Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In The Matter of	)	
	)	
Sirius Satellite Radio, Inc. and	)	
XM Satellite Radio Holdings Inc.,	)	MB Docket No. 07-57
Application to Transfer Control of	)	
FCC Authorization and Licenses	)	

COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA

The Recording Industry Association of America ("RIAA") respectfully offers these Comments regarding the applications submitted by Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") (collectively "the SDARS") seeking consent to transfer control of Commission licenses and authorizations held by Sirius, XM, and their subsidiaries pursuant to Section 310(d) of the Communications Act of 1934, 47 U.S.C. § 310(d).

The RIAA is the trade group that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes its members' creative and financial vitality. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. In support of this mission, the RIAA works to protect intellectual property rights worldwide and the First Amendment rights of artists; conducts consumer, industry and technical research; and monitors and reviews state and federal laws, regulations and policies.

With respect to the applications of XM and Sirius under consideration by the FCC, the applicable standard requires the Commission deny the application unless it finds that the merger serves the public interest.[1] The Commission's public interest evaluation encompasses, among other things, ensuring a diversity of information sources and services to the public, and a preference for preserving and enhancing competition in relevant markets.

The interest most directly affected by the proposed merger is the public's interest in music, and the effect of the merger on the music industry. More precisely, it is the interest in providing consumers with the broad diversity of music programming they have come to expect from satellite radio, and the interest in fairly compensating artists and record companies for their recordings so that the music industry can continue to create sound recordings to the great benefit of the public. The merger of XM and Sirius should be approved only if and when the Commission has satisfied itself that, on balance, the merged company is more likely than XM and Sirius competing against each other as separate companies to satisfy these interests, and any approval should be subject to the conditions requested below.

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General. Twenty years ago, there were essentially only two ways for the public to experience recorded music - by listening to the radio for free or by purchasing a physical sound carrier such as a vinyl LP, cassette tape, or CD. Today, while CD sales still generate most of the recorded music revenue for record companies, that revenue stream is decreasing as consumers make buying choices among a wider variety of music offerings (in addition to the ongoing piracy problems the recording industry continues to experience). Consumers today can choose to listen to music by purchasing a CD, or by listening to music on a computer or a portable device playing

[1] *See* 47 U.S.C. § 310(d) ("No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.").

downloaded music, or through a growing variety of web-based services that offer consumers sound recordings with varying degrees of interactivity, portability, permanence, and sound quality.

While RIAA does not at this point offer its opinion about the market definition appropriate for consideration of this merger, it is clear that satellite radio is one of these newer distribution channels by which customers choose to consume music. XM and Sirius have collectively acquired a substantial number of subscribers in a relatively short period of time, and their subscribers pay $12.99 per month to enjoy an enormous amount and variety of music. Although XM and Sirius offer stations for sports and talk radio, it is music, first and foremost, that subscribers are paying for. A recent survey conducted by Dr. Yoram Wind, professor of marketing at The Wharton School of the University of Pennsylvania, reveals that music, more than any other factor, is what attracts listeners to XM and Sirius and keeps them subscribing.[2]

Fair Compensation for Compulsory Licenses of Sound Recordings. As new distribution channels like satellite radio proliferate, it is critical that artists and record companies be fairly compensated for their sound recordings so that the public can continue to enjoy the diverse and valuable art and entertainment that the music industry presently offers. While RIAA believes that the SDARS should be paying a market rate for the compulsory copyright license they have for digital performance of sound recordings now, certainly a stronger merged satellite radio company should be required to pay a market rate for the sound recordings that make its service possible, just as the other digital services with which XM and Sirius claim to compete pay

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[2] *See* Testimony of Yoram (Jerry) Wind, In re Adjustment of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, Docket No. 2006-1 CRB DSTRA (Oct. 2006), available at http://www.loc.gov/crb/proceedings/2006-1/soundex-wind.pdf; *see also* SoundExchange Press Release, *Music Keeps Satellite Radio in Orbit, Survey Finds* (Nov. 10, 2006), available at http://www.soundexchange.com/news/sxnewsrelease3nov06.pdf.

market-based rates for copyright licenses to digitally perform sound recordings. That would advance the public interest, as the sound recording royalties paid by the SDARS are shared by artists and by their record companies, and so fund the artistic creation that underlies all sound recordings.

Under the Digital Millennium Copyright Act of 1998 ("DMCA"), the satellite radio services obtain copyright licenses to any sound recordings that have been released to the public, regardless whether they have received a separate copyright license from the record label or other copyright owner. XM and Sirius have argued that they should not be required to pay royalties for such compulsory copyright licenses similar to the rates paid by their digital competitors because they are new, struggling companies attempting to make their way into the market. XM and Sirius have pointed to factors, such as the consideration of "existing economic conditions," or of the need "[t]o minimize any disruptive impact on the structure of the industries involved,"[3] in arguing for less-than-market royalty rates for satellite radio services.

RIAA believes that XM and Sirius are no longer new, struggling companies and should be paying market rates for such compulsory copyright licenses at present, but certainly, XM and Sirius should not be allowed to argue for less-than-market compulsory rates after a merger. XM and Sirius argue that the merger is in the public interest because it would allow them to better compete in the market against distribution services that pay market royalty rates for sound recordings. If the Commission concludes that a single merged satellite radio company would in fact provide a more robust and competitive service offering in this broad digital marketplace, to that extent, the merger would advance the public interest. However, if a merged entity were permitted to acquire compulsory copyright licenses to sound recordings at below market rates,

[3] 17 U.S.C. § 801(b)(1)(B), (D)

the merger would frustrate the operation of this broader market for digital sound recording services, putting at risk other competitors in that marketplace as well as the musicians that depend on sound recording royalties as a vital part of their income. This outcome would undermine the public interest, rather than serve it.

On the other hand, the public interest would be advanced if the merged entity were required to pay fair value for the sound recordings it purchases. This will ensure fair market revenues to artists and record companies and spur the creation of new sound recordings. It also will add to the health of the broader market for digital sound recordings by ensuring that no competitor is advantaged by paying below-market rates for copyright licenses to digitally perform sound recordings. A key condition of the merger, if it is otherwise determined to be in the public interest, should therefore be to foreclose XM and Sirius from arguing that below-market royalty rates for such compulsory copyright licenses are necessary to "minimize any disruptive impact on the structure of the industries involved," since a merger would completely change the structure of the SDARS' industry.

The Commission can only protect the public interest by making clear that the SDARS' ability to pay market rates for sound recordings is among the public interest benefits it identifies as resulting from the merger. Such a finding is critical to the understanding of the parties and the rate-setting bodies in future rate settings, and would undoubtedly increase the public interest benefits that flow from the merger. Furthermore, the Commission should require XM and Sirius themselves to acknowledge that if, as they say, they are part of a larger marketplace of digital music services, then following a merger, they should pay for sound recordings at rates generated in this broader music market. These actions are necessary to ensure that the merger actually does benefit the public interest in the ways advanced by the SDARS in support of their petition to merge.

Content Protection and Substitution. The FCC should also consider in its public interest calculus the possibility that a merged company would devote greater resources to the development of technology meant to facilitate the downloading of sound recordings without licenses from copyright owners. Content protection is critical to ensuring the fair compensation of artists and record companies. Both SDARS have invested in technologies that allow them to circumvent limitations on their compulsory copyright licenses to perform sound recordings by giving users the ability to download copyrighted sound recordings to portable devices, effectively transforming a radio-like service into a digital distribution subscription service like Rhapsody or Napster, which have obtained marketplace licenses from copyright owners. RIAA is already in litigation against XM Satellite Radio over the Pioneer Inno, an XM device which allows users to save individual sound recordings to the device without paying for them. The deployment of more technology like the Inno could threaten the ability of record companies to protect their copyrighted recordings. The SDARS should not be permitted to transform their FCC license and the statutory copyright license to perform sound recordings into a business that disseminates digital copies of sound recordings to their users.[4] A merger of the two SDARS which resulted in the investment of additional funds into such technologies would seriously threaten the viability of the music industry as a whole. The Commission should therefore make clear that its approval of a merger is conditioned upon the continued protection of sound recordings from unlawful infringement by the SDARS. The Commission should also seek input

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[4] We further note that Mr. Karmazin, CEO of Sirius, agrees that the SDARS should pay for the right to distribute sound recordings. On February 28, 2007, Mr. Karmazin, CEO of Sirius, told the House Judiciary Committee's Antitrust Task Force that "We believe we made a business decision in paying a royalty. We thought it was the right thing to do."

from the Copyright Office and copyright owners to help determine how to ensure that the merged entity does not offer sound recording distributions to their subscribers under the guise of a performance license in the future.

Diversity of Music. Additionally, one of the ways satellite radio claims it has brought great benefits to the public is through the diversity of music programming and music formats broadcast to the public. The Commission should consider the extent to which it is competition between XM and Sirius that has led these two companies to deliver a more diverse library of sound recordings and music programming than is heard on broadcast radio. Unless the Commission is persuaded that competition from other music services and other sources of music will assure that the merged entity will continue to have the incentive to deliver the wide range of music that has characterized satellite radio to date, it should not approve the merger.

Effect of Increased Bargaining Power on Non-Statutory Licenses. Finally, an additional risk of increasing the market power of the SDARS is the potential threat to the ability of artists and record companies to receive fair compensation for sound recordings negotiated between the record companies and a merged satellite radio company (as opposed to compensation set via the compulsory copyright digital performance license discussed above). Undue bargaining power in the hands of a merged satellite radio company would lessen the ability of artists and record labels to bargain for proper compensation for sound recordings or for such copyright licensing arrangements that go beyond the statutory license setout in the DMCA. The Commission should therefore consider this risk as well in weighing the public interest factors in support of and against the merger, and recommend adequate checks and oversight to ensure that artists and record companies are fairly compensated by a merged company.

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The merger of XM and Sirius should be approved only if and when the Commission has satisfied itself that, on balance, the merged company is more likely than XM and Sirius competing against each other as separate companies to, among other things, provide consumers with the broad diversity of music programming they have come to expect from satellite radio, and fairly compensate artists and record companies for their recordings so that the music industry can continue to create sound recordings to the great benefit of the public.

If the Commission determines the merger is in the public interest, the Commission should condition its approval on (i) an acknowledgement by XM and Sirius that the merged company should pay the same rates as other digital music service companies for compulsory copyright licensing for digital performance of sound recordings, and foreclosing XM and Sirius from arguing that below market rates are appropriate for such compulsory copyright licensing, (ii) the continued protection of sound recording from unlawful infringement by the merged entity, and (iii) the adoption of adequate checks and oversight to ensure that artists and record companies are fairly compensated.[5]

Respectfully submitted,

Steven M. Marks
Executive Vice President and General Counsel
Recording Industry Association of America

[5] The RIAA reserves the right to appeal or seek reconsideration of any Commission decision that fails adequately to weigh the potential harms and benefits that could result from the proposed merger.