

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

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

To: The Commission

REPLY COMMENTS OF PUBLIC KNOWLEDGE

Public Knowledge submits these reply comments solely to address matters raised by the Recording Industry Association of America (RIAA) in its filing of July 9, 2007 in the above captioned proceeding.¹ The RIAA asks the FCC to condition the proposed merger of XM Satellite Radio and Sirius Satellite Radio on “the continued protection of sound recordings from unlawful infringement by the [Satellite Digital Audio Radio Services].”² For the following reasons, Public Knowledge urges the Commission to deny this request.

INTRODUCTION

Claiming that the merger would “seriously threaten the viability of the music industry as a whole,”³ the RIAA asks the Commission to approve the proposed satellite radio merger only under the condition that sound recordings be protected from “unlawful infringement by the merged entity.”⁴ Not only is this merger unlikely to herald the end of

¹ Comments of Recording Industry Association of America, MB Docket No. 07-57, at 6 (Jul. 9, 2007).

² *Id.*

³ *Id.*

⁴ Comments of Recording Industry Association of America, MB Docket No. 07-57, at 8.

recorded music, but the RIAA's proposed condition is unwarranted and detrimental to consumers. The RIAA's request should be denied on the grounds that the Commission lacks the authority to impose such a condition, and such a condition contravenes existing law and copyright policy.

I. THE FCC LACKS THE AUTHORITY TO IMPOSE THE RIAA'S PROPOSED CONDITION

The RIAA's proposed condition is an invitation for the Commission to overstep its authority. As *American Library Association v. FCC* established, the Commission lacks the authority to impose post-reception requirements on devices.⁵ Nor does the Commission have the power to shape or reinterpret copyright policy.

A. THE FCC CANNOT IMPOSE POST-RECEPTION REQUIREMENTS

The RIAA's proposed condition would seem to require the Commission to impose design requirements on satellite radio systems. This proposed condition is more than technologically troubling—it asks the Commission to regulate in an area barred to it by existing law.

At the advent of digital television, the Commission considered imposing rules to prevent the unauthorized copying of digital programming.⁶ Content providers voiced their support for such restrictions, and the Commission adopted “broadcast flag” regulations that required devices capable of receiving digital television signals to include the technology to recognize a broadcast flag in the signal.⁷ Like the RIAA's proposed condition, the broadcast flag was purportedly designed to prevent unauthorized copying. However, a unanimous Court of Appeals for the D.C. Circuit held that the Commission

⁵ *American Library Association v. F.C.C.*, 406 F.3d 689 (D.C. Cir. 2005).

⁶ *Id.* at 691.

⁷ *Id.*

lacked the authority to impose design mandates for copyright restrictions. The Commission may only regulate in those areas designated by Congress, and

the Communications Act of 1934 does not indicate a legislative intent to delegate authority to the Commission to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in communication.⁸

The fact that a device is used to receive communications does not grant the Commission the authority to dictate how the device may function post-reception.⁹

For the very same reasons, the Commission lacks the authority to implement the RIAA's condition. Any restrictions on satellite radio receivers designed to prevent infringing recordings would be an unauthorized extension of the Commission's authority.

B. COPYRIGHT IS OUTSIDE THE COMMISSION'S JURISDICTION

The proposed condition is designed to curb copyright infringement, and such copyright oriented rule-making is clearly outside the Commission's jurisdiction. The Commission's jurisdiction is limited to activities involving communication by wire or radio,¹⁰ and do not extend to the realm of copyright law. *American Library Association* established that the FCC does not have the authority to enact rules requiring digital media services to prevent unauthorized copying.¹¹ The RIAA even seems to note that the imposition of such a rule is outside the FCC's established areas of expertise and authority, and suggests that the FCC should "seek input from the Copyright Office."¹²

The Commission has correctly declined to overstep its bounds in this area before. In 2004, the recording industry asked the Commission to require copy protection systems

⁸ *American Library Association v. F.C.C.*, 406 F.3d. at 706.

⁹ *Id* at 703.

¹⁰ 47 U.S.C. § 151.

¹¹ *American Library Association v. FCC*, 406 F.3d 689.

¹² Comments of Recording Industry Association of America, MB Docket No. 07-57 (Jul. 9, 2007).

in digital broadcast radio, even while noting that the Copyright Act was not in the Commission's purview.¹³ As then, the Commission should resist the demands that it impose restrictions not within the scope of its authority.

A proposed merger is not the proper forum for the Commission to impose conditions that amount to copyright law. As Sen. Patrick J. Leahy, Chairman of the Senate Judiciary Committee has written, Title 47 grants the FCC “no express authority ... to address the complex issues of intellectual property matters[.]”¹⁴ Any issues related to copyright and content protection can be more properly addressed through legislation or through an agency specifically tasked with applying copyright law.¹⁵

II. THE PROPOSED CONDITION RUNS COUNTER TO EXISTING LAW AND POLICY

Preventing consumers from making home recordings of digital audio runs counter to the Audio Home Recording Act. Furthermore, mandating technological restrictions on copyrighted works arbitrarily denies them their ability to make lawful uses of those works.

A. THE PROPOSED CONDITION WOULD VIOLATE THE AUDIO HOME RECORDING ACT

The RIAA’s proposed condition would interfere with, if not altogether prevent, consumers from recording satellite radio broadcasts. Consumers have been able to record radio transmissions since the invention of the tape player, and the ability to do so in digital format is specifically protected under the Audio Home Recording Act (AHRA), which prohibits any copyright infringement action based on:

¹³ Comments of Recording Industry Association of America, MM Docket No. 99-325 (Jun. 16, 2004).

¹⁴ Letter from Sen. Patrick J. Leahy, Chairman, Senate Judiciary Committee and Rep. F. James Sensenbrenner, Jr., Chairman, House Committee on the Judiciary, *et al.* to Michael K. Powell, Chairman, FCC (Sep. 9, 2002).

¹⁵ *See, e.g.*, 17 U.S.C. § 701.

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.* (Emphasis added.)¹⁶

The proposed merger cannot be used to overturn existing legislation. Concerns about the AHRA can be, and have been, more properly raised in other forums. For instance, the recording industry has filed suit in federal court against XM, claiming that the AHRA does not apply to the recording receivers.¹⁷ Moreover, for the past two years and in currently pending legislation, the RIAA has lobbied for changes in the law that would prevent consumers from recording programming and desegregating individual tracks.¹⁸ Regardless of the merits of those initiatives, each takes place in a proper forum for addressing the interpretation or amendment of the AHRA. The RIAA's proposed condition cannot be implemented without circumventing existing law, and the Commission's oversight of this merger is not an appropriate means to alter copyright legislation.

B. THE PROPOSED CONDITION CONTRAVENES EXISTING COPYRIGHT POLICY

The RIAA's proposed condition would hinder or altogether prevent the public's ability to access and record broadcasts, undermine the fair use doctrine, and render otherwise lawful recording and copying activities illegal under the anticircumvention provisions of the Digital Millennium Copyright Act.

¹⁶ See 17 U.S.C. § 1008.

¹⁷ See *Atlantic Recording Corp. v. XM Satellite Radio, Inc.*, No. 06 Civ. 3733 (S.D.N.Y. Jan. 19, 2007).

¹⁸ Platform Equality and Remedies for Rights Holders in Music (PERFORM) Act of 2007, S.256, 110th Cong. (2007).

Technological protection measures for content, such as the proposal by the RIAA, are designed to prevent unauthorized copying. However, a wide range of unauthorized copying is lawful and in the public interest. For instance, some materials cannot be copyrighted, while others have come into the public domain at the end of their copyright terms. Most notably, however, the personal recording of copyrighted materials is well within the boundaries of fair use.¹⁹ There is simply no way that a broadly applied condition would only prevent unlawful action. A condition that restricted satellite radio devices from recording certain broadcasts would interfere with all consumers' ability to record those broadcasts—regardless of whether such recording was a fair use of the materials.

Furthermore, the RIAA's proposed condition would make it illegal for consumers to legally access recorded broadcasts. Section 1201 of Title 17 prohibits the circumvention of technological protection measures such as the ones that would be implemented to satisfy the RIAA's condition.²⁰ Under the proposed condition, a consumer who wanted to record a broadcast in a way that constituted fair use, or record material that was in the public domain, would have to circumvent the technological provisions embedded in the receiver. Thus, an otherwise lawful activity would subject a consumer to civil or even criminal liability.

The restriction further embodies detrimental copyright policy in that it presumes to impose a non-existent duty on services and manufacturers. XM and Sirius do not have a duty to redesign devices or remove features simply because they *may* allow users to infringe. Consumers can record content legally, and while distributors and manufacturers

¹⁹ 17 U.S.C § 107.

²⁰ 17 U.S.C. § 1201.

may not contribute to or induce infringement, neither are they required to prevent lawful uses due to a vague and unsubstantiated specter of potential infringement.

The RIAA attempts to skew the issue by mischaracterizing the nature of recording-capable satellite radio devices like the Inno, likening it to a downloading service.²¹ However, such devices simply allow consumers to record broadcasts as they are aired. In contrast, a “digital distribution subscription service” like Rhapsody or Napster provides users with an on-demand distribution of discrete phonorecords. Adding a recording capability to a receiver is a lawful and logical improvement in a consumer device, and hardly the alleged “circumvention” of compulsory licenses.²² Satellite radio providers are not phonorecord distributors any more than manufacturers of radio/tape recorders are phonorecord distributors. The existence of recording devices that enable consumers to exercise their right to make recordings does not convert a broadcaster into a distributor.

²¹ Comments of Recording Industry of America, MB Docket No. 07-57, at 6.

²² *Id.*

CONCLUSION

The RIAA's proposed content protection provision asks the Commission to issue a condition beyond its jurisdiction and runs contrary to established copyright law and policy. For these reasons, the Commission should deny the RIAA's request.

Respectfully submitted,

/s/

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