

U.S. House of Representatives
Committee on the Judiciary
Hearing on the "Performance Rights Act"
March 10, 2009

Statement of

DIGITAL MEDIA ASSOCIATION

Today, the House Judiciary Committee considers a very important issue – whether over-the-air radio should pay royalties to recording artists and record companies. However, the issue and the bill before the Committee are actually components of a much larger issue –whether our laws should treat all forms of royalty paying radio equally, and should promote competition by imposing the same royalty rules and business rules for all. The Digital Media Association ("DiMA"), on behalf of our members that provide Internet radio services including RealNetworks, MTV, Live365, Slacker and Pandora, respectfully urges the Committee to address the issue of radio competition and parity comprehensively, and to avoid adding another "patchwork" to the messy quilt that currently defines digital radio performance rights and royalties.

As the Committee is aware, the sound recording performance royalty system (found in 17 U.S.C. 114) is far from a system, and is far from equitable. It is instead a set of misaligned rules and royalty standards that impose higher or lower burdens based on the technology used to deliver programming, rather than the quality or value of the programming. For lawyers Section 114 is difficult to read and harder to understand. For businesspeople it is simply perplexing.

The problem in current law is perhaps best exemplified by the Sirius Stiletto (see <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=ProductAsset&cid=1158082417240>). The Stiletto is a marvelous technological device that offers the ability to hear more than 130 channels of subscription radio (including 69 channels of music) using both satellite technology or a wireless Internet connection. If a consumer is within range of a satellite then the programming is delivered by that technology; otherwise the programming is delivered by wireless broadband. To the consumer, the experience is seamless and uninterrupted, but to Sirius, to record companies and to artists the impact is dramatic, because satellite-delivered radio pays royalties of only 7% of revenue while Internet-delivered radio pays vastly higher royalties. Similar outcomes occur when an individual listens to music using the Denon S-52 (see http://www.amazon.com/Denon-Wireless-Network-System-Speakers/dp/B000X3OOQU/ref=pd_bbs_sr_1?ie=UTF8&s=home-garden&qid=1236028180&sr=8-1).

Last year, the Copyright Royalty Board issued two decisions regarding digital radio royalties. Using the traditional copyright arbitration royalty-setting standard (17 U.S.C. 801), the CRB set royalties for XM and Sirius at an escalating amount between 6 and 8 %

of revenues. Using the Internet radio-specific standard (17 U.S.C. 114) the CRB set royalties for Internet radio that are effectively several multiples higher than the satellite radio royalties. Large Internet radio services, such as, Pandora, Slacker and Live365, will pay royalties of 40 – 80% of revenue under the CRB decision. Small Internet radio services such as Accuradio and SomaFM will pay royalties exceeding 100% of their revenue. Moreover, the CRB effectively gutted one of Internet radio's greatest advantages, its unlimited capacity for adding new channels that are effectively the best promoters of new music, by imposing an unlimited \$500 per-channel minimum royalty that would have immediately bankrupted many innovative services if recording artists and record companies had not recognized its unfairness and agreed to a maximum.

These examples – one of practical technology and one of competitive disadvantage – demonstrate the uniquely difficult environment that Congress has defined for radio innovators and competitors. Some listeners and some artists may favor cable radio; others may favor satellite radio or Internet radio. But Congress has an opportunity to ensure that competition thrives and that artists are fairly paid.

This can easily be accomplished by amending federal law so that sound recording royalties are established under the same standard – § 801(b). The standards set forth in § 801(b) of the Copyright Act were adopted by Congress back in 1976 to ensure that ratemaking proceedings would result in royalties that were fair not only to content owners and users, but also fair to consumers.

Since the time of its enactment, four ratemaking proceedings have occurred under § 801(b) and the rates that were established on each occasion have been upheld by the courts, and in none of the cases have the parties felt compelled to ask Congress to remedy the determination.

The wisdom behind § 801(b) rests in four flexible, yet extremely important objectives. The first objective strongly favors recording artists and producers. The second objective assures that royalty payments will equitably compensate artists and producers, while providing a fair return to those radio services that make use of the sound recordings. The third objective assesses the relative strengths of the contributions of each industry. The fourth objective examines 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 this thoughtful and balanced approach, the rates awarded under § 801(b) have consistently yielded fair royalty payments to artists and the recording industry, without jeopardizing the future economic health of music service companies or harming consumer interests.

We urge the Subcommittee to take a broad approach, and a technologically neutral approach, so that the Copyright Act will promote innovation, promote competition, and will ultimately promote artists' and consumer welfare as the Constitution calls for.

Thank you for your consideration of DiMA's views.