

U.S House of Representatives  
Subcommittee on Telecommunications and the Internet  
Hearing on  
“Digital Future of the United States: Part II – The Future of Radio”

Testimony of Robert Kimball  
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On behalf of the  
Digital Media Association

Chairman Markey, Mr. Upton and Members of the Subcommittee:

My name is Bob Kimball. I am the Senior Vice President of Legal and Business Affairs for RealNetworks. RealNetworks is a leading provider of Internet media delivery software and services, and is widely known for the creation of the RealPlayer, a pioneering media player that introduced streaming media and radio over the Internet in 1995. RealNetworks offers music to users through a number of free and subscription-based services that provide consumers with on-demand access to millions of tracks through our award-winning Rhapsody service along with rich Internet radio services. In addition to our music services, RealNetworks offers online games, is the leading provider of ring-back tone services for mobile carriers and provides other digital media services and tools to enable businesses, governments and educational institutions to broadcast over the Internet. RealNetworks is a founding board member of the Digital Media Association.

On behalf of RealNetworks and the Digital Media Association (“DiMA”), I am pleased to speak with you today about the radio industry, and particularly about Internet radio’s

current business and our opportunity to develop innovative new radio services that would benefit consumers, musicians and copyright owners, and advertisers.

I will also discuss significant impediments to realizing this opportunity, notably the provisions of the Copyright Act that disadvantage Internet radio in comparison to our competitors. These disparities were starkly highlighted last Friday, when the U.S. Copyright Royalty Board determined that royalties paid to record companies by Internet radio services will increase 30% retroactively, and then 30% again in each of the next three years through 2009. The CRB then went on to impose a \$500 minimum fee per station, which threatens to destroy the vast diversity of multi-channel programming that exists only on Internet radio. These minimum fees do not apply to terrestrial or satellite radio.

## **I. Internet Radio Basics**

Internet or online radio is simply radio programming transmitted over the Internet instead of the terrestrial airwaves, satellite signals or cable. Several hundred terrestrial radio stations simulcast their primary programming online; additionally, several thousand web-based “stations” offer Internet-only original programming. For example, RealNetworks offers several Internet-only radio stations for every conceivable musical tasete.

Internet radio is not confined by radio spectrum limitations. Thousands of services can webcast at any one time, and these services are constantly creating new stations and new audiences for their content. This ability to offer an unlimited number of stations enables Internet radio to provide a much more diverse and rich experience. Internet radio enables people to find a range of content that is far broader than what is available on terrestrial or satellite radio. 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 of songs during a short car ride, our corresponding station might have over 650 songs, including many more independent artists.

Just like the broadcasters and satellite services represented on this panel, Internet radio services are supported either by advertisements or subscription fees. In the subscription radio model, subscribers typically do not hear advertisements and are able to access significantly broader programming choices. There are two major types of Internet radio music programming:

- Pre-programmed stations, which are typically genre-specific, e.g., jazz, rock, Top 40 and country. Many Internet radio services offer dozens or even several hundred pre-programmed genre-based stations, so they can be focused on more specific musical niches. For example, there are stations devoted to Southern Rock, the Motown Years, Disco, and even something called “Psychobilly”.
- Consumer-influenced programming, which permits a listener to identify genres, songs, time periods, artists or albums he or she enjoys allow the radio programmer to choose the station best suited to the listener. For example, a user who enjoys U2, Coldplay and Dave Matthews would be provided a station that blends these artists’ songs with those of less-known acts that the user has never heard of, but is likely to enjoy. This content discovery is one of the most powerful features of Internet radio and leads directly to more purchased music.

In addition to music, most Internet radio stations will provide users with links to related content, like album art, artist biographies, editorial reviews and music videos. This provides users additional opportunities to explore the music more deeply and enables artists to connect more directly to their fans.

Significantly, most Internet radio stations also offer listeners a click-to-purchase-music opportunity, which benefits listeners, as well as artists, labels and songwriters.

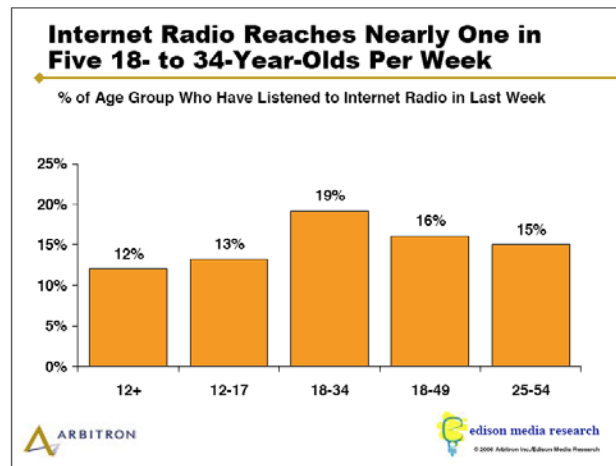
Many Internet radio stations offer consumers the ability to use their radio station in new and interesting ways, including:

- “Skip Ahead” – if a user does not like a song she can skip to the next song;
- “Pause” – a listener can pause the station and return to it later;
- Personalized recommendations and listener input, including rating songs, albums and artist and requests for related artists, based on what the listener is hearing on the radio.

## The Internet Radio Audience

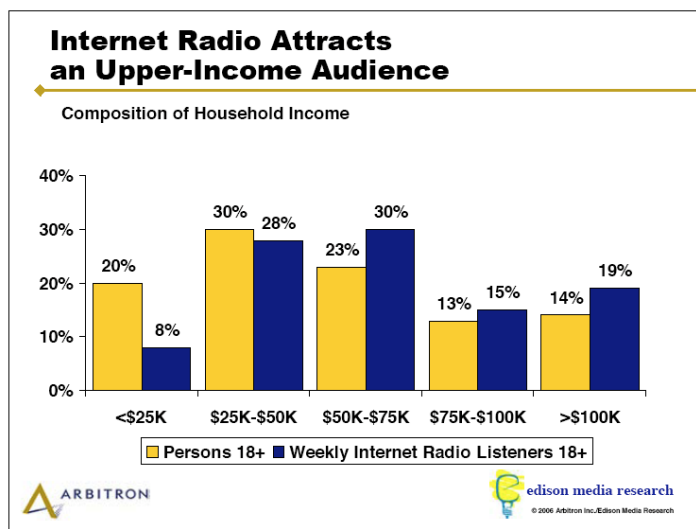
### Audience Size and Demographics

- Internet radio is a mainstream activity that is becoming increasingly popular. Studies by Arbitron and Bridge Ratings conclude that between 50 and 70 million Americans listen to Internet radio monthly, and about 20 percent of 18-34 year olds listen to Internet radio weekly.



- Internet radio is primarily a workday/office-based activity, with 75% of listening occurring at work. At-home listening is growing quickly, however, as home networking has taken off and people connect their home audio systems to the Internet. In the past year home listening increased 79% according to one recent study.

- Fortunately for advertisers, musicians and copyright owners, Internet radio attracts upper-income, tech-savvy early adopters. Internet Radio listeners are 36 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 of 18 and older:



Audience Growth: Internet radio has enjoyed steep growth in listenership.

- In the last year regular Internet radio listening jumped dramatically, from 45 million listeners per month to 72 million listeners each month. Weekly listenership also jumped, increasing 26% to 57 million listeners.
- Remarkably, not only did Internet radio attract significantly more listeners, those listeners spent much more time tuned in to Internet radio:

### Hours per week listening (Bridge Ratings)

Age	2006	2005
12+	9:06	7:00
13-21	11:40	9:20
22-35	9:54	7:36
36+	6:35	4:40

- A significant number of Internet radio listeners (38%) report they expect to be listening to more Internet radio a year from now, and one study concludes that the Internet radio audience will double by 2010 and grow to nearly 200 million monthly listeners by 2020 (Bridge Ratings).

### The Business of Internet Radio

Internet radio services enjoy two revenue streams: advertising, just like broadcasters, and consumer subscriptions, just like satellite radio. As Internet radio audiences continue to grow, our ability to monetize our audience will also develop further and our businesses will become as successful as our programming. Today, however, our industry's revenue is relatively small.

On the advertising side, Internet radio stations run the same 15, 30 and 60-second commercials as broadcast radio. Additionally, Internet radio services run "gateway" or "pre-roll" advertisements when a consumer first tunes in a station. After consulting within the industry and with advertising sales experts, DiMA's best guess is that around \$100 million was spent on Internet radio advertising in 2006. This contrasts with more than \$20 billion spent on broadcast radio advertising.

Many Internet radio consumers pay a subscription fee to enjoy 'premium' Internet radio – stations without commercials or stations that permit users to have more influence over the programming they enjoy (e.g. skipping songs, requesting artists or genres, etc.) A

recently published report estimated Internet radio subscription revenues at \$45 million for 2006. By comparison, XM and Sirius recently announced \$1.5 billion in subscription revenues for 2006.

## **II: The Benefits of Internet Radio to Consumers, the Music Industry and Advertisers**

Internet radio's growth has been driven by the medium's ability to use technology and consumer input to create a better experience for listeners, copyright owners and advertisers.

### Greater Variety of Music Benefits Listeners, Music Creators and Advertisers

As the Subcommittee is aware, AM-FM radio 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 that they enjoy. Even XM and Sirius are limited in the number of channels they offer and the diversity and creativity of their playlists. Internet radio reverses the hit-driven equation favored by traditional terrestrial radio stations. The flexibility and diversity enabled by the Internet provides significant benefits to both artists and consumers:

- One DiMA radio service reports that its listeners enjoy the music of more than 30,000 artists each week, 48 percent 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 the limitations 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 has 31 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 offering consumer-influenced programming, Internet radio services learn more about what types of music and the combinations of music consumers enjoy, which enables services to provide eclectic unpredictable song mixes that enable music discovery by consumers. This music discovery feature is critical to help smaller bands find an audience for their music which otherwise would be ignored by “big radio.”

The evidence is convincing – Internet radio listeners of all ages enjoy more radio, discover more music and buy more music. According to a recent DiMA survey, more than 85 percent of Internet radio listeners have discovered new artists they enjoy. Here are some authentic listener testimonials:

*I'm 77 years old and the music I like and grew up with just isn't played much any more. Sometimes tears come to my eyes when I hear certain songs. They bring back so many memories. I don't think I have heard any songs I haven't liked. Thank you from the bottom of my heart. – Lorraine S*

*[My Internet radio service is] absolutely fantastic . . . It calculates music recommendations based on the attributes of music I enjoy and then delivers its recommendations as radio. I've discovered so much great new music during the short period of time I've been listening. – Jarno*

*I have been "out of the [music] loop" for a long time now, and was searching for a new source of music to (legally) explore new musicians without the expense of purchasing random CDs, which was my former method of musical exploration. Your personalized Internet radio station is the perfect solution for people like me, who love to experiment with up-and-coming artists in order to expand and enhance our understanding of the creative possibilities in music. – Miles*

*Internet radio has rescued me from the doldrums of bubble gum pop and the same rotation of CDs I've owned for ten years. I searched for music based on the band*



*Nine Inch Nails to see what would happen. Wow! Not only have I found new music, but I'm discovering bands I haven't encountered before. This is a tremendous gift. – Emilie*

### Radio that Affirmatively Promotes Recording Artists

Although broadcast radio has traditionally been viewed by record labels as one of the most important tools for promoting new artists and generating CD sales and concert tickets, Internet radio serves the same promotional purposes more efficiently:

- Internet radio makes it easy for listeners to buy the music they hear, because Internet services provide listeners with the name of every song performed, the name of the recording artist and the album name, and often provide a link to buy the song or album that is playing, or to buy a concert ticket when the band is performing nearby.
- Utilizing the input provided by listeners, consumer-influenced Internet radio has more success performing new music for targeted consumers they know are likely to enjoy it. And this success equals dollars for record labels and artists:
  - Listeners to consumer-influenced radio stations in RealNetworks' Rhapsody service purchased materially more music than listeners to regular genre-based stations.
  - 86% of Internet radio users say that through the service they have discovered new musical artists that they now enjoy, with nearly 25% saying that they have discovered many of new artists. Nearly 70% of Internet radio users say that through the service they have expanded their habits to enjoy new music genres.

- More listener testimonials:

*My first day listening to this station I ended up ordering 75 dollars worth of albums from Amazon. They arrived Friday and I've listened to them all weekend, and will probably be buying more albums. – Steve*

*I have found myself listening to your station on a daily basis and enjoying it a lot. I have also discovered new [music] and bought many CDs because of your station. – Sylvia*

*I am just fascinated and amazed by the selection of music the site is providing to me and the easy access to information about each artist and album. This is the coolest web site I have seen since Google Earth... and it is more useful! The downside is that I may go broke discovering all this new music and buying new CDs! But, I'll order them from your sponsors and try to support your site. – Ian*

*At 52 I am out of the music loop. I've already found a lot of new artists using your service. I hope Amazon is paying you for all the music CD's they will be selling because of you. I decided to sign up for their \$79 a year free 2nd day shipping plan because of you. – Loyd*

### Radio That Works for Advertisers

The same targeted Internet radio audiences that make it easier for record companies to promote artists also make it easier for advertisers to reach their target consumer demographics.

For most advertisers, Internet radio is just like radio – but even better.

- Internet radio listeners are at their desks or at home and can easily take action online or by phone in response to an advertisement, something that is harder to do while driving.

- Internet radio listeners represent a very desirable demographic to advertisers: a recent report found that Internet radio listeners are 36% more likely to live in a household with an annual income of \$100,000 or higher, compared to the general U.S. population.
- Advertisers can micro-target Internet radio consumers for increased effectiveness. For example, an advertiser targeting women can buy time on an Adult Contemporary broadcast stations knowing that about 55% of the listeners are women, or can buy time on Internet radio stations that are have significantly higher percentages of women. This dynamic holds true for many desirable target audiences.

### **III. Competition Among Radio Platforms – Does it Exist? Can it Improve?**

As described previously in this testimony, all evidence points to competition existing among broadcast, satellite and Internet radio – for listeners, paying subscribers and advertisers. The interesting question for this Committee – particularly when XM and Sirius are proposing to merge and are citing Internet radio as viable competition – is whether Internet radio today competes fairly and effectively against satellite and broadcast radio, and whether we ever can compete fairly and effectively when we are hobbled by extraordinary bias in the Copyright Act that imposes far higher royalties on Internet radio. Not only are we forced to pay higher royalties than our competitors, the Copyright Act also limits our programming and innovation opportunities.

Internet radio is prejudiced by the Copyright Act in several significant ways:

- Sound recording royalties: The Act establishes a tiered royalty structure based on a service's delivery technology that
  - exempts broadcast radio from paying royalties to record companies and performers;
  - imposes a modest 7% of revenue royalty on XM and Sirius; and

- imposes a much higher royalty on Internet radio that for many small webcasters will exceed 100% of their revenue.
- Programming limitations: The Copyright Act leaves broadcasters' programming unregulated, regulates satellite companies' lightly, and inhibits greatly the programming flexibility of Internet radio companies.
  - In combination with the new \$500 minimum royalty per station, these restrictions ensure that Internet radio's rich programming diversity will likely end.
- Technological limitations: The Copyright Act prohibits only Internet radio from offering recording devices and portable radio services, and punitively regulates personalized radio so as to essentially eliminate the most compelling features of Internet commerce.
- Litigation Risk: Broadcast radio is exempt from almost all copyright royalties and restrictions, and therefore has virtually no copyright litigation exposure. Internet and satellite radio, as innovators, suffer needlessly as a result of vague Copyright Act provisions that do not reflect business or technological reality. And if we guess wrong about the meaning of one of these laws, the penalty is \$150,000 for each and every song performed. This is a very powerful deterrent to innovation. I have personally been forced to kill several innovative projects simply due to the legal uncertainty and the catastrophic effects of making the wrong interpretation of ambiguous language.

Speaking for RealNetworks only, and not for DiMA, I suggest to you that any XM-Sirius merger that relies upon Internet radio as the justifying competition should be rejected until Congress corrects the Copyright Act's bias against the Internet. Before XM and Sirius and are allowed to merge, Congress must ensure that there is a level playing field that no longer penalizes those of us who use the Internet to deliver music. I know that the Copyright Act is not in this Committee's jurisdiction, nor in the jurisdiction of the

Department of Justice, the FTC or the FCC. But if you care about the Internet and innovation and competition and consumers, then I urge you to focus on ensuring a fair and balanced Copyright Act.

#### The Copyright Act's Royalty Rate Structure Discriminates Against Internet Radio

Congress' creation of a sound recording right for digital radio explicitly exempted broadcast radio. Equally frustrating is that Internet radio is also disadvantaged in comparison to satellite radio. Satellite radio also pays royalties to record labels and recording artists, but our royalties are calculated using different economic and legal standards, and as a result, Internet radio royalties are much more costly than satellite radio royalties. Satellite radio services reportedly pay about 7 percent of their revenue to record companies and recording artists. Until Friday the Internet radio services thought we were paying at least 50 percent higher royalties, though for some services the royalties were significantly higher.

As a result of Friday's Copyright Royalty Board decision, I can confidently say that this disparity has grown far worse, and that Internet radio royalties will now cost many multiples of satellite radio royalties. For example:

- Loudcity, a small webcaster in Boston with two full-time employees, had been paying about 10% of its gross revenue to record labels under the previous rate structure. This equates to about \$2,000 per month (out of \$20,000 a month in revenue). Under the new rate structure, Loudcity royalties to record labels will now cost more than \$60,000 each month, or 300% of its gross revenue.
- Accuradio in Chicago paid \$48,000 in royalties in 2006 based on revenues of \$400,000. Friday's decision will retroactively increase its 2006 royalties to \$600,000, requiring an immediate payment of \$552,000 just to stay in business for one more day.

Internet radio competes directly against terrestrial radio for a limited universe of listeners and advertisers, and competes directly against cable and satellite radio for an even

smaller universe of subscribers and advertisers. Paying higher royalties requires Internet radio to reduce programming or performance quality, or increase advertising prices or frequency, in ways that unfairly harm Internet radio's competitive opportunity.

From the vantage point of this Subcommittee and this hearing, there should be no telecommunications or Internet policy reason for discriminating against Internet-delivered digital media services. Law and policy must be neutral with respect to underlying technologies.

If you support the broadcast industry's royalty exemption on the basis that radio performances promote sales of sound recordings, then you should support a similar exemption for Internet radio, as our listeners are more intense music fans, are more easily able to connect their music purchases to music listening, and we promote a far greater variety of music than terrestrial radio. If you care about competition, consumer welfare and innovation, or if you wish to ensure that America's music genius finds its largest audience, I urge you to correct this competitive disparity. In the meantime, many Internet radio services large and small are considering whether to wait for you to act, or whether they should just shut down in light of the CRB's decision to impose dramatically higher royalties.

The Copyright Act's Music Programming Restrictions are Overly Rigid, and Prevent Internet Radio from Engaging in Traditional Broadcast-Style Practices.

Another disparity between broadcast radio and Internet radio is created by the programming controls imposed by the Copyright Act, namely, the prohibition against advance announcements of songs to be performed and the "sound recording performance complement", which regulates how many times an Internet radio service can perform songs of a single artist or band, or songs from a single album. While intended by Congress to limit the digital public performance license to traditional radio-like activities, these provisions actually prevent Internet radio from engaging in many broadcast radio practices that have proved, over decades of experience, to promote rather than harm the interests of the record labels and performing artists.

For example, radio stations typically announce specific songs that are going to be performed either next or at an unspecified time in the near future, as an inducement to keep listeners tuned to their stations; Internet webcasters are forbidden to do this. Or, when a famous artist such as Ray Charles passes away, radio stations have complete latitude to pay tribute by playing extended blocks of the artist's work. In contrast, the sound recording performance complement limits the ability of Internet radio to honor the artist – never can we play more than two songs consecutively and four songs total over a three-hour period. There is no evidence, however, that the broadcasters' practices have harmed the record industry, or that webcasters' adoption of these practices would be harmful. Given the clear promotional benefits of webcasting to the recording industry and performing artists, there is no reason why webcasting should not also be permitted this additional programming latitude to better attract and maintain its audience against broadcast competition.

The Copyright Act Inhibits Radio Innovation That Has Proven Beneficial for Consumers and Recording Artists.

Internet radio offers programming focused on listeners' favorite artists and music genres, or can even provide a station just by keying off a favorite song. These consumer-influenced stations are proven to be more enjoyable than pre-programmed radio, to be more capable of successfully introducing new artists and songs to a listener, and to generate more sales of music to listeners. Nevertheless, the Copyright Act governs the level of engagement that listeners can enjoy with their Internet radio service, and this set of rules has proven vague and ambiguous, and has resulted in more litigation and less innovation

By limiting how "interactive" an Internet radio service can be, Congress sought to ensure that Internet radio services are not "on-demand" jukebox services that replace CD sales. Unfortunately the record industry has used this vague definition to attack Internet technologies they deem overly "interactive", and after several years of court cases and Copyright Office proceedings the law remains unclear and innovation in Internet radio

has essentially ceased. In this instance, the Copyright Act undermines a core value of the Internet that is often the most compelling opportunity in e-commerce – personalization.

Future Innovation Will Demonstrate the Absurd Anticompetitive Environment.

For most of its existence, the Internet has been a “connected” or “wired” network. Recently, however, as Tim Berners-Lee testified in this Subcommittee last week, the Internet has become a more mobile and wireless environment. And in the last several years mobile broadband capability will increase substantially when WiMax and other technologies are introduced.

Next generation technologies will deliver stable broadband access to the car, which means that Internet radio will compete directly and quite effectively against our satellite and broadcast industry colleagues. These advances will make Internet radio even more effective for discovering new music, satisfying consumer needs, and ultimately, and promoting creativity by delivering additional revenue for artists, songwriters, and record companies. It highlights the problem, however, because in the future your automobile’s multi-band radio that delivers broadcast, satellite and Internet radio will pay three different amounts of royalties and have three different regulatory environments for delivering the same music to the same consumer over the same device.

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The current state of Internet radio is dominated by two facts: we pay dramatically higher royalties than our competition, and we are subject to far more restrictions on our ability to innovate. The future of Internet radio will be largely dictated by whether this bias is corrected. In a mobile world, every radio receiver will receive "over-the-air" broadcasts, and whether these broadcasts are FM, satellite, or WiFi should be entirely irrelevant under the law.

Thank you.