

Statement of

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Senior Vice President and General Manager for
Group Operations

Susquehanna Radio Corporation



Hearing on
Broadcast Television and Radio Flag Technology

United States Senate
Committee on Commerce, Science and Transportation

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On behalf of the National Association of Broadcasters

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Chairman Stevens, Co-Chairman Inouye, and Members of the Committee. My name is Dan Halyburton. I am the Senior Vice President and General Manager for Group Operations for Susquehanna Radio Corp., which owns 33 broadcast radio stations. I am also Chairman of NAB's Audio Flag Task Force. I am testifying today on behalf of the National Association of Broadcasters.

At the outset, NAB wants to make clear that it opposes piracy in all shapes and forms. Broadcasters are, themselves, content owners and support efforts to protect both content owners and their signals from piracy and to prosecute violators. NAB, however, has concerns about current proposals with regard to copy protection for new digital audio broadcasts and receivers, in contrast to NAB's support for the digital television (DTV) broadcast flag. Specifically, NAB is concerned that any attempt to add anti-copying measures at this point should not stall the digital radio transition that promises to provide benefits to the public, broadcasters, music composers and publishers, and the recording industry alike, without solving the unauthorized copying problems raised by the recording industry.

Radio in America is today at the beginning of a massive roll-out of digital broadcast transmissions and all-new digital radio receivers. Currently, 624 digital AM and FM stations are on the air – triple that of a year ago. New digital radio receivers have

been launched in the marketplace across a range of product categories. The ability to broadcast multiple program streams has been demonstrated, and broadcasters are fast embracing this option to bring additional content to the listening public within stations' current spectrum. Major radio groups are engaged in a massive marketing campaign to promote digital radio to consumers. The U.S.-developed digital radio technology, that of iBiquity Digital, is now being tested in many countries around the world. And auto makers and after-market manufacturers are beginning to produce digital radio products for car sound systems. 2005 was an important year for the digital radio roll-out. 2006 promises to be even more important, with auto makers signing up for factory-installed radios and retail outlets prominently featuring many new digital radio products. Broadcasters have individually committed to upgrade more than 2,000 stations to HD Radio technology. It is thus of paramount importance that any copy protection mechanism for digital radio must not impede the digital radio roll-out.

NAB is greatly concerned that developing and implementing a technical system to provide copy protection for digital radio not have a negative impact on the digital radio transition. The DTV broadcast flag mechanism, for example, was developed over many years of intense negotiations by scores of participants from a wide array of industry sectors. The purpose, concept and methodology of the DTV flag were then the subject of voluminous comments and reply comments from affected industry and consumer groups, companies and organizations. The FCC scrutinized these comments, heard in-person presentations from many interested parties and concluded that the purpose of preventing widespread indiscriminate re-distribution of digital video content over the internet was worthy and that the methodology was sound and workable.

NAB has expressed its willingness to participate in developing and forging a consensus on a digital radio copy protection system so long as it would not interrupt the digital roll-out or create uncertainty that would lead to a slow down of adoption rates by manufacturers, consumers and even broadcasters. NAB does not believe that legislation is necessary at this time. The immediacy, reality, or scope of any threat to the recording industry from a scenario in which consumers make good quality recordings from digital broadcasts on their local radio stations remains to be demonstrated. Those desiring to obtain and listen to pure, uninterrupted performances of sound recordings in lieu of the radio, already have an abundant number of means to do so. Satellite and cable digital subscription services, hundreds of thousands of unencrypted compact discs, peer to peer file sharing, and hours of uninterrupted music that can be stored on recordable CDs and hard drives, are but a few such means. We see no incentive for consumers to seek out random digital audio broadcast (DAB) signals that may contain DJ patter over the recordings in order to create files to make copies of or distribute sound recordings.

In addition, in any discussion of the extent to which copy protection should be accorded to digital audio recordings or transmissions, all parties must take into account Congress' long-standing policy of protecting and preserving the public's right to make home recordings of sound recordings for personal use. The House Report accompanying the Sound Recording Act of 1971 stated:

HOME RECORDING

In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, *it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and*

with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.¹

Since that Act, Congress has expanded the sound recording right only sparingly, in careful response to specific and well-documented threats, all the while reiterating the importance of preserving the public's right to make home copies for personal use.

In the Audio Home Recording Act of 1992 ("AHRA"), Congress definitively addressed the issue of home recording of sound recordings and musical works. This Act was intended to be comprehensive, forward-looking legislation designed to end, once and for all, the "longstanding controversy" surrounding the home recording of prerecorded music.² Indeed, then-President of the Recording Industry Association of America (RIAA), Jay Berman, described the bill that became the AHRA as "a generic solution that *applies across the board to all forms of digital audio recording technology.*"³

The Senate Report that accompanied the AHRA opens its discussion of the bill with the assertion that "[t]he purpose of S.1623 is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private noncommercial use."⁴ To this end, the provision of the AHRA providing the exemption for home copying, section 1008, was considered "one of the cornerstones of the bill" because it "removes the legal cloud over home copying of prerecorded music in the *most proconsumer way possible*: It gives consumers a *complete exemption* for noncommercial home copying *of both digital and analog music*, even though the royalty obligations

¹ H. Rep. No. 92-487, 92d Congress, 1st Sess. at 7 (Sept. 22, 1971) (emphasis added).

² See S. Rep. No. 102-294, 102d Cong., 2d Sess. 30, 51 (June 9, 1992).

³ Hearing Before the Senate Subcommittee on Communications, S. Hrg. 102-908, Serial No. J-102-43, at 111 (Oct. 29, 1991) (statement of Jason Berman, President of RIAA) (emphasis added).

⁴ S. Rep. No. 102-294, at 51 .

under the bill apply only to digitally formatted music.”⁵ The Ninth Circuit confirmed this conclusion in *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*⁶

Current Proposals for Audio Copy Protection Are Problematic

One of the proposed solutions RIAA has advocated in the past for its copy protection concerns is to mandate that all radio broadcasters encrypt their digital content at the source. NAB strongly opposes this approach. Such a mandate would be antithetical to the concept of free, over-the-air broadcasting. No U.S. free, over-the-air broadcast service, analog or digital, has ever been required to encrypt its transmissions.

Any encryption requirement would likely risk stalling the digital radio transition by requiring a change in the technical digital radio broadcasting standard of such magnitude that a year’s delay and likely more would be inevitable. Resulting uncertainty in the marketplace and potential loss of confidence and interest in DAB by manufacturers now ready to roll out (DAB) receivers would harm broadcasters and threaten the public’s receipt of digital radio. To date, there has been no investigation of what kind of encryption would be utilized, what copy control and re-distribution measures would be added (and acceptable to various stakeholders) and what features receivers can and cannot employ in terms of storage and replay.

Required encryption of DAB transmissions, even at this early stage, would likely result in obsolescence of millions of units of DAB components currently in the production pipeline, including receivers, integrated circuits and installed component parts

⁵ 138 Cong. Rec. H9029, H9033 (daily ed., Sept. 22, 1992) (statement of Rep. Hughes) (emphasis added).

⁶ 180 F.3d 1072 (9th Cir. 1999).

in automobiles, thereby increasing manufacturers' and auto makers' frustration with deployment of DAB products.

Encryption and copyright protection considerations with regard to digital radio differ in important ways from the DTV broadcast flag. The DTV broadcast flag does not involve copy restrictions (as does RIAA's proposal for digital radio) but rather is designed to prevent only indiscriminate re-distribution of broadcast programming over the Internet. The DTV broadcast flag does not disable the existing base of "legacy" receivers, which will simply not "read" the flag and its instructions on re-distribution. As noted, above encryption of DAB signals would obsolete receivers now in the field as well as receivers and component parts currently in the production pipeline. With the DTV flag, there was an acknowledged problem and a consensus solution developed by a broad cross-section of industry participants.

As an alternative to encryption at the source, the RIAA has, in the past, proposed various recording function rules that would be imposed through mandatory audio protection flags. NAB opposes proposals that would severely restrict a listener's ability to make recordings of free over-the-air radio broadcasts, for example, by limiting "pre-programmed recordings" to a minimum of 30 minutes duration, by prohibiting a listener's ability to subdivide a recorded segment after-the-fact, and by allowing a listener to view the ID information for a particular recording (e.g., song title and artist) only while simultaneously listening to that recording. Digital radio receivers so restricted would present to consumers a stark contrast with the abilities of other devices, such as existing analog radios which incorporate recording features, or software applications that can be added to a computer.

With regard to a proposed digital audio flag, RIAA has offered no clear definition of the problem that the flag is intended to solve, nor any indication of how the regime it proposes may solve that problem, particularly in light of the plethora of unencrypted digital copies of sound recordings available in the marketplace. Moreover, RIAA has provided no cost assessment to broadcasters for adoption of a mandatory audio protection flag.

The Committee should reject any effort to impose a sound recording performance right in digital broadcasts

NAB urges the Committee to recognize that granting a performance right will have no effect on the redistribution and copying issues raised here. Even in countries where a performance right in sound recording exists today, both for subscription and non-subscription transmissions, the right is almost universally subject to a statutory license. That license does not impose encryption obligations, bar encrypted digital outputs or analog outputs or even prohibit metadata-based recording. Accordingly, even if there were a performance right in sound recordings, the sound recording industry would still be asking Congress for the imposition of additional copy protection. All that a new performance right would do is create a new revenue stream for the producers and performers of sound recordings at the expense of broadcasters for purported reasons having nothing to do with this hearing.

Throughout the history of the debate over sound recording copyrights, Congress has consistently recognized that record companies reap huge promotional benefits from the exposure given their recordings by radio stations and that placing burdensome restrictions on performances could alter that relationship to the detriment of both

industries. For that reason, in the 1920s and for five decades following, Congress regularly considered proposals to grant copyright rights in sound recordings but repeatedly rejected such proposals.

When Congress did first afford limited copyright protection to sound recordings in 1971, it prohibited only unauthorized reproduction and distribution of records, but did not create a sound recording performance right. During the comprehensive revision of the Copyright Act in 1976, Congress again considered, and rejected, granting a sound recording performance right. As certain senators on the Judiciary Committee recognized in their (prevailing) minority views:

For years, record companies have gratuitously provided records to stations in hope of securing exposure by repeated play over the air. The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which, in turn, depends in great measure on the promotion efforts of broadcasters.⁷

Congress continued to refuse to provide any sound recording performance right for another twenty years. During that time, the record industry thrived, due in large measure to the promotional value of radio performances of their records.

It was not until the Digital Performance Rights in Sound Recordings Act of 1995 (the "DPRA") that even a limited performance right in sound recordings was granted. In granting this limited right, Congress stated it: "should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries."⁸ As explained in the Senate Report accompanying the DPRA,

⁷ S. Rep. No. 93-983, at 225-26 (1974)(minority views of Messrs. Eastland, Ervin, Burdick, Hruska, Thurmond, and Gurney).

⁸ S. Rep. No. 104-129, at 15 ("1995 Senate Report"); *accord, id.* at 13 (Congress sought to ensure that extensions of copyright protection in favor of the recording industry did not "upset[] the long-standing

"The underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscriptions and interactive services – but not by broadcasting and related transmissions."⁹

Consistent with Congress' intent, the DPRA expressly exempted from sound recording performance right liability non-subscription, non-interactive transmissions, including "non-subscription broadcast transmission[s]" – transmission[s] made by FCC licensed radio broadcasters.¹⁰ Congress made clear that the purpose of this broadcast exemption was to preserve the historical, mutually beneficial relationship between record companies and radio stations:

The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.¹¹

The Senate Report confirmed that "[i]t is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters,

business relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.").

⁹ *Id.* at 17.

¹⁰ 17 U.S.C. §114(d)(1)(A). All statutory citations are to the Copyright Act, Title 17 of the United States Code, unless otherwise noted.

¹¹ 1995 Senate Report, at 15.

which often promote, and appear to pose no threat to, the distribution of sound recordings."¹²

This discussion is not intended to minimize whatever legitimate concerns the recording industry may have concerning the need for copy protection. Rather, it is intended to assist the Committee in understanding why a performance right for sound recordings is totally irrelevant to those concerns.

Conclusion

NAB believes there is no need for legislation at this time. Rather, the parties should have the opportunity to explore options and attempt to come to consensus. It is of utmost importance not to disrupt the digital radio roll-out currently underway. NAB remains willing to discuss developments and mechanisms to afford some agreed-on protection for content owners that will not threaten the digital radio transition that has been so long in coming to America's radio listening public and America's broadcasters.

Thank you for this opportunity to share our views.

¹² *Id.*