Committee on Commerce, Science, and Transportation
"Protecting Content In A Digital Age --
Promoting Broadband And The
Digital Television Transition"

Statement of Robert A. Perry
On Behalf Of The Home Recording Rights Coalition

February 28, 2002

Chairman Hollings, Ranking Member McCain, and Members of the Committee--

I am pleased to appear today on behalf of the Home Recording Rights Coalition (“HRRC”). I serve on the Board of the HRRC, and currently chair the Video Board of the Consumer Electronics Association ("CEA"). I also serve as Vice President of Marketing of Mitsubishi Digital Electronics America, Inc., a corporate leader in the transition to DTV and other digital products for the home network. In my role at Mitsubishi, I am the executive directly responsible for the product strategy of the company.

The HRRC was founded more than 20 years ago, after a U.S. Court of Appeals ruled that Sony could not legally sell the first “Betamax” home VCR to consumers. Fortunately for all involved – including the motion picture industry – that decision was reversed by the U.S. Supreme Court. Not many years after having failed to keep the Betamax and successive generations of VCRs off the market, the motion picture industry began receiving greater revenue from the home video market than it does from the theatrical box office, a trend that continues in the digital DVD era.

This morning it should be apparent why, after twenty years and a Supreme Court victory for consumers, the HRRC finds it necessary to remain active. Despite the tremendous benefits conferred on the entertainment industry by consumer electronics products, some in the content creation and distribution industries continue with their efforts to limit, curtail, restrict and confine the design of these products, and their use by consumers. Many or most of the areas in which restrictions are now sought are targeted at the home, and the home network, rather than at abuses related to the Internet, which is their purported justification.

Proposals to restrict the development of new technology, and consumers' use of it, represent an alarming trend which in our view should be a main subject, if not *the* subject, of the hearing today. We are at the forefront of a digital revolution that, if allowed to proceed, can offer consumers greater value at lower prices. But history teaches that if the Congress allows content industries to dictate the designs and uses of new products, the digital revolution will never reach its full potential.

All who seek regulation or legislation today cite to actual and potential redistribution of commercial programming over the Internet. But the legislative agenda of some is not confined to addressing this problem. It extends to dictation of the design of products by technology companies, and the dictation of their use by consumers. We hope this Committee, in its fact finding, will sort the wheat from the chaff.

The HRRC Has Worked With Content Industries On Approaches That Are Balanced And Fair To Consumers

In the analog domain, HRRC cooperated with the entertainment industry in drafting section 1201(k) of the Digital Millennium Copyright Act of 1998 (DMCA). Prior to that, we worked with the recording industry on the Audio Home Recording Act, and we took the initiative in negotiating with the motion picture industry, to address their concerns over emerging digital video formats, starting in 1992. It was, literally, we who invited them to the table. We were also among the founders, along with information technology and content participants, of the Copy Protection Technical Working Group ("CPTWG"), which has met approximately every month on the West Coast for the last six years. Its most recent meeting was yesterday.

For several years, both HRRC and consumer electronics companies have offered to work, via legislation if necessary, with those who legitimately want to address large scale, anonymous redistribution of content over the Internet. I am a co-chair of a CPTWG work group on this particular subject. Consumer electronics companies have already committed publicly to support measures, regulatory if necessary,

addressing such redistribution.

Some Content Industry Agendas Extend Into Deep Control Over Consumer Practices In The Home, Not On The Internet

The movie industry agendas from which consumers need protection go well beyond dealing with external connections to the Internet. Rather, they extend *internally*, inside the home, into heart of the consumer home network. We are concerned about efforts to control or eliminate reasonable, healthy, and constructive practices of consumers, and to chill the design of innovative products.

Congress Should Not Allow Control Over Consumer Home Recording Of Free Over The Air Broadcasts

At least one motion picture and television network company has sought, through regulation or legislation, the ability to control consumers' enjoyment of free, over the air broadcast programming within the home -- not just on the Internet. The argument has been that private sector content distribution licenses provide for "generational" control of home recording in some instances. So, it is reasoned, free, over the air digital broadcasts should be similarly controlled, and consumers may be limited to making a single, personal copy.

They shouldn't be. Consumer expectations about free, over the air broadcasting are different from those as to cable and satellite delivery. Those who receive programming over cable or satellite have contractual relationships with their content distributors; the devices they use are specifically licensed to receive content Approximately 15% of the public, however, chooses to forego such contractual or license relationships, preferring to watch whatever they choose, plus the advertising, delivered via rooftop antennas or rabbit ears. Imposing a technical regime on free broadcasts would forever change this paradigm and experience. If those who want to equate free programming with paid programming had their way, these consumers would become involuntary licensees, subject to technological controls negotiated elsewhere.

Advocates of such a regime say they would still allow consumers to make a single copy of a program. Beware. As Herbert T. Gillis famously advised, "The first step down is a long way." Any imposition on consumer home recording of free, over the air broadcasts would have significant, harmful consequences for consumers.

For example, many consumers now have set-top boxes with built-in "personal video recorders," or PVRs, as well as plain-old VCRs. Some studios insist that consumers should only be able to make one copy of a broadcast, claiming that they never have a need for more than one. If a PVR copy counts as the consumer's one copy, however, he or she can never record it on a VCR, or play it back on another TV in the house. A program recorded for viewing by the children could only be viewed on the same TV on which a parent would otherwise watch Sunday sports. A program of local interest could not be shared with parents or grown children living in another community.

Licenses governing programs distributed over cable and satellite systems have complex and expensive ways to deal with such issues -- for example, allowing transfer of a copy from a PVR to a VCR, if the PVR copy is erased at the same time. Nor have such licenses imposed restraints on programs originating as free, over the air broadcasts, even when delivered to the home over cable or satellite. Imposing such complexities as to free, over the air programming would bring the government into a complex, changing, and expensive technical area, with consumers suffering the consequences.

*HRRC is strongly opposed to **any** legislative (or regulatory) interference with consumers' rights to engage in in-home, private, non-commercial recording of programming originating as free over the air broadcasts. We urge the proponents of legislation to publicly disclaim any such objective today, on the record, and without condition.*

Congress And The FCC Should Not Allow Content Owners And Distributors To Exert Remote Control Over Consumers' Selection Of Home Network Interfaces And Viewing Products

Another agenda of some studios, that we already see in proposed licenses to be administered by the Federal Communications Commission, is the exertion of remote control over the daily operation of consumer devices. The technical phrase, "selectable output control," sounds inviting -- until one realizes that the "selection" would be done by the movie studio or cable company, not by the consumer. The technology as to which some studios seek mandated adherence would allow them, or cable or satellite operators, to exercise direct, remote control over all product-to-product connections in the home. Once given this power, a movie studio, or cable or satellite operator, could simply turn off any interface at will, effectively making the consumer home network a part of its own distribution system.

Please remember that digital technology, which causes content owners to feel threatened as to its *distribution* potential, offers a much more frightening potential for *control* -- if the FCC and the Congress allow such control to be exercised. And here is why it is being sought. Today, there are two standard all-digital interfaces being readied for widespread use in the home. One, known as IEEE 1394, iLink, or "firewire," provides a bi-directional means of connecting TVs, VCRs, and other standard consumer products within a home network. This connection allows home recording to be either supported or disabled. The other digital interface, called "DVI," is a one-way, broader digital connection originally designed to hook personal computers to digital monitors. The DVI signal used in this interface is simply not recordable by any known consumer technology.

Over several years of negotiations, license agreements governing the "1394" interface have spelled out when this technology may be used to block home recording of certain content, based on "encoding rules" that protect current consumer practices. (Congress in fact endorsed these rules in principle as part of section 1201(k) of the DMCA.) Such an

approach is not possible utilizing DVI alone.

Each of these interfaces offers different advantages. Many people in my industry envision home networks in which each interface connection would be available to consumers -- some TV receivers might be designed to rely on the "1394" inputs, some on DVI, some on both. Connections to digital VCRs, for example, would be made through the 1394 interface, meaning that copying would be controlled, but subject to balanced "encoding rules."

However, if those studios seeking to impose "selectable output control" gain this power, they could remotely control, on a program by program basis, which one of these interfaces would be active in a home, and which would be switched off for all purposes. A studio, cable MSO, or satellite provider that did not want to permit *any* home recording on VCRs would simply turn off the "1394" interface, and the "encoding rule" protections for consumers, painfully negotiated over several years, would become irrelevant. But the damage would not stop there. A consumer who had bought a state of the art HDTV receiver, with a copy-protected digital 1394 interface, would lose the signal from this interface for all purposes, including *viewing* the program. So even consumer high resolution *viewing*, on the newest frontline, digital products of the DTV transition, could be cut off at the discretion of the studio, cable, or satellite company.

Unfortunately, the damage to consumer living rooms from "selectable output control" would not stop even at the choice of digital interfaces. Neither of these digital interfaces is yet in general use. Most HDTV displays in the market today, and sold over the last three years, rely on the same sort of broadband interface that is used to deliver signals from PCs to computer monitors. (In computer terminology it is called "RGB." Its consumer electronics cousin is component video, also known as "Y, Pb, Pr".) *If Congress were to give this enormous "selectable output control" power to content owners, they could simply cut off broadband signals to the pioneering Americans who have purchased these 2.5 million displays.*

To simplify this issue -- if studios and content distributors were given this power over consumer viewing,

some consumers might conclude that they had overpaid for their brand new HDTV. Even more disastrously for our country's digital television transition, they might conclude, and tell their friends, that it was a mistake to buy any new digital television at all -- because all the high resolution inputs on the TVs manufactured to date could become useless as to content delivered over cable, satellite, or broadcast. We suggest that any studio proponents of such control be asked to explain to the Committee how such an outcome could possibly serve the public interest.

Spokesmen for the entertainment industry have never publicly disclaimed any intention of proceeding with such an agenda, through licenses as enforced by the FCC or through the Congress. We call upon them to do so today.

A Cable Industry Proposed License And Specification Threatens Consumer Enjoyment Of Innocent Home Products

Ironically, the Federal Communications Commission today is in a position to enforce *anti-consumer* license provisions because of a provision passed by the Congress, in the 1996 Telecommunications Act, that was meant to be explicitly *pro-consumer*. Section 304 of the 1996 Telecommunications Act requires the FCC to assure in its regulations the competitive commercial availability of devices that attach directly to cable systems -- breaking the 50-year monopoly, based on their concerns over theft of service, that cable multi-system operators have enjoyed.

To achieve competitive entry with a range of new devices, as occurred in telephone deregulation, the FCC oversaw a standards development process that would also protect the security of cable signals from unauthorized use. CableLabs, the research consortium of the cable industry, volunteered, and was chosen by the FCC, to set such standards. But as presently drafted these standards, and the license agreement that would extend from the cable industry to device manufacturers, pose another threat to consumer enjoyment of home devices, and represent yet another part of a motion picture industry agenda represented before you today. We believe that in combination, their specifications and their

license would:

- impose "selectable output control," as I have described, on all downstream devices

- reduce viewing resolution by three-fourths, at the option of the content owner (out of concern for potential copying)

- restrict the other functions and the flexibility of devices hooked up to cable, making sure that the competitive flowering and diversity that followed telephone deregulation does not happen with respect to cable

HRRC and others have repeatedly requested, in writing, that the FCC publish the pending drafts of this license, for public comment. We urge this Committee to exercise its jurisdiction to see that this occurs.

Several of these impositions are said to be at the behest of content owners. *We call upon those who seek legislation that would grant them power over consumer devices to state clearly whether and how they intend to preserve consumer enjoyment of home devices attached to cable and satellite systems.*

Congress Should Look Skeptically At Vague Proposals For A "Single, Standard Secure Domain" Controlling All Consumer Use Of Consumer Electronics And Information Technology Products

The Consumer Electronics Association ("CEA") has provided financial support for its members' attendance at CPTWG, and has also supported research and testing products of its work groups. I am thoroughly familiar with the technical proposals pending as to Internet redistribution. This project does not and should not require the sort of control over the home network that apparently has been sought as a part of a separate legislative agenda of the sort I have described today.

In addition to going well beyond the redistribution issue, these agendas also get well ahead of private sector processes.

We have heard speeches about "single, standard security domains," but have yet to see particular proposals, in the CPTWG or elsewhere, specifically related to such speeches, defining what is sought, and what it would mean for products that are in consumers' hands today. This imprecision will not be improved by tossing everything into the hands of a government agency to figure out. In my view, the output of industry-led groups such as the CPTWG should be an essential input for the consideration of any proposed legislative or regulatory agenda. We do not have an admirable history in doing the opposite -- legislating the "solution," and expecting the private sector to figure out what the Congress meant.

Any Further Regulation Or Legislation Would Be Appropriate Only As A Narrow, Necessary, And Targeted Supplement To A Private Sector Consensus That Protects Consumers

As I noted near the outset, the HRRC has worked cooperatively on legislative and regulatory proposals over the last two decades, so long as they gave fair consideration and protection to consumer interests and practices. In the analog domain, HRRC cooperated with the entertainment industry in drafting section 1201(k) of the Digital Millennium Copyright Act of 1998 (DMCA). This section -- the only part of the DMCA that provides for any mandate on product design -- takes a balanced approach. It recognizes the prevailing technology that may be used to limit analog home recording, but subjects any use of such technology by content owners to clear "encoding rules" that protect reasonable and customary consumer practices.

A similar approach could be identified to address wide-scale redistribution of content over the Internet, and, on an appropriate time scale, to provide necessary tools for the enforcement of reasonably balanced license agreements that address copy protection issues, as well. Such an approach has been suggested by Rep. Boucher in House hearings over the last several years. In fact, representatives of the content industry at times have appeared publicly committed to work towards enactment of a digital video version of section 1201(k), but little has been proposed as to such a project.

HRRC has been engaged in the debates over actual and potential copyright legislation for the digital era since that era began, for consumer recording devices, in the mid-1980's. We have developed a set of principles, as to potential legislative or regulatory mandates, which we commend to the Congress in the interest of protecting consumers and not interfering with either technical progress or commerce:

HRRC will consider supporting a regulatory or legislative mandate only if --

(1) the issue cannot be addressed effectively by private sector standards or licensing activity alone,

(2) the result promotes rather than hinders technical progress and legal certainty,

(3) the mandate is of a *known technology* and as narrow as possible, and

(4) the outcome protects *consumers' reasonable and customary expectations*.

<u>Narrow And Targeted Provisions</u>
<u>May Be Appropriate To Secure</u>
<u>Full Consumer Use And Reliance</u>
<u>On Component Analog Interfaces</u>

I have already identified the pending consensus, private sector approach to redistribution of broadcast content over the Internet as one candidate for government support of an existing private sector consensus. There is one other issue that we see, a bit further on the horizon, which might be addressed according to the principles that I have suggested.

The preferred methods for dealing with reasonable content industry concerns are private sector development of technologies, and private sector licensing as the prevailing means to apply such technologies. These should be subject to fair "encoding rules," protecting consumers from arbitrary impositions that interfere with their reasonable and customary expectations. Through licensing alone, however, it may not ultimately be possible to reach all the relevant devices in the

market, or to protect consumers through adequate encoding rules.

For example, HRRC is committed to maintaining the full consumer enjoyment of DTV displays, owned by millions of consumers, that rely on the "component analog" video interface. We have asked the FCC, and we are asking the Congress, not to do or allow anything that would interfere with the right of consumers -- the pioneers in the DTV transition -- to use and enjoy these display devices. Those who seek the discretion to turn off or degrade the quality of this interface in set-top boxes (that would feed signals to these displays), however, cite their inability, using present technical and licensing tools, to provide any protection for high definition signals once they are allowed to pass over these interfaces. They argue that without such tools, there will be no means to prevent the future re-digitization of these signals for passage over the Internet. They would also need a means to enforce whatever copy control they may apply to licensed programs provided by cable or satellite conditional access -- e.g., pay per view, video on demand -- as allowed by reasonable "encoding rules."

We hope that everyone in the Congress, the FCC, the movie industry, and the cable and satellite industries will agree with us that *it is essential that consumers who buy DTV and HDTV receivers not lose most, or even any, of the benefits of their bargain*. Therefore, in HRRC's view, a balanced regime as to "component analog outputs," that is fair to consumers, is far preferable to the imposition of broader measures such as “selectable output control” or “downresolution.” One such approach -- which at this stage would still need much private sector investigation and discussion -- would be an obligation only on narrowly and specifically defined, future analog-to-digital converters, to read and respond to so-called "watermark" technology that may emerge from a private sector consensus. Since private licenses cannot and should not reach every product, to enforce that obligation equitably some regulatory or legislative action may be necessary. We emphasize, however, that much needs to be done in the private sector first, before we can know whether the necessary preconditions as to fairness to consumers, and not hindering technology or commerce, can be met. We know there is

particular concern on these points in the information technology industry, and we share it.

A Published Draft Of Legislation Is Unfocused And Dangerously Overbroad

I have attached the HRRC critique of the first published version of a draft bill entitled the "SSSCA." I understand that it is being reconsidered. The fundamental problem with its approach -- aside from its potential support for goals that we consider to be anti-consumer -- is the lack of any apparent nexus between content that would be protected, devices that would be subject to mandate, and the results that would be achieved.

One could go on and on about the sorts of devices that would be covered, intentionally or inadvertently -- from wristwatches to PDAs to ordinary TV receivers to supercomputers. This is not a drafting issue. This is a fundamental policy issue. The main question is whether the Congress is going to hand unfettered control of the future design of devices by consumer electronics and computer makers over to a few studios to who wish to exert absolute authority over what consumers can do with lawfully acquired programming in the privacy of their homes.

If Congress is not about to hand over such power, we respectfully suggest that it needs to back up and focus on particular issues and problems, find out exactly what the private sector is capable of doing, find out where the private sector would need help as to enforcement of reasonable measures, and, most importantly, assure that the outcome is fair to the consumers who are critical to the success of the digital television revolution.

On behalf of the HRRC and the other organizations with which I am affiliated, I greatly appreciate the opportunity to have appeared today.

Home Recording Rights Coalition
Analysis And Concerns, Draft "SSSCA"
Technology Mandate Legislation

I. Objections In Principle

The approach taken in the published staff working draft of "SSSCA" technology mandate legislation would deal far too harshly with consumers, and put an end to their reasonable and customary home recording practices which, to date, have contributed to entertainment industry prosperity. The draft--

- Does not distinguish between ordinary consumer retransmission or copying of a work in a home network; and the *redistribution* of programs, outside the home, in competition with the original public distribution. It would prevent both.

- The single exception, for making a "personal" time-shift copy of only certain video programming, would not acknowledge the common practice of sharing of lawfully acquired material among *family* and close friends, nor would it recognize customary consumer "place shifting" of audio recordings. It would, therefore, in the guise of "security" legislation, virtually wipe out most private, noncommercial audiovisual, and audio, home recording.

- For the first time, this legislation would constrain consumer use, within the home, of free, over the air TV and radio broadcasts. After passage of this bill, requiring device compliance with an encryption regime as "security" for receipt of free as well as paid services, no consumer could hoist a pair of rabbit ears, or turn on a car radio, without having to agree to become a "licensee."

- The draft bill makes no reference to the Digital Millennium Copyright Act of 1998 (DMCA), and thus may make illegal devices built in conformance with that statute, in particular analog recording devices (containing digital circuitry) that implement a well-known anti-copying technology as required under section 1201(k).

- The bill contains no exemption for products that comply with the Audio Home Recording Act of 1992 (AHRA), under which consumers pay levies on products and media used primarily for digital audio recording. Nor does the bill repeal the AHRA.

II. Objections As To Overbreadth And Ambiguity

The draft legislation is so broad in its application that, technically and legislatively, it entirely lacks focus. Selecting actual products to which to apply its provisions, from the literally millions that would be covered, would be pure guesswork. Hence, its application would arbitrary, its direction uncertain, and its effect on the marketplace potentially catastrophic. The draft--

- Does not require that "digital" products be in any sense *electronic*.

- Does not require that an "interactive digital device" be in any sense *interactive*. It covers all devices primarily used for "storing, retrieving, processing, performing, transmitting, receiving, or copying information in digital form." Even if limited to electronic devices, this would include most wristwatches, microwave ovens, TV sets, radios -- *anything* with an IC chip in it. Obviously, all PCs, PDAs, and consumer electronics products would be covered.

- Does not indicate or even imply what relationship is desired between the *device*, the *"certified security technology,"* and the *content* that is sought to be "protected." Thus it entirely lacks focus or direction. Having identified a device that falls within the definition of "interactive digital device," how is the private party or government body to decide what is to be "certified," and thus mandated for application and conformance? Must a device (like a PDA) that stores, processes, performs, transmits, receives, *and* copies information be subject to a separate "certified security technology" for *each* of these functions? If not, why not?

III. Objections To Nature And Sweep Of Government Mandate

Consumers, consumer organizations, retailers, and others would be shut out of the preliminary round of "negotiations" as to imposition of any "certified security technology" -- only "device manufacturers" and "copyright owners" would participate. Even the device manufacturers would lack negotiating leverage, as the bill puts no constraint whatsoever on the objectives and means of enforcement that can be demanded by the copyright owners. The draft--

- Provides no guidance to the Administration as to *which* products and technology must be subject to a Federal mandate after private sector negotiations fail. Is a Federal mandate triggered after *any and every failed discussion between any device manufacturer and any copyright owner?* If not, which private sector discussions would be chosen as triggering a mandate, and which would not?

- Would provide a sweeping antitrust exemption for private party cooperation in imposing constraints, without providing for any input from the Department of Justice, its Antitrust Division, or the FTC.

# # #