

Before the  
House Committee on Energy and Commerce  
Subcommittee on Telecommunications and the Internet

“The Audio and Video Flags: Can Content Protection and  
Technological Innovation Coexist?”

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Statement of Gary J. Shapiro  
for  
The Consumer Electronics Association and  
The Home Recording Rights Coalition

Chairman Upton and members of the subcommittee, thank you for inviting me to appear today on behalf of the Home Recording Rights Coalition and the Consumer Electronics Association. At CEA, we have more than 2,000 corporate members who contribute more than \$120 billion to our economy and serve almost every household in the country. We thus believe it is vital to preserve the innovation, integrity, and usefulness of the products that our members deliver to consumers. The Home Recording Rights Coalition was founded almost 25 years ago, in response to a court decision that said copyright proprietors could, via a lawsuit, stop the distribution of a new and useful product – the VCR. Even the motion picture industry has admitted that it is glad that the VCR was allowed to come to market. Congress should be very careful not to impose any mandates that would be regretted later.

Before discussing the advisability of any sort of “flag” legislation, I want to emphasize that both CEA and the HRRC share and applaud Chairman Barton’s and Mr. Boucher’s determination that if the Congress should find it appropriate to proceed, it should do so only while enacting H.R. 1201 at the same time. We believe this legislation, as formulated and introduced in this Congress, would protect consumers without

threatening any legitimate service. It would not remove any tools against pirates. It has been unfairly caricatured by some, and deserves consideration on its own merits.

On the subject at hand, we have grave concerns. While the rationale for a video flag is questionable, we have not seen any rationale whatsoever for an “audio flag,” nor have we seen any actual technical proposal on the subject. Moreover, based on experience this year, we are deeply concerned about how the entertainment industry will interpret, tomorrow, the legislative language that it accepts today. These industries are turning now to both the Congress and the courts to seek new, damaging, and unreasonable interpretations of legislation which, in retrospect, we were perhaps naïve enough to join them in supporting.

We worked closely with the music industry and this Committee to help draft and enact the Audio Home Recording Act of 1992. The music industry, then, agreed with us, and told the Congress, that the AHRA was forward-looking legislation that would cover all digital audio recorders, even devices that recorded music from digital cable, satellite and terrestrial radio services. What they told the Congress then is not what they tell you now; nor is it what they tell the courts. The music industry no longer agrees that a consumer’s right to make a first generation copy of a song includes the right to play it back when and how the consumer wishes. Nor do they any longer agree that the words “No action may be brought under this title alleging infringement of copyright ...” have the meaning they told the Congress they had in 1992. (They do seem still to appreciate the word “royalties” – though apparently they are becoming ever more fond of the word “damages.”)

We worked with this Committee and the motion picture industry on the Digital Millennium Copyright Act of 1998 (the “DMCA”) as well. Yet, we have also been surprised at some of the later interpretations of this law, and at the reluctance of some to consider the clarifications proposed by Chairman Barton and Congressman Boucher. We therefore are very cautious in discussing *any* legislation that may impose a mandate on new technology and consumer devices. Both of today’s subjects have that potential.

**Any “Flag” Provision Should Be Proven Necessary And Accompanied By H.R. 1201**

The most vital requirement is that the legislation be *necessary* in the first place. There has been much discussion and review on this subject by the FCC with respect to the Video Broadcast Flag, which addresses only the mass, indiscriminate redistribution of content over the Internet. There has been no such focused discussion about an “audio flag” because we have not yet seen any actual proposal for such a “flag.” It seems evident that addressing “mass, indiscriminate redistribution” is very far from what the recording industry actually has in mind when it asks for a “flag.” The Video Broadcast Flag, as promulgated by the FCC, assured consumers’ rights to record from broadcast television. The recording industry seems intent on targeting, and preventing or taxing, consumers’ rights to record from terrestrial and satellite radio.

**Concerns About Technical Mandates In General**

Hard experience counsels that you establish some touchstones before even considering any such legislation. First, given the inherent difficulty of anticipating the timetable and course of specific technological developments, it should be shown unequivocally that the drastic step of a technology mandate is necessary. In addition:

- Any technical terms, and their consequences, must be absolutely clear and well understood *before* legislation is passed.
- The mandated technologies, their effects in the marketplace and on consumers, and the entire terms under which technology would be available to makers of the covered products must similarly be subject to a clear, common, and immutable understanding.
- Mandating the use of the technology should not harm technological progress or unduly burden legitimate products.
- It is no longer enough that, as we have previously insisted, a mandate must be accompanied by affirmative language that protect a consumer’s right to make private, noncommercial recordings at home. It is now clear to us, as I discuss below, that any mandate legislation also needs to protect, specifically, the consumer’s right to *search for, index, store, and play back any home recorded content, in the desired order, and to shift content in terms of time and place* -- just as consumers lawfully do with their personal video and audio recorders today.

### **This Hearing Is About Very Different Subjects**

The first thing our experience teaches us is that the issues noticed for this hearing are very different subjects. If I can emphasize one fundamental point, it is that these subjects should not be conflated or confused. Each is a separate and distinct issue, whether perceived from the content side as a “problem,” from the “technology” side as a potential “burden,” or from the consumer side as an obstacle to convenient and quiet enjoyment of products and services at home.

### **The “Broadcast Flag Authorization Act”**

The proposals for a “broadcast flag” emerged from two forums in which CEA, the HRRC, and various members have been very active – the Advanced Television Systems Committee (ATSC) and the Copy Protection Technical Work Group. In ATSC committees, members of the content community for years pushed for a “descriptor” for

the purportedly limited purpose of marking content, for possible control over mass Internet transmission. Members of the consumer electronics industry were greatly concerned that such a “flag” might be abused or used for other purposes, resulting in unwarranted control over consumer devices *inside* the home – something that had never been imposed on free, over-the-air commercial broadcasting. In response to these concerns, the content and broadcasting representatives agreed to clarify that the flag was meant to govern not transmission, but *retransmission*, outside the home.

Our members led in forming a Broadcast Flag work group at the CPTWG, and in drafting a final report. While the concept of a passive “flag” proved simple enough, the digital means of securing content, in response to such a flag, and the potential effect on consumers and their devices, proved highly controversial and contentious. The pros and cons finally were sorted out in the FCC Report & Order, which specified that the Flag was meant solely to address “*mass, indiscriminate redistribution*” of content over the Internet. This is the Order that the Court of Appeals nullified on jurisdictional grounds, and which, we assume, any “flag” legislation would reinstate.

While our members have a variety of views on the FCC action, CEA and HRRC have a couple of very clear concerns:

- First, we have been disappointed to see the “ATSC Descriptor” show up in a number of standards proceedings, proposed by the content industry for uses that go well beyond those originally described to the ATSC.
- Second, some of the legislative language that at times has been circulated and attributed to the Motion Picture Association of America and its members would go well beyond the FCC’s “mass, indiscriminate redistribution” standard, and could be interpreted as constraining distribution on networks *inside* the home.
- Third, the flag regulations were invalidated before they ever took effect. It should be clearly understood that, if legislation is enacted that would put the FCC regulations into force for the first time, manufacturers must be given a

commercially reasonable period of time to manufacture and include the necessary circuitry in their devices.

- Fourth, exceptions for consumer fair use, news and public affairs programming, and distance education, as we proposed to the FCC, should be part of any legislation addressing this subject.

### **The “Audio Flag”**

It is hard to think of a phrase that has been more abused in Washington this year than the words “Audio Flag.” From the context of the “Video Broadcast Flag” discussed above, one would naturally think that “audio flag” represents some proposal that:

- (a) refers to some known technology
- (b) is aimed only at “mass, indiscriminate redistribution of content over the Internet, and
- (c) is not aimed at restricting consumers’ in-home use of content that they have lawfully obtained.

Unfortunately, this is not the case.

### **Most Proposals Are Not For “Flags” At All**

Flying generally under “flag” colors in both bodies this year, either legislatively or in the PR wars, have been proposals that would govern the playback of lawfully received satellite radio content,<sup>1</sup> require a license for and then deny it to music services that are deemed to encourage lawful home recording,<sup>2</sup> define a “flag” as pertaining to

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<sup>1</sup> The “Perform Act,” H.R. 2466, would require any device that can record from a satellite radio service to play back songs *only* in the order transmitted on a particular channel -- not in the order desired by the owner of the device.

<sup>2</sup> The “Section 115 Reform Act,” H.R. 5553, would revoke the necessary license in the case of any service that “takes affirmative steps to authorize, enable, cause, or induce the making of reproductions of musical works by or for end users that are accessible by such end users for future listening” – “future listening” meaning even the type of time-shift recording that the Supreme Court protected as fair use in the *Betamax* case.

music “distribution” rather than to the public performance in question,<sup>3</sup> or require a radio service to stop consumers from “disaggregating” music by playing back the songs they lawfully record at home in the order they choose.<sup>4</sup>

While we would have very strong concerns over legislation – if there ever really is any – that would propose an “audio flag” that is remotely similar to the Video Broadcast Flag, I wish to emphasize that the sorts of proposals I have described have nothing to do with a “flag” and are inherently unfounded, unreasonable, and objectionable for a number of reasons.

First, there is no established basis whatsoever for congressional or FCC meddling with home recording from the ongoing satellite radio services, or with the terrestrial digital audio broadcast services that are just being launched. Whatever consumers will be able to do with these services in the future – including the recording, indexing, storing, and compilation of playlists -- it has been equally feasible for decades to do the same things with existing FM radio service, with comparable quality. Yet, every time the Congress has reformed the Copyright Act, it has declined to grant phonorecord producers any right or control of whether their albums are broadcast in the first place.

There is no demonstrated problem, and there is no reason to take control of these services away from broadcasters and satellite radio providers, or to interfere with the customary enjoyment of these services by consumers, and put those controls solely in the

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<sup>3</sup> The “Digital Audio Broadcast” provisions of S. 2686, telecommunications reform legislation under consideration by the Senate Commerce Committee at the time of submission of this written statement, would require the Federal Communications Commission to impose regulations governing such purported “distributions” – apparently, by implication, reclassifying broadcast performances as “distributions” and so by implication amending copyright law.

<sup>4</sup> This was contained in a minority discussion draft of the legislation referenced directly above.

hands of the record companies or music publishers. The Congress has consistently declined to do so. As a result, the United States remains a world leader in developing new broadcast and consumer technologies and services.

Second, the Congress did address the advent of digital recording, by passing a law in 1992 that went in a different and opposite direction. As you know, the Audio Home Recording Act provides for a royalty payment to the music industry on Digital Audio Recording devices and media. While the AHRA addressed devices' ability to make digital copies from digital copies, it never imposed any constraints on the "first generation" copies that consumers were explicitly allowed to make in return for that royalty payment. Yet, several legislative drafts now interpret the AHRA as saying: "Sure you can make the recording, you just can't always play it back!"

Apparently the Recording Industry Association of America, which took the lead in working with us on the Audio Home Recording Act, has forgotten that the AHRA exists. In 1991, Jay Berman, then head of the RIAA and later head of the industry's umbrella organization, IFPI, told the Senate that the AHRA --

"... 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 ...."<sup>5</sup>

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<sup>5</sup> *The Audio Home Recording Act of 1991: Hearing before the Senate Committee on the Judiciary*, S. Hrg. 102-98 at 115, October 29, 1991, written statement of Jason S. Berman 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.

Yet, on May 16, the major record labels filed suit against the XM satellite radio service, explicitly based on its support of a royalty-paid device, covered by the AHRA, that in addition to allowing consumers to make home recordings (that cannot be output from the device), allows consumers to choose the order in which the recordings are played back. According to the labels, apparently such consumer choice violates the law. Moreover, they apparently see no relevance to the legislative language they agreed to in our joint support of the AHRA in 1992:

**§ 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 making digital musical recordings or analog musical recordings.

In addition to establishing a royalty fund, the AHRA gave technical oversight authority to the Department of Commerce. Proposing an overhaul of the laws regarding recorders from satellite and terrestrial radio services without addressing or amending the AHRA is like moving city hall without telling the mayor.

**HRRC And CEA Oppose H.R. 4861**

H.R. 4861, though styled as the “Audio Broadcast Flag Licensing Act of 2006,” actually addresses both “redistribution” and the “unauthorized copying” of content. Although the language “unauthorized copying and redistribution” might be deemed simply ambiguous, if this legislation were aimed solely at “redistribution,” it would be irrelevant whether the prior in-home copying had been authorized or not. In other words, a true “flag” bill would be aimed at mass, indiscriminate redistribution -- it would not matter whether the copy that was “redistributed” had been lawfully made or not.

This legislation, therefore, although styled as a narrow bill giving the FCC ‘limited authority’ to impose licensing conditions on new HD radios and satellite radios, actually is a fundamental attack on traditional home taping practices that consumers have engaged in since the first analog cassette recorder reached the U.S. market in 1964, and the reel-to-reel recorder decades before. The bill would give the FCC remote control over consumers’ rights to engage in reasonable and customary “unauthorized” recording, even in the privacy of their homes for noncommercial purposes. Virtually all home recording is “unauthorized” by copyright owners. But as the Supreme Court held in the *Betamax* case, that does not make it unlawful. Exercising their “fair use” rights under the law, consumers have lawfully been making unauthorized tapes of music off the radio for more than 50 years.

In Congressional testimony earlier this year, the head of the RIAA said that “the one-way method of communication [enabled by HD radio] allows individuals to boldly engage in piracy with little fear of detection.” In other words, the RIAA believes that when Members of Congress, their staff, and their constituents tape a song off the radio they have engaged in piracy and ought to be criminally prosecuted. This subcommittee ought not consider any legislation that proceeds from the premise that Americans listening to broadcasts at home are actually “pirates evading detection.”

**We Have Not Seen An Actual “Flag” Proposal Because No Such Thing Exists**

Perhaps one reason we have not seen any legislation addressed strictly and only to mass, indiscriminate redistribution over the Internet is that we have also not seen any technical proposal, from the music industry, that would be so limited. Unlike the video Flag, the “proposal” made by the RIAA to the FCC in 2004 was aimed, instead, at

frustrating the long-accepted, reasonable private and noncommercial practices of consumers inside the home. As to distribution outside the home, the RIAA never explained to the FCC how it could accomplish its objectives in a non-intrusive manner, and we are still not aware of any such technical proposal.

The FCC's Digital Audio Broadcast proceeding was begun by the Commission in 1999 and its initial emphasis was almost entirely technical. Nevertheless, neither the RIAA nor any other music industry interest ever made a single filing in that proceeding until 2004 – and even then it did not disclose or propose what specific technology would be imposed on consumers. But no matter what technology ultimately is chosen, there has simply never been any case made for the need of an “audio flag.” A mandate in aid of one would be an unwarranted, unnecessary, and probably unworkable intrusion into consumer use, and into the very viability of the new digital radio format on which so many have worked so long and hard for so many years.

The proposal to suddenly lock down satellite radio comes even more “out of the blue.” There is no indication that the new devices being rolled out by these services depart from the requirements of the Audio Home Recording Act, most of which were drafted by the music industry itself. Indeed, the products that form the basis of the record labels' suit against XM *do not have any outputs, other than a headphone jack, via which music from the satellite broadcast content can be obtained.* It is true that, in theory, the output of a headphone jack can be digitized and potentially sent to the Internet. Is it the music industry's “flag agenda” to impose some copy protection scheme on *all* headphone jacks and other analog interfaces of *all* music players and stereo system components? If so, they should say so, and return to the multi-industry Copy Protection Technical

Working Group (which they left 6 or 7 years ago) for such an idea to be given appropriate consideration in the private sector.

In short, we see no justification to undo the provisions of the AHRA and the DMCA that specifically were enacted by Congress to address digital and satellite radio services. There is no reason for the Congress to give further consideration to an “audio flag” or to any of the very restrictive legislation, aimed at “distribution” or “disaggregation,” which are also thinly veiled attacks on lawful, private, noncommercial, in-home consumer recording practices. Instead, we respectfully urge that this subcommittee give renewed attention and impetus to protecting consumers, libraries, and educators by taking affirmative action on H.R. 1201.

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Finally, we must not ignore the overarching issue of technological progress and U.S. competitiveness. While other countries are busy developing their technology industries in order to compete more efficiently with the United States, we face proposals from the content community to suppress technological development on arbitrary or insufficient bases. This is a trend that ought not to be encouraged.

Again, thank you, Mr. Chairman, for the opportunity to appear before this Subcommittee to address these important issues. We appreciate being asked to be here today and look forward to working with you and your staff as you examine the important issues that have been raised for discussion today.