

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of: )  
)  
Digital Audio Broadcasting Systems ) MM Docket No. 99-325  
and Their Impact on the Terrestrial )  
Radio Broadcast Service )

To: The Commission

**COMMENTS OF THE RECORDING INDUSTRY  
ASSOCIATION OF AMERICA, INC.**

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## SUMMARY OF ARGUMENT

The Recording Industry Association of America, Inc. (“RIAA”) hereby submits its Comments in response to the Further Notice of Proposed Rulemaking and Notice of Inquiry in the above-captioned proceeding. As the trade association representing the U.S. recording industry, RIAA is vitally concerned with the issue the Commission has presented in the *Notice of Inquiry* as the need to adopt content protection rules as part of the regulatory regime for digital audio broadcasting (“DAB”). Content protection rules are vital to the health of America’s music industry, to assure that the American public continues to have access to diverse forms of music and new talent, and potentially to assure the future of free over-the-air broadcasting. Without them, the Commission will effectively be sanctioning the unauthorized copying and redistribution of copyrighted recordings, contrary to express congressional policies.

1. Digital technology has transformed the entertainment and electronic marketplace, offering consumers a host of new options and services. However, as the Commission has recognized, use of digital technology has also permitted widespread piracy of copyrighted works. Internet-based digital piracy has already caused substantial harm to all parts of the music industry – the performing artists, composers, musicians, music publishers, retail outlets, recording companies and others who contribute to the development of music. The loss of revenue occasioned by that piracy has reduced the ability of recording companies to seek out and develop new talent, forced a reduction in the number of artists on the rosters of the record

companies, caused thousands of retail record stores to close, resulted in the layoff of thousands of employees within the music industry, and threatened the economic basis of the music industry.

2. Commission authorization of DAB without assuring that recordings and other copyrighted works enjoy a reasonable level of content protection will enable an even greater degree of digital piracy than has been experienced to date. Use of available digital technology will permit listeners to program their DAB receivers to record only selected recordings from any radio station in the market without ever listening to the radio station broadcasting the music. Equipment that will permit that cherry-picking of broadcast content is being developed and unquestionably will be available in the United States. That equipment will permit consumers to create huge personal libraries of recordings without having to pay for the content. In addition, the ability of listeners to record music of their choice without listening to the stations offering that music will, in time, undermine the advertiser support of free over-the-air audio broadcasting. Widespread unauthorized copying of DAB programming would also prejudice new, legitimate music distribution industries, such as iTunes Music Store, RealNetwork's Rhapsody, and mobile music services offered by wireless carriers.

3. The Commission's authorization of DAB without content protection would undermine long-established copyright policies. The Copyright Act grants the creators of creative works exclusive rights in those works, thereby enabling them to receive compensation for use of their works. As new technologies have created new opportunities for creative expressions and new means of exploiting existing types of protected works, Congress recognized that creators should be able to continue to reap the economic rewards from their works. Congress recognized the threat to the economics of the music industry in the Digital Performance Right in Sound

Recordings Act (“DPRA”) and the Digital Millennium Copyright Act (“DMCA”), and granted recording companies a limited performance right in sound recordings in order to ensure that use of digital technology did not jeopardize the livelihood of those dependent on sound recordings. In the DMCA, Congress made it clear that newer digital technologies were also covered by the DPRA’s performance right. DAB poses the very same threats to the music industry as did the interactive and other services that concerned Congress in the DPRA and DMCA. Indeed, the ability of consumers to program their DAB receivers to record selected music made possible by any Commission decision authorizing DAB without content protection is functionally equivalent to the interactive services Congress intended to remain subject to the exclusive rights of the record companies.

4. While the Commission is not charged with enforcing the Copyright Act, the public interest standard of the Communications Act does not permit it to ignore congressional policies in other areas, including in the Copyright Act. The Commission has recognized that obligation and has often tailored its rules to accommodate other federal statutes. Thus, the Commission recognized the potential harm to the creative community from use of digital technology and adopted rules granting content protection in its *Broadcast Flag* and *Plug and Play* decisions. A similar result is required here; the Commission cannot adopt a regime for DAB that will eviscerate the intellectual property rights Congress granted in the DPRA and devastate an industry that has been a leading exporter of American culture and is vital to the broadcast industry itself. Yet that is precisely what adoption of DAB rules without content protection will do.

5. The Commission has jurisdiction to adopt content protection requirements as a component of the DAB service rules under Title I and Title III of the Communications Act. Title III of the Act gives the Commission broad regulatory authority to adopt a DAB transmission standard, including a standard that is capable of embedding content protection data and information into the transmission signal, and to require that radio receivers recognize and give effect to those rules. Under its public interest mandate, the Commission must attempt to accommodate, to the extent feasible under the Communications Act, other federal policies, including the congressional policies underlying the Copyright Act. In addition to its powers under Title III, the Commission also has ancillary jurisdiction under Title I to adopt content protection rules and to require equipment manufacturers to design receivers that give effect to those rules. As the Commission held in the *Broadcast Flag Report and Order* and the *Plug and Play Second Report*, the Commission has Title I jurisdiction to adopt content protection regulations, including rules restricting the usage of material recorded from over-the-air broadcasts. Nothing before the Commission in this proceeding justifies a different conclusion regarding the Commission's ancillary jurisdiction: Title I extends to the development of DAB and compatible digital radio receivers, and content protection rules would be reasonably ancillary to the effective performance of the Commission's development of a DAB service. Content protection rules will serve the public interest by promoting federal policies underlying the Copyright Act, ensuring continued diversity of new music broadcast on DAB and protecting advertiser support for free over-the-air radio.

6. To assure that DAB operation does not eviscerate the intellectual property rights of those who have created the music broadcast by digital radio stations, reduce the diversity of

music available to the public, or threaten the survival of advertiser-supported terrestrial radio, the Commission must incorporate content protection rules in its DAB regulations. Those regulations should (i) require radio broadcasters who elect to operate digitally to transmit as part of their digital broadcast signal a mechanism to assure content protection, (ii) set forth rules establishing the permissible duplication of copyrighted content, and (iii) preclude the unauthorized distribution of content taken from a DAB transmission. In these Comments, RIAA suggests a series of usage rules that are designed to preserve consumers' current ability to record broadcast material, while assuring that copyright owners enjoy the financial returns Congress has found necessary to assure the continued creation of artistic works. Those suggested usage rules would permit users to record DAB programming manually and to record blocks of time on a pre-programmed basis. They would, however, preclude any use of the information concerning the music, the metadata, for programmed recording of songs and would preclude distribution of recorded works electronically via the Internet.

7. RIAA discusses two potential means – encryption during transmission and an audio protection flag (“APF”) – through which content protection can be triggered. Under either method of triggering protection, the content protection afforded would be defined by the specific set of usage rules included in all DAB receivers pursuant to a license from iBiquity Digital Corporation, the sole provider of the in-band on-channel (“IBOC”) technology approved by the Commission. Although RIAA believes that encryption of the transmission is, in general, a better means of triggering protection as it provides additional content protection as compared to an APF, either method will ensure a reasonable level of content protection.

8. While the IBOC system developed by iBiquity Digital Corporation is proprietary and thus RIAA does not know its precise specifications, publicly available documentation indicates that it can accommodate either an encryption or APF method for triggering content protection. Indeed, its president has stated publicly that iBiquity can accommodate RIAA's need for content protection. Thus, Commission adoption of content protection rules in this proceeding should not adversely affect the deployment of DAB.

9. The Commission should not wait to adopt content protection requirements for audio content until the unauthorized duplication and distribution of copyrighted recordings through DAB transmissions destroys the music industry and also harms free over-the-air audio broadcasting. Delay will only exacerbate the harm to the music industry and make resolving the problem more difficult as consumer expectations become ingrained, the penetration of legacy devices that permit automated copying of selected music increase, and the technical options to address the problems are diminished. Accordingly, the Commission should adopt content protection rules concurrently with the final DAB service rules.

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- Appendix B: Report of Cherry Lane Digital LLC
- Appendix C: The Economic Impact of Digital Audio Broadcasts on the Market for Recorded Music by Thomas M. Lenard, Ph.D.
- Appendix D: Declaration of Jay Berman

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The Recording Industry Association of America, Inc. (“RIAA”) hereby submits its Comments in response to the Further Notice of Proposed Rulemaking and Notice of Inquiry in the above-captioned proceeding.<sup>1</sup> RIAA is the trade association that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes its members’ creative and financial vitality. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.

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<sup>1</sup> *In re Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, Further Notice of Proposed Rulemaking and Notice of Inquiry, MM Docket No. 99-325, FCC 04-99 (rel. Apr. 20, 2004). These Comments are largely confined to the issues raised in the Notice of Inquiry (“*Notice of Inquiry*”) concerning content protection. Except as otherwise indicated, RIAA will not comment at this time on the issues posed in the Further Notice of Proposed Rulemaking (“*Further Notice of Proposed Rulemaking*”) or on the international issues raised in the *Notice of Inquiry*.

The *Notice of Inquiry* is designed to explore whether to afford content protection to those who provide copyrighted music recordings for digital audio broadcasting (“DAB”). As demonstrated in these Comments, a Commission decision to launch DAB without reasonable content protection for the music industry will materially aggravate the substantial economic hardship the industry is currently experiencing from digital piracy from peer-to-peer (“P2P”) services by enabling the unauthorized copying and distribution of copyrighted digital works. Such a result is manifestly inconsistent with congressional copyright policy, which the Commission has historically honored and implemented. It is also unnecessary since the in-band on-channel (“IBOC”) system authorized by the Commission for DAB permits the provision of such protection. Accordingly, the Commission should require radio broadcasters who operate digitally to provide a reasonable degree of content protection for copyrighted works.<sup>2</sup>

## I. INTRODUCTION

The advent of digital technology has altered fundamentally the balance between the rights of copyright owners and the ability of users to duplicate and retransmit copyrighted material without compensating those who created the content. As the Commission has recognized:

[a]s the transition from analog-based technology to digital-based technology continues, equipment manufacturers and retailers, programming creators and distributors, and consumers will benefit from the myriad advantages offered by digital technology. Arriving in tandem with these digital advantages, however, are significant questions related to access to, and appropriate use of,

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<sup>2</sup> Set forth in Section V(B) and in the *Proposal for Copyright Protection in HD Radio, Report for RIAA prepared by Hamilton Technologies, Inc.*, attached as Appendix A at section 7 (“Hamilton Report”) are suggested content protection rules for DAB. Those rules would preserve the existing recording options of consumers and allow them to record copyrighted broadcast manually and to record entire programs on a timed basis while providing copyright owners protection against the automatic, massive copying of copyrighted sound recordings.

digital content. . . . Unlike the analog context, digital technology affords users the ability to make an unlimited number of virtually perfect copies of digital content.<sup>3</sup>

Use of digital technology also permits the rapid, widespread distribution of content over the Internet as well as on physical media or through other digital transmission systems, such as 3G wireless services. And, since digital operation supports the transmission of associated data that identifies the content of recordings known as “metadata” or “metatags,” digital radio broadcasting permits users to select automatically precisely which broadcast material they want to record and which they do not. This unfettered ability to record and distribute virtually perfect copies of digital recordings over the Internet has already significantly weakened the music industry in the United States. Unauthorized copying and distribution of copyrighted works on P2P systems has eroded the recording industry’s predominant source of revenue, sales of recordings, and in turn has stunted the growth of new legitimate models of digital distribution.

As serious as the unauthorized P2P threat is to the music industry, the threat posed by DAB without content protection will be worse. The inclusion of metadata in DAB transmissions enables users to “cherry-pick” the most popular recordings easily by programming their digital receiving devices to record automatically only the content they are interested in without ever listening to the actual broadcast. Technology is currently available that will permit this automated cherry-picking of selected songs for recording, retention and electronic distribution, and its deployment in DAB equipment is imminent. Moreover, as compared to the relative sophistication necessary for users to take advantage of unauthorized P2P technology, duplication

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<sup>3</sup> See *In re Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Further Notice of Proposed Rule Making and Declaratory Ruling, 15 FCC Rcd. 18,199, 18,204 ¶15 (2000) (“*Plug and Play Further Notice*”).

and distribution using DAB receivers with built-in recording capability and huge storage capacity will be significantly easier. Cherry-picking of music from DAB will also avoid the risks of viruses and spyware associated with unauthorized P2P services and can be done anonymously and thus with virtually no risk of being caught. It is the “perfect storm” facing the music industry.

This increase in digital music piracy will not only seriously aggravate the economic problems of the music industry, but will also further impair the industry’s ability to develop new artists and music, thereby reducing the diversity of music available to the public. The enhanced recording capabilities facilitated by the broadcast of metatags also poses a threat, over time, to advertiser-supported “free” terrestrial radio as listeners will be able to record their favorite music, and even news, weather and traffic information, without ever listening to the commercials that are the predominant source of revenue for radio station licensees.

Congress recognized the threat to the music industry from the enhanced recording and distribution capabilities of digital technology when it enacted the Digital Performance Right in Sound Recordings Act (“DPRA”)<sup>4</sup> and the Digital Millennium Copyright Act (“DMCA”).<sup>5</sup>

These two statutes establish that Congress did not want the higher quality recordings and the

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<sup>4</sup> Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified in relevant part at 17 U.S.C. § 114(d)-(j)).

<sup>5</sup> Pub. L. No. 105-304, 112 Stat. 2886 (1998) (codified to amend scattered sections of 17 U.S.C. and 28 U.S.C. and codified at 17 U.S.C. §§ 512, 1201-1205, 1301-1332 and 28 U.S.C. § 4001). In addition to these two Acts, Congress enacted the Audio Home Recording Act of 1992 (“AHRA”), Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified at 17 U.S.C. §§ 1001-1010), to provide some protection to the recording industry from the potential adverse impact of digital tape recorders on record sales. In so doing, Congress acknowledged that the ability of digital technology to create virtually perfect duplicates of recorded material threatens record sales, which account for the vast majority of the revenue of record companies. *See* S. Rep. No. 102-294, at 30, 32, 35 (1992), *reprinted at* 1992 WL 133198; *see also infra* Section VI(A).