

U.S. Senate Committee on the Judiciary
Hearing on

**“The Performance Rights Act and Parity
among Music Delivery Platforms”**

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Testimony of Robert Kimball
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Senator Feinstein, Senator Sessions and Members of the Committee:

On behalf of RealNetworks and the Digital Media Association (DiMA), thank you for inviting me to testify today regarding digital radio and the Performance Rights Act, and specifically to focus on the hardships facing Internet radio as we compete against more established platforms to offer consumers and artists a better radio experience.

As the Committee considers alternative approaches to revising the Copyright Act with respect to sound recording performance rights, RealNetworks and DiMA ask you to ensure fair and equitable treatment for all participants in the music industry ecosystem:

1. Establish a level playing field by legislating royalty parity across all forms of radio, including with respect to large and small broadcasters and webcasters, so that the government is not picking winners and losers when broadcast, cable, satellite, and Internet radio compete; and
2. Adopt a single, uniform royalty-setting standard for all radio services – specifically, the standard found at 17 U.S.C. 801(b)(1) – that consistently yields reasonable results for sound recording producers, artists, songwriters, music publishers, and radio services.

If these goals are accomplished, RealNetworks and the Internet radio industry – along with our partners in the online music retail community – will continue to innovate, grow, and deliver new opportunities for tens of thousands of artists and record companies that historically have been stifled by distribution bottlenecks and other limitations of analog radio and physical media. Legislation ensuring that all radio competitors pay royalties and that the royalty amounts are both fair in and equitable among competing technologies and business models will unleash robust innovation and competition that will generate substantial value for creators and the public alike, just as our Constitutional framers intended.

RealNetworks Invented Internet Radio and Created an Industry

In 1995, RealNetworks invented the first Internet media “streaming” software, known as the RealPlayer, which powered the first Internet radio offerings and other audio broadcasts over the internet. Today, RealNetworks is a leading provider of Internet media delivery software and services, online games, ring-back tones and mobile media services. Rhapsody, our leading online music subscription service, legally offers consumers millions of songs on-demand for a monthly fee. For today’s hearing, of course, it is notable that RealNetworks provides Internet-only radio services that offer extraordinarily diverse programming to millions of listeners. Our music customers will play billions of songs this year and RealNetworks will pay millions of dollars in music-related royalties to recording artists, record labels, songwriters and music publishers.

Internet or online radio is simply radio programming broadcasted over the Internet. Several hundred broadcast radio stations simulcast their primary programming online; additionally, several services offer many Internet-only stations and several thousand independently programmed web-based “stations” offer Internet-only original programming, though the number of large services and independent stations is declining due to the royalties. RealNetworks offers hundreds of professionally-programmed stations in dozens of musical genres, from Afro-Pop through Christian Country, Latin Dance to West Coast Jazz and beyond. In addition, our technology allows us to deliver stations based around any of the hundreds of thousands of artists in our system. If you’re a Johnny Cash fan, our “Johnny Cash Radio” will intersperse his songs with music by contemporaries such as Carl Perkins and Roger Miller, plus followers like Kris Kristofferson and Waylon Jennings. As a result, RealNetworks offers literally hundreds of thousands of different stations to satisfy fans of any musical style, no matter how niche or obscure.

Internet radio is not confined by radio spectrum limitations. The ability to offer an unlimited number of stations enables Internet radio to provide a much more diverse and rich experience, which benefits consumers and artists. For example, while a traditional radio station may have only 30 songs regularly rotated through its playlist to ensure that listeners hear one of a handful major label “hits” during a short car ride, an Internet radio station might have over 650 songs in rotation, including many more independent artists. It is notable that the Association of American Independent Music applauds Internet radio for playing more than 40% independent label music, compared to broadcast radio which plays less than 15% Indie music. Internet radio provides airtime to the broadest possible range of music and artists – not only to established stars and big labels backed by big money. This results in royalties flowing to a larger group of artists.

Advertisers and paying subscribers generate revenue for Internet radio, which in turn is used in large part to pay royalties to record labels and artists. Most Internet radio stations also link to album art, artist biographies, editorial reviews, music videos, tour information and opportunities to purchase digital downloads, CDs, performance tickets and related merchandise. This value-added content provides listeners with opportunities to explore the music more deeply and enables artists to connect more directly to their fans. Of course the purchasing opportunities directly benefit recording artists, labels, songwriters and music publishers in ways that simply do not

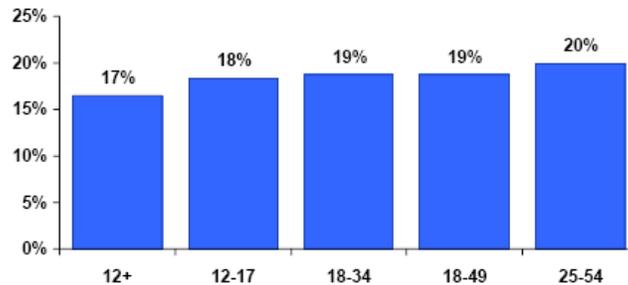
exist in traditional terrestrial radio. Internet radio is increasing the size of the music market to the direct benefit of musicians.

The Internet Radio Audience

Internet radio is a mainstream, popular activity. Studies by Arbitron and Edison Research conclude that 69 million Americans listen to Internet radio monthly, an increase of 17 percent from 2008 to 2009. Twenty percent of 25-54 year olds listen to Internet radio weekly.

Online Radio Reaches One in Five 25- to 54-Year-Olds per Week

% by Age Group Who Have Listened to Online Radio in Last Week



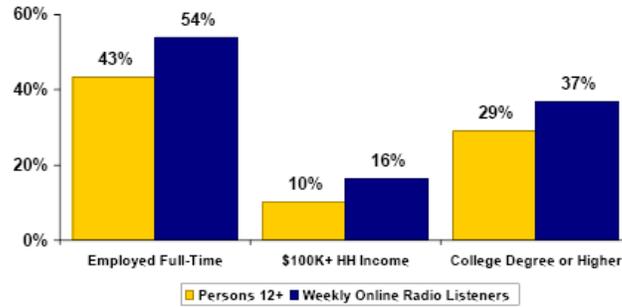
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Americans are increasingly enhancing their use of traditional media with new ways to control how, when and where they consume information and entertainment. The use of online radio, in particular, is on the rise and consumers say that flexibility, variety in music, clearer transmission signals, and less DJ chatter all drive their adoption of greater Internet radio options.

Fortunately for advertisers, artists and copyright owners, Internet radio attracts upper-income, tech-savvy listeners. Internet radio listeners are 50 percent more likely to live in a household with an annual income of \$100,000 or higher, when compared to the general U.S. population aged 12 and older:

Online Radio Attracts an Upscale, Well-Educated and Employed Audience

Composition of Weekly Online Radio Listeners vs. Total Population 12+

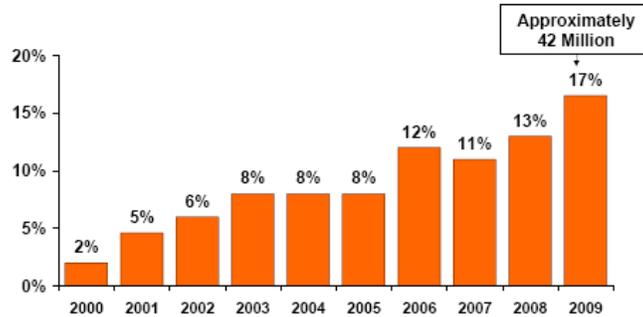


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In the last year, weekly Internet radio listening increased dramatically, up 17 percent to 42 million listeners tuning in weekly.

Weekly Online Radio Audience Up by Nearly One-Third in Last Year

% Who Have Listened to Online Radio in Last Week



Base: Total Population 12+

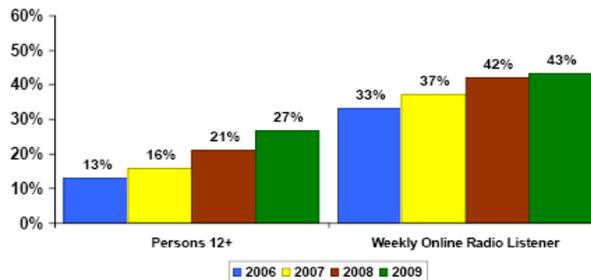


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And Internet radio listeners are nearly 60 percent more likely to purchase digital music online, compared to the general U.S. population age 12 and older. This highlights that an important value Internet radio delivers to artists is not simply the royalties that we pay, but also the related marketing opportunities and revenue streams that Internet radio enables and promotes.

Online Radio Listeners More Likely to Have Purchased Digital Audio Online

% Having Purchased MP3s or Other Digital Audio From an Online Download Service



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Internet Radio Benefits Consumers and the Music Industry

Internet radio's growth has been driven by our ability to use technology and consumer input to create a radio experience listeners love, which directly benefits copyright owners and advertisers.

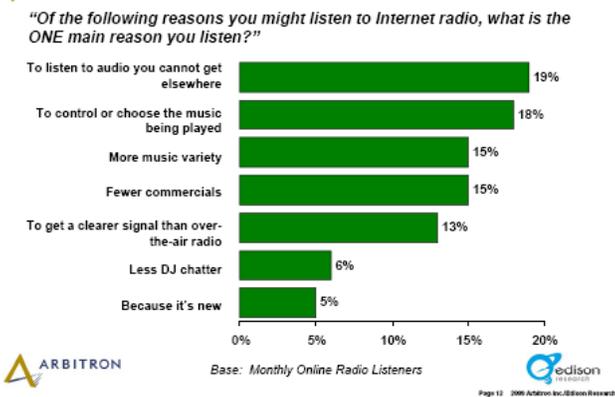
As the Committee is aware, AM-FM music programming is generally limited to repetitive hit-driven playlists, which makes it hard for new artists to find an audience and for consumers to discover new music they enjoy. Anyone listening to a typical terrestrial radio station knows how little variety exists regardless of where you listen across the country. The homogeneous playlists are created at the corporate level and broadcast in every market, limiting the ability of independent artists to break through. Even satellite radio is limited to several dozen music channels and limited playlist diversity. But Internet radio reverses the hit-driven equation favored by traditional terrestrial radio stations. The flexibility and diversity enabled by the Internet benefits artists and consumers:

- One DiMA radio service, Live365, reports that its listeners enjoy the music of more than 50,000 artists each week, more than half of whom are not signed by major labels. This alone demonstrates the value of Internet radio to artists challenged by the short playlists of terrestrial radio and even of satellite radio.
- A second DiMA service reports that its average station has a playlist of between 500 and 700 songs, which compares dramatically to KROQ, one of the biggest music broadcasters on the West Coast which reportedly has fewer than 40 songs in heavy rotation.

By offering a wide variety of programming, Internet radio services virtually guarantee that everyone will find a station they enjoy. This makes listeners more likely to continue listening through commercials rather than flipping channels, and to stick around for the next song. By measuring constant consumer feedback, Internet radio services learn more about what types and combinations of music consumers enjoy, which enables Internet radio to provide eclectic unpredictable song mixes that promote music discovery by consumers. This music discovery

feature is critical to helping smaller bands find an audience for their music which otherwise is ignored by “big radio.”

“Variety” and “Control” Are Top Reasons for Listening to Online Radio



Congress Should Legislate Royalty Parity – A Matter of Basic Fairness to Creators and Digital Radio Competitors

RealNetworks and other Internet radio services have paid more than one hundred million dollars in royalties to recording companies and artists since we started webcasting radio. In part, these payments reflect widespread consumer adoption of Internet radio. But when compared to the revenues received and royalties paid by our competitors on other radio platforms, they demonstrate the fundamental unfairness created by the Copyright Act’s discrimination against Internet radio solely because we deliver radio via the Internet, rather than using broadcast, cable or satellite technologies. This following chart says it all:

2008 RADIO REVENUES AND ROYALTIES

	Internet Radio	Satellite Radio	European Broadcast Radio (Music)	Broadcast Radio (Music)
2008 Revenue*	\$275-325 Million	\$1.9 Billion	unknown	\$16.5 Billion
Sound Recording Royalties	47-300% of Revenue	6-8% of Revenue	4.3% of Revenue	0% of Revenue
Songwriter Royalties	4% of Revenue	4% of Revenue	5.2% of Revenue	3% of Revenue

* Various sources including “Communications Industry Forecast 2008-2012,” Veronis Suhler Stevenson; “Radio Revenue drops 10% in 2008,” Radio & Records; and, “The State of the News Media,” the Project for Excellence in Journalism 2008.

Even today, in 2009, Internet radio revenue is measured in hundreds of millions of dollars, while broadcast and satellite radio revenue is many billions. Despite this massive revenue generating disparity, the largest Internet radio services are paying extraordinarily high Internet radio royalties while broadcasters pay zero and satellite radio pays 7.5% of its revenue. A prominent recent example of the continuing unfairness is the recent agreement between SoundExchange and several “pureplay” Internet radio services. Pandora announced that it would sign onto the settlement and have the opportunity to survive as a major Internet radio service because its royalties would now be reduced from a stunning **70%** of revenue as required by the Copyright Royalty Board to a merely extraordinary **50%** of revenue. This is a deeply unfair result that is only worse for Internet radio services that don’t even qualify as so-called “pureplay” radio services. These non-pureplay Internet radio services are required to pay even higher rates, solely because those companies sell more than just Internet radio. Congress cannot have intended such irrational and anti-competitive results from the Copyright Royalty Board proceedings.

Somewhere between the absurd amounts of Internet radio royalties and the zero royalties paid by broadcast radio is a rational royalty level. We believe that amount should approximate what European broadcasters pay artists and labels – generally 3-8% of revenue – or the amount that all radio platforms pay songwriters and music publishers – generally 3-5% of radio revenue.

It is important to note that Internet radio also pays public performance royalties to songwriters through our licenses with ASCAP, BMI and SESAC. However, these royalties for Internet radio are set at a level that is consistent with royalties historically paid by broadcast and other forms of radio – between 3 and 5 percent of revenue – further highlighting the absurdity of the disparate sound recording royalty rates.

How is it possible that broadcast radio pays zero, satellite radio pays 7 percent of revenue and Internet radio pays many more multiples of that? Because Congress has set different royalty rules for different radio delivery methods, and then has set different royalty-setting standards for different forms of royalty-paying radio. The result is a motley variation of royalties that has essentially created winners and losers among radio programmers based only on the technology they use to distribute programming.

The lack of royalty parity among radio delivery methods is particularly destructive in today’s technologically converging world. A single device can receive an identical radio program delivered by terrestrial stations, satellite or the Internet. Yet, the price paid by the service provider for playing a song will vary dramatically simply because the song was delivered over WiFi versus a terrestrial station or satellite. The very same SiriusXM channels are delivered to subscribers by satellite and over the Internet, and the Internet-delivered songs cost SiriusXM much more in royalties than do the satellite-delivered songs. The Copyright Act is placing a huge thumb on the scales to favor some delivery methods over others. We believe robust competition on a completely level playing field is the correct – and only – way to ensure maximum innovation and economic gain for both music creators and radio services.

Congress Should Pick the Best Royalty Standard

Assuming that the Committee agrees that royalties should be set evenhandedly, the next issue is what rate-setting standard should apply to all radio programmers.

DiMA is pleased that the standard which has historically applied to Internet radio – a unique statutory standard known as “willing buyer – willing seller” – is no longer being supported by any stakeholder. This standard has proven to be a disaster, as each Internet radio rate proceeding has resulted in royalties so high that companies – including very large services such as AOL and Yahoo! – have been forced by high royalties to shut down their radio services, and Congress has felt the need to legislate in order to promote remedial industry negotiations resulting in royalties lower than those proscribed by the CRB. The standard has resulted in numerous unintended consequences that distort the marketplace.

DiMA believes that parity and fair competition can best be achieved by applying to all radio services – regardless of underlying technology or business model -- the standards set forth in Section 801(b)(1) of the Copyright Act. These standards were adopted by Congress in 1976 to ensure that royalties would be fair both to creators and to licensees. When setting royalty rates under 801(b)(1), judges set rates to achieve the following objectives:

- (A) To maximize the availability of creative works to the public.
- (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
- (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

Since 1976, in each of the four proceedings that have occurred under the Section 801(b)(1) standard, the royalties awarded have been upheld by the courts, and in none of the cases have the parties felt compelled to ask Congress to remedy the determination or to shut down their business.

Senator Feinstein has in the past proposed that “fair market value” is the correct standard. While we applaud Senator Feinstein for recognizing that “willing buyer-willing seller” should be replaced, DiMA’s concern is that the “fair market value” standard has also been tried, but it too warranted Congressional remedy after royalty arbitrators set satellite television royalties fully 11 times higher than were being paid by cable television programmers for analogous rights to retransmit audiovisual programming; they same type of distortion currently prevailing in the radio business.

A “fair market” standard is particularly inappropriate when a true competitive benchmark does not exist for the rate-setting tribunal to use. In the highly concentrated sound recording market, the statutory license affords even more concentration in a single licensor – SoundExchange. In this type of monopoly licensor market, it is impossible to achieve undistorted market rates. The system’s efficiency benefits theoretically should accrue to both licensors and licensees, but for antitrust and royalty fairness reasons it is critical that the SoundExchange system is backed by a fair-minded and evenhanded Copyright Royalty Board which is itself governed by a fair and balanced standard. Under the present Internet radio royalty standard, SoundExchange is obtaining a traditional monopolist’s share of the benefits. We need the new standard to balance those benefits among all industry participants.

Four proceedings have been conducted under the 801(b)(1) standard successfully and without controversy – two by the Copyright Royalty Tribunal,¹ one by a Copyright Arbitration Royalty Panel² and one by the Copyright Royalty Board.³ The latter two proceedings determined sound recording performance royalties just as we are discussing today.

In the performance right rate-setting proceedings, typically the first factor strongly favors recording artists and producers. The second factor assures that the royalty payments will equitably compensate artists and producers, while providing a fair return to those services that perform the sound recordings. The third factor assesses the relative strengths and value contributed by each industry. The fourth factor takes into account the economic situation facing each industry and the need for rates or terms to avert potential instability to an industry in flux.

As a result of these balanced factors, the rates awarded under Section 801(b)(1) have consistently yielded reasonable royalty payments of between 6 and 8% of radio revenue to artists and the recording industry, without jeopardizing the future economic health of digital music services. These decisions were appealed, but the parties were not so aggrieved that they sought Congressional relief or shut down their businesses.

¹ Adjustment of the Royalty Payable Under Compulsory License for Making and Distributing Phonorecords, 46 FR 10466 (February 3, 1981); Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884 (January 5, 1981).

² Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings (Final Rule and Order), 63 FR 25394, 25406 (May 8, 1998), *aff’d in part, rev’d in part sub nom Recording Industry Ass’n of America, Inc. v. Librarian of Congress*, 176 F.3d 528, 532 (D.C. Cir. 1999).

³ Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 FR 4080 (January 24, 2008).

Small Webcasters Deserve the Same Protections Against High Sound Recording Royalties that the Performance Rights Act Extends to Small Broadcasters

In addition to ensuring general platform parity under a reasonable and uniform royalty rate standard, Congress should ensure evenhanded treatment of small broadcasters and small webcasters.

Section 3 of the Performance Rights Act recognizes that small broadcasters would be particularly challenged by the amount of royalties that could be required when this law is enacted, and so it provides relief in the form of a \$5,000 royalty cap for all broadcasters with revenue of less than \$1.25 million. DiMA appreciates that the bill's sponsors have accommodated small broadcaster concerns by providing a royalty cap, but in furtherance of the parity desired by this Committee it would be fair to also enact a similar royalty cap for small Internet radio services.

Under the present system, a commercial webcaster making \$1.25 million in annual revenue pays \$150,000 in sound recording royalties, compared to the \$5,000 that the PRA would have a similarly-sized broadcaster pay. This disparity is unfair, so DiMA urges the Committee to extend PRA small broadcaster royalty caps to similarly-situated small webcasters, and to also proportionately reduce the revenue limits and royalty caps so they apply fairly to very small webcasters which often have revenue of less than \$100,000 and even \$10,000.

In an Effort to Protect Songwriters, Congress Should Not Legislate Anti-Radio Unfairness into the Musical Works Performance Royalty System

As the Committee may be aware, songwriters and music publishers have for decades been of two minds with regard to recording companies' and artists' efforts to legislate a sound recording performance royalty. In one sense, songwriters and music publishers sympathize with their copyright owning brethren whom they agree should be paid for performances of their sound recordings. However, songwriters and publishers are also concerned that if broadcast radio pays very high sound recording royalties like prevailing Internet radio rates, there will be no money available to pay songwriter royalties.

In 1995, when enacting the Digital Performance Right in Sound Recordings Act, Congress sought to protect songwriters by including 17 U.S.C. 114(i), which prohibits the use of sound recording royalty data to be considered in proceedings to determine copyright royalties associated with the performance of musical works. This was, and is, unfair to licensees and to the federal judges who are charged with enforcing ASCAP and BMI consent decrees and the arbitrators who are occasionally called upon to determine SESAC royalties, because this provision requires them to establish reasonable royalties without knowledge of important facts. It is impossible to set a fair royalty for use of copyrighted works without considering *all* other costs of the business, including sound recording royalties being paid for the use of the work. Turning a blind eye to that significant expense is certain to yield unfair results.

In S. 379 (and even more pointedly in the House bill H.R. 848) the Committee is contemplating exacerbating this unfairness. Specifically, the Senate bill seeks to embellish the current

prohibition by noting that sound recording royalty data cannot be used to “adversely affect” musical works royalties, which suggests that the data can be used by a decision maker to increase musical works royalties. In the House bill, the proposed amendment would be even more one-sided, as it would overtly prohibit the use of sound recording royalty data to reduce royalties, and thereby implicitly permit use of the very same data to increase royalties. Thus, for example, in an effort to reduce their musical works royalties a radio service could not tell the rate-setting judge that it pays 50% of revenue to sound recording copyright owners. But ASCAP and BMI could submit the very same facts to the court as evidence of why musical works royalties should be increased. This result would be patently unfair and one-sided and should not be condoned by this Committee or Congress.

Similarly, it is important that Copyright Royalty Judges who are charged with determining reasonable royalties and who struggle to identify rational marketplace benchmarks, be permitted to look at all royalty agreements between rightsholders and radio services without regard to parties’ desire for confidentiality. In the last several weeks SoundExchange has signed royalty agreements with several Internet radio industry segments, and as it serves SoundExchange’s purpose several of those agreements are admissible as evidence in future royalty proceedings and several are not. SoundExchange, as the monopoly licensor, should not be allowed to hide its agreements from consideration by the Copyright Royalty Board. Congress should mandate that all agreements reached by SoundExchange be included in the royalty review process, and not permit confidentiality clauses to undermine judges in their desire to set fair rates.

* * * *

Mr. Chairman, Senator Sessions, Senator Feinstein and Members of the Committee, for several years DiMA has sought to equalize the royalty standards that apply to radio so that fair competition prevails and so that RealNetworks and other DiMA member companies can grow and realize the full potential that Internet radio offers.

There is a great deal of opportunity for this Committee to promote the mutual interests of creators, consumers and radio innovators. We look forward to working with you to accomplish that goal.

Thank you.