

July 24, 2009

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Re: Supplemental Comments Concerning Statutory License Rate-Setting
Standards in the Copyright Act

Dear Senator Feinstein:

On behalf of the Digital Media Association (“DiMA”), thank you for the opportunity to offer additional comments concerning potential changes to the statutory license rate-setting standards set forth in section 114 of the Copyright Act.

As you are aware, on March 18 DiMA wrote to express strong support for uniformly applying standards in the current section 801(b)(1) of the Copyright Act to all sound recording performance royalty rate-setting proceedings. Joining these comments were Sirius XM and several individual Internet radio providers. Collectively the signatories represent a wide array of innovative radio programming services that deliver extraordinary value to artists, record labels and the listening public.

Consistent with our March 18 letter DiMA remains steadfast in our belief that the 801(b)(1) criteria represent the most appropriate standard for determining sound recording performance royalty obligations. In addition, we continue to maintain that these factors should apply with equal force to all royalty-paying platforms.

As we pointed out then, and reiterate now, the benefits of 801(b)(1) rest in its longstanding use, balanced approach, and our firm belief that, as a matter of sound public policy, any standard that Congress chooses to adopt should avoid the disastrous results that have occurred with the implementation of previous “market-based” experimental standards. Indeed, if Congress were to consider making any modifications to the existing 801(b)(1) standard, those amendments should be aimed at clarifying or making minor adjustment to the existing standard.

For example, with regard to possible clarifications, Congress should consider modifying the language found in section 801(b)(1)(A) of the Copyright Act to make it clear that efforts to “maximize the availability of creative works” include the desired goal of encouraging the creation and operation of technologies and services that deliver those works to the general public. Likewise, the 114 rate-setting process would be substantially improved if Congress directed the Copyright Royalty Board (“CRB”) to consistently use competitive markets as the appropriate source for developing statutory royalty benchmarks in lieu of monopolistic or supra-competitive markets. This type of

clarifying guidance would have possibly prevented much of the controversy that ensued following the 2007 CRB decision regarding Internet radio royalty rates.

During its consideration of this legislative issue (H.R. 848), the House Judiciary Committee decided to go beyond the scope of making a simple clarifying amendment and instead chose to eliminate the fourth objective in section 801(b)(1). The fourth factor, as you know, directs the CRB when setting rates to “minimize any disruptive impact on the structure of existing industries involved and on generally prevailing industry practices.” This factor, like the rest of section 801(b)(1), equally balances the interests of copyright owners and users; and in past rate-setting proceedings has been argued to benefit both licensors and licensees.

Though DiMA does not agree that the fourth 801(b)(1) factor should be eliminated, we were agreeable to the House Committee’s compromise as the resulting standard accomplishes two important goals. First, the resulting standard will apply equally to all radio platforms. Second, the remaining three factors fairly and equally weigh the interests of copyright owners, users and the general public. In the same spirit, DiMA would be equally willing to support this approach in the Senate.ⁱ

At the beginning of this process, our simple request was for Congress to establish a fair and balanced system in which sound recording royalty rates for Internet radio would be established under the same standard that’s currently used for satellite and cable radio. We hope that the Senate bill moves in that direction, and we are pleased to work with you in this effort.

Sincerely,

Jonathan Potter
Executive Director

ⁱ It is important to note that this letter addresses only the sound recording performance royalty standard, and does not address in any manner the application of the 801(b)(1) royalty criteria to musical works royalties pursuant to Section 115 of the Copyright Act. Additionally, as you know, to the extent that the legislation provides unique royalty standards for any type of programmer, e.g., small radio broadcasters, DiMA reserves the right to seek to extend the benefit of those standards to similarly situated Internet radio programmers.