Before the
Federal Communications Commission
Washington, D.C. 20554

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

Comments of the Home Recording Rights Coalition
On Notice of Inquiry Re Digital Audio Content Control

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The Home Recording Rights Coalition ("HRRC") provides these Comments in response to the Commission's Notice of Inquiry ("NOI") appended to its Further Notice of Proposed Rulemaking ("FNPRM") in this docket. As the Commission notes in the FNPRM, it is finally nearing the conclusion of a digital radio process that it began fourteen years ago, and that it focused five years ago on fostering "the development of a vibrant terrestrial digital radio service for the public . . . ."[1] HRRC believes that the questions asked in the NOI do not provide any basis whatsoever for the Commission to impair, impede, or impose any technical or legal restraint on, the service that is the subject of the FNPRM.

The HRRC was formed in 1981, when a court, faced with dire predictions about the potential uses of consumer recording devices, ruled that one such device could be kept off the market on copyright grounds.[2] The Supreme Court, in 1984, reversed this decree, and held that a significant burden of proof must be met before considerations based on the usage of copyrighted

[1] *In the Matter of Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service,* MM Docket No. 99-325, Further Notice of Proposed Rulemaking And Notice of Inquiry ¶ 1 (Rel. Apr. 20, 2004) ("NOI").
[2] *Universal City Studios Inc. v. Sony Corp. of America,* 659 F.2d 963 (9th Cir. 1981).

works become sufficient to impair the design or marketing of a device.[3] HRRC has remained active because, in the face of this ruling by our highest court, resourceful entertainment industry interests have pursued such impairments via legislative and administrative proposals. The NOI is issued in response to one such pursuit, in which the Commission is asked to perform a trifecta: to substitute its own judgment for that of the statutes, the sitting Congress, and the private sector.

HRRC does not believe that action by the Commission at this time would be lawful or justified. The Commission has no jurisdictional basis to address the concerns cited by the Recording Industry Association of America (RIAA) because the Congress did not provide for one, either directly in the Communications Act or indirectly via the Copyright Act. It is the Copyright Act that denies to phonorecord producers any licensing authority over the free terrestrial broadcast, analog or digital, of the sound recordings stored on phonorecords. Hence, the law denies any public or private sector home for the new license administration powers that the RIAA is urging the Commission to create.

HRRC also opposes any Commission action because there is no demonstrated actual or potential harm, nor is there any specific proposal -- legal, regulatory, or technical -- before the Commission. To the extent any request for Commission action has been described in general terms, such action would seem to interfere with the technical and legal schema set out by the Congress in the Audio Home Recording Act of 1992 (AHRA) for the same devices. To the extent the AHRA is to be updated, this is a job for the Congress rather than one the Commission could possibly begin to tackle.

[3] *Sony Corp. v. Universal City Studios Inc.,* 464 U.S. 417 (1984).

I. THE RIAA CONCERN SEEMS ADDRESSED PRINCIPALLY TO THE STATUS OF PHONORECORDS WITH RESPECT TO FREE TERRESTRIAL RADIO BROADCASTING, WHICH IS A MATTER FOR THE CONGRESS.

Although the RIAA made no specific proposal in its October, 2003 letter to Media Bureau staff, it seems clear from the letter, and from the questions posed in the NOI, that the RIAA seeks an administered copy protection solution, that would specifically and purposely impair consumers from making certain home recordings for private, noncommercial use. In seeking the power for its members to administer such a regime, or have one administered for them, the RIAA seeks from the FCC ***a power that the Congress has specifically denied to them:*** the power to administer, by discretion, the licensing of their content for nonsubscription terrestrial broadcast.

A. The Law Specifically Exempts Free, Over-Air Broadcasters From Any Licensing Responsibility to Record Companies.

The record companies' interest in sound recordings does not extend to the right to control public performance via free terrestrial broadcast. Over the course of decades, Congress has repeatedly considered and rejected the recording industry's efforts to obtain such a right. Congress rejected any public performance right in 1971 when it first granted copyright protection to sound recordings. It again rejected a performance right in the comprehensive 1976 revision of the Copyright Act.

Congress granted the record companies a limited performance right in certain subscription and interactive digital transmissions in 1995. Even then, Congress expressly rejected extending the right to nonsubscription radio broadcasts. As the Senate Judiciary Committee explained:

> The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. *This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.*[4]

Even when the performance right was extended to other nonsubscription performances in 1998, Congress preserved the exemption for free terrestrial digital broadcasting. Section 114(d) expressly *exempts* free, terrestrial digital broadcasting from any control by the record industry:

> (d) *Limitations on exclusive right.—Notwithstanding the provisions of section 106(6)—*
>
> (1) *Exempt transmissions and retransmissions*.—The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—
>
> (A) a nonsubscription broadcast transmission ….[5]

In preparing for and acknowledging the digital age, and in full knowledge of the FCC's pursuit of digital radio standards, Congress clearly and explicitly drew the line between those services that would be subject to a license, and those services – primarily, free terrestrial broadcasts -- that would remain free of license.

Congress's decision *not* to grant license rights to phonorecord producers in the digital age reflected a policy as old as radio itself: that the broadcast of sound recordings would *not* be the subject of any legal obligation from a broadcaster to the producer of a phonorecord. Congress chose not to change this policy when it granted copyright protection to phonorecords thirty-three

[4] S. Rep. No. 104-128, at 14-15 (1995), reprinted in 1995 U.S.C.C.A.N. 356, 361 (emphasis added).
[5] 17 U.S.C. § 114(d).

years ago, and Congress explicitly drew a line against changing it when it addressed "digital audio transmissions" nine years ago. Whether this policy reflects a legal judgment or a political judgment does not matter – it is a clear judgment, and bounds what the Commission can and cannot address.

B. What RIAA Actually Seeks Is For The Legal Relationship Of Broadcasters To Phonorecord Producers To Be Revisited.

In seeking some sort of administrative regime over the home recording of free, digital terrestrial broadcasts, the RIAA seeks to build, in mid-air, a structure for which the Commission cannot possibly find or provide any foundation. Unlike the ongoing proceeding with respect to "Plug & Play" devices, there is no interruption of a right to license conditional access technology. In "Plug & Play," content providers argued to the Commission that they had heretofore benefited from privity of contract extending to device manufacturers, and that an administrative regime was necessary because intervening laws and regulations broke that chain.[6] But in the case of digital terrestrial broadcasts of sound recordings, there are no rights under license on any discretionary basis.

The "Broadcast Flag" context involved broadcasts of audiovisual works over which the rights holder had the right to deny or impair broadcast rights.[7] The intervening factor cited to the

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[6] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, *Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking ¶¶ 45-47, 56 (Rel. Oct. 9, 2003).

[7] *In the Matter of Digital Broadcast Content Protection,* MB Docket No. 02-230. In the Broadcast Flag case, the rationale for FCC intervention was that the producers of video programming could defeat the digital TV transition (a clear Congressional and Commission goal) by withholding their content from digital TV. The record companies have no such right to withhold their recordings from digital broadcast radio. Nevertheless, the Commission's jurisdiction to exercise authority over downstream devices is presently subject to legal challenge. The position of the HRRC, expressed during the Comment period, was that the Commission lacked sufficient jurisdiction to impose such obligations absent some further grant or direction from the Congress. *See* Comments of the Home Recording

(continued…)

Commission was non-encryption of the broadcasts, which made technical control impossible without some imposition on receivers. Nevertheless, the Commission gave discretion to *broadcasters* over whether to trigger any technical measures. Moreover, the Commission specifically clarified that the proceeding was *not* aimed at copy protection, or at restricting consumer recording rights and expectations to any extent whatsoever, by formally changing the name of the proceeding.[8]

What RIAA and its allies are tilting at in this proceeding, then, is the longstanding decision of the Congress not to invest producers of sound recordings with any of the licensing discretion over public performances, ***or any claim to control over subsequent use of such a broadcast***, with which the Congress chose to invest other types of works. Thus, the present situation cannot be distinguished from a record industry complaint *to the FCC*, prior to 1971, that the Congress had failed to provide its members with the ability to copyright a phonorecord. The case may or may not have merit, but clearly it is one for the Congress.

II. THE COMMISSION HAS NO BASIS FOR ACTION WITHIN ITS PRESENT RESPONSIBILITIES; ANY ACTION BY THE COMMISSION WOULD SEVERELY DISTORT THE MARKETPLACE AND RUN COUNTER TO THE WILL OF THE CONGRESS.

Given the lack of any basis for Commission action in either the Copyright Act or the Communications Act, the Commission simply lacks the legal or functional tools to erect the sort of complex administrative copy protection structure that the RIAA seems to be asking it to build.

Rights Coalition at 9 (Dec. 6, 2002); Reply Comments of the Home Recording Rights Coalition at 4-6 (Feb. 18, 2003).

[8] *Id.,* Report & Order, p. 1, n. 1 ("The name of this proceeding has been changed from Digital Broadcast Copy Protection to Digital Broadcast Content Protection to reflect that the redistribution control regime adopted herein for digital broadcast television in no way limits or prevents consumers from making copies of digital broadcast television content.")

The absence of any jurisdictional, legal, or prior licensing basis for Commission administration means that any such plan would be a recipe for confusion, chaos, and ultimately, disaster.

A. Any Assumption Of Commission Jurisdiction Must Be Based On Some Power Of Phonorecord Producers To License Free, Terrestrial Radio Broadcasts, And On Some Commission Power To Impose Copy Protection Impairments On Receivers.

In order to pursue the course being urged on it by the RIAA, the Commission would need to issue regulations that, for purposes of copy protection, wrest control over broadcasts from broadcasters, wrest control over device design from device manufacturers, and wrest control over device usage from consumers. The Commission lacks jurisdiction to do any of these things.

1. The Commission lacks jurisdiction to impair broadcasts for copy protection purposes.

One searches the Communications Act and the Copyright Act in vain for any suggestion of Commission authority to impair free terrestrial broadcasts in aid of copy protection. HRRC has recited, above, how the Congress has continually refused to grant any such public performance right in favor of phonorecord producers. Nor has the Congress, in the Communications Act or elsewhere, empowered or directed the FCC to pursue such a right or interest. In the long history of this docket and its predecessor, the RIAA has never come forward with any brief to the contrary.

The Commission, in its NOI, asks whether, in the absence of any such jurisdictional foothold, it can fall back on its "public interest" authority under Section 4(i) of the Communications Act.[9] If the answer were "yes," then the Commission could justify exerting control, in favor of a rights holder and at the expense of a broadcaster, whenever the rights

[9] 47 U.S.C. § 154(i).

holder had a grievance colorably grounded in public policy or "public interest," even in the absence of any support or interest in a substantive area of law (e.g., the Copyright Act or the Communications Act). But such is not the law. The Commission so concluded in *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1207-1208 ¶ 51 (1986). In that case it cited the rule enunciated by the Supreme Court in *National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 669 (1976):

> [T]he use of the term 'public interest' in a regulatory statute is not a broad license to promote the general welfare. Rather, the words take meaning from the purpose of the regulatory legislation.

In *NAACP* the Commission applied this rule to its own jurisdiction, and concluded:

> Thus, while it may be appropriate for the Commission to consider the relationship of the policies underlying other Federal statutes to effectuation of the policies behind the Communications Act, the inclusion of a public interest standard in the Communications Act did not automatically give the Commission 'either the authority or the duty to execute numerous other laws.'[10]

Most recently, in *MPAA v. FCC, 309 F.3d 796, 806* (D.C. Cir. 2002), the court observed that the following quotation from Chairman Powell "said it all":

> It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a 'necessary and proper' clause. Section 4(i)'s authority must be 'reasonably ancillary' with other express provisions.

[10] In the matter raised in the NOI, there is not even any "other law" on which purportedly to base ancillary jurisdiction, because the Copyright Act does not provide for any right of phonorecord producers over DAB broadcasts. *See also U.S. v. Southwestern Cable*, 392 U.S. 157, 178 (1968) (FCC regulation must be "reasonably ancillary" to the effective performance of its responsibilities.)

2. The Commission lacks jurisdiction to impair receivers and other home network products for copy protection purposes.

The analysis and law reviewed above apply equally to the Commission's lack of authority over the home network devices that would have to be impaired in order for a "public interest" regime to be imposed. Indeed, *even if* the Commission had some authority to impair the rights of broadcasters in favor of the rights of phonorecord producers, it would not, absent further congressional grant or direction, have any authority to impose a responsive regime on home network devices.[11]

The Commission has asked for comparisons with its exercise of power with respect to the Broadcast Flag. Assuming, *arguendo*, that the Commission does have jurisdiction over home devices in that proceeding, and that, contrary to statute, jurisdiction to impair digital audio broadcasts exists, the case still appears much weaker here – but it is difficult to say *how much* weaker, because the extent of the impairment can only be guessed at. What is known for sure is that the RIAA is asking the Commission to focus not just on Internet "redistribution," but on *home recording* itself. Indeed, at the Commission's January "hoedown" at which the RIAA discussed its concerns, the one thing the RIAA made clear was that its primary target re DAB is private, noncommercial home recording, in which the user retains the copies mainly for personal use. Internet redistribution was said to be secondary to or derivative of this concern.

As HRRC discusses below, it appears that an imposition on DAB broadcasts and receiving devices would have to cover much, much more than DAB. It would also have to cover the corollary FM service, the FM receiver, all devices capable of recording either, or of digitizing the FM service, and all means of home network transmission thereafter, and possibly competitive

[11] *See* HRRC Broadcast Flag Comments and Reply Comments, cited n. 7.

digital services – in order to be "effective" for the its stated purpose. The cost to consumers of such a regime is likely to be substantial. Unlike the case of the "Broadcast Flag," the target here would be the imposition of a copy protection regime. Therefore, and inevitably, the focus would move from the regime itself to "holes" in the regime, in the form of similarly available services that are not covered. **This would lead to a bootstrapping of the concept of *ancillary,* toward *infinity*.**

Moreover, if the Commission were to ground its authority on a "public interest" in the *success* of the DAB service, then it would likely find that it *must* similarly impair competitive services, analog and digital, because (1) as HRRC demonstrates, the same acquisition, storage and organization techniques are equally available for competitive services, and (2) impairing or increasing the cost to consumers of *only* DAB would put DAB at a competitive disadvantage. This quandary – having to impose on other media in order to avoid damaging the medium it is trying to promote – would lead to infinite extension of both the technical regime and the jurisdictional claim. It illustrates why the Commission may not, and should not, exercise jurisdiction over copyright, devices and consumer home recording rights solely on the basis of the RIAA's, or even the Commission's own, notions of "public interest."

B. In The Absence Of Any Discretionary Licensing Power, The Congress Or The Commission Would Need To Create Such A Power.

Because there is no existing power of phonorecord producers to limit the public performance of phonorecords, there is no existing licensing regime to form a basis for the exercise of such power. This poses both legal and practical obstacles for the Commission. *Legally*, as HRRC has demonstrated, this means that there is no rationale for the imposition of a

technical regime. *Practically*, it means that the Commission would have to engineer not only the law, but *also the private sector business arrangements.*

It is one thing, and difficult enough, for the Commission to apply a regulatory "patch" to an existing conditional access regime, grounded in existing licenses, when copy protection considerations intrude on the notion of "conditional access."[12] It is quite another when the FCC is asked to create, in one wave of the administrative wand: (1) the legal basis for conditional access, (2) a licensing regime to set the conditions for access, and (3) a copy protection regime as an extension of both of these regimes. To do so, the FCC would not have to just *administer* rights, it would have to create and *assign* them. Clearly it lacks the power to do so; if somehow it has the power, it should refrain from attempting to do so absent congressional guidance.

C. Commission Assumption Of A Discretionary Licensing Power Over Free Terrestrial Radio Broadcasts Would Upset Both The Statutory System And The Market That Has Evolved Under This System.

The lack of any top-level discretionary licensing authority is not only a theoretical, legal, and jurisdictional impediment. It is also a very practical problem: the assertion of copy protection license rights is voluntary with the rights holder. Fundamental to every private sector scheme is the ability to assert or not assert the protection, or to impose conditions on its non-assertion (e.g., payment of a fee). Copyright "encoding rules," in statutory,[13] administrative,[14]

[12] *See In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Further Notice of Proposed Rulemaking and Declaratory Ruling ¶¶ 28-29 (Rel. Sept. 18, 2000).
[13] 17 U.S.C. §§ 1001 *et seq.;* 17 U.S.C. §§ 1201 *et seq.*
[14] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices,* CS Docket No. 97-80, *Compatibility Between Cable Systems and Consumer electronics Equipment,* PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking (Rel. Oct. 9, 2003) at Appendix B.

and licensing[15] contexts have recognized and provided for such non-assertion, or conditional non-assertion. The lack of any statutory, legal, or jurisdictional foundation for an FCC-created right to control content would lead to a land rush among claimants, and an impossible legal and administrative regime.

1. There would be a plethora of claimants for the newly created power.

If there are any permissions, conditions, or extension of rights under license in the RIAA regime, it is difficult to imagine in whose hands the reigns would lie. As HRRC has discussed, phonogram producers lack any rights over DAB. The experience in the Audio Home Recording Act (discussed further below) teaches that there are many other potential claimants and interested parties.[16] And in the absence of strong claims, broadcasters would have a case for exercising all rights and making all decisions and contracts themselves. Given the statutory lacuna, it is difficult to see how the FCC would have the authority to serve as referee, even if it could summon the will of Hercules, the wisdom of Solomon, and the patience of Job.

2. The boundaries of a licensing power created by regulatory fiat would be difficult to determine and would spawn litigation.

In circumstances in which it has filled a statutory and real-world vacuum by fiat, any decision of the Commission would likely lead to litigation challenging as arbitrary, and lacking jurisdiction, its assignment of discretionary rights. It would seem impossible for a Commission decision in this context *not* to be arbitrary. This prospect provides further support for the conclusion that the FCC lacks jurisdiction to appoint itself to such a task.

[15] *See e.g.,* http://www.4centity.com/; http://www.dtcp.com/; http://www.macrovision.com/partners/entertainment/become_a_licensee/index.shtml.
[16] *See* 17 U.S.C. § 1006.

III. NO EVIDENCE OF PRESENT OR FUTURE HARM, SUFFICIENT TO FORM A BASIS FOR REGULATORY ACTIVITY, EXISTS.

The Commission inquires about evidence of actual or potential harm to the interests of record producers. There is no evidence of actual harm, and the allegations of potential harm rest entirely on the sort of speculation, about the effect of new products, that has been shown to be consistently wrong in the past.

A. The Combination of Features and Functions Apparently Feared By RIAA Has Been Available For Several Years, With Comparable Audio Quality.

As the Commission noted in the FNPRM, the introduction of DAB is an enhancement to present services rather than a radical shift:

> "In many ways, the move to DAB is similar to the transition from black and white to color television in the 1950s and 1960s …." [17]

It is facile but incorrect to regard all parts of a DAB receiver as radically new, or conversely to assume that any new feature or function is a consequence of the introduction of DAB reception. The fact is that metadata coding of broadcasts, "PVR"-type functionality, and software to organize recordings on hard drives are all readily available to device manufacturers, and have been for some time.

- The "Radio Broadcast Data System" ("RBDS") is already available to FM broadcasters and manufacturers of FM receivers, and can include "metadata" sufficient for the playlist cataloging of a song's storage on a PVR-type or other medium.[18]
- Storage on a PVR-type "hard drive" is available whether the original material is received in analog or digital form. A song carried via an FM

[17] NOI, ¶ 17. It has been noted that, similarly to the transition from BW to color, DAB relies on AM/FM techniques and services to assure signal acquisition because it suffers from extended acquisition times. *See* Skip Pizzi, *Will the Same Formula for Failure That Befell Past Attempts at FM Improvement Apply to IBOC as Well?* Radio World, March 1, 2003, http://www.rwonline.com/reference-room/skippizzi-bigpict/FMX.shtml.
[18] *See* http://www.rds.org.uk/rdsfrdsrbds.html.

signal may be very inexpensively converted for storage, to one of the same compressed digital audio formats in which songs carried over digital media are stored. There would be very little difference in quality, particularly after the compression.

- The use of software applications to organize audiovisual, audio, or other data on a "hard drive" does not depend on how the data was transmitted before it was stored digitally. Hence, digital storage and organization have been, and will continue to be, available for content received via FM broadcast to the same extent they will be with respect to DAB.

There is, simply, ***nothing about the onset of DAB that is unique with respect to the capabilities or conduct about which the RIAA expresses concern.*** As the Commission noted, the introduction of DAB functions will be an enhancement, not a replacement, for analog signal acquisition; indeed, IBOC DAB tuning will *depend* on analog signal acquisition. It seems reasonable to assume that any device with the capabilities about which RIAA expresses concern will make such capabilities available for FM broadcasts as well, and possibly for AM signals and Compact Discs. In the five decade history of FM radio, RIAA has not requested any such imposition on FM broadcasting; nor would it have the right to make such a request. Yet it would be a bizarre result to impose impairments on DAB broadcasts, but not on FM broadcasts, comparable in quality, received by the same device at the same time.

B. Experience In Great Britain Has Not Produced The Feared Results.

DAB service is well established in the U.K. Although a different technical standard is employed, many of the available receivers also incorporate FM reception.[19] More than 300,000 DAB receivers were sold in the U.K. in the last year alone,[20] and the NOI cites an even higher acceptance rate. To HRRC's knowledge, the issues over which the RIAA has expressed concern

[19] *See* http://www.radioandtelly.co.uk/dab.html.
[20] http://www.rwonline.com/reference-room/skippizzi-bigpict/06_rwf_pizzi_march_28a.shtml.

simply have not arisen, even though at least one product on the market in Great Britain has some, though not all, of the attributes about which the RIAA worries.[21]

C. RIAA Has Not Made The Case That The Feared Consequences Would Outweigh The Harm To Consumers From The Imposition Of Regulatory Measures.

Neither the NOI nor the communications of record from the RIAA provide any basis for balancing the purported benefits of impairing consumer DAB use against the harm to consumers from doing so. When such assertions are made more specifically, history suggests that the projections of harm to the recording industry will be overstated by proponents, and the projected harm and inconvenience to consumers will be understated by them.

HRRC has been involved in the study of consumer home recording habits almost from HRRC's inception. In 1982, HRRC and allied organizations sponsored a study of audio home recording practices by the research firm of Yankelovich, Skelly & White. This study found that (1) consumer recording was primarily for the purpose of better arranging or archiving material the consumer already owned, and (2) sharing of recordings made at home often leads to additional purchases.[22] These findings, challenged by the music industry, were confirmed by the independent 1989 study of the Office of Technology Assessment ("OTA"). Additionally, OTA found that putting constraints on consumers' ability to record at home would produce a net detriment to economic welfare.[23] More recent independent studies have shown that both the conclusions and the projections about the effect of "file sharing" on the music industry have been overstated. Like earlier proponent projections, these have ignored the impact of cycles in the

[21] *See* http://www.thebug.com/.
[22] Yankelovich, Skelly and White, *Why Americans Tape, A Survey of Home Audio Taping in the United States,* September, 1982.
[23] U.S. Congress, Office of Technology Assessment, *Copyright and Home Copying: Technology Challenges the Law,* OTA-CIT-422 (Washington, DC: U.S. Government Printing Office, October 1989).

economy, the introduction of competing products of interest to certain demographic groups (video games, MTV, etc.), and up-and-down product cycles in the music business. [24]

In the present case, the difficulty with refuting a projection of harm arises from the lack of any particular plan or proposal. What is the technological focus of the RIAA concern:

- The availability of hard drives to consumers?
- The availability of software that can compile playlists?
- The existence of metadata?

Only when one combines these elements can one address a question of "harm," yet the RIAA has not said in what respects it wishes the FCC to address such potential combinations. If the RIAA is concerned over *any* potential combination of these technologies, its concerns obviously extend well beyond anything that is in the FCC's power to address. If they extend only to *particular* combinations, HRRC would need to know whether all, or just some, of those combinations are to be addressed, before it can comment on either the industry projections of "harm," the projected impact on consumers, and whether the transition to DAB would be aided or impeded.

In all such respects, the RIAA would have to overcome the historical judgment of the Congress that record companies do not have the power to prevent the free terrestrial broadcast of sound recordings; the fact that such broadcasts have never been protected against recording; and the fact that no lawsuit has ever been filed challenging such recording, or the availability of recording devices made available for this specific purpose. This sets a high bar that the RIAA

[24]Felix Oberholzer, Koleman Strumpf, *The Effect of File Sharing on Record Sales An Empirical Analysis* (Mar. 2004), http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf; Michael Kirk, *The Way the Music Died*, Frontline, May 28, 2004.

must clear to even suggest any future "harm" attributable to the approval of DAB services in this docket.

IV. NO SPECIFIC PROPOSAL HAS BEEN PUT FORWARD, BUT THE OUTCOME SEEMS INEVITABLY CONTRARY TO FAIR USE PRINCIPLES.

Despite the fact that the FCC inquiry on DAB stems from 1990, and that this docket stems from 1999, the first RIAA filing in this docket occurred almost a week *after* the Commission announced this NOI.[25] In the fourteen years that the FCC has been studying this subject, the industry apparently concluded that it lacked the interest or the standing (or both) to make any technical proposal, and indeed it still has not done so.

A. RIAA Has Not Made A Specific Proposal As To Either Ends Or Means.

The lack of a specific proposal to accompany RIAA's initial approach to the FCC or its initial filing in this docket signifies several things – lack of legal or substantive connection to the medium in question; lack of prior involvement due to lack of connection on the merits; lack of experience due to lack of prior involvement; lack of any licensing connection due to all of the above. These deficiencies will not be cured by RIAA finally cobbling together a quasi-legislative proposal. They illustrate a deeper problem – lack of any basis or rationale for FCC involvement.

[25] Letter of Theodore Frank to Mary Beth Murphy, Esq., filed April 21, 2004.

B. RIAA Has Not Identified Any Benefit To The Consumer From The Imposition Of A Regulatory, Technological Regime.

HRRC, in weighing whether it might support any proposal for a technical regime, has always considered three factors:

- Whether it would promote or chill technological progress
- Whether consumers would share in any technological benefits
- Whether it would promote or detract from legal certainty

In the case of the present NOI, it is difficult to identify any positives, especially for consumers. At least in the case of the Broadcast Flag, the claim (of which HRRC voiced deep skepticism) was made that it was necessary to promote the licensing of content to free HDTV broadcast. In this case, RIAA members have no power to license or to prevent such broadcasts. Moreover, to the extent that RIAA comes forward with a plan that places restrictions on DAB, but not on competitive media (including standard FM broadcasting), the result will be to chill consumer acceptance of DAB itself.

C. The Potential Limitation On Reasonable Consumer Expectations Has Been Neither Defined Nor Justified.

Except for speculation and extrapolation, there is nothing yet to indicate that manufacturers will make the sorts of devices that the RIAA fears,[26] that consumers will buy them in large numbers, or that if so they will be used only to negative effect. Nor has the extent to which customary consumer expectations would be circumscribed, with respect to DAB reception, been defined. If the RIAA believed that there was something organic about DAB

[26] As is noted below, it is possible that the existing terms of the AHRA may be providing a disincentive to offer such devices.

service that required a unique lowering of expectations, it was obliged to become active in this docket at its inception in 1999. It is simply too late in this proceeding to raise some new consumer usage paradigm, and to attempt to hold consumers to it.

V. ANY REGULATORY PROCEEDING BY THE COMMISSION WOULD REQUIRE, AND SHOULD BE PRECEDED BY, A RE-EVALUATION AND RE-CASTING BY THE CONGRESS OF THE AUDIO HOME RECORDING ACT.

Although no specific proposal was before the FCC at the time of the NOI, it would appear that any proposal addressing the concerns expressed by the RIAA would apply to devices already covered by the AHRA, which are subject to royalty obligations based on their recording ability, and which benefit from a statutory exclusion from liability for copyright infringement. Law and equity would require that the AHRA be recast in light of new impositions sought by the RIAA. This, obviously, is a job beyond the ken of the FCC.

A. At Least Some Of The Products As Described Apparently Would Be Covered By The AHRA.

The AHRA[27] covers any "digital audio recording device," "digital audio interface device," and "digital audio recording medium." A "digital audio recording device" ("DAR") is defined in sec. 1001(3) as:

> … any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use ….
>
> A "digital audio copied recording" is defined in sec. 1001(1) as:
>
> … a reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission.

[27] 17 U.S.C. 1001 *et seq.*

Although the RIAA has not yet offered any particular quasi-legislative plan, it would appear, from its concerns over potential recording functions of portable or automotive products that are designed to record exclusively or primarily from DAB broadcasts of prerecorded material, that the RIAA's proposed regime would be aimed at least in part at products that are considered "digital audio recorders" under the AHRA.[28]

B. The AHRA Provides A Statutory Scheme That Already Includes Technical Constraints And A Royalty Regime On Products And Media.

The AHRA already contains specific provisions governing the sale and functioning of DARs. Section 1002 provides that DARs may not be imported, manufactured, or distributed unless they conform to the "Serial Copy Management System," or "SCMS," which is designed to allow first-generation recording, but to allow rights holders to prevent copies of copies. The specific implementation of SCMS is described in a "Technical Reference Document" referenced in the report of the House Energy & Commerce Committee. As described therein, SCMS provides for a "default" treatment of DAB (even though no such service yet existed) which specifies that one additional generation copy can be made.[29]

The AHRA, in addition to specific obligations to read and respond to SCMS codes, and to impose a default solution for DAB, also imposes a "royalty" obligation on DARs and digital audio recording media. Section 1003 obliges manufacturers or importers of such devices and media to pay royalties based on a percentage of the product's wholesale selling price. Where a

[28] HRRC, as a private organization that includes members in competition with each other, cannot take a position on whether or how the AHRA covers specific products in the absence of some legal or regulatory proceeding posing such a question. We also note that the Ninth Circuit Court of Appeals ruled in the *Rio* case that devices primarily designed to make recordings from multi-purpose computer-type hard drives do *not* make "digital audio copied recordings" hence are not DARs. *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072 (1999).

[29] H.R. Rep. No. 102-780 pt. 1, at 46-47 (1992).

recorder is integrated into a larger product, the price is based on the price of the larger product, subject to a "cap."

Therefore, it would appear that at least some of the products of concern to the RIAA would be subject to this statutory regime. They would already be obliged to read "metadata" or to make a "default" judgment in its absence; they would already be subject to levies on their value as contributions to a "royalty pool" meant to compensate for their use in making certain types of recordings. Therefore, they are *already* subject to a regime meant, by the Congress, to constrain their function in some respects, and to pay content owners, according to an exquisitely complex formula, for their recording to the extent it is not constrained. *The FCC was not given or delegated any authority to change or construe this regime as implemented by the Congress, although* ***other government agencies were.***[30] ***For the FCC to assert such power, nevertheless, would be a usurpation of congressional power and prerogative.***

C. The AHRA Provides For A Statutory Exemption From Copyright Liability Re Covered Devices That Would Be Inconsistent With Imposition Of A Regulatory Regime Based On An Assumption Of Such Liability.

In recognition of the unprecedented burdens being placed on digital audio recorders and media, the AHRA further provided an *exemption from copyright liability* in favor of the devices that were so burdened. Section 1008 provides:

> No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

[30] *See* 17 U.S.C. §§ 1002(b), 1004(a)(3), 1005, 1006(c), 1007, 1009(e), 1010(b), (e), (f), (g).

The RIAA initiative, then, seems perfectly symmetrical: ***In addition to having no legal claim on the conduct of broadcasters, by specific congressional exemption, the RIAA also has no legal claim on the conduct of devices specifically designed to record DAB programs, or on the noncommercial users of such devices, also by specific congressional exemption.***

D. Imposition Of A Regulatory Scheme Without Regard To the AHRA Would Further Distort The Marketplace.

In addition to being illegal and (in light of specific congressional exemption and legislation) unconstitutional, any action taken by the FCC without addressing the AHRA would be unfair and unwise. It would be unfair because manufacturers, retailers, and consumers already suffer impositions on these products. These impositions were "bought" in exchange for a clear expectation of their quiet enjoyment – that DAR products would now be immune from further imposition in the name of copyright. It would be unwise because it would further distort a marketplace that is already reeling from uneven application of the law, and unintended consequences.

It is not too much to suppose that one reason products of the sort feared by the RIAA do not exist is the possible application of the AHRA to them, in circumstances judged to be burdensome.[31] Thus, it may be that at least some of the fears of the RIAA have already been addressed by the Congress; new prescriptive or proscriptive action by the Commission would only further distort the marketplace. The Commission, in any event, before proceeding with a plan of its own would have to make some fine judgments about --

[31] HRRC, as an organization whose membership includes competitors, cannot speak for individual manufacturers on questions of product development decisions.

- (1) what qualifies as "SCMS,"
- (2) the status of the TRD as an interpretive guide to the AHRA, and
- (3) how to interpret the TRD in light of alternative technological approaches.

At least one of these questions -- administrative interpretation and acceptance of alternatives to "SCMS" -- was specifically delegated by the Congress -- ***not to the FCC, but to the Dept. of Commerce.***[32] Thus, the FCC would be barging into a thicket in which it lacks the power to do any clearing, cutting, or planting. It would not even have the authority to determine whether its own proposals were consistent with the statutory scheme, because elements of that scheme have been left to other agencies, or to the courts.

E. <u>It Is Up To The Congress, Not The Commission, To Consider Possible Changes To The AHRA.</u>

Although the FCC is not invested with the power either to interpret the AHRA authoritatively or to change the AHRA, it cannot ignore it. If the FCC is to act on the proposals put before it by the RIAA, it must wait for the Congress to act. Therefore, the FCC must wait not only for the Congress to invest it with jurisdiction to impair broadcasts and to impose copy protection requirements on DAB receivers; it must also wait for Congress to change or clarify:

- The extent to which the AHRA covers devices within the target zone of FCC action
- The scope and application of existing AHRA provisions
- The responsibility for making further determinations under the AHRA
- The import of the specific exemption from copyright liability granted to device manufacturers and private, noncommercial users of DARs

[32] 17 U.S.C. § 1002(b).

Pending such congressional action, the Commission can be nothing more than an interloper in the schemes, with respect to broadcasting and digital audio recorders, that have been established by the Congress.

VI. CONCLUSION

From top to bottom, the questions on which the Commission has invited discussion involve matters of substance over which the FCC has been given no authority by the Congress. To the very limited extent that the Congress has provided any mechanism for issues to be addressed at all, the responsibility to do so has been apportioned elsewhere, and not to the Commission. Even if the subjects raised in this NOI could be addressed by the Commission, there is no evidence of actual harm to the RIAA or its members, nor is there any clear or firm basis for extrapolating a projection of future harm, nor is there any legal basis for the Commission to deprive consumers of their rights and legitimate expectations. Nor is there, to date, any clear indication of what it is the recording industry would like the Commission to do. Hence, on multiple and independent grounds, there is no basis for further action by the Commission.

Respectfully submitted,

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