

Statement of

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Group Operations

Susquehanna Radio Corporation



**Digital Content and Enabling Technology:  
Satisfying the 21<sup>st</sup> Century Consumer**

**United States House of Representatives  
Committee on Energy and Commerce  
Subcommittee on Commerce, Trade, and  
Consumer Protection**

**May 3, 2006**

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**Senior Vice President and General Manager for Group Operations**  
**Susquehanna Radio Corporation**  
**On behalf of the National Association of Broadcasters**

**Hearing before the House Subcommittee on Commerce,  
Trade, and Consumer Protection**

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Good afternoon, Chairman Stearns and Members of the Subcommittee. My name is Dan Halyburton. I am the Senior Vice President and General Manager for Group Operations for Susquehanna Radio Corp., which owns 33 broadcast radio stations. I am also Chairman of NAB's Audio Flag Task Force. I am testifying today on behalf of the National Association of Broadcasters (NAB). NAB is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and the Courts.

My message today is a simple one. The radio broadcasting industry is currently embracing digital technology. Given the importance of this digital transition to both consumers and local broadcasters, any technical system developed to provide copy protection for digital content must not impede the digital radio roll-out. Although broadcasters oppose piracy in all shapes and forms, NAB remains concerned that legislatively imposing requirements for digital copy protection at this time could stall the digital radio transition. Moreover, certain audio copy protection methods that have been proposed, such as encryption, are problematic for additional reasons. NAB accordingly urges Congress to allow the broadcast industry, the recording industry and other vital stakeholders to continue working toward a consensus on digital radio copy protection.

## **Any System to Protect Digital Content Must Not Impede the Digital Radio Roll-Out**

Today, I can report that local radio broadcasters are engaged in an exciting transition to digital audio broadcasting (DAB). The industry sees digital high definition radio as our future—it will enable us to better serve our local communities and to remain competitive in today’s ever-changing digital media marketplace. But we face many challenges as we work toward a successful and timely transition to digital radio. Those challenges would be exacerbated – and the roll-out delayed – by a “quick fix” technical system to provide copy protection for digital radio. For this reason, NAB and the Recording Industry Association of America (RIAA) are now discussing the development of a consensus on digital radio copy protection. We urge you to allow this industry process to continue without the adoption of premature legislative mandates that could well have disastrous consequences for our industry.

The radio industry in America has begun its massive roll-out of digital broadcast transmissions and all-new digital radio receivers. Currently, 767 digital AM and FM stations are on the air. Broadcasters have individually committed to upgrade more than 2,000 stations to high definition (HD) radio technology this year. Why are radio broadcasters embracing HD radio? In short, because it will allow local broadcasters to better serve their listeners and to remain competitive in today’s digital media marketplace. HD radio not only offers crystal-clear audio; it also permits the broadcasting of multiple free, over-the-air program streams to bring additional content (including much more local content) to the public within stations’ current spectrum. It further enables other services, including wireless data enabling text information, such as song titles and artists or weather and traffic alerts. Even more innovative features are

under development, such as program menus giving listeners instant access to a favorite drive time show, news and information, and special music programming. New features of the future could also include real-time traffic reports broadcast by local stations and visually displayed on a vehicle's navigation system. In sum, digital radio will allow broadcasters to remain a vital and vibrant part of the media landscape of the future.

But beyond thousands of radio stations converting to digital, the HD radio revolution also involves the consumer electronics industry and, most importantly, consumers. New digital radio receivers have been launched in the marketplace across a range of product categories. Major radio groups are engaged in a massive marketing campaign to promote digital radio to consumers. And auto makers and after-market manufacturers are beginning to produce digital radio products for car sound systems. 2006 and 2007 promise to be pivotal years for the roll-out of digital radio, with auto makers signing up for factory-installed radios, retail outlets prominently featuring many new digital radio products, and hundreds more broadcasters commencing digital transmissions. Given this investment by broadcasters and equipment manufacturers and the benefits that consumers will receive from a successful deployment of digital radio, it is of paramount importance that any copy protection mechanism not impede the digital radio roll-out.

NAB remains concerned that developing and implementing a technical system to provide copy protection for digital radio not have a negative impact on the digital radio transition. Reaching a final consensus on the digital television (DTV) broadcast flag mechanism, for example, entailed many years of intense negotiations by scores of participants from a wide array of industry sectors. The purpose, concept and

methodology of the DTV flag were then the subject of voluminous comments and reply comments from affected industry and consumers groups, companies and organizations. The FCC scrutinized these comments, heard in-person presentations from many interested parties and concluded that the purpose of preventing widespread indiscriminate re-distribution of digital video content over the Internet was worthy and that the methodology was sound and workable.

NAB has expressed its willingness to participate in developing and forging a consensus on a digital radio copy protection system so long as it would not interrupt the digital roll-out or create uncertainty that would lead to a slow down of adoption rates by manufacturers, consumers or even broadcasters. To that end, NAB and RIAA are engaged in on-going discussions regarding copy protection. We jointly held an executive level meeting in New York City that served as a starting point for our discussions. We have established two working groups that will continue to move forward with meetings, which we expect will ultimately involve and include other vital stakeholders in a successful resolution of the issues.

Given these on-going discussions, NAB does not believe that legislation mandating any particular system of digital radio copy protection is necessary at this time. Terrestrial digital radio is a far different platform from satellite and on-line music services and delivery. The reality or scope of any threat to the recording industry from a scenario in which consumers make good quality recordings from digital broadcasts on their local radio stations is still an evolving concern. Those desiring to obtain and listen to pure, uninterrupted performances of sound recordings, in lieu of the radio, already have an abundant number of means to do so. Satellite and cable digital subscription

services, hundreds of thousands of unencrypted compact discs, peer to peer file sharing, and hours of uninterrupted music that can be stored on recordable CDs and hard drives, are but a few such means. These are far different concerns than that of consumers seeking out random digital audio broadcast signals that may contain DJ patter over the recordings in order to create files to make copies of or distribute sound recordings. Nonetheless, NAB strongly believes that the broadcast industry, the recording industry, and other vital stakeholders can work toward a consensus on digital radio copy protection system, as warranted by marketplace conditions and technological developments.

**The Public's Right to Make Private Copies of Sound Recordings for Personal Use Must Be Taken Into Account**

In addition, in any discussion about affording copy protection to digital audio recordings or transmissions, all parties must take into account Congress' long-standing policy of protecting and preserving the public's right to make home recordings of sound recordings for personal use. The House Report accompanying the Sound Recording Act of 1971 stated:

HOME RECORDING

In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, *it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.*<sup>1</sup>

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<sup>1</sup> H. Rep. No. 92-487, 92d Congress, 1<sup>st</sup> Sess. at 7 (Sept. 22, 1971) (emphasis added).

Since that Act, Congress has expanded the sound recording right only sparingly, in careful response to specific and well-documented threats, all the while reiterating the importance of preserving the public's right to make home copies for personal use.

In the Audio Home Recording Act of 1992 (“AHRA”), Congress definitively addressed the issue of home recording of sound recordings and musical works. This Act was intended to be comprehensive, forward-looking legislation designed to end, once and for all, the “longstanding controversy” surrounding the home recording of prerecorded music.<sup>2</sup> Indeed, then-President of RIAA, Jay Berman, described the bill that became the AHRA as “a generic solution that *applies across the board to all forms of digital audio recording technology*.”<sup>3</sup>

The Senate Report that accompanied the AHRA opened its discussion of the bill with the assertion that “[t]he purpose of S.1623 is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private noncommercial use.”<sup>4</sup> To this end, the provision of the AHRA providing the exemption for home copying, section 1008, was considered “one of the cornerstones of the bill” because it “removes the legal cloud over home copying of prerecorded music in the *most proconsumer way possible*: It gives consumers a *complete exemption* for noncommercial home copying *of both digital and analog music*, even though the royalty obligations under the bill apply only to digitally formatted music.”<sup>5</sup> The Ninth Circuit confirmed this conclusion in *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (9<sup>th</sup> Cir. 1999).

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<sup>2</sup> See S. Rep. No. 102-294, 102d Cong., 2d Sess. 30, 51 (June 9, 1992).

<sup>3</sup> Hearing Before the Senate Subcommittee on Communications, S. Hrg. 102-908, Serial No. J-102-43, at 111 (Oct. 29, 1991) (statement of Jason Berman, President of RIAA) (emphasis added).

<sup>4</sup> S. Rep. No. 102-294, at 51.

<sup>5</sup> 138 Cong. Rec. H9029, H9033 (daily ed., Sept. 22, 1992) (statement of Rep. Hughes) (emphasis added).

### **Certain Proposals for Audio Copy Protection Are Problematic**

One proposal for resolving copy protection concerns is to mandate that all radio broadcasters encrypt their digital content at the source. NAB strongly opposes this approach. Such a mandate would be antithetical to the concept of free, over-the-air broadcasting. No U.S. free, over-the-air broadcast service, analog or digital, has ever been required to encrypt its transmissions.

Any encryption requirement would also likely risk stalling the digital radio transition by requiring a change in the technical digital radio broadcasting standard of such magnitude that a year's delay and likely more would be inevitable. Resulting uncertainty in the marketplace and potential loss of confidence and interest in digital audio broadcasting by manufacturers now ready to roll out DAB receivers would harm broadcasters and threaten the public's receipt of digital radio. To date, there has been no investigation of what kind of encryption would be utilized, what copy control and re-distribution measures would be added (and acceptable to various stakeholders), and what features receivers can and cannot employ in terms of storage and replay.

Required encryption of DAB transmissions, even at this early stage, would likely result in obsolescence of millions of units of DAB components currently in the production pipeline, including receivers, integrated circuits and installed component parts in automobiles. This would clearly decrease manufacturers' and auto makers' enthusiasm for developing and deploying DAB products.

Encryption and copyright protection considerations with regard to digital radio differ in important ways from the DTV broadcast flag. The DTV broadcast flag does not involve copy restrictions, but rather is designed to prevent only indiscriminate re-

distribution of broadcast programming over the Internet. The DTV broadcast flag does not disable the existing base of “legacy” receivers, which will simply not “read” the flag and its instructions on re-distribution. As noted above, the encryption of DAB signals would obsolete receivers now in the field, as well as receivers and component parts currently in the production pipeline. And, as previously explained, with the DTV flag, there was a consensus solution developed by a broad cross-section of industry participants.

### **Congress Should Reject Efforts to Impose a Sound Recording Performance Right in Digital Broadcasts**

NAB urges the Subcommittee to recognize that a new performance right tax on broadcasters is unnecessary and has no relationship to concerns about the copying and redistribution of digital content.

Throughout the history of the debate over sound recording copyrights, Congress has consistently recognized that recording companies reap very significant promotional benefits from the exposure given their recordings by radio stations and that placing burdensome restrictions on performances could alter that relationship, to the detriment of both industries. For that reason, in the 1920s and for five decades following, Congress regularly considered proposals to grant copyright rights in sound recordings, but repeatedly rejected such proposals.

When Congress did first afford limited copyright protection to sound recordings in 1971, it prohibited only unauthorized reproduction and distribution of records, but did not create a sound recording performance right. During the comprehensive revision of the Copyright Act in 1976, Congress again considered, and rejected, granting a sound recording performance right. Congress continued

to refuse to provide any sound recording performance right for another twenty years. During that time, the recording industry thrived, due in large measure to the promotional value of radio performances of their records.<sup>6</sup>

It was not until the Digital Performance Rights in Sound Recordings Act of 1995 (the "DPRA") that even a limited performance right in sound recordings was granted. In granting this limited right, Congress stated it "should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries."<sup>7</sup> As explained in the Senate Report accompanying the DPRA, "The underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscriptions and interactive services – but not by broadcasting and related transmissions."<sup>8</sup>

Consistent with Congress' intent, the DPRA expressly exempted from sound recording performance right liability non-subscription, non-interactive transmissions, including "non-subscription broadcast transmission[s]" – transmission[s] made by FCC licensed radio broadcasters.<sup>9</sup> Congress made clear that the purpose of this broadcast exemption was to preserve the historical, mutually beneficial relationship between recording companies and radio stations:

The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many

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<sup>6</sup> *See, e.g.*, S. Rep. No. 93-983, at 225-26 (1974) ("The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which, in turn, depends in great measure on the promotion efforts of broadcasters.").

<sup>7</sup> S. Rep. No. 104-129, at 15 ("1995 Senate Report"); *accord, id.* at 13 (Congress sought to ensure that extensions of copyright protection in favor of the recording industry did not "upset[] the long-standing business relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.").

<sup>8</sup> *Id.* at 17.

<sup>9</sup> 17 U.S.C. §114(d)(1)(A).

sound recordings and careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.<sup>10</sup>

The Senate Report similarly confirmed that "[i]t is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings."<sup>11</sup> In sum, the transition of traditional local radio stations from analog to digital presents no basis to alter fundamentally the long-standing mutually beneficial relationship between the recording and broadcasting industries by imposing a new performance right in digital broadcasts, when one does not exist in analog.

NAB further stresses that this discussion is not intended to minimize legitimate concerns the recording industry may have about the need for copy protection. Rather, it is intended to assist the Subcommittee in understanding why a performance right for sound recordings is irrelevant to those concerns.

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<sup>10</sup> 1995 Senate Report, at 15.

<sup>11</sup> *Id.*

## **Conclusion**

The deployment of digital radio is essential for terrestrial broadcasters to better serve their listeners and to remain competitive in today's digital media marketplace. Because of the importance of a timely and successful roll-out of digital radio, any system to protect digital content must not impede the transition. NAB and RIAA are engaged in discussions to develop a consensus on digital radio copy protection. Congress should allow this industry process to continue without the adoption of premature legislative mandates.

Thank you for this opportunity to share our views.