

**WRITTEN STATEMENT OF MITCH BAINWOL
CHAIRMAN AND CEO
RECORDING INDUSTRY ASSOCIATION OF AMERICA
BEFORE THE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE
ON
BROADCAST AND AUDIO FLAG**

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Chairman Stevens, Co-Chairman Inouye, and Members of the Committee, I appreciate this opportunity to appear before you today to address emerging issues in the area of digital audio broadcast and the use of an audio flag for the protection of digital music.

At the outset, let me stress that we are excited about the new opportunities digital radio will provide to expose new artists and offer consumers new choices in the way they get our music, and about the convergence of different platforms and distribution systems. The record industry is wholly supportive of this new platform and joins others in looking forward to its speedy and successful rollout.

Our concern is not over the rollout of HD Radio itself, but rather the advent of new digital radio services and devices that will effectively turn radio into a music library, without paying the fair market price for licensing music that a download store or subscription service must pay. We have no issue with the convergence of radio and downloads, as long as they are licensed for that purpose. But when a radio service that is broadcast terrestrially over-the-air, or over satellite, uses free spectrum and its special treatment under the law to change its very nature, compete unfairly against download and

on-demand subscription services that need to obtain an appropriate license, and avoid paying creators of music, we object.

New devices that effectively turn HD Radio into a music library should not come at the expense of those who create and provide the content upon which HD radio depends. New HD Radio services, and current satellite radio services, threaten to transform the intended *passive* listening experience of radio into an interactive one by enabling users to become owners and worldwide distributors of a personalized collection of recordings. What we are talking about here is not casual recording by listeners. It is not taping off the radio like we used to do. We are talking about allowing broadcast programs to be automatically captured and then disaggregated, song-by-song, into a massive library of music, neatly filed in a portable device's digital jukebox and organized by artist, song title, genre and any other classification imaginable in a manner that substitutes for a sale. Listeners will be able to automatically build entire collections of music without the need to ever purchase any of it; indeed, they won't even have to listen to the broadcast in order to build the library. This is not fair use. It is not time-shifting. And it's not radio.

This transformation from a passive to an interactive listening experience without obtaining the proper license to pay the creator is especially troubling because record labels and artists receive *absolutely no payment* from the performance of their works on terrestrial over-the-air radio. This unfair situation means that revenue, if any, comes only from the ultimate sale of that music to listeners. Yet the librarying functionality that could become part of HD Radio – the equivalent of permanent digital downloads – would displace those sales by providing listeners with the same content for free. And it would

be enabled ubiquitously in every car radio receiver and in every home. You can imagine why we want to get ahead of this problem.

The resulting loss of sales threatens significant harm to an industry already hit hard by piracy. A recent letter to me from Dr. David K. Rehr, President and CEO of the National Association of Broadcasters (NAB), questioned the threat posed by piracy over HD Radio given the availability of unauthorized music on “Peer-to-peer file sharing...iPod uploads and digital music on the Internet.” While it is true that other opportunities for consumers to independently search for pirated music exist, making the free, automatic, selective downloading of music available over radios poses a piracy problem that threatens to surpass that of peer-to-peer (“P2P”) file-sharing. Unlike P2P, digital radio downloads will offer pristine copies of songs without the threat of viruses and spyware. The ubiquity and ease of use of radios outstrips that of computers, and the one-way method of communication allows individuals to boldly engage in piracy with little fear of detection. It will affect all age groups, and it will appear to be sanctioned.

The harm from allowing these free digital downloads – as well as the ability to freely redistribute them over the Internet or on removable media – would also take away new market opportunities to provide consumers with convenient music purchases through “buy buttons” on radio receivers that would allow instant sales that produce new revenue streams for broadcasters, device manufacturers, and creators alike. And, of course, the potential loss of sales ultimately affects consumers, as companies are no longer able to invest in the production of new music.

Let us be clear: we are absolutely fine with any and all new radio features that give consumers more flexibility. But when a radio service adds features to effectively

become a download service, it should be required to pay the same marketplace price that download services pay. Exemption from such a license is unfair to the legitimate distribution services and retailers, and it is unfair to the copyright owners who deserve fair compensation.

If the appropriate license is not obtained in the marketplace, we must ensure that features contained in free over-the-air radio do not allow it to tread into the realm of those download and interactive services that do pay such a license. This unfair competition threatens the stability of the digital marketplace and the value itself of copyrighted works. In order to accomplish this, we have proposed the implementation, through appropriate marketplace negotiation, of an audio flag that would allow for new consumer functionality for radio, including time-shifting, automatic recording by time, program, or channel, storage, digital read-outs, music purchase options, time-shifting capabilities, and great new sound – but would disallow the type of cherry-picking of songs and librarying that would constitute automatic selective downloading.

Why a flag? While we agree with many in the information technology industries that encryption at the source would be an effective and robust content protection method, we understand that, at this point, just as in the video context, it may not be a viable option. As I stated in my response to Dr. Rehr's letter, we are not insistent upon the use of encryption at the source. We remain agnostic as to the technology implemented to protect broadcast digital content. The broadcast flag will work, just as in the video context, it is a good alternative, and it offers an effective means of ensuring that music acquired through digital broadcasts is used appropriately. The use of a broadcast flag would in no way affect legacy devices and we understand from all relevant sectors that,

once a technology is agreed upon, implementation is the easy part. The hard part is agreeing on the usage rules.

But in seeking agreement on usage rules, it is again important to understand what we want and what we don't want. Specifically, we are only asking for protection against radio broadcasts becoming music libraries through slice and dice functionality, and for protection against redistribution of recordings onto the Internet, removable media, or to other devices. We are not seeking to stop or delay the rollout of HD Radio or other platforms. Nothing we are seeking would change consumer expectations about how they use radio. Listeners can still hit a record button when they hear a song they like, and can engage in time-shifting, and in Tivo-like recording by time, program or channel. We merely ask that the line be drawn at automatic searching, copying, and disaggregation features that exceed the experience they, the FCC, and Congress expect from over-the-air terrestrial and satellite radio.

We feel strongly that a proper balance between music usage and protection can be found, and we would like to sit down with other industry players to find the appropriate solution. However, we have been unable to compel those other players to come to the table because of a fundamental lack of bargaining power. Again, *artists and record labels have no leverage to withhold their music since they don't have a performance right at all for over-the-air terrestrial radio, and are limited to a compulsory right for satellite radio.* This lack of a market solution requires that the FCC, the regulatory agency that controls the signal for over-the-air terrestrial radio, be granted the jurisdiction to address these issues and help guide industry participants to operate fairly. Senators Smith and Boxer have released a discussion draft with that goal in mind. We think it's a great start,

and stand ready to meet with all the interested parties. (A direct Congressional grant of authority may be required since the United States Court of Appeals for the District of Columbia Circuit recently vacated the FCC's ruling on digital video broadcasts for lack of jurisdiction. Of course, any grant of authority should not be limited to digital video broadcasts, but should necessarily include digital radio broadcasts, a notion supported by FCC Chairman Martin in a recent letter to Senators Frist and Alexander.)

The concerns we have regarding new HD Radio services are part of a broader desire to see all transmitters of digital content – whether terrestrial over-the-air, satellite, cable, or Internet – play by the same rules. For example, it is now clear that satellite radio, especially with proposed features allowing permanent copying and disaggregation, presents the same issues mentioned here, and should be treated the same. All new distributors of digital music – HD Radio, satellite radio, and Internet radio will be offering the same types of products to the same consumers. They should all follow the same rules so they compete fairly, and compensate creators fairly. By leveling the playing field, all of these platforms will have the chance to grow and compete, and new services will be encouraged to participate, creating more opportunities and choices for everyone.

HD Radio and other digital platforms certainly have much to offer. Enticing new users through increased quality, range, and selection is perfectly appropriate; but encouraging such migration with the lure of free unauthorized downloads is not. Device makers for terrestrial over-the-air radio (and satellite) broadcasts need to prevent the unrestricted redistribution of recordings and the ability to perform search-facilitated or automated copying so that individual recordings cannot be separated from surrounding

content. We continue to encourage all interested parties to work with us to seek a mutually beneficial outcome. In the meantime, to guide the appropriate and responsible marketing of new HD Radio receivers, Congress should grant jurisdiction to the FCC to ensure that radio is radio, and that those who wish to effectively offer downloads, do so with a license.

Thank you.