is saddled with having to license these copies, rather than enjoying the benefit of an exemption. In the first Internet radio CARP, the recording industry was awarded nearly a 9 percent bonus on top of the performance royalty for the making of these ephemeral copies which add no independent value. They are simply a by-product of modern technology.

In its Section 104 Report to Congress, the Copyright Office stated that the compulsory license for sound recording ephemerals, found in Section 112(e) of the Copyright Act, "can best be viewed as an aberration" and that there is not "any justification for imposition of a royalty obligation under a statutory license to make copies that . . . are made solely to enable another use that is permitted under a separate compulsory license." Section 104 Report, p. 144, fn. 434. The Copyright Office urged repeal of this compulsory license; DiMA asks the Subcommittee to act on this request.

iii. Competing Radio Services Should Not Be Subject To Different Programming and Functionality Rules Based Only On Their Different Technologies.

As the Subcommittee may recall, the Section 114 sound recording performance license imposes several rules that apply to Internet radio but not to our satellite, cable or broadcast competitors. Since technologies have evolved and converged and our competitors' radio services now have become available over the Internet or other flexible digital formats, it seems reasonable to amend the sound recording performance complement and other rules that needlessly differ among competitive technologies and services. One example is the restriction that prohibits Internet radio providers from engineering features that facilitate the recording of their radio programming, which prohibition is not similarly applied to cable and satellite radio providers. The result is that the satellite radio provider XM Radio markets an innovative MyFi device that records up to five hours of programming for consumers' portable enjoyment outside the reach of a satellite signal, but Internet radio companies arguably may not offer a similar recording feature and fall within the statutory license. This is blatantly anticompetitive and unfair.

Additionally, the basic programming restrictions that were put in place to reduce the substitutional impact of Internet radio on music sales should be relaxed, as digital broadcasters whose programming is available over the Internet present the same substitutional risk, but are not saddled with these programming restrictions, and of course do not even pay sound recording royalties.

* * * *

Internet music services are at a crossroads today. Legal on-line music services are poised to be the music industry's most powerful weapon against piracy. But we need Congress to modernize the Copyright Act, enabling us to efficiently license, report and pay royalties for the music we sell. The paper and pencil system of the last century simply does not work in the new millennium. A modernized statute will reduce unnecessary administrative overhead, improve transparency for artists and allow us to focus our resources on creating great products and services that beat the pirate services. In this way, Congress can promote innovation,

protect copyright, and grow the economic pie for all stakeholders in the music industry.

Thank you for the opportunity to represent RealNetworks, DiMA and the legitimate, royalty-paying online music industry at today's hearing.