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 Services	)	

To: The Commission

REPLY 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 Reply Comments in response to the comments opposing the inclusion of content protection provisions in the Commission's digital audio broadcast ("DAB") rules or urging the Commission to delay any adoption of content protection provisions. None of those commenters have submitted anything that questions the showing in RIAA's opening Comments that DAB will effect a fundamental change in the radio industry, transforming radio from a relatively passive listening service to an interactive distribution system permitting consumers to create and redistribute vast libraries of music without ever listening to the broadcast transmissions or compensating the copyright owners of that music or other information. None of those commenters have submitted anything but conjecture and surmise to refute the extensive factual, technical and economic evidence of the harm that will inevitably and imminently befall the music industry, and very possibly the radio industry, if the Commission authorizes DAB without content protection.

As RIAA has shown, unauthorized Internet peer-to-peer ("P2P") services have caused, and continue to cause, substantial economic harm to the music industry. The ramifications of P2P piracy have been felt throughout the industry – from the decline in sales of hit CDs, to reductions in the number of artists under contract and new album releases, to closing of record stores, to the layoffs of thousands of employees. Commission authorization of DAB without content protection will sanction a viable, attractive alternative to P2P piracy for many who steal music. Consumer devices being designed and manufactured for DAB will permit listeners to cherry-pick automatically the music they wish to record, retain and possibly redistribute without ever listening to the radio. Consumers will be able to create huge personal collections of recordings without having to purchase a CD or otherwise compensate the creators of the content.

DAB also provides advantages over P2P, such as consistent audio fidelity and the avoidance of spyware, viruses and risks of prosecution for copyright infringement, making it a "perfect storm" for the music industry. Conclusory claims by commenters that the potential harm to the music and radio industries is too speculative for Commission action do not refute the extensive evidence presented by RIAA.

Many of those opposed to content protection also misconstrue RIAA's proposal and the law. First, RIAA is not asking the Commission to create a performance right nor is the lack of a performance right a basis for the Commission not to include adequate protection as it rolls out DAB. Commenters would have the Commission believe that the lack of a performance right is a license for the theft of music on DAB. There is no basis for that assertion; Congress clearly never intended the lack of a performance right as a license to steal music. Indeed, the lack of a performance right militates in favor of Commission action here because sound recording copyright owners cannot engage in self-help in the face of a Commission authorization of DAB without content protection. Therefore, RIAA has urged the Commission to adopt content protection rules to avoid creating a DAB system that will be a method for widespread, unauthorized automated copying and redistribution of copyrighted music.

Second, RIAA's proposal does not seek to limit or change current consumer practices. The usage rules proposed by RIAA preserve existing listener expectations to record broadcast music manually, while limiting the ability of consumers to record automatically DAB transmissions to collect large personal collections of recorded music. Such large-scale, automated recording is not permissible "time shifting" and would constitute copyright infringement under the Copyright Act. Those commenters who summarily claim otherwise have

not provided any legal analysis or other justification for their position, other than to cite without analysis the Supreme Court's decision in *Sony v. Universal City Studios*, 464 U.S. 417 (1984). However, as is clear from the consistent line of court cases dealing with P2P services, that decision does not support the claim that the copying of DAB transmissions to create libraries of music is a fair use under the Copyright Act.

Third, RIAA's proposal does not contemplate or require the Commission to modify the Audio Home Recording Act ("AHRA"). The AHRA does not preclude the Commission's adoption of content protection rules as part of its DAB service rules. And, contrary to the assertions of some commenters, it is unlikely that the provision of the AHRA exempting consumers from infringement actions would even apply to the recording of DAB transmissions.

In addition, RIAA's request is not late. RIAA raised the need for content protection in the DAB rules promptly after the Commission tentatively selected a DAB transmission standard. Any earlier request would have been premature. Moreover, RIAA moved to ensure content protection far earlier than comparable efforts in the DTV proceeding. In all events, however, RIAA has raised a substantial public interest consideration concerning the effect of DAB on the music industry and on the policies of the Copyright Act designed to preclude the ability of consumers to engage in the rampant copying of recorded music. The Commission cannot brush aside DAB's effect on the music industry and potentially the radio industry. Indeed, DAB is still in its nascent stages and the Commission can and should act now, before legacy devices are widespread and the Commission's ability to act is constrained by those devices and by consumer expectations with respect to their ability to copy material broadcast by stations operating digitally.

Similarly, the Commission should not, and need not, delay adopting content protection rules until the affected industries reach consensus as to how content protection rules should be implemented. That day likely will never come without Commission action. RIAA has sought to work with the broadcasting and consumer electronics industries to develop those rules, and has been largely rebuffed. Thus, while RIAA welcomes a dialogue with the broadcasters and consumer electronics manufacturers, the Commission cannot avoid its public interest obligations under the Communications Act by looking to the opinions of affected industries, particularly where, as here, the broadcasters and consumer electronics manufacturers have been reluctant to engage in meaningful discussions with RIAA. RIAA has raised matters affecting the public interest and has provided the Commission with extensive factual, economic and technical evidence upon which to act. If the broadcasting and consumer electronics industries refuse to work with content owners toward a timely solution to the public interest concerns posed by the Commission authorization of DAB without content protection, the Commission must take immediate, affirmative action to facilitate industry recommendations that may serve to inform the Commission's decision, and even without industry consensus, must adopt content protection rules for DAB.

Further, the Commission has jurisdiction to adopt content protection rules. None of the commenters have submitted any legal analysis that refutes RIAA's thorough legal analysis of the Commission's authority under the Communications Act to adopt content protection rules in order to give effect to the long-standing federal policies underlying the Copyright Act that copyright owners should be compensated for the use of their copyrighted works, particularly as new digital transmission technologies displace sales income.

Inclusion of content protection provisions in the DAB rules will not prejudice terrestrial DAB stations. Satellite digital radio services do not permit their subscribers to duplicate programming, and neither has licensed the manufacture of receivers with recording capability. Thus, as distinguished from DAB, where the potential for widespread unauthorized copying is immediate, there is time to address the issues with respect to satellite radio. Moreover, since each satellite operator has its own digital transmission system, the music industry and the satellite operators can reach agreement among themselves without Commission involvement. Similarly, content protection rules will not place DAB at a competitive disadvantage vis-à-vis Internet webcasters.

Finally, no commenters have advanced anything that rebuts the comprehensive record supporting the swift adoption of content protection rules. Based on the extensive record before the Commission, the Commission should adopt content protection rules concurrently with final DAB service rules.

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The Recording Industry Association of America, Inc. ("RIAA") submits these Reply Comments in response to the comments opposing the adoption of content protection rules for digital audio broadcasting ("DAB") or urging the Commission to delay adoption of content protection rules. In its initial submission ("Comments"), RIAA explained in detail why the Commission must include content protection rules as part of its rules for DAB. RIAA supported that position with significant factual, technical and economic evidence of certain harm to the recording industry and potential harm to radio broadcasting.

Those commenters urging the Commission to reject or delay content protection have offered neither a factual nor sustainable legal or policy basis to refute RIAA's showing. As set forth in detail below, the various arguments advanced by those opposing content protection are based on misconceptions of what RIAA is asking for; ignore the clear, unequivocal evidence of the harm that DAB without content protection will cause

to the music industry, the diversity of music available to the American public and potentially to the free over-the-air radio broadcast industry; and advocate unsustainable legal positions.

I. Introduction

In its Comments, RIAA demonstrated that DAB entails more than an improvement in audio quality; it constitutes a transformation of radio broadcasting from a service providing music and audio information selected by the broadcaster into a broadband digital distribution system that will enable consumers to select the material they wish to receive and to retain copies of that material in near-perfect quality. DAB will also afford licensees the opportunity to deliver a wide variety of additional services – from program listings, to detailed identification of music, to the ability to acquire content permanently – along with other new and innovative services. The Commission recognized this transformative effect of DAB in its *Further Notice of Proposed Rulemaking* when it sought comment on whether licensees should be allowed to engage in multicasting,[1] datacasting,[2] subscription services,[3] and advanced services such as:

> (1) enhanced information services, such as breaking news, sports, weather, and traffic alerts . . .; (2) listener controlled main audio services providing the ability to pause, store, fast-forward, index and replay audio programming via an integrated program guide with simplified and standard user interface options; and (3) supplementary data delivery that will spur the introduction

[1] *In re Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, Further Notice of Proposed Rulemaking and Notice of Inquiry, 19 FCC Rcd. 7505, 7513-14 ¶¶ 20-22 (2004) (respectively referred to herein as "*Further Notice of Proposed Rulemaking*" and "*Notice of Inquiry*").

[2] *Id.* at 7513-16 ¶¶ 23-28.

[3] *Id.* at 7516 ¶ 29.

> of in-vehicle telematics, navigation and rear-seat entertainment programming.[4]

For the music industry, DAB portends an even more fundamental and potentially harmful change: it will change the manner in which consumers access and acquire the music of their choice. As demonstrated in RIAA's Comments and supported by the reports of Hamilton Technologies, Inc., Cherry Lane Digital L.L.C., and Thomas M. Lenard (respectively, "Hamilton Report," "Cherry Lane Report" and "Lenard Report"), DAB without content protection will shift the means by which consumers can acquire music, permitting them to record automatically the music they wish to hear. That change makes DAB without content protection a new mechanism for the distribution and acquisition of recorded music. However, that mechanism is distinctly different from the record stores and legitimate online music services with which it will compete: the listener will not have to pay for his or her music. Since the sale of CDs and royalties are the predominant source of revenue for the record companies and for artists and performers and others, the Commission's authorization of DAB without content protection will further jeopardize the economic base of the music industry, which is already threatened by piracy on Internet peer-to-peer ("P2P") services.

Those commenters opposing the adoption of content protection rules ignore this fundamental change and the consequences that flow from it. They blithely assume that DAB is simply a better quality audio broadcast system.[5] They also conveniently brush

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[4] *Id.* at 7515-16 ¶ 26.

[5] Indeed, some commenters, like the Consumer Electronics Association ("CEA") and the Home Recording Rights Coalition ("HRRC"), deny even that DAB offers better audio quality than existing analog FM, although that technical superiority was the central rationale for the Commission's selection of the IBOC digital radio standard in the first place.

aside the undisputed evidence from the front pages of newspapers and in magazines across the country that unauthorized P2P services are having a devastatingly adverse affect on the music industry and argue that there is no basis for assuming that DAB will cause any additional harm to the music industry.

The Commission cannot engage in such flippancy. The simple facts are, as demonstrated in RIAA's Comments, that: (i) unauthorized P2P services are destroying the very economic foundation of the music industry; (ii) DAB will offer consumers the opportunity to engage in the very same unauthorized copying and redistribution of recorded music; (iii) the equipment to permit consumers to engage in that activity and to cherry-pick automatically the music they wish to hear, retain and redistribute is being designed and manufactured and will be available as DAB rolls out; (iv) many listeners will engage in copying and redistribution of recorded music broadcast by DAB stations; and (v) for many, DAB is likely to supplant P2P services as a source for unlicensed and uncompensated music acquisition because of its audio quality, the avoidance of spyware and viruses, and the substantially reduced risk, if not the avoidance, of being sued for copyright infringement.

It is absurd to argue, in light of these facts, that the potential harm to the music industry from DAB without content protection is speculative or that the inevitable harm to the industry will not reduce the diversity of music and, thus, the diversity of radio programming available to the American public. It also strains credulity to maintain that the ability to record automatically selected recorded music without also listening to commercials will not, in time, affect advertiser-supported terrestrial radio.

Some of those against content protection are hypocritical, opposing protection for copyrighted sound recordings, but proposing conditional access business plans to sell other services. As is clear from iBiquity Digital Corporation's ("iBiquity") press statements and information on its website, iBiquity and its investors and strategic partners, *i.e.*, the major radio broadcasters and consumer electronics manufacturers, are themselves prepared to utilize content protection measures to sell "premium" content to subscribers. Yet, these commenters oppose content protection measures to prevent the widespread illegal copying and distribution of the copyrighted sound recordings that are the principal draw of most commercial, advertiser-supported radio stations.

Many of the claims of those opposing RIAA's request mischaracterize the position of RIAA. Contrary to the position of some commenters:

- RIAA is NOT asking the Commission to create a performance right for recorded music. Clearly, only Congress can grant the record companies a performance right, and nothing in RIAA's proposal before the Commission envisions a requirement that broadcasters obtain a license from the record companies or anyone else before they can use copyrighted sound recordings in connection with their broadcast operations. Rather, RIAA is asking that the Commission not sanction the widespread, unauthorized automated copying of copyrighted sound recordings by authorizing DAB without content protection.

- RIAA is NOT asking the Commission to ban the copying of broadcast music. Indeed, RIAA has been very careful to frame its request for relief in terms that preserve existing listener expectations concerning their ability to record broadcast music manually. RIAA's proposal also would allow recording of entire programs automatically, something that generally does not occur today. What RIAA is seeking to prevent is the massive, automated recording of broadcast music that will permit consumers to create extensive libraries of recorded music without ever paying for the music. The creation of those libraries is not permissible time shifting.

- RIAA is NOT asking the Commission to modify the Audio Home Recording Act ("AHRA"). Just as the Commission cannot grant a performance right, it cannot amend the AHRA. However, as RIAA showed in its Comments and explains further below, the AHRA does not preclude the Commission from adopting the content protection rules requested by RIAA, nor does it create a

> blanket authorization for consumers to record digital material, as some appear to assert. To the contrary, it is unlikely that the provision in that Act granting consumers immunity from certain infringement actions would even apply to recording of DAB transmissions.[6]

In sum, those opposing the Commission's inclusion of content protection rules as part of its DAB technical standards have resorted to a fusillade of spurious claims refuted by RIAA in its Comments. In the remainder of these Reply Comments, RIAA addresses in greater detail the specific objections of those commenters. As demonstrated below, none of them establish a factual, legal or policy basis that would support a Commission decision to authorize DAB without content protection.

II. RIAA Has Demonstrated that Commission Authorization of DAB Without Content Protection Poses a Substantial Threat to the Music Industry, Music Diversity and Potentially Free Over-the-Air Radio.

A number of the commenters contend that the Commission lacks sufficient evidence of harm to adopt content protection rules.[7] That argument fails for several reasons. First, it ignores the harm already suffered by the music industry – and the public – as a result of unauthorized P2P services. Second, it ignores – or refuses to accept – the quality improvement offered by DAB and the enhanced means of unauthorized copying that DAB offers. Third, it ignores the existing technology that will permit listeners to cherry-pick DAB content and record it automatically without ever listening to the broadcast. Fourth, it ignores DAB's capacity to aggravate significantly the harm to the

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[6] *See, e.g., A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024-25 (9th Cir. 2001); *RIAA v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1077 (9th Cir. 1999).

[7] *See, e.g.*, CEA Comments at 3; Greater Media, Inc. Comments at 12; Electronic Frontier Federation ("EFF") Comments at 4; National Association of Broadcasters ("NAB") Comments at 32; Public Knowledge, Consumers Union and Consumer Federation of America ("Consumer Group Coalition") Comments at 2, 6; iBiquity Comments at 28; National Public Radio ("NPR") Comments at 31-32. Unless otherwise indicated, all comments cited in this Reply were filed in response to the *Notice of Inquiry*.

music industry from P2P piracy and the reduction in the diversity of music available to the public which will inevitably result. Fifth, it ignores the ability of DAB without content protection to undermine legitimate online music services and potentially free over-the-air radio. And sixth, it ignores over 40 years of Commission precedent, affirmed by the U.S. Supreme Court and the Courts of Appeals, in which the Commission has acted to prevent a foreseeable and likely harm before the harm materializes.

A. Unauthorized P2P Services Have Caused Significant and Continuing Harm to the Music Industry.

As RIAA demonstrated in its Comments, and supported by the accompanying Lenard and Cherry Lane Reports, the piracy of digitally recorded music is a clear and present threat that is destroying the economic foundation of the music industry and threatenening music diversity.[8] RIAA's Comments, and the accompanying Lenard Report, provide extensive evidence establishing the economic injury that unauthorized P2P services have caused the music industry.[9] Sales of hit CDs declined 44% from 2000 to 2003; record companies and the supporting industries have laid off thousands of employees, drastically cut their rosters of artists and reduced the number of albums released.[10] Unauthorized P2P services have also caused a loss of royalties to artists, songwriters, and music publishers, as well as forced the closing of thousands of record stores.[11]

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[8] *See* RIAA Comments § II, Apps. B-C.

[9] *See id.* at 11-29, App. C.

[10] *See id.* at 19-22.

[11] *See id.* at 21-22.

RIAA's extensive factual and economic showing is further supported by several commenters.[12] For instance, the Recording Artists' Coalition ("RAC") noted that piracy of music on unauthorized P2P services has already decreased diversity of recordings available on the radio. RAC explained that

> [l]abels are releasing [*i.e.*, cutting from their rosters] acts at an alarming rate (some as much as 50% of the label roster), production and promotion money is drying up as labels have instituted a broad cutback in budgets, and there are fewer employees at the labels promoting and marketing the product for artists not dropped. . . . Of gravest concern, however, is that this depression is moving some recording artists to give up.[13]

This evidence clearly demonstrates that the piracy of digital music poses a serious threat to the music industry and to the diversity of music that will be available to the American public. None of those commenters opposing content protection has advanced any evidence that would rebut this showing.

B. DAB Offers Superior Quality Compared to Analog FM and Enhanced Capabilities that Will Encourage Unlawful Copying.

Several commenters, including CEA and HRRC, suggest that RIAA's concerns are misplaced because DAB provides "comparable audio quality" to current FM broadcasts and thus there is nothing "unique" about the transition to digital radio.[14] Since the recording industry has not experienced significant piracy problems with current analog FM broadcasts, these commenters argue that RIAA's concerns are unfounded.

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[12] *See, e.g.,* Cox Radio Comments at 9-10; RAC Comments at 3-4; National Music Publishers' Association Comments at 4; National Academy of Recording Arts and Sciences, Inc. Comments at 4; American Federation of Radio and Television Artists, et al. Comments at 2.

[13] RAC Comments at 3.

[14] HRRC Comments at 13-14; CEA Comments at 6-7.

This argument is meritless. DAB offers superior quality to that of current analog FM. As the Commission recognized, "[t]he transition to DAB promises the benefits that have generally accompanied digitalization – *better audio fidelity,* more robust transmission systems, and the possibility of new auxiliary services."[15] The *Notice of Inquiry,* not surprisingly, therefore depicted the "dramatic improvement in digital audio quality" available with DAB as a core factor in the Commission's selection of iBiquity's IBOC standard.[16]

The NRSC audio quality tests proved that IBOC FM digital signals "performed better"[17] than unimpaired analog FM and, as iBiquity itself describes, its IBOC system "will exceed the quality of the best possible analog and will deliver CD-quality sound."[18] Indeed, because audio fidelity is the first (and thus presumably the foremost) of the ten criteria the Commission utilized in selecting IBOC as the DAB standard for the United States,[19] there can be little legitimate question that DAB audio quality is superior to, not just "comparable" with, current FM technology. In iBiquity's own words, DAB is a "revolutionary upgrade" to radio broadcasting.[20] iBiquity's recently announced intention

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[15] *See In re Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, First Report and Order, 17 FCC Rcd. 19,990, 19,991 ¶ 3 (2002) (emphasis added) ("*DAB First Report and Order*"); *see also id.* at 20,001 ¶ 32 ("The NRSC tests show that both AM and FM IBOC systems offer enhanced audio fidelity and increased robustness to interference and other signal impairments."); *Further Notice of Proposed Rulemaking*, 19 FCC Rcd. at 7506-07 ¶ 2 (DAB also "eliminate[s] the static, hiss, pops, and fades associated with the current analog radio system.").

[16] *Notice of Inquiry*, 19 FCC Rcd. at 7506 ¶ 1.

[17] *DAB First Report and Order*, 17 FCC Rcd. at 19,994 ¶ 13.

[18] iBiquity Comments at 6 (filed Feb. 19, 2002).

[19] *DAB First Report and Order*, 17 FCC Rcd. 19,993 ¶ 7.

[20] iBiquity Comments at ii. iBiquity routinely describes the audio fidelity of IBOC as "radically upgraded sound" and "crystal-clear digital sound quality" in its public statements and press releases. *See, e.g.*, Press Release, iBiquity, HD Radio™ Going Live

Footnote continued on next page

to incorporate "surround sound" in its technology advances the audio quality to an even more superior level than that of existing analog FM and even satellite radio.[21]

All of this is apparent from the context in which the Commission has driven the transition from analog radio to DAB. First, one of the prime factors underlying the move to DAB is the fact that terrestrial broadcasters face new competition from satellite-delivered radio, which likewise offers CD-quality audio.[22] Second, the IBOC standard supports multiple audio streams, permitting broadcasters to further increase audio quality by varying the bit-rate at which digital content is transmitted (*i.e.,* fewer streams with higher bit-rates). Third, audio fidelity will improve further in the future, as broadcasters explore the additional capabilities of DAB, such as digital surround sound. For instance, "Circle Surround" technology allows IBOC broadcasters to encode multichannel content into two-channel output, which can then be decoded into full-bandwidth surround sound.[23] And just as the newer generation of audio coding technologies (AAC, WMA,

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Footnote continued from previous page
Coast-to-Coast...and Beyond, Apr. 19, 2004, *available at* http://www.ibiquity.com/press/pr/041904Coast2Coast.htm (last accessed July 27, 2004).

[21] *See* Press Release, iBiquity, iBiquity Digital Approves SRS Labs' Circle Surround® 5.1 as Compatible Surround Sound Format for the HD Radio System (June 29, 2004), *available at* http://www.ibiquity.com/press/pr/062904.htm ("Circle Surround Press Release") (last accessed July 27, 2004).

[22] "Digital radio will allow the industry to respond in a timely manner to the competition that they face from satellite radio services." Press Release, FCC, FCC Selects Digital Radio Technology (Oct. 10, 2002), *available at* 2002 WL 31260039 (joint statement of Commrs. Abernathy and Martin).

[23] Circle Sound is a digital radio technology developed by SRS Labs, Inc. iBiquity and SRS Labs commenced joint testing of this surround sound technology in January 2004, and iBiquity recently endorsed it as compatible with the IBOC specification. *See* Circle Surround Press Release. The companies described the technology in this joint press release as offering "[u]p to a full 6.1-channel surround sound experience . . . with a CS II decoder, which can be found in a wide variety of home theater products from Kenwood, Marantz, Accuphase and Theta Digital." *Id.*

etc.) have increased audio quality for digital music generally, the same is certain to be true of DAB; over time, audio quality will further increase with improvements in compression algorithms. The assertion by CEA and HRRC that DAB will not exacerbate incentives for unauthorized copying because its quality is merely "comparable" to current FM broadcasting is therefore manifestly false.

However, if these and other parties meant, instead, only to imply that the features and functions of DAB – metatags, automated PVR recording, etc. – are available today for analog radio, their comments[24] are either incorrect or irrelevant. While CEA and HRRC argue that "metatag coding of broadcasts" is available today with Radio Broadcast Data System ("RDS"),[25] RDS has not been implemented widely in the U.S. and, even when offered, rarely provides playlist-level information.[26] Thus, as RIAA established in its Comments, DAB will include additional features that will facilitate and encourage automated copying of broadcast music.[27]

The marketplace clearly indicates that consumer electronics equipment manufacturers intend to promote the enhanced recording capabilities of DAB. Digital receiving equipment in the planning stages includes the capacity to use metatags to record broadcast material, and iBiquity argues in its comments that "[c]onsumers expect to have this functionality available in many classes of radios," and that equipment

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[24] *See, e.g.*, CEA Comments at 6-7.

[25] *Id.*; HRRC Comments at 13; *see also* iBiquity Comments at 30-31.

[26] Kevin McNamara, *The Value of a Subcarrier*, Radio, Oct. 1, 2003, *available at* 2003 WL 8757265; Chriss Scherer, *The Data Dilemma*, Radio, Jan. 1, 2004, *available at* 2004 WL 64111813. Further, as RIAA demonstrated in its initial Comments, piracy from analog broadcasts has been less problematic than digital piracy. *See* Lenard Report ¶ 48.

[27] RIAA Comments at 16-28.

manufacturers will not manufacture home or portable DAB receivers without recording capability.[28] Thus, DAB without content protection manifestly poses a significantly greater threat to the music industry than analog FM.[29]

C. DAB Without Content Protection Will Materially Aggravate the Harm to the Music Industry.

While the evidence of harm demonstrated in RIAA's Comments relates to unauthorized P2P services, it is a proxy for the harm that DAB will cause. The Commission would ignore reality to assume, as those opposing content protection urge without support, that consumers will not engage in the kind of copying and redistribution characterized by unauthorized P2P services if the Commission authorizes DAB without content protection. The Commission relied on less evidence of harm than RIAA has demonstrated here when it adopted the *Broadcast Flag Report and Order*.[30] In that

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[28] iBiquity Comments at 31.

[29] Moreover, even if, contrary to the Commission's findings, DAB did not offer materially improved audio quality or did not match CD quality, the quality of the iBiquity transmissions are manifestly sufficient to pose a serious threat to the music industry. Unauthorized P2P file sharing systems have developed rapidly despite using a relatively old codec (MP3), with files generally encoded at a mere 128 Kbps, which is considerably less robust and of far lesser audio fidelity than the IBOC standard. Similarly, the quality of iBiquity transmissions are plainly as good as unauthorized P2P services, which have already presented tremendous financial and legal problems to legitimate providers of copyrighted music. There is no reasoned basis to believe that, even if DAB quality is no better than analog FM, consumers will not exploit the ability to use DAB to obtain sound recordings of the music they wish to keep. Moreover, "the presence today of analog broadcast content on peer-to-peer file sharing networks" was relied on by the Commission as a key factor in reacting favorably to the movie industry's "concern[] about protecting all DTV broadcast content, including both standard and high definition formats" through Commission regulation. *In re Digital Broadcast Content Protection*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 23,550, 23,554 ¶ 8 (2003), *pets. for recons. and appeal pending* ("*Broadcast Flag Report and Order*"). The same reasoning manifestly applies here. Accordingly, even if the quality of DAB transmission is not materially better than current FM, it still poses a material threat to the music industry and warrants adoption of content protection rules.

[30] 18 FCC Rcd. at 23,552 ¶ 4.

proceeding, the Commission did not have empirical evidence that the television industry was harmed from unlimited redistribution of video content, yet it adopted redistribution limitations based on the *harm to the music industry* from unauthorized P2P services.[31] Since unauthorized P2P services have had a far greater impact on the music industry than on the video industry, the Commission's reliance on the harm to the music industry to support its *Broadcast Flag* decision makes the case that there will be harm here *a priori*.

In all events, however, RIAA demonstrated in its Comments that the piracy experienced with unauthorized P2P will follow inexorably to DAB if the Commission authorizes DAB without content protection. As the Cherry Lane Report shows, the technology is available today to permit listeners to program their DAB receivers to record automatically selected music from any radio station in the market without ever listening to the station.[32] Using this technology, consumers will be able to create large personal collections of recordings without having to pay for the content.[33] And, as RIAA demonstrated, DAB without content protection would provide a better vehicle than unauthorized P2P services for copying the same variety of music. These advantages include:

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[31] *Id.* at 23,554 ¶ 8.

[32] *See* Cherry Lane Report at 26-33; *see also Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Comm. on the Judiciary*, 108th Cong., 30-32 (July 15, 2004) (statement of David O. Carson, General Counsel, U.S. Copyright Office) (describing technology that offers PVR-type functions for DAB listeners) ("Carson Statement"). The Statement of Mr. Carson is attached to these Reply Comments as Appendix B.

[33] *See* RIAA Comments at 23-24; *see also* Carson Statement at 33 ("Why would anyone pay for a reproduction of a sound recording when they can create their own private music collection without expending a dime for the reproduction?").

- greater consistency of audio quality and accuracy of artist/track names when compared to the files available on unauthorized P2P services; [34]
- enhanced audio features, such as the use of Circle Surround;[35]
- access to many sound recordings before they are commercially released;
- the ability to create a personal library of digital music without any of the costs or risks associated with unauthorized P2P music piracy, such as spyware or computer viruses; and
- greater privacy for the listener because he or she does not provide access to a hard drive to outsiders.[36]

These advantages demonstrate that the Commission's authorization of DAB without content protection will pose a substantial threat to the music industry that far exceeds the impact of unauthorized P2P services.

The results of a survey commissioned by RIAA demonstrate that consumers will engage in the kind of copying of broadcast music that concerns RIAA. The survey indicates that 69% would use the automatic recording feature to record programs so they could listen to them later and skip the commercials. In addition, 65% indicated that they would use the automatic recording capabilities to copy recorded music broadcast by DAB stations, and 72% of those surveyed indicated that they would use their DAB receiver/recorders to store music and to transfer the music to their computers or MP3 players to use in their personal music libraries. Further, 82% of the people interviewed would program their DAB receiver/recorder to skip commercials.

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[34] *See* Paul Boutin, *It's All Groovy, Baby*, Wired Magazine, July 2004, ("Friendly user interfaces, speedy downloads, consistent quality – online music stores are becoming better than the P2P networks that inspired them."), *available at* http://www.wired.com/wired/archive/12.07/play.html?p:8 (last accessed July 27, 2004).

[35] *See* Circle Surround Press Release.

[36] *See* RIAA Comments at 26; Lenard Report ¶¶ 54-78; *see also* Cherry Lane Report at 33-34.

It is also clear that the music copied using unauthorized P2P services is the same as the music broadcast by the nation's radio stations. As the attached Supplemental Report of Thomas M. Lenard demonstrates,[37] the top 50 unauthorized downloads were played on the radio stations in the markets studied an average of between 77.1 and 106.9 times during a two-week period.[38] The top 100 unauthorized downloads were played only slightly less frequently – between 69.8 and 90.5 times.[39] "What these data indicate is that the music currently being pirated through unauthorized P2P services will be conveniently available for digital copying through DAB . . . ."[40] This data clearly demonstrates that, if DAB is authorized without content protection, many consumers will program their DAB receivers to automatically record these same hits for retention and electronic distribution as are being pirated currently with unauthorized P2P services.

Moreover, the music that will be pirated from DAB transmissions is the most popular hit recordings that finance the record companies' developmental activities for new sources of music as well as the production of less popular musical recordings. As the Supplemental Lenard Report shows, there is substantial overlap between the recordings that are most frequently searched and traded on unauthorized P2P websites and the top-selling recordings.[41] Seventy percent of the top 50 recordings and 61% of the

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[37] *See* Thomas M. Lenard, *The Economic Impact of Digital Audio Broadcasts on the Market for Recorded Music, Supplemental Report* ¶¶ 8-13 (analyzing Nielsen Broadcast Data Services data of the top 200 songs played on monitored commercial radio stations in three geographically diverse markets that represent typical markets in terms of number of stations, formats, owners, etc.) attached as Appendix A ("Supplemental Lenard Report").

[38] *Id.* ¶ 13.

[39] *Id.*

[40] *Id.* ¶ 15.

[41] *Id.* ¶ 8.

top 100 recordings downloaded from unauthorized P2P services are on the Billboard "Top 200" Chart listing the top-selling albums.[42] In other words, the recordings most often pirated are those commercially successful recordings upon which the recording industry relies to fund its diverse roster of artists and recordings. In short, DAB without content protection will be a "superior platform for unauthorized copying than existing P2P services"[43] and will aggravate the already substantial injury experienced by the music industry from unauthorized P2P services.

D. DAB Without Content Protection Will Reduce the Diversity of Music Available to the Public, Jeopardize New Legitimate Online Music Services, and Potentially Adversely Affect Free Radio Services.

The piracy of the most popular music will not only adversely affect RIAA's members but will reduce the diversity of music available to the public and impair the ability of new musical groups and new musical formats to reach the public. Since the sale of CDs generate the primary source of revenue for record companies,[44] the diminished sales of CDs caused by piracy will reduce the resources available for the discovery and development of new talent. Moreover, the ability of listeners to cherry-pick broadcast content for copying and distribution will hinder new, legitimate music

[42] *Id.* ¶ 9.

[43] *Id.* ¶ 16.

[44] *See* RIAA Comments at 16-18; *see also* Carson Statement at 32 ("These technological advances threaten to disrupt the careful balance Congress struck between the record industry, on the one hand, and the purveyors of new digital technologies, on the other, in the DPRA and DMCA. Moreover, widespread use of these products would alter the longstanding relationship between record companies and radio broadcasters in which record companies have provided radio stations with the latest releases at no cost in exchange for promotional airplay, a relationship based on record companies' expectation that consumers would purchase new CDs based upon what they heard over the airwaves.").

distribution services, such as iTunes Music Store, RealNetworks' Rhapsody, and mobile music services offered by wireless carriers.[45] Yet, by authorizing DAB without content protection, the Commission will effectively sanction the unauthorized copying of broadcast music and undermine these emerging industries that are playing by the rules Congress has established.

Unauthorized copying and distribution of DAB content will also, over time, undermine the advertiser support of free over-the-air broadcasting. Cox Radio stated that "[a]llowing listeners to exploit DAB in the manner RIAA suggested represents an *unsustainable business model for broadcasters*, as listeners would have less and less reason to tune into broadcast radio."[46] Likewise, the General Counsel of the Copyright Office recently testified:

> [b]roadcasters could also suffer from extensive use of these new technologies, albeit in a more indirect fashion. In the event that the TiVo type devices become popular, listeners will simply avoid the ads, making it ineffective for business to advertise on radio. Were this to occur, businesses will seek better ways to reach consumers, and advertising dollars will no longer flow to the broadcasters.[47]

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[45] These evolving online music distribution services represent the "'best way to prevent illegal file sharing . . . .'" Ryan Naraine, *Reaching for Real Starz*, Internet News, June 14, 2004 (quoting Starz Encore Group CEO John Sie on launching a monthly movie subscription service in conjunction with RealNetworks), *available at* www.internetnews.com/bus-news/article.php/3367781 (last accessed July 27, 2004).

[46] *See* Cox Radio Comments at 9 (emphasis added).

[47] Carson Statement at 33.

The record in this proceeding demonstrates the real and significant threat to the economic foundation of the music industry, music diversity and the radio industry if the Commission authorizes DAB without content protection.[48]

E. The Commission Need Not Wait for the Harm to Materialize to Act.

The Commission should not, and need not, wait until the harm is felt before the Commission takes action to protect these public interest concerns, as some commenters urge.[49] As noted above, the Commission adopted content protection rules for digital over-the-air television in the *Broadcast Flag* proceeding based on the harm to the music industry from unauthorized P2P services and its predictive judgment of the foreseeable harm to the television industry.[50] In numerous other instances, tracing back to the adoption of the Commission's initial cable carriage rules almost 40 years ago, the Commission has adopted, and the courts have upheld, rules based on the Commission's predictive judgment when specific harms would be difficult to prove with direct, empirical evidence.[51]

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[48] RIAA Comments 26-33; *see also* Carson Statement at 34 ("In the absence of corrective action, the rollout of digital radio and the technological devices that promise to enable consumers to gain free access at will to any and all the music they want will pose an unacceptable risk to the survival of what has been a thriving music industry and to the ability of performers and composers to make a living by creating the works the broadcasters, webcasters and consumer electronics companies are so eager to exploit because such exploitation puts money in their pockets.").

[49] *See* CEA Comments at 3; HRRC Comments at 13.

[50] *See Broadcast Flag Report and Order*, 18 FCC Rcd. at 23,554 ¶ 8.

[51] *See, e.g., Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003) (upholding Commission's rules requiring digital tuners in all televisions); *Melcher v. FCC*, 134 F.3d 1143, 1152 (D.C. Cir. 1998) (upholding Commission's rules prohibiting incumbent local exchange carriers from holding licenses for local multipoint distribution services in the same geographic areas in which they provide telephone service); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1180 (D.C. Cir. 1989) (upholding Commission's syndicated exclusivity rules); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 814-15 (1978) (upholding Commission's newspaper/broadcast cross-ownership rules).

In this instance, the harms described in RIAA's Comments are inevitable. As the Cherry Lane Report details, the combination of the improved audio fidelity of DAB service and DAB receivers/recorders, even in their nascent stages, will enable consumers to cherry-pick songs to automatically copy, redistribute and compile large personal collections of music.[52] If the Commission waits until after the adoption of final service rules and DAB receivers capable of automated copying and redistribution become ubiquitous, its ability to respond will be constrained by the large numbers of incompatible, legacy DAB receivers. Moreover, consumers will have become accustomed to the automated copying of the music of their choice, and the Commission will face significant resistance to content protection rules that would limit consumers' ability to continue that practice. The Commission need not take that risk; RIAA has provided it with a thorough, undisputed record upon which to act now.[53]

F. Recent Developments in the United Kingdom Support RIAA's Concerns.

It is inaccurate to suggest, as some commenters have, that the experience in the United Kingdom indicates that RIAA's concerns are speculative and unrealistic. As RIAA noted in its Comments, the lack of a problem in the United Kingdom to date is largely the result of the lag in development and deployment of the technology for equipment permitting automated copying is just available today.

As consumer equipment manufacturers have begun deploying that technology, the recording industry in the United Kingdom has moved aggressively to address the

[52] *See* Cherry Lane Report at 5-12, 15-22, 26-32.

[53] *See* RIAA Comments at 80-83.

emerging problem,[54] and the broadcast industry has recently acknowledged the problem. RIAA has been informed by the International Federation of the Phonographic Industry that the BBC and the recording industry have recently entered into an agreement concerning the use of metadata and copy protection for digital broadcasting. Under that agreement, the BBC acknowledged the recording industry's concerns regarding the ability of listeners to cherry-pick songs they wish to copy and has agreed to cooperate with the recording industry to develop ways to protect sound recordings transmitted over DAB against this threat. The recording industry in the United Kingdom has similar concerns as those expressed by RIAA in this proceeding and is moving quickly – with the cooperation of the broadcast community – to limit the impact of this problem.[55] Thus, contrary to those who assert that the experience in the United Kingdom indicates that RIAA's concerns are unfounded, the experience there demonstrates that, as the technology has become available, the concerns that RIAA has raised in this proceeding also exist in the United Kingdom.

[54] *See id.* at App. D.

[55] The agreement also includes a recognition by the BBC that, if the BBC does not cooperate to address the issues, the BBC might lose the right to transmit the metadata associated with copyrighted sound recordings. That means of enforcing copyright owners' rights is not available in the United States because, as distinguished from the situation in the United Kingdom, record companies do not have a performance right for broadcast radio in the United States.

III. The Threat Posed by the Commission's Authorization of DAB Without Content Protection Is Substantial and Critical.

A. The Threat to the Music Industry Extends to Both Copying and Redistribution of DAB Content.

There is substantial support in the initial comments in this proceeding for the position that the Commission should impose limitations on the redistribution of copyrighted works transmitted over DAB. For instance, iBiquity states that it "does not support unauthorized redistribution of any copyright protected works, whether derived from over-the-air broadcasts or otherwise. . . . [and it has] repeatedly and publicly stated that it is prepared to implement a content control scheme designed to prevent unauthorized distribution of copyright protected works . . . ."[56] Likewise, the Business Software Alliance ("BSA") does not oppose rules designed to prevent "indiscriminate redistribution" of copyrighted content.[57] These and other commenters appear to support RIAA's position that the Commission must act to address the threat of redistribution of DAB content.

However, as RIAA thoroughly demonstrated in its Comments, the ability of users to copy DAB content automatically without the necessity of listening to the broadcasts is

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[56] iBiquity Comments at 28. iBiquity has offered to implement content protection based on an industry consensus. While RIAA welcomes and encourages an industry dialogue to develop content protection standards for DAB, it has been unable, as explained below, to engage others in the affected industries, including iBiquity, in such a dialogue. In all events, however, the Commission cannot substitute its obligation under the Communications Act to act in the public interest with the opinions of affected industries, particularly when, as here, the relevant industries have been unwilling and unable to reach consensus. Those opinions may inform the Commission's action, as they did in the *Broadcast Flag* and *Plug & Play* proceedings, but the ultimate responsibility lies with the Commission.

[57] BSA Comments at 6.

the bigger threat to the music and radio industries.[58] The combination of metadata in DAB transmissions, technologically sophisticated receiving devices, digital media storage capacity, steadily decreasing storage costs and high quality content will enable consumers to program their DAB receivers to create "a large digital library of permanent sound recordings capable of being searched, stored, reproduced, and redistributed via the Internet or physical media,"[59] without ever having to pay copyright owners for the content.[60] "Consumers will no longer need to purchase music to obtain high option value . . . . Instead, all they will have to do is record through a combination receiver/recorder or run a software application to capture all the music they want – all for free . . . ."[61] Consequently, by authorizing DAB without content protection, the Commission would effectively be eliminating the need for consumers to ever purchase recordings from copyright holders.[62]

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[58] In another forum, broadcasters throughout the world have recognized the threat of, and have sought protection against, piracy from both copying and redistribution of broadcast content in the digital age. The Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization is presently negotiating a treaty to give broadcasters, among other things, the right to prevent copying and redistribution of broadcast content. *See* Draft Treaty on the Protection of Broadcasting Organizations and Cablecasting Organizations, Dec. 26, 2003, World Intellectual Property Organization Standing Committee on Copyright and Related Rights, Eleventh Session, *available at* http://www.wipo.int/documents/en/meetings/2004/sccr/pdf/sccr_11_2.pdf (last accessed July 27, 2004).

[59] *See* Lenard Report ¶ 5 (emphasis omitted).

[60] *See* RIAA Comments at 11-16; Cherry Lane Report at 5-12, 15-22, 26-32; Lenard Report ¶¶ 22-23, 28-32. As the Cherry Lane Report indicates, consumers will be able to eliminate DJ chatter at the beginning of any broadcast music and compensate for fading in or out of music that is broadcast. *See* Cherry Lane Report at 28-29.

[61] Cherry Lane Report at 32.

[62] RIAA's proposed usage rules would preserve the type of copying that consumers could traditionally do using analog radio technology.

B. The Recording Industry Is Taking Measures to Limit Rampant Piracy.

iBiquity argues that because the record companies themselves release unprotected CDs to the public, which provide source material for illegal file sharing on unauthorized P2P networks, the Commission should not do anything to prevent sound recordings broadcast on DAB from being similarly shared on P2P networks.[63] iBiquity's argument is nonsensical. iBiquity is essentially arguing that the Commission should sanction the theft of music merely because there are other means to pirate music.[64]

Moreover, iBiquity's argument is based on a false premise: the recording industry is taking aggressive steps to protect its content. It is important to remember that the CD format represented a significant advance in the state of the art and offered an appropriate degree of protection when it was developed in the 1970s and originally introduced in 1982.[65] Easy, high-quality copying of CDs was not possible until quite recently when compression technologies, such as MP3, came into wider use; CD-ROM drives capable of reliably ripping audio files from prerecorded CDs at high speed and recording to writeable CDs became available; the price of hard drives dropped to the point where a

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[63] *See* iBiquity Comments at 29-30 ("iBiquity finds it puzzling that the RIAA would propose that greater restrictions on distribution of content should be imposed on digital radio than the recording industry is willing to impose on itself.").

[64] The Commission cannot ensure that unauthorized copying will never take place. It has long understood that digital content protection, combined with analog outputs, leaves a so-called "analog hole" that technically sophisticated users can exploit to copy and distribute broadcast content. But content protection was nevertheless adopted, as in the DTV realm, as a means of fashioning a "speed bump" against widespread, indiscriminate redistribution of copyrighted material. *Broadcast Flag Report and Order*, 18 FCC Rcd. at 23,557-59 ¶¶ 17, 19-20.

[65] When CDs were introduced, personal computers were still in their infancy, and CD-ROM drives were not available. Computer hard drives were very expensive and had a small capacity relative to today. They were largely connected to big machines in corporate data centers and not adapted for personal use. Additionally, the audio compression technology known as MP3 had not yet been invented.

typical consumer PC was capable of holding a sizeable library of sound recordings; consumers had increased access to high speed Internet; and unauthorized P2P networks provided a venue for users to illegally download sound recordings.[66] As these technologies and systems created the opportunity for widespread copying of CDs, the recording industry began to investigate the feasibility of physical and electronic formats that offered a degree of protection that was not necessary when CDs were developed. The recording industry promptly introduced protected physical formats, such as DVD-Audio ("DVD-A") and Super Audio CD ("SACD"), to address the problem of digital piracy while allowing playback on a variety of devices.[67]

There remains, however, a significant legacy problem in that there is an existing base of millions of CD players and computers. Thus, while the problems of unauthorized duplication and P2P file trading have been rampant for several years, the CD format remains dominant and probably cannot be wholly replaced by more secure formats in the foreseeable future.[68]

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[66] *See* RIAA Comments at 19-20.

[67] DVD-A and SACD technologies were introduced in 1999, with the first DVD-A title released in 2000. The format originally relied on the Content Scrambling System for protection. In 2000, an additional level of protection was realized with the development of Content Protection for Pre-recorded Media by the 4C Entity (a consortium comprised of IBM, Intel, Matsushita and Toshiba). Similarly, SACDs incorporate a layered approach to copy protection, which includes watermarking and content scrambling. The SACD specification allows for both a standard ("Red Book") audio CD and an SACD layer on the same side of the disc. Discs that incorporate both layers are known as "dual layer" or hybrid discs. Hybrid SACDs can be played on PCs with a CD-ROM drive. Other protected formats include "copy control" (or "copy management") technologies for CDs and electronic distribution in formats that incorporate Digital Rights Management ("DRM") technologies, such as Windows Media Audio and Apple's AAC with the Fairplay DRM system.

[68] The lack of copy protection measures in older formats, such as vinyl records, cassette tapes and CDs, exemplifies the difficulties of implementing content protection for an existing technology after there is an installed base of legacy devices on the market. As demonstrated in RIAA's Comments and these Reply Comments, it is precisely because of

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However, the lack of copy protection measures in older product formats was never intended to indicate that the recording industry had chosen to forego its copyrights by permitting unlimited duplication. And as technology has created new threats, record companies have responded on multiple fronts to address them and to migrate to more secure formats. Thus, the record companies' alleged failure to protect their own products is both factually incorrect and an improper basis for the Commission to ignore the public interest threats posed by DAB without content protection.[69]

IV. Use of a DAB Receiver/Recorder to Build a Collection of Sound Recordings Would Be a Copyright Infringement And Is Not Privileged By the AHRA.

Various commenters suggest that using a DAB receiver/recorder to collect sound recordings is a fair use and, even if such conduct were infringing, that copyright owners are precluded from bringing an infringement action against the user by virtue of the Audio Home Recording Act ("AHRA").[70] Those suggestions are wrong: the conduct which concerns RIAA – unauthorized use of a DAB receiver/recorder to build a

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the problem of legacy devices that the Commission should act now – before the widespread penetration of DAB receivers in the marketplace – to adopt content protection measures for DAB. "Remedying the problem after such legacy equipment has penetrated the market will be challenging because (1) consumers effectively will be misled into believing that many sorts of copyright infringement enabled by DAB and associated electronics devices are legal, when they are not, and (2) it may be impossible to adopt 'second-generation' equipment if it is not compatible with 'first-generation' products." Lenard Report ¶¶ 5, 97; *see also* RIAA Comments at 80-83.

[69] Record companies have also taken a number of other steps to protect their content. They – and recording artists – have undertaken extensive public education efforts to inform the public about the illegality of copying and distributing copyrighted music, and, because of the ongoing and growing problem, RIAA has reluctantly commenced litigation against individuals who have engaged in extensive unauthorized distributions of copyrighted sound recordings using P2P services.

[70] CEA Comments at 3-6; Consumer Group Coalition Comments at 10-12; EFF Comments at 3, 8-11; HRRC Comments at 19-22.

collection of copyrighted sound recordings for which creators have not been paid – would be an infringement of copyright; most such devices probably would not be covered by the AHRA; and even if such a device were covered by the AHRA, the AHRA probably would not immunize the user's infringing conduct.

A. Use of DAB Receivers/Recorders to Build a Personal Collection of Sound Recordings for Which Copyright Owners Have Not Been Compensated Would Constitute Copyright Infringement.

Under the Copyright Act, a copyright owner has the exclusive right to reproduce its copyrighted works.[71] No commenter questions the proposition that use of a DAB receiver/recorder implicates the reproduction right. Some, however, suggest that use of a DAB receiver/recorder to reproduce sound recordings would constitute a "fair use," and thus would not infringe the copyright owner's exclusive rights. These commenters assume rather than explain why this might be the case. As discussed below, there is no basis for their claim.

1. *Sony v. Universal City Studios* Does Not Extend to Automated Copying and Redistribution of DAB Content.

Those commenters suggesting that use of a DAB receiver/recorder to build a collection of sound recordings might be a fair use rely almost exclusively on *Sony Corp. of Am. v. Universal City Studios, Inc.*[72] to support their claim. In that case, the Supreme

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[71] 17 U.S.C. § 106(1).

[72] 464 U.S. 417 (1984). EFF also points to dicta in *RIAA v. Diamond Multimedia*, 180 F.3d at 1079, to the effect that "space shifting" is consistent with the purposes of the AHRA. EFF Comments at 10 n.26. That dicta is doubly irrelevant, since use of a DAB receiver/recorder to build a collection of sound recordings for which creators have not been paid would not seem to be "space shifting" as that term is usually used, and the AHRA is not relevant to a determination of fair use. In any event, every court that has actually considered whether asserted "space shifting" is fair use has found it to be infringing. *See e.g.*, *Napster*, 239 F.3d at 1019; *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000). It also is perplexing why the EFF believes that

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Court found the practice of "time shifting" of broadcast commercial television programming to be fair use.[73] However, *Sony* does not support the conclusion that use of a DAB receiver/recorder to build a collection of sound recordings is also a fair use.

In *Sony*, the Supreme Court specifically defined time shifting as "the practice of recording a [television] program *to view it once at a later time, and thereafter erasing it.*"[74] And given the technology of the day, users overwhelmingly watched the advertisements that paid for the content during the one time they viewed it.[75] Thus, a proper analogy to *Sony* is one drawn by EFF:

> [W]ere a listener to set her DAB receiver/recorder to record a particular radio program for later listening, listen to it once without skipping any commercials, and then promptly delete the recording, it is hard to conceive how the RIAA could distinguish this circumstance from the one that faced the Supreme Court in *Sony v. Universal City Studios*.[76]

RIAA would not try to draw such a distinction, since this analogy is obviously based very closely on the facts at issue in *Sony*. For that reason, the usage rules proposed by RIAA

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the *Diamond* court's limiting construction of the AHRA, which excluded a wide variety of devices (probably including DAB receiver/recorders) from the scope of the AHRA's immunity for certain noncommercial copying, is supportive of its argument.

[73] 464 U.S. at 420 (the works at issue had been "exhibited on commercially sponsored television").

[74] *Id.* at 423 (emphasis added). Such time shifting was then the dominant use of the video tape recorders ("VTRs") at issue in the case. The Court found that "the average member of the public uses a VTR principally to record a program he cannot view as it is being televised and then to watch it once at a later time." *Id.* at 421. Specifically, "'75.4% of the VTR owners use their machines to record for time-shifting purposes half or most of the time.'" *Id.* at 424 n.4 (quoting results of Sony survey of Betamax use).

[75] *Id.* at 452 n.36 ("[t]o avoid commercials during playback, the viewer must fast-forward and, for the most part, guess as to when the commercial has passed. . . . 92% of the programs were recorded with commercials and only 25% of the owners fast-forward through them.").

[76] EFF Comments at 10.

would not restrict the use of a DAB receiver/recorder to record a program, listen to it once and delete it as described by EFF.[77] Instead, RIAA's usage rules seek to prevent listeners from using DAB receiver/recorders to assemble massive collections of disaggregated sound recordings that would transmogrify digital broadcasting into the equivalent of an interactive streaming or download service.

Such collecting bears little resemblance to the time shifting sanctioned in *Sony*; rather, it looks much more like the piracy that takes place over P2P networks. As is the case with the unauthorized copying that concerns RIAA, users of P2P networks receive transmissions of sound recordings and make copies of them. They don't copy programs and listen to them in their entirety, including advertisements that compensate creators. Instead, they take individual recordings. Once downloaded, those recordings are not generally listened to only once and deleted, but are retained and listened to innumerable times.[78] Not surprisingly, every court that has addressed the issue of whether this kind of copying of copyrighted sound recordings is a fair use has had no difficulty in rejecting the claim and finding such activity to be infringing.[79] One such court specifically found

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[77] As note above, RIAA is *not* seeking to prevent the listeners from retaining manually duplicated music and would allow the automated recording of programs, something that is not feasible currently. *Supra*, at 5.

[78] In a recent poll by Public Opinion Strategies, 65% of adults said that they would be likely to program their digital radio to record their favorite songs so those songs could be played whenever they choose, and 72% said that they would save recordings collected by a digital radio to a computer or personal music player for future listening. 82% of adults said that they would use their receiver/recorder to skip commercials.

[79] *E.g.*, *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) ("Teenagers and young adults who have access to the Internet like to swap computer files containing popular music. If the music is copyrighted, such swapping, which involves making and transmitting a digital copy of the music, infringes copyright."); *Napster*, 239 F.3d at 1014-19; *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1034-35 (C.D. Cal. 2003) ("Just as in *Napster*, many of those who use Defendants' software do so to download copyrighted media files . . . and thereby infringe Plaintiffs'

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that "library building" like that at issue here was not sanctioned by *Sony*. The court wrote that such copying:

> was unquestionably infringing to the extent that the programs copied were under copyright and the taping of them was not authorized by the copyright owners . . . . Subject to this qualification, building a library of taped programs was infringing because it was the equivalent of borrowing a copyrighted book from a public library, making a copy of it for one's personal library, then returning the original to the public library.[80]

Accordingly, reference to *Sony* does nothing to establish that use of a DAB receiver/recorder to build a collection of sound recordings is a fair use. Moreover, that activity fares no better under a more complete fair use analysis.[81]

2. The Automated Copying and Distribution of Copyrighted Works on DAB Does Not Constitute a Statutory "Fair Use".

The fair use defense is codified in Section 107 of the Copyright Act:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

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rights of reproduction and distribution."); *A&M Records, Inc. v. Napster, Inc.*, No. C 99-5183 MHP, C 00-0074 MPP, 2000 WL 1009483, at *1 (N.D. Cal. 2000) ("[A] majority of Napster users use the service to download and upload copyrighted music. . . . And by doing that, it constitutes – the uses constitute direct infringement . . . .").

[80] *Aimster,* 334 F.3d at 647.

[81] None of those arguing that using DAB to create libraries of recorded music have advanced any similarly thorough analysis of the Copyright Act's fair use provisions.

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[82]

Building a collection of sound recordings for which creators have not been paid is not one of the core fair use purposes specifically identified in the Act, and all of the four statutory factors militate against a finding that it is a fair use.

The first statutory factor is "the purpose and character of the use."[83] The Supreme Court has explained that the "central purpose" of the first factor is to see "whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character . . . ."[84] Time shifting, P2P piracy and use of DAB receiver/recorders are superseding and do not "add something new." As such, they are relatively disfavored under the first factor.

Moreover, the use is not "noncommercial." Although courts have held that "[d]irect economic benefit is not required to demonstrate a commercial use,"[85] they also have held that copying by individuals is a commercial use when "repeated and exploitative unauthorized copies of copyrighted works . . . made to save the expense of

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[82] 17 U.S.C. § 107.

[83] *Id.* § 107(1).

[84] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (no. 4901) (C.C.D. Mass. 1841)).

[85] *Napster*, 239 F.3d at 1015.

purchasing authorized copies"[86] is a commercial use. Since the use of a DAB receiver/recorder to create vast libraries of sound recordings without compensating the copyright owners will manifestly deprive copyright owners of sales of their sound recordings, the duplication of those sound recordings is not sanctioned under this first factor. As RIAA has shown, the prospective use of DAB for unauthorized duplication of DAB music is much more like P2P copying than time shifting as defined in *Sony,* and must be evaluated in the same manner as P2P copying under the first factor.

The second factor is "the nature of the copyrighted work."[87] This "factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."[88] In *Sony*, the Court considered "the nature of a televised copyrighted audiovisual work" and was persuaded "that timeshifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge . . . ."[89] Thus, the Court's analysis of this factor turned on the fact that the producers of the televised works and the licensees that broadcast them were fully compensated through advertising revenues, which were not reduced by time shifting.

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[86] *Id.* While the Supreme Court was persuaded in *Sony* "that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity," 464 U.S. at 449, the Court indicated that copying of broadcast programming by individuals could be considered commercial if it deprives the copyright owner of a sale. The Court simply was persuaded that time shifting did not have that effect. *Id.* at 450 n.33. By contrast, the *Napster* court found that the kinds of duplication involved in that case was commercial because it deprived copyright owners of sales of their sound recordings, 239 F.3d at 1018.

[87] 17 U.S.C. § 107(2).

[88] *Campbell*, 510 U.S. at 586.

[89] 464 U.S. at 449.

By contrast, sound recordings are among those works courts have found to be "'close[] to the core of intended copyright protection,'"[90] and creators of recordings receive virtually all of their income from sales, not from advertisements – which in *Sony* typically were viewed by those who engaged in time shifting. Thus, in contrast to the facts presented in *Sony,* the unauthorized copying of sound recordings goes to the core of copyright protection and undermines the fundamental interest the Copyright Act is designed to protect – the creation of new artistic works through the compensation of the artist. As such, the second factor weighs against a finding of fair use.

The third factor considers the extent to which a work is copied.[91] The fair use defense does not generally apply to cases of copying a complete work.[92] The "time shifting" of broadcast television programming found to be a fair use in *Sony* is one of the rare exceptions to this general rule.[93] There, the Court found that this factor did not weigh against fair use because those who engaged in time shifting merely watched once in its entirety what they had been invited to watch once in its entirety.[94] By contrast, in the case of P2P copying, courts have consistently found that the general rule applies, and that such wholesale copying "militates against a finding of fair use."[95] *Sony* does not

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[90] *MP3.com*, 92 F. Supp. 2d at 351 (quoting *Campbell*, 510 U.S. at 586).

[91] 17 U.S.C. § 107(3).

[92] *See* Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 13.05[D][1] (2004) ("Nimmer").

[93] Other exceptions that have been recognized are reproduction for a judicial proceeding, some instances of incidental reproduction of background material in motion pictures and news broadcasts, and reverse engineering of computer programs. Nimmer § 13.05[D][2]-[4].

[94] *Sony*, 464 U.S. at 449.

[95] *Napster*, 239 F.3d at 1016 (quoting *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986)).

suggest any reason that copying of sound recordings from DAB for long-term retention should not likewise be disfavored.

Finally, the fourth factor asks "'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."[96] In *Sony*, the court found that "'[h]arm from time-shifting is speculative and, at best, minimal.'"[97] Given the nature of the works at issue – motion pictures aired on commercial broadcast television – and the limited use – copying to enable viewing a single time – the harms asserted in *Sony* were somewhat attenuated.[98] The plaintiffs conceded that there had been no harm to date[99] and that the case was more about "a point of important philosophy."[100] By contrast, in P2P litigation, copyright owners have produced considerable evidence supporting the unsurprising proposition that widespread copying of music reduces sales and is impairing the growth of legitimate digital music services.[101] That evidence is consistent with the evidence RIAA has submitted in its Comments of the harm that would inexorably result from users' assembling vast collections of music recorded from DAB, including that reflected in RIAA's Comments.

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[96] *Campbell*, 510 U.S. at 590 (quoting Nimmer § 13.05[A][4]).

[97] 464 U.S. at 454.

[98] *See id.* at 452-54.

[99] *Id.* at 451.

[100] *Id.*

[101] *E.g.*, *Napster*, 239 F.3d at 1004.

Accordingly, each of the four statutory factors supports a finding that the conduct RIAA's usage rules are designed to limit – use of a DAB receiver/recorder to build a collection of sound recordings for which creators have not been paid – is not a fair use.

B. The Audio Home Recording Act Does Not Prevent the Commission from Addressing the Harm Posed by Its Authorization of DAB without Content Protection.

Some of the commenters opposing the adoption of content protection rules argue that it would be unlawful for the Commission to address content protection as part of its regulation of digital broadcasting because DAB receiver/recorders are subject to the AHRA and the AHRA authorizes consumers to use those devices to make digital copies. The thrust of this argument seems to be that the AHRA's regulation of copying is so pervasive that, where copying is concerned, the AHRA circumscribes the Commission's power to regulate broadcasting.[102] The argument is meritless.[103]

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[102] Some commenters express their concerns in terms of the Commission's making "changes to the AHRA." Consumer Group Coalition Comments at 11; *see also* CEA Comments at 3, 6 (referring to "updat[ing]" of the AHRA and "change" to the AHRA); HRRC Comments at 2, 21, 23. These comments latch onto the AHRA because it happens to address a form of copying (serial copying). However, these comments need to talk about "change" in the AHRA because they recognize that the AHRA does not address the harm caused by digital broadcasting without content protection. The question is not whether the Commission is empowered to amend the AHRA. Of course it isn't, and RIAA isn't asking it to. The question is whether the Commission is empowered to regulate digital broadcasting in a way that might possibly touch upon some devices subject to the AHRA.

[103] So too is EFF's assertion that Congress rejected Commission-imposed content protection rules when it did not pass the so-called "Hollings Bill" – the Consumer Broadband and Digital Television Promotion Act of 2002, S. 2048, 107th Cong. (2002). *See* EFF Comments at 4-5. The Hollings Bill never reached the Senate floor for a vote and thus was not actually rejected by the majority of Senators, much less the full Congress and the President. *See INS v. Chadha*, 462 U.S. 919, 919 (1983) (holding that congressional legislation must meet constitutional requirements of passage by a majority of both Houses and presentment to President). Moreover, the courts have consistently held that Congress's failure to adopt a particular legislative proposal does not support a claim that Congress somehow intended thereby to preclude the conduct or activity authorized in the defeated proposal. *See Pension Guaranty Benefit Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance'

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As RIAA demonstrated in its Comments, the AHRA was designed to address a narrow issue –serial copying by a limited class of devices – that is distinct from the issue before the Commission. Moreover, the issue here – the use of DAB transmissions to create libraries of recorded music without paying for them – is not addressed by the AHRA, and Commission adoption of content protection requirements as part of its DAB rules will not undermine or question the policies or requirements of the AHRA. Nothing in the AHRA speaks to whether the Commission can require that stations operating digitally with the iBiquity technology include a content protection system in their transmission stream, or whether the Commission can require DAB receivers to recognize and honor content protection requirements. Thus, the AHRA does not constrain the Commission's ability to adopt DAB regulations that include content protection requirements.[104]

This would be so even if every DAB receiver/recorder were subject to the AHRA. However, it is particularly so given that most such devices probably would not be

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because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'") (quoting *U.S. v. Wise*, 370 U.S. 405, 411 (1962)); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 382 (1969) ("[U]nsuccessful attempts at legislation are not the best of guides to legislative intent . . . ."). Moreover, the Hollings Bill was targeted at content protection for DTV and over the Internet; it did not address DAB content protection.

[104] Were the AHRA to constrain the Commission's power, it would not be long before manufacturers began marketing multifunction devices assertedly immune from the rules developed in the *Broadcast Flag* and *Plug & Play* proceedings because of audio recording functionality subject to the AHRA. Likewise, it cannot be that the Commission is required to abdicate its responsibility to regulate broadcasting in a manner consistent with congressional policy, while injury is done to the music industry and a legacy device problem mounts, until everyone can finally see whether the attributes of particular receiver/recorders are in fact such as to subject significant numbers of them to the AHRA.

covered by the AHRA. The commenters who suggest that the AHRA restricts the Commission's ability to act here do not address the exclusion from the AHRA found at 17 U.S.C. § 1001(3)(B), but it is key: the AHRA does not apply to a DAB receiver/recorder not designed or marketed primarily for recording music. In addition, such commenters do not address the one case under the AHRA – a decision that gives the AHRA such a limiting construction as to effectively "eviscerate" it.[105] Specifically, that decision holds that the term "digital musical recording," which is fundamental to determining the scope of the AHRA, does not include "songs fixed on computer hard drives."[106] That decision may exclude hard drive-based devices from the scope of the AHRA altogether. In any event, as noted in RIAA's opening Comments, that interpretation of the term digital musical recording would leave a user of a hard drive-based device subject to an infringement claim because the AHRA's immunity from infringement suits for digital copying only extends to the reproduction of "digital musical recordings."[107]

Since those opposing the adoption of content protection rules have relied on conclusory statements rather than setting forth any analysis of the relevant legal authority, they have not refuted the RIAA's detailed discussion and analysis of the AHRA in its comments. That analysis demonstrated that the AHRA does not preempt the field so as to preclude Commission action to adopt content protection rules, nor, with

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[105] *Diamond,* 180 F. 3d at 1078 (quoting *RIAA v. Diamond Mutlitmedia Sys., Inc.*, 29 F. Supp. 2d 624, 630 (C.D. Cal. 1998)).

[106] *Id.* at 1077.

[107] 17 U.S.C. § 1008.

the potential exception of a small class of devices that might come within the scope of the AHRA, does the AHRA immunize the use of a DAB receiver/recorder to duplication music broadcast by DAB stations.[108]

V. The Commission Has Jurisdiction to Adopt Content Protection Requirements.

Some parties opposing the adoption of content protection rules contend that the Commission does not have jurisdiction to adopt content protection rules for DAB.[109] In general, they take the simplistic approach that, because the Communications Act does not by its terms grant the Commission authority to adopt content protection rules, it lacks jurisdiction.[110] Under that view, the Commission could not have adopted its cable television rules,[111] sports blackout rule,[112] syndicated exclusivity rules,[113] Part 68 rules allowing interconnection of privately owned telephone equipment to the public switched network,[114] its Computer II[115] or Computer III regulatory regimes,[116] or a host of other

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[108] *See* RIAA Comments 68-75.

[109] *See, e.g.,* CEA Comments at 3; iBiquity Comments at 32-33; NPR Comments at 31-32; Consumer Group Coalition Comments at 3-5; HRRC Comments at 2.

[110] *See, e.g.*, CEA Comments at 3; iBiquity Comments at 32-33.

[111] *See U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (upholding Commission regulation of cable television); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (upholding Commission regulations requiring cable companies to originate programming in order to promote diversity).

[112] *In re Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs on Cable Television Systems*, Report and Order, 54 F.C.C.2d 265, *aff'd on reconsideration*, Memorandum Opinion and Order, 56 F.C.C.2d 561 (1975).

[113] *See United Video*, 890 F.2d at 1180 (upholding Commission's syndicated exclusivity rules).

[114] *See, e.g., In re Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) And Wide Area Telephone Service (WATS)*, First Report and Order, 56 F.C.C. 2d 593 (1975); *Id.*, Memorandum Opinion and Order, 57 F.C.C.2d 1217 (1976); *Id.*, Memorandum Opinion and Order, 58 F.C.C.2d 716 (1976);

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regulations designed to foster a robust and dynamic broadcast and telecommunications industry. In fact, there is no provision of the Act expressly authorizing the Commission to authorize digital audio broadcasting.

As distinguished from those who take this pinched view of the Commission's jurisdiction, RIAA showed in its Comments that the Commission has jurisdiction under Title I and Title III of the Communications Act to impose content protection as part of its decision to authorize DAB. Title III gives the Commission broad regulatory authority to adopt a DAB transmission standard, and well-established Commission and judicial precedent demonstrates that the Commission must, in adopting rules under Title III, give effect, to the extent feasible, to other federal policies, including the congressional policies underlying the Copyright Act.[117] As such, the Commission cannot adopt a DAB service that will decimate the intellectual property rights Congress has granted to creators of sound recordings, cause significant economic harm to the music industry, reduce the diversity of music available to the public and threaten the viability of free over-the-air radio.

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Id., Second Report and Order, 58 F.C.C.2d 736 (1976); *Id.*, Memorandum Opinion and Order, 59 F.C.C.2d 83 (1976).

[115] *See, e.g., In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 F.C.C.2d 384, 432 ¶¶ 124-25 (1980) (full history omitted) ("*Computer II Order*").

[116] *See, e.g., In re Amendment of Sections 64.702 of the Commission's Rules and Regulations*, Report and Order, Phase I, 104 F.C.C.2d 958, 1123-25 ¶¶ 340-42 (1986) (full history omitted) ("*Computer III Order*").

[117] *See* RIAA Comments at 45-48 (citing Commission and judicial precedent); *see also* Carson Statement at 34 (urging that the Commission process "must include a careful analysis of copyright policies").

The Commission also has ancillary jurisdiction under Title I to adopt content protection rules, including rules restricting the usage of material recorded from over-the-air broadcasts, and to require that radio receivers recognize and give effect to those rules. It exercised that jurisdiction in adopting its *Broadcast Flag*[118] and *Plug & Play*[119] rules and has exercised it in numerous other circumstances where realization of congressional goals required. Nothing before the Commission in this proceeding justifies a different conclusion regarding the Commission's ancillary jurisdiction over DAB: Title I extends to the development of a DAB service and compatible receiving devices, 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 and diverse music broadcast on DAB and protecting advertiser support for free over-the-air radio.

The precedent on which those opposing content protection rely to argue that the Commission lacks jurisdiction are inapposite. HRRC cites *NAACP v. FPC*[120] and *MPAA v. FCC*[121] for the proposition that ancillary jurisdiction does not extend to all "grievance[s] colorably grounded in public policy or the 'public interest' . . . ."[122] But that is not the issue here. No one is asking the Commission to act on the basis of

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[118] *Broadcast Flag Report and Order*, 18 FCC Rcd. at 23,562-67 ¶¶ 27-35.

[119] *See In re Implementation of Section 304 of the Telecommunication Act of 1996, Commercial Availability of Navigation Devices*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd. 20,885, 20,905-06 ¶ 45 (2003).

[120] 425 U.S. 662 (1976).

[121] 309 F.3d 796 (D.C. Cir. 2002).

[122] HRRC Comments at 7-8.

generalized public policy concerns that are unrelated to its Title III jurisdiction. The Commission has recently explained that "Title I of the Act confers upon the Commission ancillary jurisdiction over matters that are not expressly within the scope of a specific statutory mandate but nevertheless necessary to the Commission's execution of its statutorily prescribed functions."[123] The content protection rules RIAA is seeking come within that definition of the Commission's jurisdiction.

In *NAACP,* in contrast, the Supreme Court overturned Federal Power Commission rules for workplace diversity and employment non-discrimination by power utility licensees because the scope of a regulator's public interest authority "take[s] meaning from the purposes of the regulatory legislation."[124] Indeed, in a footnote, the Court noted that the Commission's statutory mandate was significantly broader than the Federal Power Commission and indicated that the Commission might be authorized to adopt such rules in order to promote program diversity.[125]

While the Court in *MPAA* held that the Commission could not assert ancillary jurisdiction to compel television broadcasters to provide a video description service for the visually impaired, the decision rested on the relatively narrow grounds that Congress had directed the Commission to explore the feasibility of the service, but withheld

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[123] *In re IP-Enabled Services,* Notice of Proposed Rulemaking, 19 FCC Rcd. 4,863, 4,895 ¶ 46 (2004). And as the Third Circuit recently held in reversing the Commission's media concentration rules, "necessary" Commission regulations are those that are "useful" and "appropriate," not only those which are strictly "required." *Prometheus Radio Project v. FCC,* Nos. 03-3388 et al., __ F.3d __, 2004 WL 1405975 (3d Cir. June 24, 2002) (construing "necessary in the public interest" as used in Section 202(h) of the 1996 Act consistent with settled interpretation of the Commission's public interest authority).

[124] 425 U.S. at 669.

[125] *Id.* n.7.

authority to impose the requirement.[126] As Judge Henderson explained in her concurring opinion in *MPAA*, "neither section 1 [of the Communications Act], nor any of the other provisions of the Act the Commission relies upon, independently delegates authority that section 713 plainly withholds."[127] There can be no claim here that the Communications Act "plainly withholds" Commission authority to promulgate content protection measures for digital radio broadcasting. To the contrary, as RIAA has demonstrated, the Commission's adoption of DAB without content protection will undermine clear and consistent congressional policies in the Copyright Act.

Nor is there any serious issue whether the Commission's "public interest" authority extends to the issues advanced in the *Notice of Inquiry*. Title I authority clearly may be employed to ensure that its regulations are consistent with congressional policies and will protect free over-the-air broadcasting from untoward harm arising from indiscriminate copying and redistribution of sound recordings contained in DAB transmissions. Thus, the scope of the Commission's public interest mandate as applied to DAB content protection is fully consistent with "the purposes of the regulatory legislation [*i.e.*, the Communications Act]" pursuant to which the Commission derives its powers. Indeed, under the extreme view advanced by CEA, the Commission's landmark assertion of ancillary jurisdiction over telecommunications customer premises equipment, *CCIA v. FCC*,[128] its regulation of data services by telecommunications carriers[129] and a host of

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[126] 309 F.3d at 806.

[127] *Id.* at 807.

[128] 693 F.2d 198, 212-13 (D.C. Cir. 1982).

[129] *Computer II Order*, 77 F.C.C.2d at 432 ¶¶ 124-25; *Computer III Order*, 104 F.C.C.2d at 1123-25 ¶ 340-42.

other Commission decisions furthering the goals of the Communications Act would likewise fail. It is more than sufficient as a jurisdictional matter that for DAB – as the Commission similarly held with respect to both digital television and digital cable – some form of content protection "is reasonably required" to perform the Commission's "express statutory obligation" of regulating radio broadcasting, over which the Commission enjoys near-plenary statutory powers.[130]

VI. RIAA Has Timely Raised a Compelling Matter Affecting the Public Interest.

A. RIAA Brought Its Concerns Regarding Content Protection to the Commission When Those Issues Were Ripe for Commission Consideration and Action.

CEA and others argue that the Commission should not address content protection issues at this time because RIAA did not raise these issues at an earlier stage in the DAB proceedings.[131] In other words, CEA argues at once that RIAA is both too late, because it did not inform the Commission of its concerns sooner, and too early, because the Commission must wait until there is concrete evidence of harm.[132] CEA cannot have it both ways; in fact, both positions are meritless.

RIAA has addressed and refuted in its Comments and in Section II of these Reply Comments the claims of CEA and others that there is no evidence of harm. CEA's arguments concerning the timeliness of RIAA's involvement in this proceeding are equally vacuous. While CEA claims that this proceeding is 14 years old,[133] the

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[130] *In re IP-Enabled Services,* Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, 4895 ¶ 46 (2004).

[131] *See* CEA Comments at 9; *see also* HRRC Comments at 17-19.

[132] *Compare* CEA Comments at 9 *with Id.* at 3.

[133] *See* CEA Comments at 8. It is unclear where CEA gets this time period. The Commission considered authorizing digital audio radio services for the first time in 1990,

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Commission did not turn its attention to terrestrial DAB until 1999 when it issued a Notice of Proposed Rulemaking focused on the selection of a technical standard for DAB.[134] At that time, the Commission did not seek comment on any of the broader issues raised by DAB, including content protection issues. Thus, there was no call for RIAA to become involved and, had it tried, RIAA might well have been rebuffed by iBiquity and the broadcast community for raising unrelated issues.

The Commission's first real step toward authorizing DAB came in October 2002, when it released its Report and Order in the DAB proceeding, selecting IBOC as the technology to implement terrestrial DAB, and tentatively authorizing the use of the iBiquity technical proposal.[135] However, it deferred consideration of formal standard-setting procedures and related licensing rules until a future further notice of proposed rulemaking.[136]

RIAA and its members moved promptly thereafter to establish a dialogue with iBiquity regarding the need for content protection rules to protect the copyright interests

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see In re Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, Notice of Inquiry, 5 FCC Rcd. 5237, 5237 ¶ 1 (1990), but quickly concluded that the terrestrial IBOC DAB systems under consideration were not technically feasible and therefore focused on satellite radio. *See In re Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, Notice of Proposed Rulemaking, 15 FCC Rcd. 1722, 1724-25 ¶ 5 (1999) (describing background leading up to terrestrial DAB rulemaking) ("*DAB Notice of Proposed Rulemaking*"). In 1997, the Commission adopted service rules for satellite radio, while postponing formal consideration of a DAB service until 1999. *See In re Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd. 5754 (1997).

[134] *See DAB Notice of Proposed Rulemaking*, 15 FCC Rcd. at 1731 ¶¶ 19-20.

[135] *See DAB First Report and Order*, 17 FCC Rcd. at 19,990 ¶ 1.

[136] *Id.*

of the recording industry.[137] In November 2002 and March 2003, RIAA met with iBiquity to discuss iBiquity's technical proposals and the importance of assuring content protection for recorded works. In both meetings, iBiquity assured the recording industry that the IBOC specifications included the capability to afford content protection and implied that it was not opposed to including content protection as part of its system. RIAA and its members continued discussions with iBiquity regarding possible usage rules throughout 2003 and 2004.

In the Spring of 2003, RIAA became aware of iBiquity's business plans and of the technical developments in consumer electronics equipment that would enable consumers to engage in widespread automated copying and redistribution of DAB transmissions, including sound recordings. RIAA promptly approached the Commission regarding its concerns and met with the Commission's staff on August 6, 2003 to discuss those concerns and to explore how the Commission might address them. As a follow up to that meeting and in response to the staff's suggestions, RIAA contacted representatives of the broadcast industry and the equipment manufacturers and further contacted iBiquity to discuss content protection. RIAA met again with the staff on December 3, 2003 and, on January 30, 2004, the Media Bureau hosted a roundtable discussion on content protection in which several interested parties participated, including RIAA, iBiquity, Public Knowledge, NAB, HRRC, the National Music Publishers' Association and the BSA. At that meeting, RIAA presented its concerns regarding the Commission's

[137] Prior to the adoption of the Commission *DAB First Report and Order*, Universal Music Group, an RIAA member and one of the major recording companies, had informal discussions with iBiquity regarding content protection.

authorization of DAB without content protection. Given this involvement, it is clear that RIAA has actively and timely sought Commission action and industry consensus to assure that the any DAB rules would include reasonable without content protection provisions.[138]

B. RIAA Has Raised Compelling Public Interest Concerns that the Commission Must Address.

Even assuming *arguendo* that RIAA might have raised its concerns regarding content protection earlier in the DAB proceedings, the Commission should not and, indeed, cannot ignore the compelling public interest issues raised by RIAA in response to the *Notice of Inquiry*. As RIAA set forth in its Comments, the Commission has an obligation under the Communications Act to consider the public interest consequences of permitting radio broadcasters to operate digitally.[139] It is irrelevant for purposes of the Commission's inquiry when in the proceeding the issue affecting the public interest is

[138] The Commission's action on DTV content protection issues further belies commenters' assertions that the Commission cannot act at this stage of the DAB proceeding. The issue of content protection for television programming did not arise until well into the DTV transition and long after the Commission adopted a transmission standard in 1996. *In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fourth Report and Order, 11 FCC Rcd. 17,771, 17,772 ¶ 1 (1996). Thus, the Broadcast Protection Discussion Subgroup, which developed the ATSC flag proposal, was not formed until November 2001, over five years after the Commission adopted the DTV transmission standard. *See In re Digital Broadcast Content Protection*, Notice of Proposed Rulemaking, 17 FCC Rcd. 16,027, 16027-28 ¶¶ 2-3 (2002). The Commission did not seek comment on DTV content protection issues until June 2002, six years after adoption of the DTV transmission standard. *Id.* Moreover, the Commission did not adopt final content protection rules until November 2003, seven years after adoption of the DTV transmission standard. *See Broadcast Flag Report Order*, 18 FCC Rcd. at 23,551 ¶ 4. Therefore, the Commission has issued the *Notice of Inquiry* at an appropriate time in the development and rollout of DAB and failure to address these compelling public interest issues cannot be justified.

[139] *See* RIAA Comments 44-48, 53-57.

raised, as long as it is raised before the Commission adopts final rules.[140] RIAA has raised substantial public interest issues that implicate the Commission's obligations to honor and implement clear congressional policies. The Commission cannot ignore them.

VII. The Absence of a Consensus Concerning Content Protection Is Not a Basis for the Commission to Defer Adoption of Content Protection Rules.

iBiquity suggests that the Commission should not adopt content protection rules for DAB because, unlike the *Broadcast Flag* proceeding, there is no consensus among the affected industries as to how content protection requirements should be implemented.[141] As iBiquity concedes, however, the Broadcast Protection Discussion Subgroup to the Copy Protection Technical Working Group, which presented the broadcast flag proposal to the Commission, did not reach unanimous consensus among the industry representatives that were members of the Subgroup.[142] In fact, consumer electronics manufacturers and others objected to numerous aspects of the proposal.[143] And, the Commission did not adopt the proposal wholesale. Rather, the Commission undertook its own public interest analysis, found that portions of the proposal were not necessary, and sought further public comment on certain matters.[144]

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[140] *See AT&T Corp. v. FCC*, 86 F.3d 242, 247 (D.C. Cir. 1996) (remanding where Commission "completely failed to address" argument raised in ex parte letter).

[141] *See* iBiquity Comments at 28-29; *see also* NAB Comments at 32 (stating that it is not likely that affected industries will reach consensus on DAB content protection rules).

[142] *See Broadcast Flag Report and Order*, 18 FCC Rcd. at 23,556-57 ¶¶ 13-16; Final Report of the Co-Chairs of the Broadcast Protection Discussion Subgroup to the Copy Protection Technical Working Group §§ 2.6, 2.10.2, 2.12, Tab N (June 3, 2002) (noting that there was not complete consensus among members and that the purpose of working group was not to develop complete consensus) ("Final BPDG Report"), *available at* http://www.mpaa.org/Press/Broadcast_Flag_BPDG.htm (last accessed July 28, 2004).

[143] Final BPDG Report § 2.12 (listing consumer electronics companies' objections).

[144] *Broadcast Flag Report and Order*, 18 FCC Rcd. at 23,559-60, 23,577-78 ¶¶ 21, 59-63.

While the Commission has acknowledged the benefits of relying, when possible, on standards bodies composed of industry experts, it has also recognized that it cannot rely entirely on those bodies as a substitute for its public interest obligations under the Communications Act.[145] The Commission has also recognized that "when consensus cannot be achieved" among affected industries, standards bodies "lack the Commission's authority" to ensure that fair rules are developed.[146] Thus, while industry consensus may play an important role in developing some of the Commission's rules, the Commission must retain the ultimate responsibility to ensure that the public interest is served.[147]

That is especially true when, as here, the affected industries are reluctant to participate in the development of technical standards. In those circumstances, the Commission must take an active role to facilitate and encourage the affected industry players to work together to develop a standard so that the public interest will be served. In the DTV proceeding, for instance, the Commission established the Advisory Committee on Advanced Television Service to provide recommendations regarding technical, economic and public policy issues associated with the introduction of DTV.[148] This Advisory Committee, comprised of industry representatives, played an integral role in formulating the DTV standard adopted by the Commission.[149] Among other things,

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[145] *See In re Petition to Amend Part 68 of the Commission's Rules to Include Terminal Equipment Connected to Basic Rate Access Service Provided Via Integrated Services Digital Network Access Technology*, Report and Order, 11 FCC Rcd. 5091, 5102-03 ¶ 28 (1996).

[146] *Id.* ¶ 29.

[147] *Id.*

[148] *See In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fourth Report and Order, 11 FCC Rcd. 17,771, 17,773-74 ¶ 4 (1996).

[149] *See id.* (describing role of Advisory Committee in development of DTV standard adopted by the Commission); *see also In re Advanced Television Systems and Their*

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the Advisory Committee urged proponents of four different DTV standards to form the "Grand Alliance" to work together to develop one DTV standard combining elements from all four systems.[150]

The DAB proceeding similarly requires the Commission to take action that will encourage industry representatives to develop content protection rules. As described in these Reply Comments, the recording industry attempted to begin a dialogue with iBiquity and other representatives of affected industries to develop content protection rules for DAB that could be jointly presented to the Commission for consideration. Several parties declined to engage in meaningful discussions with RIAA[151] and, indeed, had little incentive to compromise.[152] Thus, RIAA is at an impasse: iBiquity, the company that holds the proprietary technology standard for DAB and has been awarded a government-sanctioned monopoly, has refused to incorporate content protection rules into its standard – although the technology is capable of accommodating them – absent a consensus; the other relevant industry representatives have not been willing to engage in

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Impact Upon the Existing Television Broadcast Service, Fifth Further Notice of Proposed Rule Making, 11 FCC Rcd. 6235, 6237 ¶ 3 (1996).

[150] *See* Brian Santo, *FCC Urges 'Grand Alliance' for U.S. HDTV*, Electronic Engineering Times, Mar. 1, 1993, *available at* 1993 WL 7726209; *FCC Committee Pushes HDTV Alliance; Further Tests Set*, FCC Report, Mar. 10, 1993, *available at* 1993 WL 2674531.

[151] Shortly following release of the *Notice of Inquiry*, RIAA proposed to begin, along with CEA, a multi-industry discussion to develop a content protection proposal. *See, e.g.*, Letter from Cary Sherman, RIAA, to Gary Shapiro, Consumer Electronics Association (Apr. 14, 2004) (attached as Appendix C). CEA never responded to RIAA's invitation.

[152] Because the recording industry does not have a performance right in sound recordings transmitted on over-the-air radio, the recording industry cannot prevent these recordings from being broadcast on DAB if the affected industries cannot agree on content protection rules.

meaningful discussions aimed at developing industry-negotiated content protection rules absent Commission action, presumably because it is not in their perceived business interests to do so.[153] RIAA has raised substantial concerns affecting the public interest; the Commission cannot, consistent with its public interest obligations, sit back, as iBiquity would have it do, and wait for some divine intervention to bring the players to the table.[154] If iBiquity, broadcasters and consumer electronics manufacturers refuse to cooperate with content owners, then the Commission must act affirmatively to facilitate agreement which can inform the Commission's decision, and, even absent such agreement, must adopt content protection rules for DAB.

VIII. There Is No Legal or Policy Imperative Requiring the Commission To Await Congressional Action Before Implementing DAB Content Protection.

A. The Commission Would Implement Clearly Established Congressional Policies By Adopting DAB Content Protection Rules.

Numerous commenters argue that the Commission should defer action until Congress can investigate and specifically legislate a solution for digital radio.[155] However, there is no need for the Commission to await congressional action before

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[153] A few radio station groups have recently stated publicly that they would work with RIAA on this issue. In its Comments, Cox Radio expressed a willingness "to work with RIAA to ensure the continued viability of their respective industries." Cox Radio Comments at 10. In addition, at a hearing on July 15, 2004 of the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary, a representative of Susquehanna Radio Corporation, testifying on behalf of the NAB, stated that broadcasters were willing to work on DAB content protection issues. *See* Terry Lane, *RIAA Wants More Protection; Broadcasters to House: Copyright Fees Killing Internet Radio*, Communications Daily, July 16, 2004, at 5.

[154] NAB even concedes in its Comments that "achieving a broad industry consensus on the technical parameters of such a protection scheme would not be such a simple matter." NAB Comments at 32.

[155] *See, e.g.*, CEA Comments at 3; HRRC Comments at 3, iBiquity Comments at 32-33; NPR Comments at 31-32; Consumer Coalition Group Comments at 3-4.

addressing the issues RIAA has raised. Congress has clearly spoken on the underlying issue – whether the unauthorized widespread copying of recorded music for the purpose of recreating a private library of musical works is authorized under the Copyright Act. As demonstrated above, the clear, unequivocal answer is no – such duplication violates the copyright owners' reproduction rights.

Moreover, there is no doubt that Congress intended to protect sound recordings from piracy in the digital age. As established in RIAA's Comments, the DPRA[156] and the Digital Millennium Copyright Act ("DMCA")[157] were enacted to assure that digital technology did not undermine the economic base of the music industry. The DMCA specifically conditions radio webcasting licenses on the employment of copy protection when supported by the underlying technology[158] and requires webcasters to cooperate in preventing listeners from scanning the webcasts in order to copy selected works.[159] Section 114(d)(2)(c)(v) clearly indicates that Congress intended to preclude listeners "from automatically scanning the transmitting entity's transmissions . . . in order to select a particular sound recording," where feasible and practical.[160] Any question as to the scope of that provision is dispelled by the legislative history of the DMCA. Thus, the House Conference Report on the DMCA provided:

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[156] Pub. L. No. 104-39, § 3, 109 Stat. 336 (1995) (codified in relevant part of 17 U.S.C. § 114(d)-(j)).

[157] Pub. L. No. 105-304, § 405, 112 Stat. 2860, (1998) (codified at 17 U.S.C. § 114(d)(2)(C)(vi)).

[158] *Id.*

[159] 17 U.S.C. § 114(d)(2)(C)(v).

[160] *Id.*

> Subparagraph (C)(v) provides that, in order to qualify for a statutory license, a transmitting entity must cooperate with sound recording copyright owners to prevent a transmission recipient from scanning the transmitting entity's transmissions to select particular sound recordings. In the future, a device or software may be developed that would enable its user to scan one or more digital transmissions to select particular sound recordings or artists requested by its user. Such devices or software would be the equivalent of an on demand service that would not be eligible for the statutory license. Technology may be developed to defeat such scanning, and transmitting entities taking a statutory license are required to cooperate with sound recording copyright owners to prevent such scanning, provided that such cooperation does not impose substantial costs or burdens on the transmitting entity.[161]

While that section addresses the situation in which the sound recording is selected for transmission to the listener, there is no meaningful difference or distinction between that situation and DAB where the consumer directs his or her receiver to scan and record selected material available over-the-air. In both situations, the consumer is selecting the particular song he or she wishes to record and the difference is purely in the technical means by which that is accomplished. Indeed, Section 114(d)(2)(c)(v) reaches scanning in order to listen, a practice that is clearly less problematic than scanning in order to record. Yet Congress was concerned enough about the former to make it a condition of the statutory license. What RIAA seeks in this proceeding is nothing more than what Congress intended when it last spoke on the subject of digital transmissions of sound recordings. The Commission need not wait for further congressional action before going forward to give effect to the underlying policy in its DAB rules.

[161] *See* H.R. Conf. Rep. No. 105-796, at 83 (1998).

As was the case in the *Broadcast Flag* and *Plug & Play* proceedings, the Commission enjoys ancillary jurisdiction to require DAB content protection in order to support congressional copyright policies and to protect against long-term harm to both the recording and advertiser-supported broadcasting industries.[162] As the Commission has explained, "[i]ssues relating to content protection are particularly acute in the broadcast realm because of the service's nature – it is transmitted in the clear via public airwaves."[163] Yet a Commission decision to incorporate content protection requirements into DAB would, as was the case with DTV, leave "the underlying right and remedies available to copyright holders . . . unchanged," because the Commission's decision would "not reach existing copyright law."[164] Thus, whether the Commission has statutory authority under the Copyright Act is irrelevant to the question of whether it should adopt content protection rules in this proceeding.

B. The Recording Industry's Lack of A Performance Right Does Not Preclude the Commission From Acting.

Several of those opposing the adoption of content protection rules argue that what RIAA is really seeking is for the Commission to grant the recording industry a "performance right" applicable to radio broadcasting. They contend that the Commission lacks that authority and point to the fact that the DPRA did not grant the recording industry such a performance right. As noted in the Introduction to these Reply Comments, RIAA is not asking the Commission to adopt a performance right. Indeed,

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[162] RIAA Comments at 49-57.

[163] *Broadcast Flag Report and Order*, 18 FCC Rcd. at 23,551 ¶ 3.

[164] *Id.* at 23,555 ¶ 9.

the Commission lacks the power to do so; only Congress can grant that right. However, the provisions of the DPRA exempting broadcasters from the performance right that was granted in that Act do not preclude the Commission from adopting the content protection rules sought here.

As RIAA explained in its Comments and as reiterated in the recent congressional testimony of the General Counsel of the Copyright Office,[165] the DPRA was enacted at the outset of the digital revolution to assure that digital technology did not undermine the ability of the recording industry and those dependent on it for their livelihood. Congress exempted broadcast radio from the performance right because it concluded that there was a symbiotic relationship between the radio and music industries and that radio broadcasting at that time did not threaten the economics of the music industry in the same manner as interactive and subscription radio services.[166] That conclusion was based on an understanding of the then-current state of the art of broadcasting, including the Commission's regulation of broadcasting to require "a mix of entertainment and non-entertainment programming and other public interest activities to local communities."[167]

DAB without content protection, however, presents an entirely different paradigm because it will permit the very same types of conduct as the interactive and subscription services Congress subjected to the performance right in the DPRA. Indeed, interactive services are the functional equivalent of the sort of programmed, automated mass recording made possible with DAB technologies. The question is whether the

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[165] *See* Carson Statement at 8-9.

[166] RIAA Comments at 37-42.

[167] S. Rep. No. 104-128, at 15 (1995).

Commission will regulate broadcasting, as it has always regulated broadcasting, in a manner that preserves the symbiotic relationship between the radio and music industries that Congress perceived in 1995 or in a manner that dramatically alters, and undermines Congress's expectations concerning, that relationship.

Thus, the presence or absence of a performance right is irrelevant to the issue here. Whether broadcasters need to obtain a performance license from record companies or record companies can withhold music content for DAB broadcast, DAB operation without content protection will pose the same threat to the music industry as the interactive services that are covered by the DPRA and enable consumers to engage in the same type of harmful, unauthorized copying that concerned the Commission in the digital and cable television realms. The hyperbolic claims that RIAA is seeking from the Commission a performance right denied by Congress are simply wrong.[168]

Nor are there any legitimate reasons to delay a decision on DAB content protection merely because Congress has legislated on the subject of digital copyright previously. It is plain that congressional action in the communications and copyright areas is both slow and unpredictable, with substantial regulatory discretion in the communications arena delegated to the Commission. When Congress enacted section 336 of the Communications Act in 1996 to govern digital television,[169] it did not expressly empower the Commission to decide on content protection, even though the question had already been at issue for some time. That power flowed from the

[168] *E.g.*, CEA Comments at 2-5; HRRC Comments at 3-5; iBiquity Comments at 29-30.
[169] 47 U.S.C. § 336 (added by § 201 of the 1996 Act).

Commission's general public interest mandate and broad powers under the Act to take necessary steps to achieve its purposes.

While the Commission lacks the digital transition mandate for DAB that section 336 granted for digital television,[170] the lack of such a statutory provision is not a bar to Commission action here. As RIAA has demonstrated, the Commission has the necessary jurisdiction to adopt DAB content protection rules and its failure to do so would be inconsistent with its obligation to honor and implement, to the extent consistent with the Act, congressional policies in other areas, including copyright. Indeed, if the Commission were required to wait for congressional consideration and authorization before acting on new technologies and new issues, then its lack of express statutory power to require (or even permit) DAB would imperil the entire DAB proceeding, not just the far narrower issue of content protection.[171]

Simply put, it is the role and responsibility of the Commission to react to current developments, under the long-term policies expressed by Congress, in advance of the slow-moving process of legislation.[172] Implementing content protection for DAB is

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[170] *DAB Notice of Proposed Rulemaking*, 15 FCC Rcd. at 1730 ¶¶ 16-17.

[171] Moreover, section 336(e) expressly permitted Commission authorization of subscription ("ancillary or supplementary") services by digital television broadcasting licensees. *See In re Advanced Television Systems And Their Impact Upon The Existing Television Broadcast Service,* Fifth Report and Order, 12 FCC Rcd 12809, 12821-22 ¶ 32 (1997) (holding that section 336 "sets out the specific parameters of our authority to permit ancillary and supplementary services"). If CEA and its allied commenters are correct that express prior congressional authorization is required for content protection in digital radio, then the Commission likewise would be required to wait for express congressional authorization of subscription digital radio services. *See Notice of Inquiry*, 19 FCC Rcd. at 7516 ¶ 29.

[172] *Consumer Elecs. Ass'n*, 347 F.3d at 299 (holding that the Commission had authority to issue new tuner requirements).

consistent with congressional copyright policies and, as explained by RIAA, necessary to ensure that DAB does not jeopardize the economic viability of free, advertiser-supported terrestrial radio broadcasting. In these compelling circumstances, there is no reason for delay and every justification for swift action. Indeed, if the Commission waits, its very inaction may, as a practical matter, constrain Congress's later ability to modify the copyright laws in light of settled (albeit improper) consumer expectations and the presence of a massive embedded base of "legacy" DAB receivers.[173] In a very real sense, therefore, it is Commission inaction that would threaten congressional authority over copyright law as applied to digital radio, not the converse.

IX. Including Content Protection Requirements in the Commission's DAB Rules Will Not Prejudice Terrestrial Radio Broadcasters Against Comparable Services.

Some commenters appear to suggest that the Commission should not adopt content protection rules for DAB because similar rules are not in place to prevent copying and distribution of analog radio, digital satellite radio or Internet webcasting.[174] These commenters suggest that the Commission will prejudice DAB and discourage the implementation of DAB in favor of these other music delivery services. To the contrary, RIAA has proposed content protection rules for DAB that will protect the legitimate expectations of content owners, broadcasters, equipment manufacturers and consumers and encourage the adoption of DAB.

[173] RIAA Comments at 80-83.

[174] *See, e.g.*, EFF Comments at 12-14; iBiquity Comments at 28-32.

In its Comments, RIAA suggested a series of usage rules to be included in all DAB receivers pursuant to a license from iBiquity.[175] These rules are designed to preserve consumers' current ability to record broadcast material, while ensuring that copyright owners enjoy the financial returns Congress has found necessary to facilitate the continued creation of artistic works. The usage rules would permit users to record DAB programming manually and to record blocks of time on a pre-programmed basis. However, the rules would preclude any use of identifying information for programmed recording of songs and would preclude distribution of recorded works electronically via the Internet.[176] Since they reflect a reasoned balance between consumer expectations and the rights of copyright owners, these rules will not prejudice DAB stations as compared to satellite digital radio and Internet streaming.[177]

In addition, there are other reasons why incorporating content protection provisions in the DAB rules will not place terrestrial broadcasters at a competitive disadvantage as compared to the other forms of digital programming.

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[175] RIAA Comments at 57-78; Hamilton Report § 7. RIAA does not believe that the mechanisms it proposed are the only means of assuring content protection; to the contrary, there are other alternative mechanisms. If others propose mechanisms that assure the same level of protection but give users, broadcasters and copyright owners more flexibility, RIAA will fully support Commission adoption of those alternatives. RIAA's principal concern is in the usage rules it has proposed.

[176] *Id.*

[177] *See* Lenard Report ¶¶ 64-65 and accompanying chart (discussing characteristics most likely to affect consumers' choices among competing channels of digital music distribution).

A. Satellite Digital Radio Is a Subscription Service Distinguishable from DAB.

As RIAA explained in its Comments, there are major differences between terrestrial and satellite radio services. Many of these distinctions will make content protected DAB radio service as or more desirable than satellite radio.[178] First, the two satellite radio providers – XM Satellite Radio, Inc. ("XM") and Sirius Satellite Radio ("Sirius") – provide subscription radio services for a monthly fee.[179] These are conditional access systems that currently require user authentication before content delivery and that are also technically capable of utilizing content protection if the providers elect to do so. Presently, both XM and Sirius prohibit subscribers from recording and transmitting recordings broadcast on the satellite services.[180] Similarly, neither XM nor Sirius has licensed consumer electronics manufacturers to make devices with functions that raise similar concerns as addressed in RIAA's Comments and these Reply Comments.[181] Thus, DAB service requiring content protection would not be placed at a competitive disadvantage because neither service permits copying and redistribution. Indeed, DAB arguably would be competitively advantaged as compared to satellite radio because DAB is free. Second, unprotected DAB would threaten satellite services because it would allow consumers automatically to search and record

[178] *Id.* ¶ 64 (table comparing key attributes of DAB and satellite radio).

[179] *See* XM Subscriber Information, http://www.xmradio.com/get_xm/ (last accessed July 29, 2004); Sirius Subscriber Information, http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cid=1018209032790 (last accessed July 29, 2004).

[180] *See* RIAA Comments at 79 (citing XM Satellite Radio: Customer Service Agreement § 1.b and Sirius Satellite Radio: Terms & Conditions § 1.b).

[181] *See* Lenard Report ¶ 75.

personalized playlists of their favorite music genres, thus competing with the genre-specific programming that presently distinguishes subscription-based satellite radio from over-the-air broadcast radio.[182]

In any event, the unauthorized copying and redistribution of digital material broadcast by satellite radio operators raise very similar concerns as those presented by DAB. However, the concerns regarding authorization of DAB without content protection are immediate, and the Commission is in a position to act on them now, before legacy problems and consumer expectations make addressing the issue more challenging and complex. Finally, as distinguished from DAB where the Commission will set the industry standard, the XM Satellite Radio and Sirius Satellite Radio control their own technical standards and thus can implement content protection rules without Commission action. RIAA has begun a dialogue with XM and Sirius to address content protection issues regarding satellite radio.[183] RIAA believes that there may be a mutuality of interest between the copyright owners and the satellite radio operators that should lead to a commercial solution to the problem. If RIAA, XM and Sirius cannot reach a negotiated solution, the Commission can address the concerns regarding satellite radio content protection in a separate proceeding.

B. Content Protection Restrictions for DAB Will Not Place DAB at a Competitive Disadvantage to Internet Webcasting.

iBiquity asserts that content protection restrictions for DAB will place DAB at a competitive disadvantage to Internet webcasting.[184] This is not true. Internet webcasters

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[182] *Id.*

[183] *See* RIAA Comments at 78-79.

[184] *See* iBiquity Comments at 30-31.

operate under a statutory license that subjects them to numerous conditions designed to protect creators – none of which apply to broadcasters. One of those conditions requires webcasters to cooperate to prevent scanning of the webcaster's transmissions to allow users to select particular recordings to hear.[185] This condition limits the ability of listeners to webcast programming to engage in the automated duplication that concerns RIAA. Another condition requires that webcasters "take[] no affirmative steps to cause or induce" copying by users and take advantage of the capabilities of the technologies they use to limit copying by users.[186] Here, RIAA is seeking very similar protection for DAB content. The iBiquity system, like the transmission technologies used by most webcasters, can accommodate a content protection regime. Thus, far from disadvantaging broadcasters relative to webcasters, RIAA is seeking to level the playing field by requiring that DAB broadcasters provide copyright owners the same kinds of protections as webcasters.[187]

X. The Unprecedented Selection of a Proprietary DAB Standard Controlled by the Broadcasting and Consumer Electronics Industries Warrants Commission Skepticism.

In the *DAB First Report and Order*, the Commission acknowledged that it selected iBiquity's IBOC system as the sole-source technology for DAB because today "broadcasters face competitive challenges from various digital media" and "many station owners link their continued viability to the prompt introduction of a digital transmission

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[185] 17 U.S.C. § 114(d)(2)(C)(v).

[186] *Id.* § 114(d)(2)(C)(vi).

[187] *See* Lenard Report ¶ 65 (table comparing key attributes of DAB and Internet webcasting). Moreover, webcasters are required to pay a royalty to the record companies. *See Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 499 (3rd Cir. 2003).

technology."[188] The extraordinary selection of a closed, proprietary technology as the standard for DAB in the United States contrasts markedly with the Commission's prior approach to mass media communications standards (*e.g.*, NTSC analog television, AM stereo, DTV, cable TV set-top boxes, etc.), in which the Commission has typically eschewed mandating use of proprietary technologies.[189]

Given this unique development in which the Commission is effectively granting a monopoly to iBiquity, the Commission should approach iBiquity's opposition to content protection with skepticism. Just as the Commission has cautiously warned it will examine iBiquity's licensing conduct to ensure fair and reasonable access to the IBOC technology,[190] so too should it act with caution in evaluating iBiquity's claims with respect to content protection. All of the major industry segments involved in radio – save the recording industry – have a direct interest in iBiquity's success. As the Commission explained, iBiquity includes among its "strategic partners" most of "the largest broadcast group owners, as well as manufacturers of broadcast equipment, consumer electronics, and semiconductors."[191] "The company's investors include 15 of the nation's top radio broadcasters, including ABC, Clear Channel and Viacom . . ."[192]

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[188] *DAB First Report and Order*, 17 FCC Rcd. at 20,006 ¶ 44.

[189] As a result, it appears that the Commission "patent policy" referenced in the *Further Notice of Proposed Rulemaking*, 19 FCC Rcd. at 7527 ¶ 57, which dates from 1966, has never before been utilized in connection with radio or television broadcast standards.

[190] *E.g., Id.*

[191] *Id.* at 7506 ¶ 1 n.2.

[192] Circle Surround Press Release.

CEA and NAB, which respectively represent these equipment and broadcast entities, not only "support" the iBiquity standard,[193] but also are either opposed or indifferent to content protection, challenging RIAA's position that the type of indiscriminate copying and distribution enabled by DAB and current-generation DAB receivers will devastate the music industry. However, it is clear from iBiquity's press reports and public statements that it plans to use the enhanced distribution capabilities of DAB to market a variety of services using a "buy-button" on DAB receivers,[194] and thus has an interest is assuring that DAB is made as attractive to the consuming public as possible in order to facilitate its own business agenda. Allowing consumers to engage in the kind of copying that concerns RIAA will clearly make DAB more attractive than a DAB system in which the copyright interests of the music industry are protected. Indeed, iBiquity argues in its Comments that

> It is unlikely that manufacturers of consumer electronics products would be interested in producing home or portable IBOC radios if recording capabilities had to be removed in return for the introduction of IBOC. Moreover, consumers would have little incentive to buy home or portable products if the upgrade to digital came at the expense of the convenience of personal recording for time shifting purposes.[195]

Consequently, the Commission should approach with a high degree of skepticism the claims of iBiquity and its investors that DAB without content protection poses no threat to the music industry. To the contrary, the Commission should act with special care to

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[193] *Further Notice of Notice of Proposed Rulemaking*, FCC Rcd. at 7506 ¶ 1 n.2.

[194] *See, e.g.*, Cherry Lane Report at 37-38.

[195] iBiquity Comments at 31.

avoid enhancing the market power bestowed on iBiquity and its partners by, from what RIAA can determine, the historically unprecedented grant of a technological monopoly over DAB technology in the United States.

Indeed, while iBiquity argues it finds it "puzzling that the RIAA would propose that greater restrictions on distribution of content should be imposed on digital radio than the recording industry is willing to impose on itself,"[196] the only thing that is puzzling is the fact that iBiquity and its investors are themselves prepared to utilize content protection measures to sell "premium" content to subscribers while opposing content protection measures to prevent the widespread illegal copying of the copyrighted sound recordings that are the principal draw of commercial radio in the first instance.

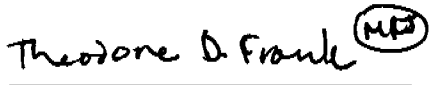
XI. Conclusion

For the reasons set forth above and in RIAA's Comments, the Commission should adopt content protection requirements concurrently with final DAB service rules. The record demonstrates that the iBiquity technology will support a content protection requirement, that existing technology will permit automated cherry-picking of content of the listener's choosing, that without content protection DAB will facilitate the unauthorized duplication of copyrighted sound recordings, and that listeners will employ the automated recording technology to create libraries of recorded music without compensating the artists, record companies or others whose copyrights are infringed. Those opposed to a content protection requirement have advanced only conjecture, supposition, and hyperbole to refute this clear and unambiguous record. The

[196] *Id.* at 29-30.

Commission has jurisdiction to include a content protection regime as part of its DAB rules; the public interest requires that it do so.

Respectfully submitted,



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