

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

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

**Reply Comments of the Home Recording Rights Coalition**

July 24, 2007

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**Reply Comments of the Home Recording Rights Coalition**

The Home Recording Rights Coalition (“HRRC”), respectfully submits these Reply Comments solely to address suggestions raised in the comments of the Recording Industry Association of America (RIAA).<sup>1</sup> RIAA invites the Commission to override three ongoing lawsuits, contradict Supreme Court precedent and the Copyright Act, and write new copyright law – all in the limited context of a license transfer. HRRC takes no position on whether the merger should be approved or otherwise subject to condition. HRRC files solely in response to the ill-considered and outrageous proposal of the RIAA.

According to RIAA, the Commission should condition its approval of the merger of the two satellite digital audio services, XM and Sirius, on “. . .the continued protection of sound recordings from unlawful infringement,” and further “. . .seek input from the Copyright Office and copyright owners” in order to issue more binding interpretations of copyright law.<sup>2</sup> The Commission has no authority to interpret copyright law so as to

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<sup>1</sup> *In the Matter of Sirius Satellite Radio, Inc. and XM Satellite Radio Holdings Inc., Application to Transfer Control of FCC Authorization and Licenses*, MB Docket No. 07-57, Comments of the Recording Industry Association of America (July 9, 2007) (hereinafter RIAA Comments).

<sup>2</sup> RIAA Comments at 6-7.

circumscribe music listeners' recording rights. If the Commission had such authority, this license transfer proceeding would not be the right forum.

## **I. Introduction and Summary**

HRRC was founded in 1981 after the U.S. Court of Appeals for the Ninth Circuit ruled that furnishing videocassette recorders with TV tuners to consumers was a contributory infringement of copyright.<sup>3</sup> The Supreme Court's reversal of that holding, in *Universal Studios, Inc. v. Sony*,<sup>4</sup> became the *magna carta* for the age of digital consumer electronics, in which virtually all products have some recording capacity. The *Betamax* decision established important *fair use* rights for media consumers, interpreting and applying Section 107 of the Copyright Act.<sup>5</sup> Courts continue to construe and apply this decision,<sup>6</sup> and the Congress continues to refer to it in its deliberations.<sup>7</sup> XM and Sirius, the two satellite digital audio services (SDARS) which are the subject of this proceeding, have followed in the tradition of Sony's original VCR by offering satellite receivers with recording functions. The receivers are closed systems, in that recorded music cannot be transferred from the receiver in digital form.

This is the second extraneous initiative of the RIAA aimed at enlisting the FCC to constrain accustomed consumer rights and practices. In 2004 the RIAA – having never evinced an iota of interest in the long proceeding that gave birth to terrestrial digital radio – entered at the last minute to urge the Commission to strip consumers of their

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<sup>3</sup> *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963 (9th Cir. 1981), rev'd 464 U.S. 417 (1984).

<sup>4</sup> 464 U.S. 417 (1984) (hereinafter the “*Betamax*” case).

<sup>5</sup> 17 U.S.C. § 107 (2006 & West 2007).

<sup>6</sup> E.g., *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>7</sup> H.R. 1201, 110th Cong. (2007).

accustomed right to record radio broadcasts for personal use.<sup>8</sup> Grudgingly acknowledging that “. . . the Commission is not charged with enforcing the Copyright Act,”<sup>9</sup> the RIAA nonetheless asked the Commission to create and enforce new copy protection mandates. The Commission wisely took no action to become a copyright enforcement agency.

In the subsequent Congress, the RIAA urged “Audio Flag” and other legislation that would have empowered the Commission to impose copy protection mandates on both terrestrial and satellite digital radio. Congress, too, declined to undermine the courts’ traditional role in copyright enforcement by giving vast new copyright powers to the Commission. In both of these attempts, the recording industry sought mandates that went far beyond preventing the mass redistribution of infringing music files on the Internet. The rule they sought would effectively ban private, noncommercial recording of audio broadcasts for personal time-shifting – the same practice that the Supreme Court found to be a fair use in the television context.<sup>10</sup>

Having failed at the Commission and in Congress to impose new recording bans for digital audio, several of the RIAA’s largest member recording companies are now pursuing a lawsuit against XM,<sup>11</sup> and an additional lawsuit is now pending against Sirius.<sup>12</sup> The record labels are claiming that the sale of receivers with recording functions transforms XM’s rendering of copyrighted music into a “distribution” for which XM is

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<sup>8</sup> *In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, MM Docket 99-325, Comments of the Recording Industry Association of America, Inc. (June 16, 2004).

<sup>9</sup> *Id.* at iii, ¶ 4.

<sup>10</sup> *Betamax*, 464 U.S. at 449-56.

<sup>11</sup> *Atlantic Recording Corp., et al v. XM Satellite Radio Inc.*, No. 06 Civ. 3733 (S.D.N.Y. filed May 16, 2006); *see also National Music Publishers’ Assoc. v. XM Satellite Radio Inc.*, No. 07-CV-2385 (S.D.N.Y. filed Mar. 22, 2007).

<sup>12</sup> *Nota Music Publishing, Inc. et. al. v. Sirius Satellite Radio Inc.*, No. 07-CV-6307 (S.D.N.Y. filed July 10, 2007).

not licensed. In addition to denying liability, XM has raised the defense of the Audio Home Recording Act of 1992 (the “AHRA”),<sup>13</sup> which prohibits suits based on the sale of a device covered by the AHRA. In any event, as HRRC discussed at length in its Comments on RIAA’s initiative in 2004, Congress gave the implementation of the AHRA to the *Department of Commerce* – not the FCC.<sup>14</sup>

Now, with these three lawsuits still pending, RIAA is asking the Commission yet again for a broad and unwarranted copy protection mandate, this time in the form of a condition on the merger of XM and Sirius. A mandate today is no more necessary than it was in 2004 or in 2006, and would punish the very innovators who are developing new markets for music and ways of enjoying it. Like their previous proposals, RIAA’s current request exceeds the Commission’s jurisdiction and usurps the role of the Federal courts in interpreting the copyright law.

## **II. The Commission Lacks Jurisdiction to Make Copyright Law or Regulate Recording Functions**

RIAA has once again asked the Commission to exceed its jurisdiction by imposing *new* interpretations of copyright law, and enforcing them with new mandates. One searches the Communications Act and the Copyright Act in vain for any suggestion of Commission authority to announce whether the SDARS’ recording-capable receivers violate copyright law, or to enforce any such *sui generis* interpretations through conditions, or otherwise. In fact, the U.S. Court of Appeals for the District of Columbia Circuit has explicitly ruled that the Commission may not impose copy protection mandates on receiving devices when those devices are performing functions other than

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<sup>13</sup> 17 U.S.C. §1001 *et seq.*

<sup>14</sup> See *In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, MM Docket 99-325, Comments of the Home Recording Rights Coalition on Notice of Inquiry re Digital Audio Content Control at 22-23 (June 16, 2004); 17 U.S.C. §1002(a)(3) and (b).

receiving a broadcast signal.<sup>15</sup> The rule struck down by the appeals court, though in fact less restrictive of consumer rights than the mandate the RIAA seeks now, was equivalent in concept: mandated restrictions on consumers' lawful recording of digital broadcasts for their private use.

Nor can RIAA invoke the Commission's "public interest" standard under Section 4(i) of the Communications Act<sup>16</sup> as a plenary source of copyright enforcement authority. As the Commission has previously concluded, quoting the Supreme Court:

[T]he use of the term 'public interest' in a regulatory statute is not a broad license to promote the general welfare. Rather, the words take meaning from the purpose of the regulatory legislation.<sup>17</sup>

Of course, were the law otherwise, the Commission would have to weigh any and all proposals for promoting the general "public interest," no matter how tangential such proposals might be. Any number of proposals might advance "the public's interest in music" – perhaps the SDARS could be required to fund music lessons in public schools. Were the Commission's ancillary authority as broad as the RIAA implies, the Commission would need to assume the role of any number of other regulatory agencies. Obviously, and even without the express ruling of the Court of Appeals that the Commission lacks jurisdiction in this area, ancillary authority does not reach so far. Thus, the court quoted former Chairman Powell: "It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation . . . . Section 4(i)'s authority must be 'reasonably ancillary' with other express provisions."<sup>18</sup>

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<sup>15</sup> American Library Association v. Federal Communications Commission, 406 F.3d 689, 708 (D.C. Cir. 2005).

<sup>16</sup> 47 U.S.C. § 154(i) (2006 & West 2007).

<sup>17</sup> *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1207-08 ¶ 51 (1986) (quoting *National Assoc. for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 669 (1976)).

<sup>18</sup> *Motion Picture Assn. of Am. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002).

### **III. RIAA's Proposal Would Pre-Empt Three Federal Lawsuits in Progress**

RIAA's request, to condition approval of the license transfer ". . . upon the continued protection of sound recordings from unlawful infringement,"<sup>19</sup> presupposes that XM and Sirius are violating copyright law, that the Copyright Act's distribution right is broad enough to cover the SDARS' activities, and that the AHRA does not apply. To act on that supposition now would be to prejudge the outcome of three Federal lawsuits which are now considering that very question, and would in effect take that decision away from the courts, and arrogate a power granted by the Congress to another agency of government. The parties to those lawsuits are the very same parties that are the subjects of and commenters to the instant proceeding.<sup>20</sup> To even consider copy protection mandates in this proceeding would require the Commission to hear and evaluate the same evidence already being considered in the courts.

Even worse, RIAA is not only asking the Commission to broaden the scope of the distribution right, but also to craft a permanent injunction controlling XM's and Sirius's future product designs. According to the RIAA, "[t]he Commission should also seek input 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."<sup>21</sup> It has not been established that the SDARS have ever "offer[ed] sound recording distributions," but the RIAA

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<sup>19</sup> RIAA Comments at 6.

<sup>20</sup> HRRC, along with the Consumer Electronics Association, filed an *amicus curiae* brief urging dismissal of the *Atlantic Records v. XM* suit (*Atlantic Recording Corp., et al v. XM Satellite Radio Inc.*, 06 Civ. 3733 (S.D.N.Y. filed Jan. 19, 2007).

<sup>21</sup> RIAA Comments at 6-7.

nonetheless asserts that “copyright owners” – meaning RIAA’s own members – should be able to set limits on the functionality of future SDARS receivers.

As described above, the Commission has no jurisdiction to make and enforce copy protection mandates on content after it has been received. Imposing or even considering such mandates in the context of this proceeding would directly interfere with ongoing litigation. Even if XM and Sirius are ultimately found to have infringed copyrights, the courts have all of the tools needed to craft a remedy – additional conditions imposed by the Commission can at best duplicate the courts’ remedy, at worst undermine it.

#### **IV. Conclusion**

RIAA’s proposal – to entangle the Commission in contentious questions of copyright interpretation and enforcement – is not new. The Commission, courts, and Congress have rejected this proposal in various forms over the past few years. Even if the Commission had jurisdiction over the recording functions of digital receivers – which it does not – and even if the Commission could trump the courts’ interpretation of copyright law – which it cannot – imposing new copy protection mandates as a condition on a license transfer would punish the very innovators whose technologies have created new markets and revenue sources for artists and songwriters. The Commission should not actively create copyright policy – especially in this context.

Respectfully submitted,

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