

Summary of Testimony of Alex Alben
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RealNetworks, since its founding in 1994, has pioneered streaming technology as the ecommerce and broadcasting platform for audio and video over the Internet. As proof of the power of these technologies, more than 155 million unique users have downloaded the RealPlayer software for receiving streaming audio and video, and more than 45 million unique users have downloaded the RealJukebox application for organizing and personalizing music on their PCs. More than 350,000 hours of streaming content are available weekly over the Internet using RealNetworks technologies. Through partnerships with major recording labels and consumer electronics manufacturers, and participation in SDMI, RealNetworks has been working to facilitate secure commercial sale of music via digital downloading.

Since the release of the first RealAudio 1.0 streaming player in April 1995, legal issues have clouded prospects for new businesses based upon these new revolutionary technologies. One of the first of these issues was the threat that the temporary memory buffer, used to assemble and organize a few seconds of audio or video during the technical process of streaming, could be considered an infringement of copyright. Any attempt to either enjoin or charge for these transmissions, based on the temporary memory buffer, would have an immediate and potentially devastating impact on the developing streaming media business. While the streaming media business has steadily been growing in popularity, recently several prominent streaming content and programming companies have been forced to close or cut back their offerings in light of severe financial difficulties. Current licensing practices already impose substantial costs and administrative burdens upon these companies, and it would be untenable and unfair to require them to shoulder additional costs with respect to these buffer copies.

We strongly advocate explicit amendments to clarify that this temporary memory buffer made in the course of lawful streaming of media does not constitute either an act of copyright infringement or an “incidental digital phonorecord delivery” under 17 U.S.C. § 115. An appropriate starting point for an amendment could be Section 6 of H.R. 3048, 105th Cong., 1st Sess. (1997). In response to a question posed in the Notice of Hearing, RealNetworks believes the better approach would be to immunize buffers that are incidental to a “lawful” use rather than an “authorized” use. This formulation would ensure that all lawful uses, and not just licensed uses, would be appropriately immunized from any claim of liability.

In addition, RealNetworks supports an express legislative acknowledgement of the first sale doctrine for digitally-downloaded content. Consumers need and deserve the same rights for digitally-acquired content as for physical media. Restrictive license agreements imposed upon today’s downloading consumers impede the development of legitimate ecommerce in music, and limit the inherent flexibility and value proposition offered by digitally-delivered content. Digital rights management tools can be employed by content owners that wish to secure retransmissions of downloads and assure that only one usable copy remains. Section 4 of H.R. 3048, cited above, provides a sound legislative basis to address digital first sale.