

**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)

**Reply Comments of the Home Recording Rights Coalition
On Notice of Inquiry Re Digital Audio Content Control**

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August 2, 2004

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In its Comments filed on June 16,¹ HRRC argued that action by the Commission at this time would be neither lawful nor 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.
- It is the Copyright Act that denies to phonorecord producers any licensing authority over the free terrestrial broadcast, analog or digital, of the sound recordings stored on phonorecords.
- Hence, the law denies any public or private sector basis or home for the new license administration powers that the RIAA is urging the Commission to create.
- To the extent RIAA has spelled out the action it seeks from the Commission, such action would seem to interfere with the technical and legal schema set out by the Congress in the Audio Home Recording Act of 1992 (AHRA) for the same devices.
- To the extent the AHRA is to be updated, modified, reinterpreted or repealed, this is a job for the Congress rather than one the Commission could possibly begin to tackle.

¹ *In the Matter of Digital Audio 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 (“NOI”) (Rel. Apr. 20, 2004); Comments of the Home Recording Rights Coalition On Notice of Inquiry Re Digital Audio Content Control (June 16, 2004) (“HRRC NOI Comments”).

The comments by other entities, including the RIAA,² do not provide any basis for revisiting or questioning these conclusions. Rather, the RIAA has endeavored to weave a blanket of support out of *gaps in*, rather than provisions of, existing law. By curious logic, RIAA argues that Congress's *failure* to provide RIAA's members with any protection for free over-air broadcasts in either the telecommunications law or the copyright law must mean that Congress *intended* – without giving the slightest such indication – for the FCC to do so. This thesis can withstand neither precedent nor analysis.

I. THE RIAA IS ASKING THE COMMISSION TO REWRITE RATHER THAN IMPLEMENT THREE LAWS ENACTED IN THE LAST TWELVE YEARS.

The RIAA Comments seem a remarkable example of turning night into day by citing three Congressional enactments, in the last dozen years, that *specifically excluded* conferring the rights that the RIAA now asks the FCC to manufacture. Somehow, this is supposed to be translated into a congressional mandate, authorization, or grant of jurisdiction. To so interpret these omissions gives new meaning to the term “Congressional oversight.”

A. The Audio Home Recording Act Covered Much More Than RIAA Now Avers, And Remains An Intractable Obstacle To The Quasi-Legislative Agenda Now Urged On The FCC.

RIAA's novel cloaking of the Audio Home Recording Act (AHRA) as essentially irrelevant to the products and conduct that it now asks the Commission to regulate fits poorly on the frame of the group that (with HRRC and others) negotiated, drafted, presented, and explained this legislation to the Congress. The history of this legislation, and its provisions, belie each of the remarkable claims and twists that the RIAA now makes.

The AHRA evolved from a multi-year negotiation that began with consumer electronics manufacturers and the RIAA, and ultimately included the entire music industry, the consumer

² Recording Industry Association of America, Inc. (“RIAA”) NOI Comments.

electronics industry, the HRRC, and others. In the 1992 hearings on H.R. 3204, composer George David Weiss, on behalf of the © Copyright Coalition – an umbrella group of music industry proprietor interests – explained to a subcommittee of the House Judiciary Committee the history, evolution, scope, and meaning of this legislation.³ He said:

“I am here today to describe why I and the organizations that I represent so enthusiastically support H.R. 3204. In so doing, I hope it will become clear ... that a delicate balance has been achieved in this legislation between the desire to provide the newest technologies for the American public, on the one hand, and the need to protect the vital interests of music creators and copyright owners on the other. The balancing of these interests in H.R. 3204 represents an historic achievement, which – if enacted into law – will end more than a decade of controversy that has consumed the energies of many people in both government and industry and has delayed the availability to the public of exciting new means for the enjoyment of music. ***

[I]t is important to emphasize that H.R. 3204 does address the issue that in the past has been most crucial for the creative music community – the substantial threat that we believe is posed by unlimited, uncompensated digital home taping. By providing for a modest royalty and a copy limiting system, the bill implicitly recognizes the need to protect intellectual property rights and the economic well being of the American music industry. ***

To break the impasse and address the various issues posed by audio home recording, H.R. 3204 combines three key elements from previous proposals.

The first addresses a central concern of consumers. The bill makes clear that consumers copying for private, non-commercial use, whether in digital or analog format, cannot be the subject of a copyright infringement suit.

The second element is a system of modest royalty payments, designed to partially compensate music creators and copyright owners for digital audio copies made by consumers. ***

The third element involves a technological limitation – the Serial Copy Management System – on the recording capability of nonprofessional digital audio recording equipment. ***

³ *Audio Home Recording Act of 1991: Hearing on H.R. 3204, Audio Home Recording Act of 1991 Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102nd Cong. 159-166 (1992) (Statement of George D. Weiss, on behalf of the Copyright Coalition.)* A copy of Mr. Weiss’s testimony, as published by the Committee, is attached as an Appendix.

This carefully balanced package therefore provides substantial benefits to each of the affected parties. First, for creators and music copyright owners, it will provide compensation for digital copying of our music and will thereby stimulate creativity. Second, by removing the legal cloud that has surrounded digital recording technologies, manufacturers and importers will finally be free to bring their new products into the American market without concern about copyright infringement lawsuits.”

This accurate explanation of the origins and scope of the AHRA is a far cry from the tortuous arguments and explanations now put forward to the Commission. While RIAA’s uncertainty, today, about the ultimate scope of the AHRA can be justified, the interpretations and assertions made in its Comments cannot be.

1. The AHRA Covered More Than “DAT” Recorders.

First, it is directly contrary to the language of the Act, and to a history and evolution that the RIAA knows as well as anyone else, to claim that the AHRA was inspired by and targeted at “only” digital audio tape (“DAT”) recorders, and not at other existing and future digital recording products. Mr. Weiss explained to the House Judiciary subcommittee that his music industry coalition opposed the “DAT Bill” in the previous Congress precisely *because* it was addressed only to a single, tape-based format, and not to other future digital audio recording techniques:

“When the © Copyright Coalition was originally founded ... our initial concern was focused on legislation introduced in 1989 that would have relied solely on a technical fix – the Serial Copy Management System – to address the copyright issues raised by the advent of digital audio tape (DAT) technology. *** We opposed the bill principally because it did not represent a comprehensive solution: first, it did not provide for compensatory royalties to creators and copyright owners; and second, *it applied only to DAT technology, not to all recording systems.*

In part due to the objections expressed by the © Copyright Coalition, Members of Congress urged the various interests to go back to the negotiating table, and to return when we had reached an agreement. With these negotiations successfully concluded, the Coalition can now express its unqualified support for H.R. 3204 because this bill does represent a comprehensive solution. ***

Because H.R. 3204 extends to *all analog and digital audio recording devices, whether now known or later developed*, you will be spared from having to consider separate legislation each time a new audio recording format is developed.”⁴

Jay Berman, President of the RIAA (now head of IFPI), explained to the Senate Judiciary Committee why the RIAA subsequently *backed out* of supporting the 1989 “DAT Bill,” and reopened private sector negotiations to achieve the AHRA – a much more comprehensive bill to cover Mini-discs, recordable Compact Discs, and “other formats that, quite possibly, haven’t even been conceived of yet.”⁵ He recounted specifically why RIAA had come to insist, successfully, that the AHRA must cover all formats, not just the DAT format:

“Mr. Chairman, not everyone concurred that our agreement jointly to advance Serial Copy Management System (“SCMS”) legislation, last year’s S. 2358, represented substantial progress, but it was the right first step. Some, including our partners in the songwriting and music publishing community and a number of our friends in Congress, felt that the agreement did not go far enough, for two reasons: First, it addressed only DATs, *rather than digital audio recording technology generically*. Second, it did not provide for royalties.

It became clear, particularly as the new DCC technology was revealed during consideration of that legislation, that *a step-by-step approach to legislation was not practical* for the marketplace or for Congress. So we joined hands with our colleagues in the music industry and sat down once again with our new friends in the consumer electronics industry. As you can see today, that exercise was successful. *** *S. 1623 is a “generic” solution in that it applies across the board to all digital audio recording technologies. Congress will not be in the position after enacting this bill, as it might have been with prior bills, of having to enact subsequent bills for new forms of digital audio technologies.*⁶

⁴ *Id.* at 160-168. Underlined emphasis is in original; bolded emphasis supplied.

⁵ *The Audio Home Recording Act of 1991: Hearing before the Subcomm. On Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, S. Hrg. 102-98 at 115 (1991) (Statement of Jason S. Berman.) (“*Senate Judiciary AHRA hearing*”).

⁶ *Id.* at 117 - 118, 120. Underlined emphasis in original; bolded emphasis supplied. As passed by the Senate, S. 1623 contained the Technical Reference Document (“TRD,” referred to now in RIAA’s Comments as specifically referencing only “DAT”) with the same text in which it was cited in the House legislative history. In other words – the TRD did not change between Mr. Berman’s testimony, touting its comprehensive coverage, and the final enactment of the AHRA.

2. RIAA's Present Uncertainty About the Scope of "SCMS" Is A Reason That The FCC Must *Refrain* From Usurping The Jurisdiction Of Another Agency And Of The Courts.

An RIAA observation more firmly grounded in reality is that the AHRA, as enacted, has left the precise scope and definition of the "Serial Copy Management System" ("SCMS") in some doubt, both legally and technologically. However, this uncertainty is a reason the Commission *cannot* and *should not* intervene – not a reason that it should.

While it is true that uncertainties persist, RIAA presents a less than accurate picture. RIAA suggests that the Act and the "Technical Reference Document" ("TRD")⁷ provide for only two possible "flavors" of SCMS – (1) the example fleshed out in the TRD, and (2) some additional implementation if approved by the Secretary of Commerce. Actually, the Act offers *four* alternatives, of which three are evident from the text:

"§ 1002 Incorporation of copying controls

(a) Prohibition on Importation, Manufacture, and Distribution.—No person shall import, manufacture, or distribute any digital audio recording device or digital audio interface device that does not conform to—

(1) the Serial Copy Management System;

(2) a system that has the same functional characteristics as the Serial Copy Management System and requires that copyright and generation status information be accurately sent, received, and acted upon between devices using the system's method of serial copying regulation and devices using the Serial Copy Management System; or

(3) any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying.

(b) Development of Verification Procedure.—The Secretary of Commerce shall establish a procedure to verify, upon the petition of an interested party, that a system meets the standards set forth in subsection (a)(2)."

⁷ H.R. Rep. No. 102-780 pt. 1, at 32-50 (1992).

The Act does not define the Serial Copy Management System. As RIAA notes, the TRD (included in the version of the AHRA passed by the Senate⁸ and which the Energy & Commerce Committee references in a committee report⁹) gives only one detailed example (IEC958 / 60A) of SCMS operation. However, the TRD *also* lays a broader, functional requirements description that appears intended to apply to additional means of marking content and reading the marks.¹⁰ Therefore, there are several possible flavors of “SCMS”:

- (1) As described in 1002(a)(1) via reference to the functional requirements set forth in Part II.(A)¹¹ of the TRD;
- (2) As described in 1002(a)(1) via the specific example set forth in Parts II.(B) and (C) of the TRD;
- (3) Via a *de facto* implementation in the marketplace that may or may not be *verified* by the Secretary of Commerce under 1002(a)(2); or
- (4) Via a *de jure* implementation proposed to the Secretary and *certified* as compliant.

This statutory scheme is plainly at variance with RIAA’s present attempt to describe the law as one inspired by and addressed only to “tape” recorders, and limited by the Congress to a single technical mode of implementation. This much is clear beyond dispute:

- The interpretation of the AHRA has been, and is, up to the courts, not the FCC.
- Two of the four means of implementing technical measures, with respect to digital audio recording, are up to the Secretary of Commerce, not the FCC.
- Any future clarification, re-direction, or repeal of the AHRA is up to the Congress, not the FCC.

⁸ S. Rep. No. 102-294, at 17-30 (1992); 138 Cong. Rec. S8723-S8730 (1992).

⁹ H.R. Rep. No. 102-780 pt. 1, at 32-50 (1992).

¹⁰ *Id.* at 41-47.

¹¹ “A. General Principles for SCMS Implementation in DAR Devices—To implement the functional characteristics of SCMS in DAR devices, *whether presently known or developed in the future*, the following conditions must be observed” *Id.* at 42 (emphasis supplied).

3. RIAA Cites The *Rio* Case With Respect To The Wrong Devices.

Acknowledging that courts do have the power to interpret and apply the AHRA, the RIAA engages in what can be described as only a *sleight of hand* reading of the *Rio* case to make an argument that virtually none of the devices it is asking the FCC to regulate would be covered by the AHRA. In so doing, RIAA obscures:

- the court's actual holding, which applied to portable devices that make copies *from* a general purpose computer hard-drive recorder. The *Rio* holding was *not* addressed to the sort of PVR-type recorder that the RIAA is asking the FCC to regulate technologically; and
- the relevance of spoken-word recordings (not covered by the AHRA), by suggesting that, *e.g.*, a car-based recorder will not be covered by the AHRA because it would record spoken words more often than it would songs.

The Ninth Circuit held in the *Rio* case that the *Rio* MP3 player was not covered as a “DAR” because its source – a computer hard drive – was not a “digital musical recording.” While the MP3 player passed the test that its *primary purpose* was to record music, it did not pass the additional requirement that the *source* of such music must be a transmission or a substrate that contains “only sounds.” The court observed that a computer hard drive’s contents are not limited to “only sounds,” so that computer hard drives were not the “digital musical recordings” to whose copying the AHRA was addressed.¹²

The court did *not* hold that *all* potential hard drives – such as a car-based “personal audio recorder,” or “PAR” – were not covered by the AHRA. Indeed, the status of the *computer hard drive* as a DAR was not before the court at all. Therefore, the *Rio* court held *nothing* on the subject of whether a dedicated musical recording device, as in a car, whose primary purpose is to

¹² *RIAA v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1076 (9th Cir. 1999).

receive and store transmissions from an off-air tuner rather than from a PC, would be “covered” by the AHRA, or if so, what technical responsibilities would be imposed on it.¹³

Apparently recognizing the frailty of its argument, RIAA then falls back on the proposition that somehow the AHRA could not apply because it does not apply to non-musical recordings. But this is a *non-sequitur*. The AHRA applies to any recorder “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 limited to sounds and excludes recordings of sounds that consist entirely of spoken words. It remains the case, however, that if a recorder’s *primary purpose* is to record sounds with at least some music from a “digital musical recording” or from a “transmission,” it is covered by the AHRA. So RIAA’s argument is based on the notion that the conduct as to which it expresses concern – a driver with a “button on the steering wheel” or a search engine to capture songs – will wind up recording more live spoken words than recorded songs, *and* that in time, *live spoken-word recording* will become the *primary purpose* for which such recorders are sold. This seems unlikely on its face. At best, this would need to be a “wait and see” item, rather than a basis for any action by the FCC now – but, in such case, *RIAA’s rationale for FCC action* would have been undermined by any such development in the marketplace.

¹³ The court did observe that in a *computer* a hard drive would not meet the definition of a DAR as a 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” 17 U.S.C. § 1001(3). This says nothing, however, about the status of a non-computer PAR-type device whose *primary purpose* may be to record music directly from a transmission, rather than from a computer hard drive. As noted in the HRRC NOI Comments, this is not a court proceeding and HRRC takes no position on how such a question should be resolved in court. The important point is that it is a question for the courts and not for the FCC.

4. RIAA's Citation To *Napster* Is Irrelevant To The AHRA's Governance Of Products And Is Simply Fallacious.

RIAA next attempts to twist out of the AHRA's grasp by citing *Napster*,¹⁴ taking refuge in the court's dismissal of Napster's flawed reliance on the AHRA as a defense applicable to its service. Napster argued that § 1008 – the broad prohibition on infringement actions cited by Mr. Weiss and Mr. Berman in the congressional testimony quoted above – could be stretched to cover consumer receipt of copies via its service. That Napster's attempted stretch failed does *not* mean, as RIAA now suggests, that this crucial exemption – acknowledged by these music industry witnesses as the main “benefit of the bargain” for consumers and the consumer electronics industry in negotiating and advocating the AHRA – somehow, now, does not apply to the devices covered by the AHRA.

The exemption from suit reads as follows:

“§ 1008 Prohibition on certain infringement actions

“No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.”

On Napster's citation of the AHRA as a defense, the Ninth Circuit held:

“First, [u]nder the plain meaning of the Act's definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices because their ‘primary purpose’ is not to make digital audio copied recordings.’ *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1078 (9th Cir. 1999). Second, notwithstanding Napster's claim that computers are ‘digital audio recording devices,’ computers do not make ‘digital music recordings’ as defined by the Audio Home Recording Act. *Id.* at 1077 (citing S. Rep. 102-294) (‘There are simply no grounds in either the plain

¹⁴ *A&M Records, Inc. v. Napster, Inc.* 239 F.3rd 1004 (9th Cir. 2001).

language of the definition or in the legislative history for interpreting the term ‘digital musical recording’ to include songs fixed on computer hard drives.’).”¹⁵

This Ninth Circuit disposition of the Napster defense says *nothing* about whether hard drives in devices *other than computers* are DARs. Therefore, the Napster court made *no* new or separate pronouncement to limit the scope or applicability of the AHRA’s exemption from suit for consumer electronics products and their users.

The final nail in the coffin of RIAA’s disclaimer of the AHRA exemption is, again, provided by Mr. Berman himself. Before the Senate Judiciary Committee, he “said it all”:

“S. 1623 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”¹⁶

5. The Vague Schemes Now Suggested By RIAA Remain Impossible To Implement Without A Repeal Or Clarification Of The AHRA; Either Is Beyond The Commission’s Jurisdiction And Capability.

In light of this analysis of what the AHRA actually says, and what the courts have actually said, it is clear that the AHRA does *not* provide any basis, inducement, support, intention, or predicate for FCC intervention, but it does establish a congressional regime that would have to be dismantled before it could possibly be displaced by an FCC-legislated system. The AHRA is a congressionally mandated regime that the Secretary of Commerce can implement, the courts can interpret, and only the Congress can alter. It is up to the courts, the Congress, and possibly the Secretary – not the FCC – to determine the extent to which the regime established by the AHRA would govern the devices that would be covered by the

¹⁵ *Id.* at 1024-1025.

¹⁶ *Senate Judiciary AHRA hearing* 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.

comprehensive technical mandate that the RIAA would like the Commission to impose on a wide range of devices and consumers. Given the breadth and ill-defined nature of the RIAA scheme, not even the RIAA can discount the fact that the FCC would have to trample on a statutory regime whose scope, interpretation, and possible revision have been left to others to determine.

B. The Digital Performance Rights Act of 1995 Explicitly Provides No Basis For FCC Intervention.

The copious RIAA quotations from the DPRA and its legislative history accurately track the law's development as discussed in the Senate Judiciary Committee Report – all except for the word *not*. In that Report, the Committee gave an historical overview of the *unsuccessful* legislative efforts to add a broadcast performance right, despite one having been recommended by two agencies – the Register of Copyrights and the Commissioner of Patents and Trademarks. The Committee reported: “Notwithstanding the views of the Copyright Office and the Patent and Trademark Office that it is appropriate to create a comprehensive performance right for sound recordings *** the Committee has *chosen* to create a carefully crafted and narrow performance right, *applicable only to certain* digital transmissions of sound recordings.”¹⁷ In its section-by-section analysis, the Committee deals *explicitly* with the status of future digital format transmissions, as it clearly foresaw them:

¹⁷ S. Rep. No. 104-128, at 13 (1995), reprinted in 1995 U.S.C.C.A.N. 356, 360. (emphasis supplied) The RIAA NOI Comments seem to deal with congressional decisions not to grant rights to its members as either oversights or failures to foresee the future, rather than acknowledging the fact – explicitly stated in the report – that a legislative balanced was struck with the *other* interests involved in the legislative process (such as broadcasters and device manufacturers) that *deliberately* limited and confined the scope of the rights granted to RIAA members. For example, in the paragraph noted above, the Committee cites as a reason for the narrowness of the congressional grant its desire not to upset “the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.” *Id.*

“Section 114(d)(1)(A) (nonsubscription transmissions)

Under this provision, any transmission to members of the public that is neither a subscription transmission ... nor part of an interactive service is exempt from the new digital performance right. The classic example of such an exempt transmission is a transmission to the general public by a free over-the-air broadcast station, such as a traditional radio or television station, *and the Committee intends that such transmissions be exempt regardless of whether they are in a digital or nondigital format, in whole or in part.*”¹⁸

By now going to the FCC, the RIAA appears to be trying to cut out the congressional middleman because, in pursuing rights over digital broadcasts, it has had better luck with agency recommendations than it has had with the Congress. Having failed to gain congressional enactment of recommendations by the Copyright Office and the Patent & Trademark Office, the RIAA now shops the idea to the FCC, hoping that the Commission will proceed with its *own* amendment to Section 114.

C. The DMCA Provides No Basis For FCC Intervention.

RIAA cites the passage of the DMCA – the most recent instance in which the Congress *declined* to grant a digital broadcast performance right – as one in which the Congress must have *meant* to do so. Yet none of the DMCA legislative history cited by the RIAA does, or can, contradict what Congress plainly meant to do, and what it clearly refrained from doing. In addressing Internet “webcasting,” the Congress, still cognizant (as it was three years before) of the advent and promise of digital radio, again *chose not* to grant to RIAA members the rights for which the Commission is now being petitioned.¹⁹ As in the case of the AHRA and DPRA, there is no basis whatsoever for an agency or a commission to stand a congressional decision on its

¹⁸ *Id.* at 18 (emphasis added). As HRRC noted in its NOI Comments, in 1995 the FCC had already begun its exploration of digital audio broadcasting. As this Report language shows, the Congress was well aware of its imminence when it decided *not* to include a performance right. The Congress would also have been aware of potential uses of “metadata,” as SCMS, mandated in 1992 in the AHRA, is a form of metadata.

¹⁹ In explaining how congressional *omissions* were actually intended as positive actions, the RIAA seems to be imputing to Congress the logic of Steve Martin’s classic comedy routine purporting to justify a failure to pay taxes: *I forgot.*

head. To the contrary, the Commission is obliged to refrain from interfering in and *modifying* the specific statutory frameworks erected by the Congress via the AHRA and the DPRA / DMCA.

II. THERE IS NO OTHER BASIS FOR COMMISSION JURISDICTION.

Having failed to identify and grant of a right on which to hang its request for Commission action, and having failed to discount the contrary enactments via which the Congress has occupied the field, RIAA falls back on “general principles” – Titles I and III of the Communications Act. Specifically, RIAA cites Title III provisions including Sections 301 and 303 of the Communications Act²⁰ as bases for the Commission to initiate such discretionary action. It cites Title I provisions including Sections 1, 2(a) and 4²¹ to justify the exercise of the FCC’s ancillary jurisdiction. Even in the absence of the explicitly contrary congressional intentions and conflicting congressional enactment discussed above, these provisions are clearly insufficient to confer jurisdiction on the Commission to act in the manner requested by RIAA.

A. There Is Simply No Title III Basis For The FCC To Regulate Radio Receivers In The Manner Now Proposed By The RIAA.

HRRC’s initial Comments *supposed* that RIAA must be seeking FCC imposition of a broadly based technical regime covering a wide variety of devices, and argued that the Commission – in addition to lacking any jurisdictional basis for ordering restrictions in use of the service – did not have sufficient jurisdiction over devices to make any such system effective. Now that the RIAA has spelled out, somewhat, the technical goals (if not means) of its proposal, this objection, made by HRRC and others,²² is clearly correct.

²⁰ 47 U.S.C. §§ 301, 303.

²¹ 47 U.S.C. §§ 151, 152(a), 154.

²² See Section VI.

RIAA asserts that Sections 301 and 303 of the Communications Act confer broad jurisdiction on the FCC to require Commission licensees to include content protection requirements when transmitting digitally. Nothing in these sections, however, addresses manufacturers of radio equipment, nor has either section been interpreted in a manner consistent with the scope that RIAA would confer upon them. Rather, the plain language of the provisions cited by RIAA focuses on authority over the *transmission* of radio signals, not their reception and most certainly not their recording for personal use. Section 301, for example, provides for Commission authority over “radio transmission” and the “transmission of energy or communications or signals by radio.”²³ Section 303 similarly focuses radio transmission and frequency management.

Where section 303 has addressed jurisdiction over receivers, it is specific and limited to authority over *television receivers* for specific purposes, and makes no reference to receivers for the receipt and recording of audio transmissions.²⁴ As the DC Circuit has noted, the power of the FCC, “in respect to radio broadcasting, is confined to regulation of those whom it licenses or declines to license to broadcast and those who provide facilities for broadcasting.”²⁵ The manufacturers that RIAA seeks to reach are not within the FCC’s jurisdiction under the plain language of the sections referenced by RIAA.

²³ 47 U.S.C. § 301.

²⁴ See, e.g., 47 U.S.C. § 303(s) (giving the FCC authority to “require that apparatus designed to receive television picture broadcasts simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting”); § 303(u) (giving the FCC authority to require “that apparatus designed to receive television pictures broadcast simultaneously with sound be equipped with built-in decoder circuitry designed to display closed-captioned television transmissions”); § 303(x) (giving the FCC authority over “apparatus designed to receive television signals that are shipped in interstate commerce or manufactured in the United States” to be equipped with mechanisms to enable program blocking (V-chips)).

²⁵ *Yankee Network, Inc. v. FCC*, 107 F.2d 212, 215 (1939).

The FCC's *Digital Tuner Order* is not to the contrary.²⁶ In that proceeding the FCC found that it had authority under the All Channel Receiver Act of 1962, codified at 47 U.S.C. § 303(s) ("ACRA"),²⁷ to require television receivers with a display of 13 inches or more to be capable of receiving over-the-air television signals, including digital transmissions. This limited determination and the appeal that followed, however, only addressed the scope of the phrase "all frequencies allocated for *television broadcasting*" as used in ACRA,²⁸ and whether or not this language encompassed authority over both analog and digital television transmissions as opposed to merely providing FCC authority over expanding television receiver capabilities to include both VHF and UHF transmissions as was originally intended by Congress.²⁹ The scope of Section 303(s) is also further limited to authority over "apparatus designed to receive television pictures broadcast simultaneously with sound."

RIAA does not suggest Section 303(s) as a basis upon which the FCC may be justified to act in this arena, nor could it.³⁰ Even if read broadly, "apparatus designed to receive television pictures" in 303(s) does not and cannot include audio transmissions broadcast without the accompanying "picture." While authority over transmission generally may include both analog and digital transmission, there must still be specific authority directed to the receiver itself. Section 303(s) does not reach so far to provide jurisdiction over receivers that *do not* include the capability of receiving television broadcasts, nor do any of the other provisions in Section 303.

²⁶ *In re Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 00-39, Second Report and Order and Second Memorandum Opinion and Order (rel. Aug. 9, 2002) ("*Digital Tuner Order*"), *aff'd*, *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291 (D.C. Cir. 2003).

²⁷ All Channel Receiver Act, P.L. No. 87-529, 76 Stat. 150 (codified at 47 U.S.C. § 303(s)) ("ACRA").

²⁸ ACRA, 47 U.S.C. § 303(s) (emphasis added).

²⁹ *Digital Tuner Order* at ¶¶ 20, 24.

³⁰ *See*, RIAA NOI Comments at 45 n.150 (citing Sections 303 (a-c), (g-h) and (r) as possible bases for FCC jurisdiction over DAR).

Indeed, RIAA only briefly mentions Sections 301 and 303 and does not offer any real explanation as to how they may provide a basis for jurisdiction over the unregulated audio receiver manufacturing industry. Instead, RIAA again relies upon the argument that the FCC may generally “act in the public interest,” and how in the past the FCC has found it in the public interest to attempt to “harmonize” its policies with other statutory regimes, including copyright and antitrust laws. However: (1) “harmonization” does not mean that the FCC may undertake to enforce or regulate in an area in which it has not been given authority to do so,³¹ and (2) in any event, as HRRC demonstrates above, taking the action proposed by the RIAA would be a gross *reversal* of the statutory regime, or, at best, a legislative *amendment* of it.

In the *Broadcast Flag* proceeding³² (in which the Commission cited its ancillary jurisdiction) the FCC noted that it has never attempted to exercise jurisdiction over an equipment manufacturer absent express statutory authority. The Commission recognized this fact, noting that “the Commission’s assertion of jurisdiction over manufacturers of equipment in the past has typically been tied to specific statutory provisions.” No such specific provision exists in this case within Title III of the Communications Act. Any exercise of jurisdiction, therefore, would necessarily be an exercise of ancillary jurisdiction. This, however, also falls short in the digital audio broadcast context, as described below.

³¹ HRRC NOI Comments at 7-8.

³² *In re Digital Broadcast Content Protection*, MB Docket No. 02-230, *Report and Order and Further Notice of Proposed Rulemaking*, (rel. Nov. 4, 2003) *appeal pending sub. nom. American Library Ass’n et al. v. FCC*, Docket No. 04-1037 (DC Cir. filed Jan. 30, 2004) (hereinafter “*Broadcast Flag Order*”). A number of parties filed petitions for reconsideration of this Order as well. *See, e.g.* Petition for Reconsideration of National Music Publishers’ Association (“NMPA”), the American Society of Composers, Authors and Publishers (“ASCAP”), the Songwriters Guild of America (“SGA”) and Broadcast Music, Inc. (“BMI”) (Dec. 31, 2003). RIAA filed Comments in support of reconsideration.

B. The FCC Does Not Have Ancillary Jurisdiction Under Title I.

Because the FCC does not have a specific grant of jurisdiction over radio manufacturers, RIAA is forced to fall back upon ancillary jurisdiction, citing sections 1, 2(a) and 4³³ of the Communications Act. However, “ancillary” jurisdiction does not extend to subjects tangentially related to, or impacted by, the FCC’s regulatory obligations. Rather, ancillary jurisdiction is a *limited* concept, requiring that FCC action be “*necessary to ensure the achievement of the Commission's statutory responsibilities*” such that regulation is an “*imperative to prevent interference with the Commission's work*” in a particular area.³⁴ RIAA, however, asserts that the subject of regulation need only be “reasonably ancillary” to the effective performance of the Commission’s various responsibilities,³⁵ rather than “necessary” and “imperative” to fulfill its obligations. Even if, however, the subject of the Commission’s exercise of ancillary jurisdiction need only be “reasonably ancillary” as advocated by RIAA, this standard has not been met with respect to the action requested by RIAA.

RIAA’s reliance on the *Broadcast Flag Order* to argue that the FCC has ancillary jurisdiction over this issue is misplaced. As the Commission itself noted, the *Broadcast Flag Order* is the first and *only* instance in which the FCC has asserted ancillary jurisdiction over

³³ 47 U.S.C. §§ 151, 152(a), 154.

³⁴ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706-707 (1979) (emphasis supplied).

³⁵ *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982), quoting *United States v. Southwestern Cable*, 392 U.S. 157, 178 (1968). While some debate may exist among the lower courts and commenters with respect to the standard the Commission must meet in order to exercise its ancillary jurisdiction, the Commission has recognized that the Supreme Court's threshold for the reasonable exercise of ancillary jurisdiction, as stated in both *Midwest Video* and *Southwestern Cable*, requires that any such exercise be "necessary" and "imperative" to the Commission's clearly enumerated statutory obligations. See, *Broadcast Flag Order* at 33, notes 86 & 87, citing *Southwestern Cable*, 392 U.S. at 173-174 ("In upholding the Commission’s regulatory authority, the Supreme Court [in *Southwestern Cable*] found that the Commission had 'reasonably concluded that regulatory authority over CATV is *imperative* if it is to perform with appropriate effectiveness certain of its other responsibilities' including 'the obligation of providing a widely dispersed radio and television service' with a 'fair, efficient, and equitable distribution' of service among the 'several States and communities.' (citation omitted, emphasis added). Any roll back of the necessary and imperative threshold is, therefore, inappropriate and unsupported by Supreme Court precedent.

equipment manufacturers.³⁶ This was not done lightly, and the FCC went to considerable pains to justify its decision to do so – spending no less than five pages on the subject of its jurisdiction to act.³⁷ Its rationale for its extraordinary action in the *Broadcast Flag Order*, however, is also wholly limited and uniquely keyed to broadcast *television*, and cannot – *especially* in light of Congress’s decision *not* to grant performance rights in digital broadcasts of sound recordings – justify Commission jurisdiction with respect to digital audio transmissions.

The primary “responsibility” and “long-standing” goal the Commission cited in the *Broadcast Flag Order* is the “intricate and detailed set of provisions” that are “woven into the Communications Act” *to enable timely transition from analog television to digital television* (“DTV”).³⁸ Specific statutory provisions also outline and compel the DTV transition in order to recover the analog television broadcast spectrum.³⁹ The Commission noted further that the legislative history of these specific DTV-oriented provisions reflect “a clear Congressional expectation that the [DTV] transition take place.”⁴⁰ This Congressional intent, coupled with the FCC’s “ongoing and prominent initiatives” in this area, indicated that the DTV transition is “one of the Commission’s primary responsibilities under the Communications Act at this time.”⁴¹

By contrast, no statutory goal, obligation, instruction, or even any hint is present in the case of digital radio. Congress is not seeking to transition analog audio broadcasting or to reallocate spectrum to other services. Nor is there a comparable “intricate and detailed set of

³⁶ *Broadcast Flag Order* at ¶ 32 (“...this is the first time the Commission has exercised ancillary jurisdiction over consumer equipment manufacturers in this manner.”).

³⁷ *Broadcast Flag Order* at ¶ 33.

³⁸ *Broadcast Flag Order* at ¶ 30.

³⁹ 47 U.S.C. §§ 309(j)(14), 337, 336, 396(k)(1)(D), 544(c)(2).

⁴⁰ *Broadcast Flag Order* at ¶ 30.

⁴¹ *Broadcast Flag Order* at ¶ 30.

provisions” that provide a structure within which the Commission may address terrestrial digital radio broadcasting. There is no statutory mandate to which the exercise of ancillary jurisdiction over equipment manufacturers can be linked, nor is there any *agency* mandate to which the quasi-legislative mandate RIAA has requested can even be linked, much less be deemed “reasonably ancillary.”

RIAA’s reliance on the FCC’s *Plug and Play Order* is equally inapposite.⁴² There, the FCC based its jurisdiction, *inter alia*, on specific provisions of the Communications Act that directly address consumer equipment, *as well* as on the same “intricate and detailed set of provisions” that are “woven into the Communications Act” to enable timely transition from analog television to DTV.⁴³ Again, no such pervasive statutory requirements are present with respect to terrestrial digital audio broadcasting.

In fact, the FCC’s *Broadcast Flag Order* and its *Plug and Play Order* are *so* specifically tied to the Communications Act’s provisions relating to the digital television transition that the rules adopted in these proceedings *do not extend to the audio component transmitted to accompany a digital television transmission*. RIAA fails to mention this, despite the fact that RIAA itself has filed comments supporting a Petition for Reconsideration of this element of the *Broadcast Flag Order*.⁴⁴ Rules in that proceeding were also adopted to implement a

⁴² *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*, CS Docket No. 97-80, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking, (rel. Oct. 9, 2003) (“*Plug and Play Order*”).

⁴³ 47 U. S.C. §§ 544A, 549.

⁴⁴ *See, 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*, CS Docket No. 97-80, PP Docket No. 00-67, *Joint Petition for Reconsideration of the National Music Publishers’ Association, the American Society of Composers, Authors and Publishers, the Songwriters Guild of America and Broadcast Music, Inc.* (December 29, 2003); Comments of the Recording Industry Association of America in Partial Support of Joint Petitioners Petition for Reconsideration of the National Music Publishers’ Ass’n et al. (Mar. 10, 2004).

memorandum of understanding (“MOU”) between the cable and consumer electronics industries, a circumstance that is not present here.⁴⁵ Justifications for the exercise of FCC jurisdiction in the *Broadcast Flag Order* and the *Plug and Play Order*, therefore, were far more weighty than those presented here.

III. THE RIAA HAS FAILED TO POINT TO ANYTHING UNIQUE ABOUT DAB THAT WOULD JUSTIFY A COMMISSION INITIATIVE.

A main point made by the HRRC Comments was that there is nothing unique about digital radio that could justify, or even rationalize, imposing constraints on consumer behavior without imposing parallel constraints – not presently proposed by the RIAA – on competitive services. The RIAA has had several chances to make this case: First, at the initiation of this Docket or at any other time up to the preliminary authorization of the service and the marketing of receivers. Second, RIAA could have persuasively differentiated DAB from the other services in its October, 2003 letter to Commission staff, or at the “Hoedown” earlier this year – but dramatically failed to do so, and even *agreed* that it would be equally sensible to impose such constraints on some other services. Finally, RIAA had the chance in marshaling its massive consultant reports that it filed along with its Comments. But these do not even purport to make any such case.

A. “Cherry Picking” Is Neither Novel Nor Confined To DAB, Or Even To Digital Transmissions.

A main point of the HRRC Comments is that the transmission, reception, storage, and file management of broadcast content are all *separate* functions, that can be mixed and matched in the digital age. For example:

⁴⁵ *Plug and Play Order* at ¶ 8.

- The popular TiVo-type PVR is emblematic of the digital age, using a digital computer-type hard-drive to store content – yet in virtually all cases today, the signals it stores are received in either analog or digital form, and transmitted to a TiVo *exclusively* via an *analog* interface.
- HDTV is transmitted exclusively in a digital format, yet the majority of HDTV displays in consumers’ homes operate via *analog* cathode ray tubes and receive their content over *analog* interfaces.
- For years, TV “tuner” cards have been on the market for PCs that contain *analog* NTSC tuners, yet the programs received are processed, indexed, managed, and stored on a PC in digital form.

As a consultant recently reported: “Not all functionality will be provided by fully integrated products. In many cases, even more capabilities can be programmed by different software authors into more utilitarian hardware devices. Examples are the various computer cards represented here by Modular Technologies’ PCI card and the multipurpose Psion Wavefinder and its different software options.”⁴⁶

The RIAA Comments focus on *metadata* as a means for “Cherry picking” recordings as if metadata were somehow unique or uniquely suited to DAB. Yet RIAA’s consultant, Cherry Lane – the consultant quoted above – in describing the various distinguishing features of digital radio, mentions metadata not at all – probably because metadata predates DAB by decades, is in common use in analog as well as digital audiovisual and audio signals and transmissions, and does not appreciably distinguish DAB with respect to RIAA’s voiced concerns.

B. RIAA Has Provided No Basis For Singling Out DAB.

DAB receivers *can*, as Cherry Lane points out, integrate reception, storage, and indexing technologies to allow “caching” of content and other TiVo-like functions. As Cherry Lane also points out in the sentences quoted above, however, *the same functions and results can be*

⁴⁶ RIAA NOI Comments Appendix B, at 22-23.

achieved by any manufacturer mixing and matching these search, reception, storage, and indexing functions. It matters not whether the means of transmission is digital or analog. It matters not whether the metadata is carried by digital means, as in IBOC (or in a Compact Disc as SCMS), or by analog means, as in RDS. Functional integration into computer chips is also not a technique limited to IBOC. It is no more complex or costly to integrate an FM receiver into a chip than it is a DAB receiver. Indeed, FM receivers have been integrated into semiconductor chips for decades. As a consultant told the Senate Judiciary Committee a few years ago:

“Audio versions of TiVo and Replay will likely arrive soon, permitting users to fill jukeboxes from *digital and analog broadcast* stations.”⁴⁷

Nor is DAB the end of story. If DAB and competitive services are to be regulated and controlled by the FCC, without any direction from the Congress, so would future services have to be. One consultant has pronounced that disc-based “buffer” services, such as the features RIAA fears from DAB, are *already* verging on becoming obsolete:

“Buffers and storage are determinative factors of our media interaction today, but long-term they are obsolete, the equivalent of today's floppy disk - or disk of any kind. Disks are like traveler's checks in an era of automatic teller machines. Who amongst us didn't rely upon traveler's checks when we absolutely, positively had to have the money we needed to feed and shelter ourselves in a foreign land? Today, with the just-in-time efficiency of customized cash available with the swipe of a plastic card, I know few who bother.”⁴⁸

⁴⁷ Music on the Internet: Is There an Upside to Downloading? Statement of James Griffin, CEO, Cherry Lane Digital & OneHouse LLC's, before the Senate Comm. on the Judiciary (July 11, 2000), available at http://judiciary.senate.gov/oldsite/7112000_jg.htm. (emphasis supplied) (“Statement of James Griffin”).

⁴⁸ *Id.*

IV. THE RIAA TECHNICAL PROPOSAL AMOUNTS TO NOTHING LESS THAN THE DEATH OF THE INSTALLED BASE, THE EXPUNGING OF CONSUMER RIGHTS AND EXPECTATIONS, AND THE NULLIFICATION OF THE AHRA.

At the heart of the RIAA proposal to encrypt DAB broadcasts, or to require that they be encrypted once received, is a goal as to which a consultant cautioned the Senate Judiciary Committee a few years ago:

“Once digitized, art can be liberated, but *equally if not more tempting is the idea of making access conditional through encryption*. If we choose the course of predicating access to intellectual property on ability to pay, a class-based society of information haves and have-nots will emerge.”⁴⁹

Whether the Commission would choose the “source encryption” or the “flag” option floated by the RIAA, the heart of the RIAA idea is to take a *free* service, over-air terrestrial radio, and turn it into a *protected and proprietary* service, guarded by encryption and conditional access – despite the lack of *any* congressional grant of rights, in either the copyright or the telecommunications law, to its members as to this service.

The RIAA proposal, however, far exceeds the bounds of “conditional access,” as practiced in the Plug & Play licenses, DBS services, and audio subscription industries, or of the Broadcast Flag as approved by the FCC, by several orders of magnitude:

- The point of *conditional access* is to allow for a *negotiation* between the service provider and the consumer as to what services, under what rules, will be purchased. Because such a negotiation is not possible as to broadcast services, the *encoding rules* set forth in the DMCA and in Subpart W of Commission regulations provide that constraints on viewing and recording may *not* be activated. By contrast, the RIAA proposal is for *all or nothing* “usage rules” – if “protection” is activated by a broadcaster, consumer recording is not possible *at all* on analog or existing digital devices (including those covered by the AHRA), and would be limited, in a one-size-fits-all mold, on all new devices.

⁴⁹ *Id.* (emphasis added).

- The *Broadcast Flag* model was aimed at preventing the *redistribution* of content over the Internet, *not* at limiting home recording. Hence, the “always on” or “always off,” non-interactive nature of broadcasting was less of an issue. To avoid a slaughter of the installed base, all *analog* interfaces are explicitly *not* covered. What RIAA is proposing, however, is a limitation on *all consumer recording* rather than on redistribution. Because of the blanket nature of the proposal, *all* existing analog recorders would be cut off, as would PCs, DAT recorders, iPODs, etc.

A. The Proposal to Encrypt DAB Broadcasts Is Anti-Consumer, Would Strand Hundreds Of Millions Of Existing Products, Would Violate the AHRA, And Has Recently Been Opposed By RIAA’s Own Consultants.

One option briefly discussed by RIAA consultant Jeff Hamilton is source encryption of all DAB broadcasts, to be preserved and carried through all consumer usage via “robustness rules” modeled on the Broadcast Flag – but in this case, aimed *against* consumer home recording, rather than *at* Internet redistribution (while *preserving* consumer home recording). This is more than just a sea change; it is a drowning.

Preserving source encryption, via “robustness” obligations, so as to enforce the “usage rules” proposed as a result of polling RIAA’s members, would mean, with respect to receiving DAB content, nothing less than the extinction of all analog recorders, all existing DARs (on which royalties have been paid, to RIAA members and others in the music industry under the AHRA), and all other recording functions not equipped to decipher to unspecified encryption that would be imposed. And since – as HRRC demonstrated in its comments – to be effective, the “usage rules” would have to be applied to all competitive analog and digital services, it would mean, essentially, the extinction of these products.

There is no precedent in either congressional or agency action for such an imposition on an innocent consuming public. Moreover, HRRC would venture to agree with Mr. Griffin⁵⁰ of

⁵⁰ See Statement of James Griffin..

Cherry Lane that such a result would be counter-productive – it would drive the consuming public away from the usage of consumer electronics products and further into the arms of P2P services that would *not* be disenfranchised by any such measure.

As to the idea of initiating the usage rules via encryption “at the source,” HRRC’s and others’ criticisms of this idea were accepted in the case of the Broadcast Flag, and apply equally here. Indeed, in this case the idea is particularly egregious, as the Commission first studied DAB in the early 1990’s, this Docket was instituted in 1999, and RIAA did not float this “option” – still without specifics – until halfway through 2004. At the “Hoedown” earlier this year, HRRC made the point that no music industry entity had *ever* surfaced in this Docket until 2004. Counsel for the RIAA responded that, heretofore, the Docket had been principally about “technological issues.” The era in which this Docket was initiated – not one in which receivers are already on the market – was in fact the time to raise the idea of source encryption.

B. The Proposal For An “Audio Flag” Is Vague, Would Cause Massive Legacy Problems, And Would Interfere With Every-Day Rights Currently Enjoyed By Responsible, Law-Abiding Consumers.

As an alternative to source encryption, Mr. Hamilton next proposes implementing “protection” in the DAB receiver rather than upon broadcast, and carrying it through all home systems via “robustness” rules. Mr. Hamilton specifies that the “protection” RIAA has in mind is encryption, which would have to be preserved in all consumer uses. The only difference from “source encryption” is that it would be imposed in the DAB receiver rather than upon broadcast.

Here is the “protection” scheme as supposed by Mr. Hamilton:

“7.4 Digital Audio Outputs and Removable Media

HD Radio receivers shall only output COVERED CONTENT using:

- 1) a ROBUST Method as defined in Section 12, or
- 2) an Approved Method as defined in Section 13.

All ROBUST or Approved Methods shall provide a means to limit the number of copies of COVERED CONTENT and prevent unauthorized redistribution. ***

11. Receiver Robustness

*** Recordings on *any device* would be required to employ ROBUST encryption of all COVERED CONTENT on recording media, authenticated delivery of content control information on *all internal and external interfaces*, revocation of compromised devices, and clearly stated obligations for enforcement of usage rules by any downstream devices.

12. ROBUST Methods for Digital Output

ROBUST Methods for protection of COVERED CONTENT on digital outputs and removable media will need to include encryption and secure authentication of downstream receiving devices such that COVERED CONTENT is effectively protected against:

- 1) recording except as permitted pursuant to the usage rules;
- 2) unauthorized redistribution via any wired or wireless network or removable media; and
- 3) reception or interception by any device that does not comply with the usage rules.”⁵¹

No exemption from the “all internal and external interfaces” rule is countenanced for the analog interfaces that are the lifelines to most existing consumer devices, *including speaker and headphone* systems. This illustrates the impossible, intractable nature of RIAA’s glib suggestion that a Bizarro⁵² copy of the Broadcast flag could be applied to audio:

⁵¹ RIAA NOI Comments Appendix A, at 8, 11-12 (emphasis added).

⁵² See, e.g., <http://theages.superman.ws/Encyclopaedia/bizarro.php>.

- If the RIAA scheme does *not* apply to analog interfaces, it could not possibly be robust. Audio A/D conversion is so cheap, commonplace and virtually lossless that it would be trivial to convert analog outputs back to digital – unless an unstated objective of the RIAA proposal is to regulate and govern all low bandwidth A/D converters as well.
- If the RIAA scheme *does* apply to analog interfaces, then DAB services would be effectively walled off from most existing consumer electronics devices, including virtually all speaker and headphone systems.

It is no wonder that neither Mr. Hamilton nor his client specifically addresses the analog interface issue, which was a basic and prominent point of departure in the Broadcast Flag.

Nothing is more emblematic of the fact that, as the Congress realized in 1992, 1995 and 1998, the cloak designed by the RIAA cannot possibly fit the framework of digital audio broadcasts.

Even in the world of digital interfaces, the RIAA proposal is a non-starter. First, it would specifically disenfranchise, and impose contrary rules upon, any product covered by the AHRA. The RIAA does *not* suggest that its proposal be vetted by the Secretary of Commerce. Nor does it even try to rationalize its “usage rules” with the guarantees that this law afforded to consumers in return for the payment of a levy on DAR devices and media. As to PCs and PC-reliant portable devices, which are not covered by the AHRA, the proposal is vague as well as objectionable. Who would select the encryption? Who would enforce the usage rules? Could software be ported to existing PCs? If so, could they possibly comply with the robustness rules? Would existing portable devices be able to receive content? (And will even the first generation of “compliant” devices also become stranded when the encryption system is hacked and replaced?)

Finally, even if they could possibly be implemented so as to preserve the functionality of existing and future devices, the proposed rules are, in and of themselves, unreasonable impositions on consumers. In 50 years of FM broadcasting – including periods in which it was

an attractive alternative to storing content on vinyl records – no evidence has been compiled that broadcasting has been other than a boon to the recording industry. Nor is there any evidence that consumer recipients of such broadcasts have abused their rights.

C. The Scheme Laid Out By RIAA’s Consultants Is Legislative Rather Than Administrative.

The most Orwellian statement in the RIAA Comments occurs at n. 197, to support why, contrary to the Broadcast Flag model, radio broadcasters would *not* have any option over use of the “APF”:

“Unlike with digital television, the record industry does not have a performance right with respect to non-subscription over-the-air radio broadcasting. Therefore, the Commission should not leave content protection to the radio broadcasters’ discretion because the record industry will not have any means to withhold music content if the radio licensee declines to insert the APF into the DAB transmission.”

In other words: “Even though Congress has specifically, and repeatedly, decided not to give us legal rights over radio broadcasters, the Commission should enable us to dictate to the radio broadcaster what he can and can’t do.” It is hard to imagine a less appropriate call for agency or Commission action – action that would be contrary, rather than ancillary, to legal obligation.

1. The “Plug & Play” Order Is Not A Precedent For The Sort Of Administrative Action Proposed By The RIAA.

The RIAA statement is also telling in its illustration of the *differences* between its plea to the Commission, and the context of the Plug & Play and Broadcast Flag proceedings. As HRRC pointed out in its Comments, the entire issue of copy protection arose in Plug & Play because the advent of competitive products potentially broke a chain of licenses that heretofore had allowed content owners to demand conditional access and copy protection conformance as conditions of

granting content licenses. In Plug & Play, the Commission determined that a limited enforcement of copy protection device requirements, as a species of conditional access, would be allowed *in licenses* from cable system operators to device manufacturers. In the case of DAB, as RIAA itself points out, there is *no such licensing power*.

2. The “Broadcast Flag” Order Is Not A Precedent For The Sort Of Administrative Action Proposed By The RIAA.

In the case of Broadcast Flag, the Commission recognized that the broadcaster’s right to perform audiovisual programming *is* subject to a license from content providers, and that such licensing approval may be withheld as to any program. Therefore, the Commission, in making imposition of the Flag optional with the broadcaster, recognized that this is in fact the content owner’s choice, because the content owner has the power to withhold the content entirely. In the case of DAB, the content owner has *no* such power under law. Therefore, the proper *administrative* solution is to leave any imposition of a technical regime *up to the broadcaster* (within the constraints of the broadcaster’s own license and authority). Giving the power, instead, to a content provider that has *no* legal right to withhold content would be a *legislative* rather than *administrative* solution, as it would involve a re-allocation of substantive legal rights under both the copyright and telecommunications acts.⁵³

⁵³ In making this observation, HRRC does *not* by any means advocate legislative implementation of any plan such as is proposed by the RIAA, or mean to “induce” others to make such a proposal. The quandaries and unjustified impositions on consumers inherent in any such plan would persist, whether it were ordered by the Commission or by the Congress.

V. **COMMENTS BY OTHER MUSIC INDUSTRY GROUPS SUPPORT THE HRRC CAUTION THAT A FREE-FOR-ALL WOULD ENSUE AMONG GROUPS HAVING SUPERIOR CLAIMS THAN RIAA TO ADMINISTERING AND PROFITING FROM ANY COPY PROTECTION LICENSING SYSTEM ESTABLISHED BY THE FCC.**

The imposition of an administered regime by the Commission, as proposed by and in favor of an organization whose members lack any rights over the broadcast content, would create a rights vacuum that many interests would be eager to fill. Hints of this eagerness – which no doubt would accelerate if the Commission showed signs of moving toward a regulatory proceeding – and the chaos that would ensue, have surfaced already in the Comments received by the Commission:

- NMPA warns that “[t]he Commission must take notice, with respect to DAB, that Section 106 of the Copyright Act vests in songwriters and their licensees the *exclusive* right to publicly perform a song ... even though no license is required for broadcasting the sound recording”⁵⁴
- BMI warns, “Should the Commission determine to adopt a content control regime for digital audio transmissions, such regime should not derogate from the existing rights of copyright owners of musical works.”⁵⁵
- NAB observes, “Specifically, RIAA has yet to cite any content owner right to prevent or condition the use of audio content delivered via free, over-the-air terrestrial broadcast services. This has prompted some parties to question the Commission’s jurisdiction to act. Moreover, achieving a broad industry consensus on the technical parameters of such a protection scheme would not be such a simple matter.”⁵⁶

The feeding frenzy induced by any administrative venture into changing the nature of the rights pertaining to radio performance rights is yet another reason for the Commission to recognize that this is not and cannot be a Commission project. It is the Congress that has apportioned these rights, and the Congress that would have to re-apportion them.

⁵⁴ National Music Publishers Association NOI Comments at 7 – 8 (emphasis supplied) (Longstanding antitrust judgments constrain the ability of the major rights collectives, however, to exercise any discretionary control over such rights or to use them to withhold content.).

⁵⁵ Broadcast Music, Inc. NOI Comments at 2.

⁵⁶ National Association of Broadcasters NOI Comments at 32.

VI. HRRC AGREES WITH THE VIEWS OF OTHER COMMENTERS EXPRESSING OPPOSITION OR CAUTION.

HRRC is far from alone in its vigorous opposition to the RIAA request for the Commission to reapportion digital audio performance rights, and to thereby specifically and disastrously regulate the entire market for home audio devices.

A. Many Commenters Have Said That Any Action By The Commission On This NOI Would Be Premature Or Unfounded At This Time.

The Corporation for Public Broadcasting,⁵⁷ Cox Radio,⁵⁸ Greater Media,⁵⁹ iBiquity,⁶⁰ Named State Broadcasters,⁶¹ NAB,⁶² and NPR⁶³ all label the RIAA proposal as “premature,” “unfounded at this time,” or unsupported by evidence that it is necessary or appropriate. As expressed by NPR:

“It is incumbent on the [RIAA] to demonstrate a concrete harm associated with DAB, and, given the nascent state of the technology, we do not believe such a showing can be made at this time. There is an existing statutory mechanism to compensate copyright owners for the use of digital recording devices, moreover, and, at present, there is no reason to believe that this mechanism will be inadequate or that copyright infringement will threaten the demise of free over-the-air broadcasting and trigger the Commission’s statutory authority over the matter.”⁶⁴

⁵⁷ Corporation for Public Broadcasting NOI Comments at 5.

⁵⁸ Cox Radio, Inc. NOI Comments at 9.

⁵⁹ Greater Media, Inc. NOI Comments at 12.

⁶⁰ iBiquity Digital Corporation NOI Comments at 28.

⁶¹ Joint Comments of the Named State Broadcasters Associations NOI Comments at 20.

⁶² National Association of Broadcasters NOI Comments at 32.

⁶³ National Public Radio, Inc. NOI Comments at v, 31-32.

⁶⁴ *Id.* at v.

B. HRRC Agrees With Those Commenters Who Oppose The RIAA Proposal As Unwarranted, Unwise, And Beyond The Commission’s Jurisdiction.

Several other Commenters agree with the HRRC that the RIAA proposal is unwarranted, as well as unworkable and beyond the Commission’s jurisdiction.

- EFF provides thorough technical support for the fact that the DAB attributes focused on by the RIAA and its consultants can easily and routinely be furnished with respect to other analog and digital services as well.⁶⁵
- Public Knowledge, Consumers Union, and Consumer Federation Of America argue persuasively that a copy protection imposition is unnecessary, would be ineffective, would not address redistribution issues, and would be contrary to the intention of the Congress.⁶⁶
- XM Satellite Radio argues persuasively that “... under current law, it is clear that consumers can record from radio broadcasts, organize those recordings and store them to create their own ‘jukebox’ to be played again and again. The fact that new models of receivers streamline this process is immaterial.”⁶⁷
- CEA rightly concludes 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.”⁶⁸

HRRC agrees with these contributions and conclusions. The record before the Commission simply does not support any further action.

VII. CONCLUSION: THERE IS NO BASIS FOR ANY FURTHER ACTION WITH RESPECT TO THIS NOTICE OF INQUIRY.

In its own June 16 Comments, the HRRC concluded: “From top to bottom, the questions on which the Commission has invited discussion involve matters of substance over which the FCC has been given no authority by the Congress. To the very limited extent that the Congress has provided any mechanism for issues to be addressed at all, the responsibility to do so has been

⁶⁵ EFF NOI Comments at 11 – 14.

⁶⁶ Joint Public Knowledge, Consumers Union, and Consumer Federation of America NOI Comments at 6 – 12.

⁶⁷ XM Radio Inc. NOI Comments at 4.

⁶⁸ Consumer Electronics Association NOI Comments at 10.

apportioned elsewhere, and not to the Commission. Even if the subjects raised in this NOI could be addressed by the Commission, there is no evidence of actual harm to the RIAA or its members, nor is there any clear or firm basis for extrapolating a projection of future harm, nor is there any legal basis for the Commission to deprive consumers of their rights and legitimate expectations. Nor is there, to date, any clear indication of what it is the recording industry would like the Commission to do. Hence, on multiple and independent grounds, there is no basis for further action by the Commission.”

The Comments of the other parties strengthen and underscore this conclusion. Neither the RIAA nor any consultant has provided any basis for Commission jurisdiction and action. Indeed, the “proposal” that lists *categories* of possible technological approaches and of anti-consumer “usage” and “robustness” rules demonstrates that the RIAA scheme would be completely unworkable and ineffective unless it were to deprive consumers of legitimate rights and expectations on a shockingly broad and entirely unjustified basis.

The flaws in the RIAA approach are not matters of detail, or lack thereof. They spring, rather, from the inherent difficulty of trying to impose a quasi-conditional access regime onto a free broadcast service over which the leading proponent has never enjoyed any substantive rights or discretion. Imposing “mere” redistribution control in the case of the broadcast flag was and is difficult enough, where the content owner *does* have such discretionary substantive rights and the FCC *does* have a recognized interest in the transition to DTV and HDTV. Imposing redistribution and copy control – or even redistribution control alone – on the legacy audio world, in the absence of any such rights or transitional interest is beyond the Commission’s

jurisdiction and contrary to law. Even if the Commission had the power, it could not be accomplished on any basis that would be nearly acceptable to consumers or consistent with legitimate consumer rights and expectations.

Respectfully submitted,

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August 2, 2004