

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

To: The Commission

**REPLY COMMENTS OF THE AMERICAN SOCIETY
OF COMPOSERS, AUTHORS AND PUBLISHERS**

The American Society of Composers, Authors and Publishers (“ASCAP”) submits these reply comments in the above captioned proceeding pursuant to the Further Notice of Proposed Rulemaking and Notice of Inquiry adopted by the Commission April 15, 2004 and released April 20, 2004. ASCAP applauds the Commission’s attention to the matters in this proceeding and respectfully requests the Commission to take into account the following points: (1) The Commission must balance the benefits of digital audio broadcast radio (“DAB”) with the need to respect copyright; (2) the Commission must respect Congress’ carefully crafted scheme of exclusive rights in copyrighted works; and (3) any adopted copy control process must permit ASCAP, and other performing rights organizations, to monitor the performances in DAB broadcasts through automated digital methodologies.

I. The Commission Should Focus its Rulemaking Power to Ensure the Growth and Viability of Digital Broadcast Radio.

ASCAP represents hundreds of thousands of songwriters, composers, lyricists and music publishers who create and own the copyrights to millions of musical works in the licensing of the public performances of such musical works via broadcast radio. Accordingly, ASCAP possesses a strong interest in this proceeding and in ensuring a healthy, robust future for radio broadcasting. However, ASCAP possesses an even stronger interest in ensuring the continuation of the creative process that results in the music that helps keep radio vibrant. The Commission must recognize that a balance must be made to ensure the viability of both interests.

In an industry where interests do not always align, the fact that the music copyright community and broadcasters alike share support for DAB speaks volumes.¹ Broadcast radio has long been a national treasure, in large part because it permits the public, who have otherwise little access or means to enjoy music – both old and new – to receive a world of music at their fingertips.

As the Commission noted, and as many commentators discussed, DAB technology has the ability to take the benefits of radio to an unprecedented level.² First, DAB will offer a “dramatic improvement in audio quality” that will transform FM broadcasts into near-CD quality and AM broadcasts into a higher quality currently possessed by FM broadcasts. Second, the use of metadata will permit listeners to have the real time ability to identify broadcast songs and artists – a benefit lost in the modern preprogrammed broadcast world where such information is

¹ See, e.g. Comments of Cox Radio 9-10 (“Cox believes that the interests of radio broadcasters are aligned with RIAA’s”); Comments of the National Music Publishers’ Association (“NMPA”) at 3-4 (“NMPA welcomes the fact that music lovers around the country will be able to enjoy listening to their favorite songwriters and artists with digital quality.”)

² See Comments of the Recording Industry Association of America, Inc. (“RIAA”), Comments of Cox Radio, Comments of NMPA.

not easily obtained. Third, DAB technology will permit digital “multicasting” by a single broadcast station. This will enable stations to broadcast multiple genre programming, effectively promoting broadcast diversity.

The effects of these advancements are straightforward: A greater forum and audience for songwriters’ music will exist, and radio, which has been criticized by many to having fallen into a conglomerate blandness, will blossom. Audiences, with greater access to more varied programming, broadcast in digital clarity, will flock to this new musical experience.

However, as numerous commentators have made clear, digital advancements, despite their benefits, do have drawbacks. As the Commission acknowledged in both the Cable Plug and Play and Broadcast Flag proceedings, the potential for piracy will increase as DAB technology advances.³ Commentators have detailed the likelihood that the aforementioned DAB benefits will unfortunately in turn lead to copyright piracy.⁴ As those commentators explain, available technology will permit consumers to selectively record specific songs or programs, fast-forward/rewind through such content at will and freely distribute such content digitally.⁵ It is feared that this, in turn, will cause consumers to avoid purchasing music legally as perfect digital copies can be downloaded via DAB for free, and users will be able to illegally share such music via the Internet or through other means.⁶

Such unbridled piracy may have two potentially interrelated devastating effects. First, unchecked DAB will likely have an economic impact on the music industry. While ASCAP does not represent its members in the collection of royalties from the reproduction and

³ *In re Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility between Cable Systems and Consumer Electronics Equipment*, Further Notice of Proposed Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67, FCC 03-3 (2003); *In re Digital Broadcast Content Protection*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 02-230, FCC 03-273 (2003).

⁴ Comments of the RIAA at i.

⁵ *Id.* at i-ii, 12.

⁶ *Id.* at i-ii.

distribution of copyrighted works – the paramount concern of the owners of sound recordings and a concern of songwriters and music publishers as well⁷-- ASCAP licenses the performance of musical works over radio. As more fully discussed below, to the extent DAB influenced piracy negatively affects radio broadcasters' transmission of music, such piracy may affect ASCAP's members' ability to generate performance royalties and may inhibit creativity.

Second, and possibly of greater concern to the Commission, piracy threatens the viability of DAB itself. A successful launch of, and ultimate transition to, non-subscription DAB relies on two essential needs. Radio broadcasting relies on advertising as its main source of revenue. Moreover, radio broadcasters require an audience to listen to their programming in order to draw advertising dollars, it being presumed by advertisers that an audience to the radio content of a particular station will likewise be an audience to their advertising. As some commentators have argued, technology that permits uncontrolled reproduction and redistribution of digital broadcasts as well as the ability to easily skip advertising will threaten both broadcaster needs.⁸

Copyright owners who fear the release of their works to digital radio broadcasters will threaten their income stream will withhold, or limit, such release. Effectively, broadcasters will have a reduced access to newer works, which will in turn threaten a reduction in audience and a consequential reduction in advertising revenue, thus threatening the viability of DAB.⁹ Moreover, technology that permits consumers to obtain a Tivo-like ability to skip over advertising, may pose a similar threat to advertising revenue, which will, in turn, threaten DAB's success.¹⁰

⁷ The interests of the music publishers with regard to the earning of royalties from the reproduction and distribution of musical works (i.e. "mechanical royalties") are represented by the National Music Publishers' Association ("NMPA").

⁸ Comments of RIAA at 29.

⁹ See Comments of NMPA at 8-9.

¹⁰ See Comments of RIAA at 29.

The Commission should not gloss over these concerns. DAB technologies offer innumerable benefits to the public. Digital broadcasts, offering CD-quality varied programming, should support, not inhibit, creativity. ASCAP respectfully urges the Commission to focus on means to balance these benefits with the unfortunate burdens associated with digital transmission technologies.

II. The Commission Should Recognize the Myriad of Rights Afforded to Creators Under the Copyright Law.

Unless carefully considered, DAB threatens to eviscerate the carefully balanced scheme of exclusive rights of, and associated income streams to, copyright owners. The Commission should not upset Congress' intentions and copyright owners' revenue expectations.

The fundamental root of copyright law relies on the notion that the creation of artistic works is dependent upon granting creators exclusive rights in their works and thus the ability to control the use of their works and receive, or not to receive at their will, compensation for such authorized uses. As the comments of the Recording Industry Association of America, Inc.

(“RIAA”) expound:

Time and again, Congress has acted to assure that technology that enhances the ability of users to [use] creative works does not deprive the creators of those works of the compensation that is necessary to assure that the public will receive the benefit of a steady supply of new works. * * * The details of these numerous statutes vary widely, but one overarching policy is clear: to stimulate creative effort – creators should be able to reap the economic rewards from the exploitation of their works.¹¹

Implicit in this granting of exclusive rights is the idea of a “bundle” of rights. In other words, because creative works can be used in various ways, copyright owners enjoy the

¹¹ Comments of RIAA at 34-35.

exclusive right to separately control these various uses of their works and to be separately compensated for each type of use.¹²

By virtue of the different exclusive rights granted by Congress, creators have numerous means by which to exploit their works. Thus, for example, a songwriter can authorize the reproduction of his or her song in a recording, then authorize the further reproduction of that song, as recorded, in a motion picture or television program, and still retain the right to authorize the performance of the song on television when performed as part of the program, or separately to permit the performance on radio. The examples of exploitation are nearly endless. Yet, the songwriter expects, and has a right to demand, compensation for each of these uses. The songwriter receives payment separately when the song is recorded, when it is used in the audiovisual work and for the different performances.¹³

This core principle of multiplicity of rights has a major corollary. The application or adoption of one right should not negatively affect another right. Congress responds to the advent of new technologies by carefully ensuring that creators received extended protection for new types of works and types of uses.¹⁴ Yet, implicit is an understanding that an expansion of one right should not affect a separate right that might be affected by a given technology; copyright owners control and receive compensation for each separate right. Of most recent example, digital technologies prompted Congress to extend protection to certain digital performances of copyrighted sound recordings.¹⁵ While certain digital performances of copyrighted sound recordings enjoy copyright protection,

¹² See 17 U.S.C. §106.

¹³ As mentioned above, ASCAP represents its members in granting licenses for all such performances.

¹⁴ See Comments of RIAA at 34-35 fns. 118 & 119.

¹⁵ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, Sec. 3, 109 Stat. 336; Digital Millennium Copyright Act, Pub. L. No. 105-304, Sec. 405(a), 112 Stat. 2860.

one who makes such a performance must still receive separate authorization from, and give fair compensation to, the copyright owner for the performance of the musical work that underlies the sound recording. Indeed, Congress specifically recognized that principle when creating the new digital performance right in sound recordings.¹⁶

Accordingly, it is crucial for the Commission to recognize that digital radio will affect several rights and their separate associated streams of compensation.

Commentators that have alleged that DAB broadcasts are exempt from licensing requirements¹⁷ are flat out wrong. While the current Section 114 does not extend its reach to digital over-the-air broadcasts, even if it were so extended, the performance right in the underlying musical work would separately apply to such transmission, as the core nature of the music broadcast – entertainment and enjoyment – has not changed.¹⁸ And, copyright owners of the musical work – ASCAP members – would expect fair compensation for such transmissions.

While in the ordinary course, radio broadcasts are one of the major means by which songwriters earn their living, the comments of the National Music Publishers Association (“NMPA”) have argued that DAB broadcasts that compete with, and

¹⁶ 17 U.S.C. §114(i) states “It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).” Section 114(d)(3)(C) explicitly provides: “Notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6) [in sound recordings], an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance on any copyrighted musical work contained in the sound recording” See also 17 U.S.C. §115(c)(3)(K) (digital reproduction right shall not affect the exclusive right of performance).

¹⁷ See Comments of iBiquity at 33; Comments of the Home Recording Rights Coalition at 5.

¹⁸ The NMPA describes the “change of radio broadcast from solely a public performance that promotes sales of copies.” It should be stressed that songwriters are not paid performance royalties because such performances promote record sales. While songwriters may enjoy mechanical royalties associated with sales, songwriters care about and rely upon remuneration from the performance separate and apart from sales. Broadcasters pay performance royalties due to the benefits (e.g. revenues) they receive from providing musical entertainment to its audiences. As noted above, DAB will not alter this core benefit of providing musical entertainment.

negatively effect, record purchases – and the associated mechanical royalties due songwriters – may have the unintended consequence of forcing copyright owners to choose between performance and mechanical income streams.¹⁹ However, as there is no performance right for digital radio broadcasts of sound recordings, owners of sound recordings would not be forced to make such a choice – faced with a threat of diminished sales record companies would do whatever they could to keep new releases from radio broadcast. The unfortunate result of the record companies’ preventative actions, if successful, would be a loss of new content on radio and a drastic blow to the writers of new songs who would lose a major stream of supporting income – their performance royalties.

The Constitutional empowerment to Congress to “promote the Progress of Science and useful arts” in the copyright clause²⁰ has been carefully followed by Congress in ensuring copyright owners that they will be fairly compensated for the different uses made of their works. The resulting multiplicity of income streams has shaped and fueled the industry, permitting more songwriters to write more songs. The Commission, in acting in this proceeding, should be cognizant of the drastic effects that may occur if this applecart is upset.

III. The Commission Should Give an Exception to Performing Rights Organization in Promulgated Copyright Control Regulations for the Monitoring of Music Performances.

The RIAA has proposed two different copy control schemes: encryption and broadcast flag. Each method incorporates usage limitations and will limit digital audio output using robust and approved technologies that will prevent unauthorized

¹⁹ See Comments of NMPA at 8.

²⁰ U.S. Const., art. I, § 8, cl. 8.

redistribution.²¹ Essentially, copy control mechanisms will be mandatory on DAB receivers to respect usage and redistribution limitations.

AS ASCAP explained in its initial comments and expressed in joint comments it filed in the Cable Plug & Play and Broadcast Flag proceedings, ASCAP must monitor radio (as well as other media) broadcasts in order to accurately credit and distribute royalties for its members' performances. For years, ASCAP was limited in its ability to monitor due to the number of broadcasts on thousands of radio stations occurring throughout the day. With advances in technology, ASCAP has been able to more effectively monitor broadcasts. Specifically, ASCAP has started to utilize advanced fingerprinting methodologies that identify songs based on their unique characteristics through the use of specific algorithms. A database of song fingerprints can be matched against a radio broadcast, permitting a computer to automatically account for every song performed in that broadcast.

In order to utilize this fingerprint monitoring system, however, ASCAP, or its agent, must have the ability to transmit, and retransmit if necessary, such radio broadcasts through the fingerprint database's computer systems. While the RIAA proposal is nascent and lacks detail, it appears that its intention is to prohibit output of the broadcast from licensed receivers, output which is necessary for ASCAP to perform its business practices. Indeed, the RIAA lists fingerprinting technologies as one of the types of "developing technologies that * * * will contribute to unauthorized use of DAB."²²

The RIAA may argue that DAB will not alter current analog broadcasting, the broadcast method to which ASCAP's monitoring technologies are currently geared, and

²¹ RIAA Comments, Report of Jeff Hamilton at 8.

²² Comments of RIAA at 76-77.

will therefore have no effect on ASCAP's ability to monitor using fingerprint technologies. Similar arguments were made against ASCAP in the Cable Plug & Play and Broadcast Flag proceedings. However, as ASCAP explained to the Commission, digital broadcasts are an obvious advance in technology, and ASCAP should not be cut off from likewise utilizing technological advances in its monitoring operations for digital transmissions. Moreover, it is apparent that DAB will not only serve to parallel the analog radio broadcasts, but will also give broadcasters the ability to simultaneously transmit multiple digital feeds that may only be received in digital form (and not analog form). If so, ASCAP must be assured of having the ability to retransmit and reproduce for monitoring purposes these additional DAB transmissions at a reasonable expense.²³

Accordingly, ASCAP respectfully requests the Commission that to the extent it promulgates regulations, or otherwise acts, to establish copy control, it specifically respects the operations of those who represent the creators and copyright owners of works being performed and require the ability to retransmit DAB transmissions for the purpose of performance monitoring. Such respect can be accomplished through an exemption grant or mandatory gratis licensing of decryption or other technologies to permit monitoring.

Of course, ASCAP wishes to do nothing other than respect copyright interests. Indeed, its monitoring systems were established for that very purpose. ASCAP will cooperate with the Commission, the RIAA and others to ensure that ASCAP's utilization of DAB transmissions for monitoring purposes is done in such a way that respects copy control usage rules and maintains security and confidentiality.

²³ Availability of DAB transmissions at a reasonable expense is crucial, as iBiquity is the sole DAB technology provider recognized by the Commission. The Commission should ensure that iBiquity does not use its monopoly power to control the use of the transmission in a noncompetitive manner.

Respectfully submitted,

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