

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Digital Audio Broadcasting Systems)
And Their Impact on the Terrestrial) MM Docket No. 99-325
Radio Broadcast Service)

**COMMENTS OF THE CONSUMER ELECTRONICS ASSOCIATION
ON NOTICE OF INQUIRY REGARDING DIGITAL AUDIO CONTENT CONTROL**

The Consumer Electronics Association (“CEA”) hereby submits these Comments in response to the Commission’s Notice of Inquiry appended to its Further Notice of Proposed Rulemaking (“FNPRM”) in above-captioned docket.¹ CEA commends the Commission for its continued efforts to “foster the development of a vibrant terrestrial digital radio service for the public.”² CEA supports the Commission’s view that matters involving digital audio content control are not appropriate for a rulemaking at this stage of the DAB conversion process, or perhaps at all.³ CEA firmly believes that the questions asked in the NOI do not provide any basis for the Commission to impose any technical or legal restraint on DAB services or technologies. Further, CEA warns that such restraints threaten to stifle innovation, chill technological progress, and deny U.S. consumers rights upon which they have come to rely.

The Consumer Electronics Association is the principal U.S. trade association of the consumer electronics and information technologies industries, including manufacturers of the

¹ *In the Matter of Digital Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, MM Docket No. 99-325, Further Notice of Proposed Rulemaking and Notice of Inquiry, FCC 04-99 (rel. Apr. 20, 2004) (“*FNPRM and NOI*”).

² *Id.* at 1.

³ *Id.*

television receivers, monitors, and associated electronics, personal digital recorders (PVRs) and video cassette recorders (VCRs) that bring the video marketplace to consumers. Its members design, manufacture, distribute and sell a wide range of consumer products, including digital and analog television receivers and monitors, video cassette recorders, direct broadcast satellite radio (DARS) and television (DBS) equipment, broadcast AM and FM radios, and many similar devices. Our members also design and manufacture unlicensed devices such as Wi-Fi network devices that connect personal computers, PDAs and laptops to peripheral devices and networks, cordless phones, baby monitors, and wireless headsets. CEA's more than 1,500 member companies include all of this country's major consumer electronics manufacturers.

I. GOVERNMENT MANDATES THAT HINDER TECHNOLOGICAL INNOVATION SHOULD BE AVOIDED.

In 1984, the Supreme Court held in the landmark "Betamax" case, that manufacturers and retailers have a right to sell a product if it is capable of any commercially significant non-infringing uses.⁴ In its opinion, the highest court noted that "[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial non-infringing uses."⁵

CEA firmly supports the Supreme Court's "Betamax" decision, and notes that resourceful entertainment industry interests have pursued efforts to limit consumer rights through ill-conceived legislative and administrative proposals. The Commission's NOI is issued in response to one such pursuit.

While CEA respects and supports the intellectual property rights of content owners, it

⁴ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁵ *Id.* at 442.

believes, however, that there should be an extraordinary burden of proof before the government considers imposing a mandate that would hinder technological innovation that enhances the quality and availability of content to consumers, and any such decision should be taken or directed explicitly by the Congress. Accordingly, CEA does not believe that action by the Commission at this time would be either lawful or justified. The Commission has no jurisdictional basis to address the concerns cited by the Recording Industry Association of America (RIAA) because the Congress did not provide for one, either directly in the Communications Act or indirectly via the Copyright Act. The Copyright Act denies to phonorecord producers any licensing authority over the free terrestrial broadcast, analog or digital, of the sound recordings stored on phonorecords. Thus, the law denies any public or private sector venue for the new license administration powers that the RIAA urges the Commission to create.

CEA also opposes any Commission action because there is no demonstrated actual or potential harm, nor is there any specific proposal -- legal, regulatory, or technical -- before the Commission. To the extent that any request for Commission action has been described in general terms, such action would seem to interfere with the technical and legal framework set out by the Congress in the Audio Home Recording Act of 1992 (AHRA)⁶ for the same devices. To the extent the AHRA is to be updated, CEA advises that this falls within the purview of Congress, not the Commission. In fact, this enormous undertaking is **well beyond** the FCC's

⁶ The Audio Home Recording Act (AHRA) covers any "digital audio recording device," "digital audio interface device," and "digital audio recording medium." A "digital audio recording device" ("DAR") is defined in Section 1001(3) as: "... any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use" A "digital audio copied recording" is defined in Section 1001(1) as: " a reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission." *See* 17 U.S.C. 1001 *et seq.*

jurisdiction.

II. **RIAA SEEKS TO USE A GOVERNMENT MANDATE TO IMPAIR CONSUMERS' ABILITY TO RECORD FREE TERRESTRIAL RADIO BROADCASTING.**

While the RIAA made no specific proposal to Media Bureau staff in its October 2, 2003 letter, it is clear from its letter and from the questions posed in the NOI that the RIAA seeks an administered copy protection solution that would specifically and deliberately impair consumers' ability to make certain home recordings for private, noncommercial use. In seeking a government mandate to preclude, limit, or charge for private, noncommercial home recording of digital radio programs, the RIAA seeks from the FCC a power that the Congress has specifically denied its members: the power to administer, by discretion, the licensing of their content for terrestrial broadcast via non-subscription media. Further, RIAA seeks this power without making even a minimal showing that an actionable problem exists that would justify restraining non-commercial recording of freely broadcast over the air radio programming – a fundamental consumer right.

A. **Free, Over-Air Broadcast of Sound Recordings Are Exempt From Any Legal Obligation to Record Companies.**

The right to control public performance via free terrestrial broadcast does not extend to record companies' interest in sound recordings. Section 106 of the Copyright Act provides for such a right only for sounds recordings transmitted via “a digital audio transmission.”⁷ Section 114(d), however, expressly *exempts* free, terrestrial digital broadcasting from the definition of a “digital audio transmission”⁸

⁷ 17 U.S.C. Sec. 106(6).

⁸ Section 114(d) provides as follows:

(d) *Limitations on exclusive right.—Notwithstanding the provisions of section 106(6)—*

(1) *Exempt transmissions and retransmissions.—*The performance of a sound recording publicly by means
(continued...)

Congress added this provision in 1995 to recognize the arrival of the digital age, and it specifically maintained the exemption from license control when planning the transition from the analog era. In preparation for and acknowledgement of the digital age, and in full recognition of the FCC's pursuit of digital radio standards, Congress clearly and explicitly drew the line between those services that would be subject to a license, and those services – primarily, free terrestrial broadcasts -- that would remain free of license.

Congress' decision *not* to grant license rights to phonorecord producers in the digital age reflected and reiterated a longstanding policy: that the broadcast of sound recordings would *not* be the subject of any legal obligation from a broadcaster to the producer of a phonorecord. CEA believes that Congress' decision reflects a clear judgment that further reinforces the limits on what the Commission can and cannot address.

B. Any Regulatory Proceeding Regarding Content Control Would Require Thorough Congressional Review Of The Audio Home Recording Act of 1992 (“AHRA”).

Any Commission action regarding content control without addressing the AHRA would be unfair and imprudent, in addition to being illegal and (in light of specific congressional exemption and legislation) unconstitutional. It would be unfair because manufacturers, retailers, and consumers already suffer impositions on these products. These impositions were “bought” in exchange for a clear expectation of their quiet enjoyment – that DAR products would now be *exempt* from further imposition in the name of copyright. It would be imprudent because it would further distort a marketplace that is already reeling from uneven application of the law,

(...continued)
of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—
(A) a nonsubscription broadcast transmission. 17 U.S.C. Sec. 114(d) *et seq.*

and unintended consequences.

The FCC is not invested with the power either to interpret the AHRA authoritatively, or to change it. Nor can the FCC ignore the AHRA. If it is to address to act on the proposals put before it by the RIAA, it must wait for the Congress to act. Therefore, the FCC must wait not only for the Congress to invest it with jurisdiction to impair broadcasts and to impose copy protection requirements on DAB receivers; it must also wait for Congress to change or clarify the AHRA. Pending such action by Congress, the Commission has no authority to act in these schemes, with respect to broadcasting and digital audio recorders, that have been established by the Congress.

III. THERE IS NO EVIDENCE OF PRESENT OR FUTURE HARM SUFFICIENT TO FORM A BASIS FOR REGULATORY MANDATE.

A. RIAA Fears A Combination of Features and Functions That Have Been Available For Several Years.

The Commission noted in the FNPRM, that “[i]n many ways, the move to DAB is similar to the transition from black and white to color television in the 1950s and 1960s”⁹ DAB is not a radical shift in service, rather, it is an enhancement to an existing one. Further, all parts of a DAB receiver are neither radically new, nor could one assume that any new feature or function is a consequence of the introduction of DAB reception. Currently, metadata coding of broadcasts, “PVR”-type functionality, and software to organize recordings on hard drives are all readily available to device manufacturers, and have been for some time.

- The “Radio Broadcast Data System” (“RBDS”) is already available to FM broadcasters and manufacturers of FM receivers, and can include “metadata” sufficient for the playlist cataloging of a song’s storage on a PVR-type or

⁹ *FNPRM and NOI* at 17.

other medium.¹⁰

- Storage on a PVR-type “hard drive” is available whether the original material is received in analog or digital form. A song carried via an FM signal may be very inexpensively converted for storage, to one of the same compressed digital audio formats in which songs carried over digital media are stored. There would be very little difference in quality, particularly after the compression.
- The use of software applications to organize audiovisual, audio, or other data on a “hard drive” does not depend on how the data was transmitted before it was stored digitally. Hence, digital storage and organization have been, and will continue to be, available for content received via FM broadcast to the same extent they will be with respect to DAB.

Nothing about DAB is unique with respect to the capabilities or conduct about which the RIAA expresses concern. As the Commission aptly noted, the introduction of DAB functions will be an enhancement, not a replacement, for analog signal acquisition. In fact, IBOC DAB tuning will *depend* on analog signal acquisition. One also could reasonably assume that any device with the capabilities about which RIAA expresses concern also could be available for FM broadcasts, and even possibly for AM signals and compact discs. Since the inception of FM radio, RIAA has *never* requested such an imposition on FM broadcasting. So, one must question the absurd result of imposing impairments on DAB broadcasts, but not on FM broadcasts, which are comparable in quality and received by the same device at the same time.

B. DAB Service Is Well Established in the United Kingdom.

Although a different technical standard is employed in the United Kingdom, many of the available receivers also incorporate FM reception.¹¹ More than 300,000 DAB receivers were sold in the U.K. in the last year alone,¹² and the NOI cites an even higher acceptance rate. The issues over which the RIAA has expressed concern simply have not arisen; the experience in the

¹⁰ See <http://www.rds.org.uk/rdsfrdsrbds.html>.

¹¹ See <http://www.radioandtelly.co.uk/dab.html>.

¹² http://www.rwonline.com/reference-room/skippizzi-bigpict/06_rwf_pizzi_march_28a.shtml

U.K. has not produced the results that RIAA fears. There is no reason to believe that the results will differ in the U.S.

C. RIAA Fails to Show That The Feared Consequences Would Outweigh The Harm To Consumers From The Imposition Of Regulatory Measures.

Neither the NOI nor the RIAA provide any rational basis for balancing the alleged benefits of impairing consumer DAB use against the considerable harm to consumers from doing so. Without a plan or proposal, CEA finds it difficult to understand RIAA's assertions that regulatory measures are needed, the industry projections of "harm," or the projected impact on consumers.

CEA asserts that even with relevant data, the RIAA faces an uphill climb to overcome the historical judgment of the Congress that record companies do not have the power to prevent the free terrestrial broadcast of sound recordings; the fact that such broadcasts have never been protected against recording, and that no lawsuit has ever been filed challenging such recording. The RIAA must clear a high bar even to suggest any future "harm" attributable to the approval of DAB services.

IV. NO SPECIFIC PROPOSAL HAS BEEN PUT FORWARD, BUT THE OUTCOME IS LIKELY CONTRARY TO FAIR USE PRINCIPLES.

The FCC's inquiry on DAB dates back to 1990, with the present docket dating back to 1999. The music industry's first appearance in the docket was an *ex parte* filing that occurred this year (2004) as the Commission was proceeding toward the present NOI. In the fourteen years that the FCC has been studying this subject, the music industry apparently concluded that it lacked the interest or the standing (or both) to make any technical proposal, and indeed it still has not done so.

A. RIAA's Lack Of A Specific Proposal Is Telling.

The lack of a specific proposal to accompany RIAA's approach to the FCC signifies several things – lack of legal or substantive connection to the medium in question; lack of prior involvement due to lack of connection on the merits; lack of experience due to lack of prior involvement; lack of any licensing connection due to all of the above. These deficiencies will not be cured by RIAA finally cobbling together a quasi-legislative proposal. They illustrate the lack of a deeper problem – lack of any basis or rationale for FCC involvement. Further, RIAA fails to identify any benefit to consumers through the imposition of a regulatory, technological regime. In CEA's view, there is no positive outcome for consumers in the present NOI.

Despite RIAA's speculation and extrapolation, there is nothing yet to indicate that: (1) manufacturers will make the types of devices that the RIAA fears; (2) consumers will buy them in large numbers; or (3) that if they will be used only to negative effect. With respect to DAB reception, the extent to which customary consumer expectations would be circumscribed has not yet been defined. CEA asserts that if the RIAA truly believed that there was something pertaining to the DAB service that required a unique lowering of expectations, then it was obliged to raise its concerns when this docket was initiated in 1999. CEA believes that nearly five years into this proceeding, it is simply too late to raise a new consumer usage paradigm, with consumers as the victims, or as RIAA would have it, the suspects.

After nearly ten years of Commission and private sector work, digital radio is on the verge of introduction. Radio stations are broadcasting on an experimental basis, and digital radios were displayed and well-received at the 2004 International Consumer Electronics Show. Any last-minute attempt to impose ill-conceived limitations on devices and consumers will introduce uncertainty into the marketplace, warn away consumers, and frustrate the fundamental goal of revitalizing the AM and FM radio bands.

VI. CONCLUSION

Without any evidence of harm to home recording of digital radio, CEA believes that issues regarding digital audio content control are inappropriate for a rulemaking at this critical stage of the DAB conversion process. To forestall technological innovation and deployment would wholly disserve the public interest. CEA urges the Commission to proceed with the rapid deployment of DAB services and technologies to fully serve the interests of U.S. consumers and industry.

Respectfully submitted,



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