

U.S. Senate Committee on the Judiciary
Hearing on

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

**Statement of the
Digital Media Association**

August 11, 2009

On behalf of our member companies that offer or support Internet radio programming, the Digital Media Association is pleased to offer this supplement to testimony of Bob Kimball, RealNetworks’ Executive Vice President who testified last week on DiMA’s behalf.

The purpose of this submission is not to repeat Mr. Kimball’s articulate written and oral presentations, but rather to offer additional concerns with respect to current law in the area of sound recording performance rights that we suggest the Committee consider prior to a markup of S. 379 or related legislation. This submission is also not intended to substitute for or otherwise supplement DiMA’s letters to Senator Feinstein regarding the appropriate standard the rate-setters should apply when deciding sound recording performance royalty disputes.

Digital Radio Statutory License Qualifiers Should be Updated.

17 U.S.C. 114(d)(2) includes several characteristics that qualify a digital radio program to utilize the statutory sound recording performance license. These provisions were enacted in 1998 with the intention of limiting the likelihood that digital radio would substitute for purchased sound recordings. Several could usefully be modified .

1. Pre-Announcements. 17 U.S.C. 114 (d)(2)(C)(ii) prohibits radio services from publishing or pre-announcing upcoming works to be performed, while allowing only the pre-announcement of artists whose works will be performed. As Internet radio adopts the audio advertising model of traditional broadcast radio, it is becoming more important to persuade listeners to not change stations when an advertisement is about to break up the music. Moreover, it is similarly helpful to have the ability to pre-announce a song or two so that listeners who dislike one song are less likely to change channels.
 - DiMA Proposal: Generally authorize digital radio services to announce what song will be performed “next”, and prior to an advertisement authorize services to announce two songs that are upcoming “after the break.”
2. Unreleased Sound Recordings. (d)(2)(C)(vii) prohibits stations with statutory licenses from performing sound recordings that have not been publicly released or otherwise specifically authorized to be performed by the copyright owner. This prohibition limits digital radio services from performing uncopyrighted sound recordings, e.g., concert or rehearsal recordings or in-studio recordings, though these types of recordings are

cherished and are often included in terrestrial radio programming that features historical or unique recordings, and their performance generates musical works performance royalties.

- DiMA Proposal: Generally authorize the performance of all sound recordings, regardless of whether they have been released or authorized by the copyright owner.
3. Sound Recording Performance Complement. The sound recording performance complement limits the number of times that a statutorily licensed digital radio service can play songs by a single artist or from a single album within certain amounts of time. Generally this is not problematic for Internet radio services, except on the occasion of a memorable event that justifies unusual programming, e.g., the death (or anniversary of the death) of a famous recording artist or the anniversary of a prominent album's release. It is also notable, however, that many broadcast radio stations have programs such as "Breakfast with the Beatles" or "Album Sides Sunday" with no apparent undermining of sales of sound recordings.
- DiMA Proposal: Generally authorize 2 hours of weekly programming that exceeds the complement, which programming can be archived for up to three days. Authorize up to two additional hours of programming in a given month that exceeds the complement, but only when the additional two hours marks a recognized special occasion.

The Ephemeral Sound Recording License is an "Aberration" That Should be Eliminated.

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 (or "server") 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 station's possession and is used solely to facilitate licensed performances of the same music. Internet radio services also require ephemeral recordings (or server copies) 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., Windows Media or RealNetworks or Adobe's Flash formats), services and Internet access speeds. Each of a webcaster's server copies resides on a server that is under the control of the webcaster (either directly or through a contractor/vendor relationship), and each recording functions precisely like the copy exempted for radio broadcasts. Internet radio, however, is required to pay royalties for these copies, rather than enjoying an exemption.

In the first Internet radio royalty arbitration the recording industry was awarded nearly a 9 percent bonus on top of the performance royalty for the making of these ephemeral recordings which have no independent economic value – they are simply a by-product of digital streaming technology. In more recent proceedings the ephemeral recording was not assigned an additional

royalty, and in fact the Copyright Royalty Judges have ignored it and in one instance the D.C. Circuit Court of Appeals remanded a CRB decision as a result.

In its 2001 Section 104 Report to Congress the Copyright Office stated that the compulsory license for sound recording ephemerals, found at 17 U.S.C. 112(e), “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 and that . . . are made solely to enable another use that is permitted under a separate compulsory license.” Section 104 Report, p.144, fn. 434.

To the extent that an additional royalty is assigned to these server copies, this provision exacerbates the unfairness of Internet radio royalties and should be repealed. To the extent that this provision is ignored, it also should be repealed so that the Copyright Act is not devalued. To the extent that the provision requires parties to make legal and economic arguments about a conclusively valueless set of reproductions, all interested parties’ resources are being wasted.

- DiMA Proposal: As the Copyright Office urged repeal of this licensing obligation, DiMA urges that such an amendment be made a part of the PRA.

Confidential Business Information Should be Guaranteed to be Protected from Disclosure

In recent proceedings, the CRB has made it difficult for the parties to enter into Protective Orders that are aimed at keeping proprietary information confidential. Even when all of the parties have submitted joint, agreed-upon Protective Orders, the court has rejected and/or modified them, in what the Copyright Royalty Judges have announced as an effort to allow the public access to as much of the proceedings as possible. This has created an unjustifiable and extremely burdensome additional cost and additional exposure of proprietary information for all parties to CRB rate-setting proceedings.

CRB Proceedings are not typical public proceedings. They necessarily involve the presentation and detailed analysis of economic and business information of the businesses subject to the royalties for which the rates are being set. It is very difficult for the parties to present all of the information that they might need to have considered for the purposes of a complete record in the proceedings to set rates fairly, if they are unsure if some of their proprietary economic and business information might be compromised, be acquired by business rivals or adversaries, or known to potential competitors, customers and others.

- DiMA Proposal: Require the Copyright Royalty Board to defer to parties’ assertions of confidentiality, and to accept and apply any jointly submitted Protective Orders that have been agreed to and proposed by all parties.

The CRB Should Not be Permitted to Require Parties Appearing Before It to Engage Outside Counsel

The CRB has indicated that it would like to impose a threshold on who can represent parties to copyright royalty rate-setting proceedings that is not supported by the rules governing the Copyright Royalty Board. The Copyright Royalty Judges seem to be requiring the retention of

outside counsel for any non-individual party that wishes to participate in CRB proceedings. Title 37, Section 350.2 of the Code of Federal Regulations requires that all parties, other than individuals “must be represented by an attorney,” but it does not require an independent, outside attorney. Companies, organizations and associations should be permitted to have staff attorneys represent them in copyright royalty proceedings.

- DiMA Proposal: Clarify that Section 350.2 of the Code of Federal Regulations does not require outside attorneys and allows for attorneys who are employed by a corporation, organization or association or other entity to represent such corporation, organization or association, subject to applicable requirements with respect to confidentiality and the terms of any Protective Order or Order of Confidentiality that might be in place.