

Before the  
U.S. Senate Committee on  
Commerce, Science & Transportation

“Broadcast and Audio Flag”  
January 24, 2006

Statement of Gary J. Shapiro  
for  
The Consumer Electronics Association and  
The Home Recording Rights Coalition

On behalf of the Home Recording Rights Coalition and the Consumer Electronics Association, I appreciate the Committee’s invitation to appear today. At CEA, we have more than 2,000 members who contribute more than \$125 billion to our economy and serve almost every household in the country. We thus believe it is vital to preserve the innovation, integrity and usefulness of the products that our members deliver to consumers. Any legislation that would impair the usefulness of lawful products is a threat to innovation, and to the satisfaction of our customers with us and with our political process.

The Home Recording Rights Coalition was founded more than 25 years ago, in response to a court decision that said copyright proprietors could enjoin the distribution of a new and useful product – the VCR. This court decision was later reversed by the U.S. Supreme Court, and even the motion picture industry has admitted that it is glad that the VCR was allowed to come to market. But elements of the entertainment industry, after repeatedly suggesting that they want cooperative licensing and marketing initiatives rather than new legislation, keep returning to the Congress with unilateral proposals that would subject new and legitimate consumer products to prior restraints.

We have been down this road before, but somehow enough is never enough. From 1989 through 1992, we worked with the Recording Industry Association of America and other rights holders to draft and propose the Audio Home Recording Act of 1992 (the “AHRA”). The AHRA still produces revenue for the recording industry and music publishers, and protects them against serial copying on the latest generations of our industry’s lawful and legitimate products. Yet except at royalty collection time, the music industry seems to want to forget that this law exists.

We worked with the motion picture industry and with Members of Congress and their staff in developing Section 1201(k) of the Digital Millennium Copyright Act of 1998 (the “DMCA”). This provision requires that certain analog home recorders must respond to a copy protection technology, but – and this is the key point for us – in return, it has “Encoding Rules” that protect consumers’ reasonable and customary time-shift recording practices from interference by content providers.<sup>1</sup>

### **What Is An “Audio Flag”?**

I believe we can be excused, Mr. Chairman, for not knowing what the RIAA means when it uses the term “Audio Flag.” If it is meant to be something strictly limited and analogous to the video “Broadcast Flag” proposal that was the subject of a Federal Communications Commission regulation (since nullified by the courts), then this is something that to my knowledge has never been shared with us, formally or informally, as a proposed regulation, or in proposed legislation.

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<sup>1</sup> The HRRC and many CEA members also helped launch the Copy Protection Technical Working Group (CPTWG), an open forum in which participants in the content, information technology, and consumer electronics industries have met regularly for almost 10 years. The CPTWG has had work groups on both the “broadcast flag” and the “analog hole,” and CEA members served as co-chairs of each group. The RIAA was the fourth founder of this group, but withdrew its support and participation early on to concentrate on the “Secure Digital Music Initiative,” which went into permanent hiatus several years ago, and never returned to the CPTWG.

The RIAA's first, and most specific iteration of a new constraint on digital radio surfaced at the FCC in 2004, and was *nothing like* the video "Broadcast Flag," which did not and does not purport to limit the utility of consumer recording products inside the home. By contrast, the proposal that the RIAA made to the FCC aimed specifically at frustrating and impairing the long-accepted, reasonable private and noncommercial practices of consumers in the use of *lawfully received content, inside their own homes*. The RIAA admitted in its FCC filings that, *even if not encrypted at the source*, accomplishing this would involve some home encryption requirement that, in order to be effective, would make any new digital radio products severely non-interoperable with existing home stereo systems. The RIAA never explained to the FCC, and has not explained in any public forum, specifically what it is trying to accomplish or how it could accomplish any of its objectives effectively yet in a non-intrusive manner.<sup>2</sup>

More recent suggestions that the popular satellite radio services be locked down also came "out of the blue." There is no indication that new devices now being rolled out, to make these services more portable and convenient<sup>3</sup> for lawful subscribers, would depart from the requirements of the Audio Home Recording Act -- *most of which were drafted by the music industry itself*. Nor is there any indication of any problems as a result of the wide consumer acceptance of these services. It seems that, as in the case of Digital Audio Broadcasts, the main objective of imposing new constraints on in-home

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<sup>2</sup> Indeed, the FCC's Digital Audio Broadcast proceeding was begun by the Commission in **1999** and its initial emphasis was almost entirely technical. Nevertheless, neither the RIAA nor any other music industry interest ever made a single filing in that proceeding until **5 years later** – and even then it did not disclose what specific technology would be imposed on consumers, and it still has not done so. But no matter what technology ultimately is chosen, it would be an unwarranted, unnecessary, and probably unworkable intrusion into consumer use, and into the very viability of the new digital radio format on which so many have worked so long and hard for so many years.

<sup>3</sup> Eric A. Taub, "Basics; Satellite Radio Leaves the Car To Go Home And on Walks," *The New York Times*, at C-9, January 12, 2006.

use is to destroy the utility of new consumer products that, like the VCR, will likely have the effect of enhancing consumers' lives and broadening the market for entertainment programming.

**The In-Home Consumer Capabilities That RIAA Now Wants To Constrain Are Not New And Have Never Been Shown To Be Harmful To The Music Industry.**

There is no established basis whatsoever for congressional or FCC meddling with the ongoing satellite radio services, or with the terrestrial digital audio broadcast services that are just being launched. Whatever consumers will be able to do with these services in the future -- including the recording, indexing, storing, and compilation of playlists -- it has been equally feasible for decades to do the same things with existing FM radio service, with comparable quality. Yet, every time the Congress has reformed the Copyright Act, the Congress has declined to grant phonorecord producers any right or control over home recording or even over whether albums are broadcast over the radio in the first place.

There is no demonstrated problem, and there is no reason to take control of these services away from broadcasters and satellite radio providers, or to interfere with the customary enjoyment of these services by consumers, and put those controls solely in the hands of the record companies. The Congress has consistently declined to do so.<sup>4</sup> As a

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<sup>4</sup> When Congress first granted copyright protection to sound recordings in the 1970's, it affirmed consumers' historical right to record radio transmissions: "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." House Judiciary Committee Report No. 92-487, 92nd Cong., 1st Sess. at 7 (1971) (emphasis added).

result, the United States remains a world leader in developing new broadcast and consumer technologies and services.

The constraints now being sought by the recording industry pertain to the *first* copy a consumer might make inside his or her own home. But, at the behest of the RIAA, the Congress already addressed this issue in the AHRA. The AHRA provides for a royalty payment to the music industry on Digital Audio Recording devices and media. At the specific request of the RIAA and the National Music Publishers Association, the AHRA explicitly does not prevent consumers from making a first generation copy, but limits devices' ability to make digital copies from digital copies. In 1991, Jay Berman, then head of the RIAA and now head of the industry's umbrella organization, IFPI, told the Senate that the AHRA --

“... will eliminate the legal uncertainty about home audio taping that has clouded the marketplace. The bill will bar copyright infringement lawsuits for both analog and digital audio home recording by consumers, and for the sale of audio recording equipment by manufacturers and importers. It thus will allow consumer electronics manufacturers to introduce new audio technology into the market without fear of infringement lawsuits ...”<sup>5</sup>

Indeed, the AHRA provides explicitly that copyright infringement suits *cannot* be based on products that comply with the AHRA, or based on consumers' use of such devices or their media. And, don't believe RIAA's revisionist claims that the AHRA had a narrow, limited focus. When urging passage of the AHRA, RIAA was singing a different tune. Again, in Mr. Berman's own words: the AHRA “is a generic solution that *applies across the board to all forms of digital audio recording technology*. Congress

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<sup>5</sup> *The Audio Home Recording Act of 1991: Hearing before the Senate Committee on the Judiciary*, S. Hrg. 102-98 at 115, October 29, 1991, written statement of Jason S. Berman at 119. Mr. Berman, in fact, emphasized that the comprehensive compromise nature of the AHRA was a reason for the Congress to pass it: “Moreover, enactment of this legislation will ratify the whole process of negotiation and compromise that Congress encouraged us to undertake.” *Id.* at 120.

will not be in the position after enactment of this bill of having to enact subsequent bills to provide protection for new forms of digital audio recording technologies.”<sup>6</sup> Moreover, the AHRA was specifically intended to address recordings made from digital transmissions as well as from prerecorded media.<sup>7</sup> We see no justification to undo the provisions of the AHRA that safeguard the right to manufacture, sell and use devices to record transmissions by digital and satellite radio services.

**There Is No Factual Or Principled Basis To Constrain Consumers’ Use Of These Lawful New Products.**

In addition to destroying Digital Audio Broadcasts in their infancy, the RIAA proposals seem aimed at destroying the utility of new consumer products that, like the VCR and TiVo, will enhance consumer enjoyment of music and broaden the market for entertainment programming. Sirius has already introduced a new hand-held device and XM has recently announced new hand-held devices that will allow their subscribers to record and playback content they already have paid for, much like a “radio TiVo.” At the just concluded International Consumer Electronics Show, both devices won awards for their innovation and consumer friendliness. Configured to meet the terms of the Audio Home Recording Act, the only outputs from the Sirius and XM devices are headphone jacks for listening. They do not permit songs or talk radio to be moved to another device in digital form, and thus block the very kind of P2P file sharing that the RIAA has fought in its program of lawsuits against individuals. And yet the music industry apparently wants to keep these award-winning listening devices out of the hands of consumers.

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<sup>6</sup> *Id.* at 111 (emphasis supplied).

<sup>7</sup> 17 U.S.C. § 1001(1), (3) (digital audio recording devices include those primarily designed to copy from transmissions); S. Rep. No. 102-294, 102d Cong., 2d Sess. 65-66 (June 9, 1992) (rules allow one generation recordings of digital broadcast transmissions).

The drive for legislation to constrain digital audio devices seems aimed at killing innovative new products, *even though* the music that these subscribers would record is music they have lawfully received via satellite and for which they have paid a fee, a portion of which goes to the very same record companies that want to kill these products. In addition, the manufacturers of these devices will make the royalty payments established by Congress in the Audio Home Recording Act to compensate for these recordings and will prevent serial copying as required by Congress under the AHRA. In short, even though the record companies already receive millions of dollars annually in royalty payments for the satellite radio transmissions and millions more for the recordings under the AHRA, the RIAA appears to be looking for double protection and triple compensation.

**To Be Analogous To The FCC's Prior Action, Any "Flag" Proposal Would Be Aimed Solely At Mass, Indiscriminate Redistribution Over The Internet By Means Of A Known, Industry Standard Flag Technology That Does Not Hamper Interoperability Within The Home.**

A draft of combined "flag" legislation that was circulated late last week, but has not been introduced, would purport to establish an "audio flag" modeled substantively and, to the extent possible procedurally, on the "video" flag. But this draft appears also to specifically invite impositions against *in-home* consumer recording, as well as explicit constraints on the in-home utility and interoperability of lawful consumer products. In our view this is *not* a "flag" approach aimed, like the original, solely at mass, indiscriminate redistribution of content over the Internet to anonymous entities who have not lawfully acquired it.

The “video” flag (1) referred to a known technical standard, already adopted by the Advanced Television Systems Committee (ATSC), a multi-industry standards-setting organization, (2) was limited in its purpose, in standards and later contexts, to addressing anonymous redistribution outside the home, and (3) underwent a massive and entirely voluntary vetting in the Copy Protection Technical Working Group (CPTWG). The proposal in the “audio flag” portion of the draft bill is none of these things. In fact, the RIAA has never approached any standards-setting organization with any “flag” proposal, nor, for the last 7 or 8 years, has RIAA shown up in the CPTWG *at all*.

To date, no technical specifications have been developed to define an audio flag and there has been no effort by the RIAA to achieve consensus through any voluntary process. As a result, we now see that at least one legislative proposal would bring back the widely criticized procedure at the heart of S. 2048, introduced in the 107th Congress.<sup>8</sup> That bill would have required every digital device of any kind to recognize a “flag” in the information it receives, and restrict copying. It would have given the force of law to a “consensus” proposal from the entertainment and electronics industries. If the entertainment industry withheld its “consensus,” the bill authorized the FCC to mandate the anti-copying technology that all products must use.

Neither the consumer electronics industry nor the information technology industry has ever been willing to accept the idea of a technical mandate under such circumstances. All of the criticisms leveled at S. 2048 in the 107<sup>th</sup> Congress, from all quarters, should apply to any such approach, and we would oppose any legislation that proceeds on such a basis.

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<sup>8</sup> See generally, <http://www.wired.com/news/politics/0,1283,51275,00.html>.

### The Video “Broadcast Flag”

The proposals for a video “broadcast flag” emerged from two forums in which CEA, the HRRC, and various members have been very active – the ATSC, and the Copy Protection Technical Work Group. In ATSC committees, members of the content community for years pushed for a “descriptor” for the purportedly limited purpose of marking content, for possible control over mass Internet transmission. Members of the consumer electronics industry were greatly concerned that such a “Flag” might be abused or used for other purposes, resulting in unwarranted control over consumer devices *inside* the home – something that had never been imposed on free, over-the-air commercial broadcasting. In response to these concerns, the content and broadcasting representatives agreed to clarify that the flag was meant to govern not transmission, but *retransmission*, outside the home.

Our members led in forming a Broadcast Flag work group at the CPTWG, and in drafting a final report. While the concept of a passive “flag” proved simple enough, the digital means of securing content, in response to such a flag, and the potential effect on consumers and their devices, proved controversial and contentious. The pros and cons finally were sorted out in the FCC Report & Order, which specified that the Flag was meant solely to address “*mass, indiscriminate redistribution*” of content over the Internet. This is the Order that the Court of Appeals nullified on jurisdictional grounds. We understand that the sole purpose of any video broadcast flag legislation would be, or at least ought to be, to reinstate the FCC’s authority to pursue the same course.<sup>9</sup>

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<sup>9</sup> Just as there have been superficial and misleading attempts to link the “broadcast flag” with a purported “audio flag,” we suspect that confusion may arise as to another commonly discussed issue, the “Analog

While our members have a variety of views on the FCC action, CEA and HRRC have a couple of very clear concerns:

- First, legislative language circulated and attributed to the Motion Picture Association of America and its members would go well beyond the FCC’s “mass, indiscriminate redistribution” standard, and could be interpreted as constraining distribution on networks *inside* the home.
- Second, the flag regulations were invalidated before they ever took effect. Accordingly, it should be clearly understood that, if new legislation is enacted, manufacturers must be given a commercially reasonable period of time to manufacture and include the necessary circuitry in their devices.
- Third, we have been disappointed to see the “ATSC Descriptor” show up in a number of standards proceedings, proposed by the content industry for uses that go well beyond those originally described to the ATSC.

If the Congress is going to provide more protection to the media industry, it should, simultaneously, safeguard the rights of consumers to enjoy the copyright works that they lawfully acquire. Our testimony to the other body said that, should the Congress move forward with Broadcast Flag legislation, the text of H.R. 1201, the Digital Media Consumers Rights Act (Boucher – Doolittle – Barton) should be part of the package, and we commend this view to your Committee as well.

### **Constraining Lawful Devices Chills Innovation**

While we have voiced many specific concerns today about what some of this legislation would do to consumers and to the use and viability of legitimate consumer products, we must not ignore the overarching issue of technological progress and U.S. competitiveness. While other countries are busy developing their technology industries in order to compete more efficiently with the United States, we face proposals from the

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Hole.” As in the case of a purported “audio flag,” there is one overriding fundamental difference: The proposals we have seen to address the “analog hole” would restrict home copying, not just Internet retransmission. In a House hearing last year we expressed detailed concerns over drafts of such legislation.

content community to suppress technological development on arbitrary or insufficient bases. This is a trend that ought not to be encouraged.

Again, thank you, Mr. Chairman, for the opportunity to appear before the Commerce Committee to address these important issues. We appreciate being asked to be here, and look forward to working with you and your staff as you examine the important issues that have been raised for discussion today.