AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

# DIGITAL CONTENT AND ENABLING TECHNOLOGY: SATISFYING THE 21ST CENTURY CONSUMER

## HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

MARCH 29 AND MAY 3, 2006

**Serial No. 109-90**

Printed for the use of the Committee on Energy and Commerce

Available via the World Wide Web: http://www.access.gpo.gov/congress/house

U.S. GOVERNMENT PRINTING OFFICE

29-352PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON ENERGY AND COMMERCE

JOE BARTON, Texas, *Chairman*

RALPH M. HALL, Texas
MICHAEL BILIRAKIS, Florida
*Vice Chairman*
FRED UPTON, Michigan
CLIFF STEARNS, Florida
PAUL E. GILLMOR, Ohio
NATHAN DEAL, Georgia
ED WHITFIELD, Kentucky
CHARLIE NORWOOD, Georgia
BARBARA CUBIN, Wyoming
JOHN SHIMKUS, Illinois
HEATHER WILSON, New Mexico
JOHN B. SHADEGG, Arizona
CHARLES W. "CHIP" PICKERING, Mississippi
*Vice Chairman*
VITO FOSSELLA, New York
ROY BLUNT, Missouri
STEVE BUYER, Indiana
GEORGE RADANOVICH, California
CHARLES F. BASS, New Hampshire
JOSEPH R. PITTS, Pennsylvania
MARY BONO, California
GREG WALDEN, Oregon
LEE TERRY, Nebraska
MIKE FERGUSON, New Jersey
MIKE ROGERS, Michigan
C.L. "BUTCH" OTTER, Idaho
SUE MYRICK, North Carolina
JOHN SULLIVAN, Oklahoma
TIM MURPHY, Pennsylvania
MICHAEL C. BURGESS, Texas
MARSHA BLACKBURN, Tennessee

JOHN D. DINGELL, Michigan
*Ranking Member*
HENRY A. WAXMAN, California
EDWARD J. MARKEY, Massachusetts
RICK BOUCHER, Virginia
EDOLPHUS TOWNS, New York
FRANK PALLONE, JR., New Jersey
SHERROD BROWN, Ohio
BART GORDON, Tennessee
BOBBY L. RUSH, Illinois
ANNA G. ESHOO, California
BART STUPAK, Michigan
ELIOT L. ENGEL, New York
ALBERT R. WYNN, Maryland
GENE GREEN, Texas
TED STRICKLAND, Ohio
DIANA DEGETTE, Colorado
LOIS CAPPS, California
MIKE DOYLE, Pennsylvania
TOM ALLEN, Maine
JIM DAVIS, Florida
JAN SCHAKOWSKY, Illinois
HILDA L. SOLIS, California
CHARLES A. GONZALEZ, Texas
JAY INSLEE, Washington
TAMMY BALDWIN, Wisconsin
MIKE ROSS, Arkansas

BUD ALBRIGHT, *Staff Director*
DAVID CAVICKE, *General Counsel*
REID P. F. STUNTZ, *Minority Staff Director and Chief Counsel*

---

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

CLIFF STEARNS, Florida, *Chairman*

FRED UPTON, Michigan
NATHAN DEAL, Georgia
BARBARA CUBIN, Wyoming
GEORGE RADANOVICH, California
CHARLES F. BASS, New Hampshire
JOSEPH R. PITTS, Pennsylvania
MARY BONO, California
LEE TERRY, Nebraska
MIKE FERGUSON, New Jersey
MIKE ROGERS, Michigan
C.L. "BUTCH" OTTER, Idaho
SUE MYRICK, North Carolina
TIM MURPHY, Pennsylvania
MARSHA BLACKBURN, Tennessee
JOE BARTON, Texas
*(EX OFFICIO)*

JAN SCHAKOWSKY, Illinois
*Ranking Member*
MIKE ROSS, Arkansas
EDWARD J. MARKEY, Massachusetts
EDOLPHUS TOWNS, New York
SHERROD BROWN, Ohio
BOBBY L. RUSH, Illinois
GENE GREEN, Texas
TED STRICKLAND, Ohio
DIANA DEGETTE, Colorado
JIM DAVIS, Florida
CHARLES A. GONZALEZ, Texas
TAMMY BALDWIN, Wisconsin
JOHN D. DINGELL, Michigan
*(EX OFFICIO)*

# CONTENTS


| | Page |
|---|---|
| Hearings held: | |
| March 29, 2006 | 1 |
| May 3, 2006 | 62 |
| Testimony of: | |
| Krikorian, Blake, Chief Executive Officer, Sling Media | 18 |
| Feehery, John, Executive Vice President, External Affairs, Motion Picture Association of America | 31 |
| Denney, Jim, Vice President for Product Marketing, TiVo, Inc. | 36 |
| Mitchell, Stevan, Vice President of Intellectual Property Policy, Entertainment Software Association | 43 |
| Parsons, Gary, Chairman of the Board, XM Satellite Radio | 67 |
| Ostroff, Michael, General Counsel and Executive Vice President, Business and Legal Affairs, Universal Music Group | 75 |
| Halyburton, Dan, Senior Vice President and General Manager, Group Operations, Susquehanna Radio, on behalf of the National Association of Broadcasters | 80 |
| Regan, Robert J., President of the Board, Nashville Songwriters Association International | 87 |
| Lawrence, Jeffery T., Director, Digital Home and Content Policy, Intel Corporation | 89 |
| Additional material submitted for the record: | |
| Parsons, Gary, Chairman of the Board, XM Satellite Radio, response for the record | 116 |
| Ostroff, Michael, General Counsel and Executive Vice President, Business and Legal Affairs, Universal Music Group, response for the record | 118 |
| Halyburton, Dan, Senior Vice President and General Manager, Group Operations, Susquehanna Radio, on behalf of the National Association of Broadcasters, response for the record | 119 |
| Lawrence, Jeffery T., Director, Digital Home and Content Policy, Intel Corporation, response for the record | 121 |
| Parsons, Gary, Chairman of the Board, XM Satellite Radio, submission for the record | 122 |
| The American Society of Composers, Authors and Publishers, prepared statement of | 131 |

# DIGITAL CONTENT AND ENABLING TECHNOLOGY: SATISFYING THE 21ST CENTURY CONSUMER

**WEDNESDAY, MARCH 29, 2006**

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 1:05 p.m., in Room 2123 of the Rayburn House Office Building, Hon. Cliff Stearns [chairman] presiding.

Members present: Representatives Stearns, Radanovich, Bass, Terry, Ferguson, Otter, Barton [ex officio], Schakowsky, Towns, DeGette, Gonzalez, and Baldwin.

Staff present: David Cavicke, General Counsel; Chris Leahy, Policy Coordinator; Will Carty, Professional Staff Member; Billy Harvard, Legislative Clerk; Jonathon Cordone, Minority Counsel; David Vogel, Minority Research Assistant; and Chris Treanor, Minority Staff Assistant.

MR. STEARNS. Good afternoon. In today's digital world, movies, music, and software travels at light speed to any user in any corner of the world with the technology to receive and utilize digital material, whether it is web-based, satellite, or an old-fashioned DVD. The law, however, clearly does not move at the speed of light and historically has struggled to keep up with the constant evolution of technology. Creative digital content and the slick, innovative enabling technology that makes it accessible for the consumer has begun an incredible evolution over the past few years. Powered by better electronics, faster chips, and the widespread deployment of broadband, today's digital technology hardware amazes us with its ability to quickly provide consumers with exactly what they want, when they want it, wherever they may be. It seems like almost any type of digital content--movies, music, games--is available via download or through some new and ingenious means of distribution that makes it more accessible, convenient, and portable for the consumer.

The other side of the slick and virtually seamless distribution of digital material is the content itself. A $300 iPod is a $300 piece of shiny

plastic and metal without the music and video content that makes it worth the investment. In addition, these new means of distribution and digital technology push the creativity of those desiring compensation for their creative endeavors and investment. Maintaining the incentives to produce creative works in a market teeming with seamless technology and inexpensive ways to distribute copies of digital content continues to be an issue for the content community and is one that is at the heart of the ongoing struggle between these two great American industries. Content is obviously the major driver for many of these slick gizmos, but the consumer electronics industry also believes its slick gizmos are opening up consumers to new forms of content, just look at Pod-casting and streaming.

I don't think a chicken or the egg analysis about what drives what will get us very far in this case, but is clear that the American content and consumer electronics industries are indeed interdependent, and therefore, have a stake in each other's success. The key issue to put it in base terms is to ensure that everyone is getting paid and getting paid fairly. My colleagues, more specifically the challenge is to ensure the legal framework that bounds the market, including over-the-air, web-based, and satellite programs, allows the consumer electronics industry the freedom to engineer even more innovative distribution devices and methods while maintaining incentives for the content industry to create material consumers want to watch and listen to with all their fancy hardware.

Today's hearing is the first part of a two-part series on the future of digital content and the consumer electronics industry and what lies in store for the consumer. I think taking a look at some of the more innovative content and device stakeholders to better understand where they see their industry moving in the future will help us, as legislators, here in the committee. It will give us some perspective on how we can help these industries remain the best in the world and a very important engine for the American economy and for American jobs. Todays panel represents the video side to the content and consumer electronics industry. Our second part of this hearing series will be focused on the audio and software side of this sector. The basic question I have for all the witnesses is how they see the way content delivery via devices that can run on several platforms, like cable, Internet, and satellite, affecting the distribution of audio, video and software media to the ultimate judge with the wallet, the consumer. In addition, I would like to hear more about the challenges, both in the domestic market and internationally, that both industries face as they work to serve and satisfy their consumers.

As all of you know, the subcommittee has held a number of hearings focused on the issue of fair use and digital rights management, DRM, technology and we continue to be engaged on these issues. My colleagues, this subcommittee also remains concerned that both counterfeiting and piracy remain critical problems for both the consumer electronics and content industries, and believes that strong enforcement of intellectual property rights in our trade agreements is critical to fighting those problems. This series of hearings will be very helpful in getting us a broader understanding of the business of entertaining consumers from the supply and distribution side so that, in the end, the demand component of the equation, the American consumer, will continue to benefit and fuel the tremendous growth and innovation in these two great American industries.

Obviously, I would like to welcome the panel today and I look forward to the testimony, and with that, the Ranking Member, Ms. Schakowsky, is welcomed.

[The prepared statement of Hon. Cliff Stearns follows:]

PREPARED STATEMENT OF THE HON. CLIFF STEARNS, CHAIRMAN, SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

Good afternoon. In today's digital world, movies, music, and software travels at light speed to any user in any corner of the world with the technology to receive and utilize digital material, whether it is web-based, satellite, or an old-fashioned DVD. The law, however, clearly does not move at speed of light and historically has struggled to keep up with the constant evolution of technology. Creative digital content and the slick, innovative enabling technology that makes it accessible for the consumer has begun an incredible evolution over the past few years. Powered by better electronics, faster chips, and the widespread deployment of broadband, today's digital technology hardware amazes us with its ability to quickly provide consumers exactly what they want, when they want it, wherever they may be. It seems like almost any type digital content - movies, music, games - is available via download or through some new and ingenious means of distribution that makes it more accessible, convenient, and portable for the consumer.

The other side of the slick and virtually seamless distribution of digital material is the content itself. A three hundred dollar iPod is a three hundred dollar piece of shinny plastic and metal without the music and video content that makes it worth the investment. In addition, these new means of distribution and digital technology push the creativity of those desiring compensation for their creative endeavors and investment. Maintaining the incentives to produce creative works in a market teeming with seamless technology and inexpensive ways to distribute copies of digital content continues to be an issue for the content community and is one that is at the heart of the ongoing struggle between these two great American industries. Content is obviously the major driver for many these slick gizmos but the consumer electronics industry also believes its slick gizmos are opening up consumers to new forms of content, just look at "Pod-casting" and "streaming."

I don't think a chicken or the egg analysis about what drives what will get us very far, but it is clear that the great American content and consumer electronics industries are indeed interdependent, and therefore have a stake in each other's success. The key issue,

to put it in base terms, is to ensure that everyone is getting paid - and getting paid fairly.

More specifically, the challenge is to ensure the legal framework that bounds the market - including over-the air, web-based, satellite platforms - allows the consumer electronics industry the freedom to engineer even more innovative distribution devices and methods while maintaining incentives for the content industries to create material consumers want to watch and listen to with all that fancy hardware.

Today's hearing is the first part of a two part series on the future of the digital content and consumer electronics industries and what lies in store for the consumer. I think taking a look at some of the more innovative content and device stakeholders to better understand where they see their industries moving in the future will help give the Committee some perspective on how we can help these industries remain the best in the world and a very important engine of the American economy. Today's panel represents the video side of the content and consumer electronics industries. Our second part of this hearing series will be focused on the audio and software side of this sector. The basic question I have for all the witnesses is how they see the way content delivery - via devices that can run on several platforms (like cable, Internet, and satellite) - affecting the distribution of audio, video and software media to the ultimate judge with the wallet – the consumer. In addition, I would like to hear more about the challenges, both in the domestic market and internationally, that both industries face as they work to serve and satisfy their customers.

As you all know, the Subcommittee has held a number of hearings focused on the issue of "fair use" and digital rights management (DRM) technology and we continue to be engaged in these issues. The Subcommittee also remains concerned that both counterfeiting and piracy remain critical problems for both the consumer electronics and content industries and believes that stronger enforcement of intellectual property rights in our trade agreements is critical to fighting those problems. This series of hearings will be very helpful in giving us a broader understanding of the business of entertaining consumers from the supply and distribution side so that, in the end, the demand component of the equation - the American consumer - will continue to benefit and fuel the tremendous growth and innovation in these two great American industries.

Again, I would like to welcome the panel before us today. We look forward to your testimony

Thank you.

MS. SCHAKOWSKY. Thank you, Mr. Chairman, and let me apologize for being a bit late. I was caught in a motorcade coming back from lunch honoring Ranking Member Dingell. So I thank you for holding today's hearing on how digitized content has affected copyright and the consumer experience.

Technological innovations open the door to novel means of hearing your favorite singer, in my case, Aretha Franklin, or watching a movie on a portable device. However, the digitization of books, music, and movies, in tandem with the ability to transmit that information over the Internet, has also necessitated the updating of laws that have either been rendered ineffective or become too stifling because of technological advances. I look forward to today's witnesses about how the new platforms for distributing content in digital formats affect artists, consumers, researchers, libraries, and the creative industries, including technology developers.

With the passage of the DMCA in 1998, which was before I came to Congress, my colleagues made a significant attempt to contend with the new challenges that digital capabilities introduced to copyright law. The DMCA was meant to stop copyright infringement on new digital mediums. Unfortunately, by trying to predict where the technology would take us, the DMCA was drafted with broad strokes that many argue went too far concerning the fair use provisions of the copyright law. DMCA has been abused by those who want to squelch competition in areas wholly unrelated to copyright. For example, manufacturers of garage door openers have used the DMCA to try and prevent their competitors from developing alternative and cheaper models. Remember, these competitors are not infringing on copyrights or violating any patents. They are simply trying to provide a better product at a better price.

There is no denying that copyrights need to be protected and artists need to be compensated for their work. However, I am concerned when a law makes consumers and artists enemies, when fans and innovators are considered criminals, when companies can use the DMCA to prevent new products from coming to the market, and when libraries may have to limit or charge for services they traditionally have provided for free.

Since we began these hearings two years ago, I have been talking with artists' groups, consumer groups, technology developers, and I truly believe that we can work together to craft a remedy to the problems at hand. We need to find a balance between the rights of the consumers and the rights of the artists and we need to do that without hurting other industries.

I am hoping that today's hearing will help us understand better how consumers and technological developers have been able to work with artists and content providers in innovating within the DMCA. I believe we are in the midst of a paradigm shift on how we think about commerce, art distribution, and traditional consumer protections. It is our responsibility as lawmakers to make sure that all voices are here in this debate and that the proper regulations are put in place. I am glad we are here today with so many people who are affected by the DMCA and are interested in fair use. I look forward to your testimony and demonstrations. Thank you, Mr. Chairman.

[The prepared statement of Hon. Jan Schakowsky follows:]

PREPARED STATEMENT OF THE HON. JAN SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Thank you, Chairman Stearns, for holding today's hearing on how the digitized content has affected copyright and the consumer experience. Technological innovations opened the door to novel means of hearing your favorite singer, like Aretha Franklin in my case, or watching a movie on a portable device. However, the digitization of books,

music, and movies, in tandem with the ability to transmit that information over the Internet, has also necessitated the updating of laws that have either been rendered ineffective or become too stifling because of technological advances. I look forward to hearing from today's witnesses about how the new platforms for distributing content in digital formats affect artists, consumers, researchers, libraries, and the creative industries, including technology developers.

With the passage of the DMCA in 1998, (before I came to Congress), my colleagues made a significant attempt to contend with the new challenges that digital capabilities introduced to copyright law. The DMCA was meant to stop copyright infringement on new digital mediums. Unfortunately, by trying to predict where the technology would take us, the DMCA was drafted with broad strokes that many argue went too far concerning the Fair Use provisions of the copyright law. DMCA has been abused by those who want to squelch competition in areas wholly unrelated to copyright. For example, manufacturers of garage door openers have used the DMCA to try to prevent their competitors from developing alternative and cheaper models. Remember, these competitors are not infringing on copyrights or violating any patents; they are simply trying to provide a better product at a better price.

There is no denying that copyrights need to be protected and artists need to be compensated for their work. However, I am concerned when a law makes consumers and artists enemies, when fans and innovators are considered criminals, when companies can use the DMCA to prevent new products from coming to the market, and when libraries may have to limit or charge for services they traditionally have provided for free.

Since we began these hearings two years ago, I have been talking with artists' groups, consumer groups, and technology developers, and I truly believe that we can work together to craft a remedy to the problems at hand. We need to find a balance between the rights of the consumers and the rights of the artists. And we need to do that without hurting other industries.

I am hoping that today's hearing will help us understand better how consumers and technological developers have been able to work with artists and content providers in innovating within the DMCA.

I believe we are in the midst of a paradigm shift on how we think about commerce, art distribution, and traditional consumer protections. It is our responsibility as lawmakers to make sure that all voices are heard in this debate and that the proper regulations are put in place. I am glad we are here today with so many people who are affected by the DMCA and are interested in fair use. I look forward to your testimony and demonstrations.

MR. STEARNS. Mr. Ferguson?

MR. FERGUSON. Thank you, Mr. Chairman. Let me first express my appreciation to you and the Ranking Member for putting this hearing together. This subcommittee can serve an important role in this particular area, shining a light on exciting new technologies and examining how to effectively protect digital content and ultimately ensure that consumers get access to new products in a quick and reliable and a responsible fashion. The pace at which digital content is reaching our constituents is at an all time high. With each passing day, it seems there is something new for consumers to enjoy on devices that are becoming more and more user friendly.

We have the ubiquitous and wildly popular iPods, its video version allowing consumers to download their favorite shows and watch them on

a metro on the way home. Our cell phones are increasingly becoming a favorite device for watching and listening to content, and more legal downloads of motion pictures, TV shows, and music are available on our home computers than ever before. Why do consumers have so many options? What facilitated such a rich market of content available on demand? I will tell you one thing: it wasn't through piracy; it wasn't through Grokster; it wasn't through Kazaa; and it was certainly not through the circumvention of copy protection technology. It was through industry and technology companies working together, entering into licensing agreements for legal distribution of content, creative products that owners not only should, but must be compensated for.

By protecting creative content, you encourage innovation and in turn, increase options for the consumer. The theory that loosening protections for digital content is somehow pro-consumer is not only seriously flawed, it is misguided, and it is one that I roundly reject. The proliferation of piracy and the ease with which digital content can be misappropriated has made it more difficult than ever to protect copyrights against massive infringement. To ensure that these exciting products continue to flow to consumers, intellectual property needs to be protected. There must be a balance. The content and tech industries must continue to work together to achieve these goals. It is not only in their best interest, more importantly, it is in the consumers, our constituents', best interest as well. I look forward to hearing from our witnesses and I thank you, Mr. Chairman. I yield back.

[The prepared statement of Hon. Mike Ferguson follows:]

PREPARED STATEMENT OF THE HON. MIKE FERGUSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Let me first express my appreciation to Chairman Stearns for holding this hearing. This subcommittee can serve an important role in this area, shining a light on exciting new technologies, examining how to effectively protect digital content , and ultimately, ensuring that consumers get access to new products in a quick, reliable – and responsible – fashion.

The pace at which digital content is reaching our constituents is at an all time high. With each passing day, it seems there's something new for consumers to enjoy, on devices that are becoming more and more user friendly.

We have the ubiquitous and wildly popular Ipod, its video version allowing consumers to download their favorite shows and watch them on the metro on the way home. Our cell phones are increasingly becoming a favored device for watching and listening to content. And more legal downloads of motion pictures, tv shows, and music are available on our home computers than ever before.

Why do consumers have so many options? What facilitated such a rich market of content available on demand? I'll tell you one thing, is wasn't through piracy. It wasn't though Grokster, it wasn't through Kazaa, and it was certainly not through the circumvention of copy protection technology.

It was through industry and technology companies working together, entering into licensing agreements for legal distribution of content, creative product that owners not only should, but must be compensated for. By protecting creative content, you encourage innovation and in turn increase options for the consumer. The theory that loosening protections for digital content is somehow pro-consumer is not only seriously-flawed, it's misguided, and its one I roundly reject.

The proliferation of piracy and the ease with which digital content can be misappropriated has made it more difficult than ever before to protect copyrights against massive infringement. To ensure that these exciting products continue to flow to consumers, intellectual property needs be protected. There must be a balance.

The content and tech industries must continue to work *together* to achieve these goals. It's not only in their best interest. more importantly, it's in the consumers – our constituents' – best interest. I look forward to hearing our witnesses. Thank you Mr. Chairman.

MR. STEARNS. Ms. Baldwin.

MS. BALDWIN. Thank you, Mr. Chairman. I am delighted that we are having this hearing today to continue the ongoing dialogue regarding the need to balance digital rights management technology with the concept of fair use. As we know, the analog to digital transition in the telecommunications arena has presented great opportunities, but also challenges to the U.S. copyright industry. Specifically, the capabilities of digital technology have in some instances facilitated copyright infringements, such as elicit peer-to-peer traffic in movies and music. It is therefore crucial for the copyright industries to invest and develop secure content delivery systems through advancements in digital rights management technologies. It would benefit not only consumers, but also rights owners.

I am delighted to see the participation of both TiVo and Sling Media in this panel. TiVo's digital video recorder allows a consumer to time-shift entertainment programs through the recording of a broadcast TV program; while Sling Media's Slingbox place-shifts television programs from television sets at the home to just about any location on any device with a broadband Internet connection. We are living in an exciting age where rapid advancements in digital technology have led to a proliferation of innovative entertainment products, and both TiVo and Sling Media perfectly illustrate that.

I look forward to hearing their testimony and learning more about their efforts to balance the delivery of content and the protection of intellectual property rights. Finally, as we move ahead to a broader system of legal but competing digital rights management technologies for different products by different companies, we should pay close attention to how rival DRM standards could stifle innovation and economic growth, as well as create inconveniences for consumers.

While I am confident that market forces will eventually resolve interoperability issues caused by DRM licensing, I hope technology

companies and content providers will work together to expeditiously create more uniform ways of protecting copyrighted digital content. I look forward to all of your testimony. Thank you for being here. Thank you, Mr. Chairman.

[The prepared statement of Hon. Tammy Baldwin follows:]

PREPARED STATEMENT OF THE HON. TAMMY BALDWIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Thank you Mr. Chairman. I am glad that we are having this hearing today to continue our ongoing dialogue regarding the need to balance digital rights management (DRM) technology with the concept of fair use.

As we know the analog-to-digital transition in the telecommunications arena has presented great opportunities but also challenges to the U.S. copyright industry. Specifically, the capabilities of digital technology have in some instances facilitated copyright infringements, such as illicit peer-to-peer traffic in movies and music. It is therefore crucial for the copyright industries to invest and develop secure content delivery systems through advancements in DRM technology that would benefit not only consumers, but also rights owners.

I am delighted to see the participation of both TiVo and Sling Media in this panel. TiVo's digital video recorder allows a consumer to "timeshift" entertainment programs through the recording of a broadcast TV program, which Sling Media's Sling Box "placeshifts" television programs from television sets at home to just about any location on any device with a broadband internet connection. We are living in an exciting age where rapid advancements in digital technology has led to a proliferation of innovative entertainment products, and both TiVo and Sling Media perfectly illustrate that. I look forward to their testimonies and learning more about their efforts at balancing the delivery of content and the protection of intellectual property rights.

Finally, as we move ahead to a broader system of legal, but competing DRMs for different products by different companies, we should pay close attention to how rival DRM standards could stifle innovation and economic growth, as well as create inconveniences for consumers. While I am confident market forces will eventually resolve inter-operability issues caused by DRM licensing, I hope technology companies and content providers will work together to expeditiously create more uniform ways of protecting copyrighted digital content.

I look forward to the testimonies and thank you Mr. Chairman.

MR. STEARNS. Mr. Gonzalez.

MR. GONZALEZ. Thank you very much, Mr. Chairman, and I appreciate your calling this hearing and hearing from the witnesses today, and I apologize if I have to leave a little early. I am going to be really brief. I am one that really believes that certain legal precepts and principles have served this republic well for time immemorial, and I believe that they can be adjusted to accommodate modern technology. I don't see that technology is the problem, but it really should be part of the solution. When we say proprietary rights, I was part of a panel last week or the week before, South by Southwest in Austin, regarding content and regarding the writers, the artists, and the producers being rewarded justly and fairly for their creations and such, and yet we

understand that technology moves forward, and it makes things easier. There are easier ways to infringe and such. But I really believe that we can get in here and recognize all of the stakeholders' interests in this. But again, the guiding light for all of us should be what has allowed this country and its free enterprise system and its capital system to thrive, and it has been the regulatory system, rich in principles, in legal principles of proprietary rights, and somehow we do need to reconcile that. So I look forward to your testimony today. Thank you, Mr. Chairman.

MR. STEARNS. Mr. Towns.

MR. TOWNS. Thank you very much, Mr. Chairman, and of course Ranking Member Schakowsky for having this hearing today. I am pleased to see the video game industry represented here today, as it continues to provide consumers with innovative technology and products. With that said, I would like to stress that the protections in the DMCA have helped companies bring their products and intellectual property to the market, and we should do our best to preserve the stream of commerce.

America's content companies continue to entertain and amaze all of us, and the movie industry at large has aggressively and innovatively embraced the digital marketplace. Movie and television studios are not holding back their content, as some would have you to believe, but rather are exercising due diligence and caution and not licensing a business model that exacerbates piracy. Consumers want new products and recent movies in their hands as quickly as possible. We must be extremely careful when reviewing the protections and guidelines that govern the distribution of content. I feel that the entertainment industry has made great strides, and I cite Mr. Feehery's testimony in that regard. He looks at a number of recent digital content deals cut by motion picture companies to distribute their work online on IPTV Services for the iPod and peer-to-peer services. And through innovative uses of the airwaves, these efforts, I believe, are steps in the right direction.

I was intrigued by Denney's testimony, in which he cites century old examples of one or another content industry's opposing various new technologies. However, it appears to me that a look at more recent history shows the movie industry has embraced and driven the adoption of the DVD player and other consumer electronic devices. Therefore, I look forward to Mr. Denney's comments here today and hearing his rationale.

Finally, I would like to quickly mention that the video industry is not alone in fighting piracy and in need of protection. We must be just as diligent in coming to the aid of those who operate the audio realm, as our music artists are also under siege from rampant piracy and improper file sharing. I look forward to the second session of this two-part hearing,

Mr. Chairman, where we will concentrate on audio protections in greater detail. So on that note, I yield back and again, thank you and the Ranking Member for holding this hearing today. Thank you.

[The prepared statement of Hon. Edolphus Towns:]

PREPARED STATEMENT OF THE HON. EDOLPHUS TOWNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Thank you, Mr. Chairman for holding this timely hearing. I'm again pleased to see the video game industry represented here today, as it continues to provide consumers with innovative technology and products. That said, I'd like to stress that the protections in the DMCA have helped companies bring their products and intellectual property to market, and we should do our best to preserve their stream of commerce. America's content companies continue to entertain and amaze all of us, and the movie industry at large has aggressively and innovatively embraced the digital marketplace. Movie and television studios are not *"holding back"* their content, as some would have you believe, but rather are exercising due diligence and caution in not licensing a business model that exacerbates piracy.

In an age when consumers want new products and recent movies in their hands as quickly as possible, we must be extremely careful when reviewing the protections and guidelines that govern the distribution of content. I feel that the entertainment industry has made great strides, and I cite Mr. Feehery's ("FEARIE") testimony in that regard. He lists a number of recent digital content deals cut by motion picture companies to distribute their works online, on IPTV services, for the i-Pod, on peer-to-peer services, and through innovative uses of the air waves. These efforts, I believe, are steps in the right direction. I was intrigued by Mr. Denney's testimony, in which he cites century-old examples of one or another content industry opposing various new technologies. However, it appears to me that a look at more recent history shows the movie industry has embraced and driven the adoption of the DVD player and other consumer electronic devices. Therefore, I look forward to Mr. Denney's comments here today and hearing his rationale.

Finally, I would like to quickly mention that the video industry is not alone in fighting piracy and in need of protection. We must be just as diligent in coming to the aid of those who operate in the *audio* realm, as our music artists are also under siege from rampant piracy and improper file sharing. I look forward to the second session of this two-part hearing, when we will concentrate on audio protections in greater detail.

Thank you, Mr. Chairman. I yield back the balance of my time.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF THE HON. JOE BARTON, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Good afternoon. Thank you, Chairman Stearns, for holding this hearing. I understand that this is the first day of a two-part hearing, and I am glad that we are exploring the issues surrounding digital media and its distribution; specifically the intersection of the content and the consumer electronics industries.

Some have said that the content industries have been slow to adapt to the "anytime, anywhere" world of entertainment. At the same time, the consumer electronics industry has exploded with new devices and new platforms to distribute digital entertainment. The content creators are afraid of widespread piracy in the digital world, and understandably so. The digital world has made the transfer of large files fairly easy. At

its worst, the digital age offers a thieves market where the products are stolen and both the sellers and the buyers are crooks. The sellers always know what they're doing, but the buyers rarely do. Accordingly, the industry has worked hard to educate consumers about illegal conduct, and has indeed prosecuted many bad actors. But in their enthusiasm for protecting their copyrights, some have said that consumers' *long-standing and legal* rights of fair use actually promote illegal behavior.

Consumers have reacted strongly to new limitations on their rights imposed by technological constraints. While some of this technology has been largely benign, some has obstructed consumers' legitimate use and enjoyment. And shockingly, in one instance, software that was supposed to help protect copyrighted material actually ended up actually spying on the people who bought it. This is absolutely unacceptable.

Although the history of this debate may suggest otherwise, my hope is that these groups can work together to determine the appropriate technological protection for content without curtailing consumers' rights. It remains illegal to circumvent technological content protections, even if you are not ultimately infringing on a copyright. That's not right. People are liable for infringement, but should not be called criminals for exercising their recognized rights, for making *legal* use of their *legally acquired* music or movies. I hope to hear today about the future of digital rights management in that context.

The content and consumer electronics businesses are two of the great American success stories. In this new world of media distribution, they not only can benefit each other, but depend on one another. The device makers can sell more new and innovative machines as long as there is an abundance of easily acquired content. And similarly, the content creators can sell more original movies, music, and other media as long as there are new tools with which to enjoy them—new tools that consumers want and expect.

These tools and the content created for them must work together in a way that does limit consumers' rights.

I want to thank Mr. Boucher for attending this hearing today. He has done important work on these issues. While he is not on the subcommittee, I want to welcome him and commend him for his leadership. This is not a hearing on Congressman Boucher's "fair use bill", which I support. Later, this subcommittee may start talking about legislation, but today's hearing is intended to give us a fresh look at the environment. I hope we learn some things today and in the second day of hearings that will help us come up with a new way to address the dilemmas before us.

Thank you, Mr. Chairman. I am anxious to continue the Committee's involvement on these important issues, and I look forward to the second day of this hearing as well.

I yield back the balance of my time.

PREPARED STATEMENT OF THE HON. MARY BONO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, thank you for holding this hearing today.

We live in one of the most exciting times in history when it comes to the advancement of technology for personal use. The challenge is how to continue to nurture new technology while at the same time, protecting the very content these devices deliver to us.

We have learned what can happen when industry is slow to adapt to the new environment. At first, the music industry didn't know what to make of these new technologies and how best to use them to deliver their content. This was their burden, not the government's. But after struggling, this industry has found a way to embrace these advances in technology. Apple's iTunes and other online music stores deliver high quality music to consumers while protecting intellectual property rights. I have always maintained that the "enter" key is the entertainment sector's best asset.

In fact, recently Universal Pictures announced that like Warner Brothers, it would start a pilot project in Europe to debut digitally downloaded movies. Universal's first "download to own" movie service will include a DVD as well as two digital downloads for the PC or laptop. If the U.S. ensures strong content protection, I am certain we will see this service in our own country soon.

Now that the entertainment industry has met its burden to adapt and embrace new technologies, Congress must be careful to not only undermine the rights of copyright holders, but also those who depend on the industry – from grips to caterers to sound technicians and thousands of others. We need to protect the content if we are to hope for advancement in technology or otherwise, technology will not have anything to deliver.

Mr. Chairman, I am a great proponent of technology. I own several iPods, a DVR and most recently a Slingbox, to mention only a few devices. But as an advocate for copyright holders, I believe the U.S. must take the lead in protecting intellectual property rights if we are to realize the full potential of the marriage between entertainment and technology.

Again, thank you Mr. Chairman for holding this hearing. I look forward to hearing from the witnesses today.

PREPARED STATEMENT OF THE HON. C.L. "BUTCH" OTTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Thank you for holding this hearing today, Mr. Chairman. We spend a lot of time debating fair use, and most people in this room know how strongly I feel about this issue and the larger issue of protecting property rights. However, if we are ever going to get this right we must continually go back to the industry and take a look at what they are doing. Today's hearing offers us the chance to do that.

I have had the opportunity to take a look at some of the stuff that the consumer electronics industry has created over the past few years, and I am continually astounded by what they come up with and how they allow us to enjoy the creative genius of musicians, movie makers, and others. And the more I see of these products, the more convinced I am that the industry, on both sides of the issue, is far more capable of responding to the growing concern with fair use and copyright protection than is the government.

Both the past and the present make it clear to me that government involvement in this issue only impedes innovation for both sides of this issue. For example, about twenty years ago we had a similar debate when a new technology called the VCR hit the market. At first the implications of this new technology seemed devastating for the industry. But then a marvelous thing happened: rather than allow government regulations to harm both industry and consumer, the industry responded to consumers' desire to see films at home and became innovative, thus building an economic empire in the video rental and retail industry as a result. Everybody won.

While there are certainly differences in today's debate over fair use, I believe one principle is the same: Consumer demand, not governmental regulation should lead industry response.

It seems to me that the entertainment industry again has an opportunity to work with the software and device manufacturers to develop and sell products that meet consumer demand. Protecting intellectual property investments is the key element in achieving cooperation. Without these protections, all of these industries will ultimately suffer.

Today's hearing is an important part of ensuring that we promote good policies that do not stifle investment and innovation. I look forward to hearing from the witnesses and again thank the Chairman for the opportunity to step back and hear from the industry on this issue.

PREPARED STATEMENT OF THE HON. JOSEPH R. PITTS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, I would like to thank you for convening this hearing today on this timely issue.

As we all know, for the last several years, we have witnessed significant growth in the Internet. In fact, the Internet connects more than 407 million host computers in 214 countries.

Through the World Wide Web, one can view pictures, listen to music, or see movies. Users communicate and exchange information freely without burdensome regulations and fees.

Aside from the Internet, innovations in other enabling technology continue at a rapid pace, as does consumer demand for this technology and for the content that can be played and stored on devices. iPod and TiVo are perfect examples of enabling technology that have taken the consumer world by storm, and have allowed consumers to enjoy unprecedented access to their favorite music, movies, and TV shows.

iPod and TiVo decision-makers have struck the proper balance in respecting copyrights, discouraging piracy, and providing consumers with a variety of choices at affordable prices.

It is my hope that this hearing is a step toward ensuring that content and consumer electronics businesses will continue to work together to provide a legitimate marketplace that will encourage innovation and advances in technology, respect copyrights, foster creativity among artists, and provide increased choices and greater convenience for consumers.

Thank you, Mr. Chairman, and I yield back my time.

MR. STEARNS. I thank my colleague. We welcome the panel, Mr. Blake Krikorian, Chief Executive Officer of Sling Media in San Mateo, California; Mr. John Feehery, Executive VP, External Affairs, Motion Picture Association of America; Mr. Jim Denney, Vice President for Product Marketing, TiVo; and Mr. Stevan Mitchell, Vice President of IP Policy, Entertainment Software Association. We welcome your opening statements. Mr. Krikorian, you are first. And just put the mike closer to you and turn it on. It has an on/off switch.

MR. KRIKORIAN. Yes, I am a techie, so--

MR. STEARNS. Okay. All right.

MR. KRIKORIAN. --this is a little too complicated for me, but I got it, I got it.

**STATEMENTS OF MR. BLAKE KRIKORIAN, CHIEF EXECUTIVE OFFICER, SLING MEDIA; JOHN FEEHERY, EXECUTIVE VICE PRESIDENT, EXTERNAL AFFAIRS, MOTION PICTURE ASSOCIATION OF AMERICA; JIM DENNEY, VICE PRESIDENT FOR PRODUCT MARKETING, TIVO, INC.; AND STEVAN MITCHELL, VICE PRESIDENT OF IP POLICY, ENTERTAINMENT SOFTWARE ASSOCIATION**

MR. KRIKORIAN. Thank you. Thanks for the opportunity, subcommittee. This is really an exciting thing for me. In fact, it is really interesting, but I have been in the digital convergence world for, oh, about 15 years, for lack of a better term. We don't know what we call ourselves. And about two years ago, I was spending some time with one of the co-founders of Excite, Joe Krause, who has been pretty passionate about some of these issues. He saw some of the products that we had been incubating in our previous company and he was urging us to get our rear ends out here to D.C. to start to show you all some of the things that we are working on to try to bring some of this in real context instead of us always sitting around in these rooms talking about it from a theoretical perspective. Because it is very, very difficult to understand how certain legislation could affect products that don't yet exist. And so it is funny, two and a half years later, I am sitting here today.

So what I wanted to do is a couple things here. I am going to actually throw up a live demonstration to give you an idea of the product. But let me first start by saying, one thing that is very exciting for us in the United States is I believe that we are on the verge of a renaissance for consumer electronics companies that were based and founded in the United States to actually thrive again. With the exception of a company like Palmer or a company like a TiVo, it is really about once a decade we see consumer electronics companies come to life in the United States and we stand here today as a company who has been around now for about two years. Hopefully, we still have a long runway ahead of it. When we started this company, Sling Media, we viewed ourselves as a new kind of consumer products company, and most investors looked at us as really insane, thinking that we can't possibly sell a product that is a hardware product at retail. That is for the mega corporations and for the Chinese and the Japanese. And yet, what we believed was that these new types of products are a very tight blending of hardware and software and services and user interface and content, and that is where the U.S. is strong. And so we are able to apply quite a bit of our software expertise and know how, which, again, the U.S. still leads in actually creating these new products that are really software. It is not in a box of cardboard, but software that is in a box of silicon. So I am pretty excited about that and hopefully there will be more and more startups like us that come about.

So one of the things I want to introduce to you is this notion of placeshifting as we go into the demo. If we can switch over to the PC. I know it is highly unusual for people to throw up a PowerPoint on here, but I will keep it very, very brief. One of the things, just to set the context, is I talked from a consumer, because this is how the product and the company actually was born, but most of you already know this, but from a calibration perspective, I will just spend a minute on it. People

love their television, but more and more, as we know, they want it on their terms. And the product that the DVR and TiVo popularized, really delivered on, this notion that the VCR had promised early on, which is the ability to time-shift, the ability to watch my TV when I want it. But now, us as consumers, we are finding ourselves more and more spending time in front of displays other than the living room television. We are spending time in front of our laptops, our desktops at work, our mobile phones, and so forth, and in fact, if you look to the television industry, this has actually started to hurt them, in terms of ratings that have continually plummeted. But as consumers, we are spending more time in front of these other displays and more time outside of that living room.

And so what we believe is this notion of placeshifting is the next major evolution in television viewing. And what does it do? It greatly increases the number of displays, that I can watch my familiar television, which is the key word here, but also greatly increases the number of places that I can watch my familiar television as well. And in some ways you can actually say that overnight we have doubled or tripled the number of television sets on the planet by turning every single display into a living room television. So quite simply, the Slingbox, which is this small box that you can buy now at Best Buy, CompUSA, over 3,000 stores nationwide, is $200, $249 retail. Basically take your television signal, put this in your home, take your basic cable, take your TiVo, take your satellite box, really over 5,000 different devices, plug your TV signal in, connect it to your home network, and then wherever you happen to be, you can watch and control your living room TV just like you were sitting on the couch.

Now the way this came about was actually out of sheer consumer frustration. My brother and I had a firm before we started Sling, and we were born in the Bay area. We are big San Francisco Giants fans, unfortunately, and the Boston Red Sox. Now they have one so they can't gripe as much as us now. We are moving up the totem pole. But it was the summer of 2002 when the Giants were heading to the playoffs and my brother and I, as entrepreneurs, found ourselves working like dogs, sitting in the office, late at night, and also traveling quite a bit, and we just wanted to watch our home team. And we looked around and we couldn't find a way to do it, even though there was an offering on the Internet that promised to deliver me all my games. You know, albeit, it was another monthly fee. I was willing to pay that extra monthly fee. But then I went to watch my Giants, and I am sitting in San Mateo, literally two miles from my house, and the Giants didn't come on.

I thought to myself, well, what is going on here? And I went down and I read the legal fine print at the very bottom of the screen and it says, oh, I am sorry, you get all the games except for your local team, which

they black out. And I am scratching my head and kind of wondering, well, wait a second. What is going on here? I have been traveling and there was some of that happening back home and I wanted to understand what was going on, and I was thinking to myself, you know what? If I could only watch my television back in my house, I have all these channels, all this programming that I love and know. I have a broadband connection in and out of my home. I am spending more time in front of all these other displays. Why can't I just basically create these big binoculars so I can look into my house and watch my TV and control it? And that is really how the Slingbox was born. So really, it is about your living room TV wherever you want.

Now one thing that probably hasn't happened in one of these subcommittees, at least I would imagine, is I am showing you a few goofy videos of just how I use it as a consumer.

[Video.]

MR. KRIKORIAN. One of the ways that I end up using the Slingbox, I am sitting here at home. I never thought I would use it in the living room. But I am sitting here babysitting my daughter who is watching this Barbie Rapunzel thing for 50 times, and I start singing the songs at work, and I am about to go crazy. So that is her hogging the whole couch and everything. And so I was able to watch my football game at the same time while she was watching her DVD.

[Video.]

MR. KRIKORIAN. You know, another goofy one, of course, is I am sitting in my house, in the hot tub doing a little bit of work, and I have my dog looking at me and wondering what the heck is going on and I am watching in the corner. While I am going, I am watching a little bit of sports. Then, of course for most of you have traveled, the boundaries for this are limitless anywhere I have a broadband connection.

[Video.]

MR. KRIKORIAN. And then the last one, and this is a horrendous one, but some of the dads might understand. I had to go to a Beauty and the Beast play and well, fortunately, we had just worked on our mobile client.

[Video.]

MR. KRIKORIAN. So I was able to watch the football game while I am sitting in the play. I did it only for a little bit. So the one problem was my daughter was elbowing me because daddy's face was--

MS. SCHAKOWSKY. I draw the line. Come on.

MR. KRIKORIAN. I know. I am sorry. This is not about good parenting today. So one of the things that I wanted to just give you is a very quick demo of how this works. I have a laptop that was provided to me from some members of the staff here and I just loaded on a little

client, the little SlingPlayer, and what I did is then I added, and I will actually even show you here in a second. Each Slingbox has a unique identifier, and it is this gosh awful ID that you can never memorize, and a password. And what I do is I enter my ID and my password and then anywhere I am in the world, I can connect and watch my living room TV. So, here I am just going to go ahead and say watch, and what is going to happen, without even knowing my IP address or anything else, I am going to connect back into my home in San Mateo.

[Video.]

MR. KRIKORIAN. So this is my television right now live at home, so I can go ahead and do anything that I could normally. And if you notice, here is a Comcast remote. Before, you saw on the video I had a TiVo remote. What our goal is, is to take this and turn this into your familiar experience, right down to the remote control. So if I want to go to Channel 5 as an example, I have some favorites I can add, I can go ahead and I can change the channel to five, watch a little Price is Right. I can go to CNN. Whatever it is that I can do from my living room couch, I could be in China right now. What we see quite a bit is people not just using it at home, but people using it at work as well, where here, people have CNN or CSPAN or CNBC going on in the day and they dock it over on the side so they can be working on their documents.

So one of the things that I wanted to highlight here, and I can show you after, if we have time, is I can actually watch it on my phone now, as well. But to summarize, the one thing I wanted to point is that this is not a mass piracy machine. We have actually taken voluntary steps to ensure that this is not P to P, but this is actually me to me. And so right now, if my wife, for example, tried to connect to my Slingbox back home, she would not be able to do so because I am watching it. It only allows one stream at a time, as an example. So I would like to conclude that, but again, thank you very much. I just want to watch my living room TV wherever I happen to be. Thank you.

[The prepared statement of Mr. Krikorian follows:]

PREPARED STATEMENT OF BLAKE KRIKORIAN, CHIEF EXECUTIVE OFFICER, SLING MEDIA

Chairman Stearns, Ranking Member Schakowsky, and other members of the Subcommittee, thank you for the opportunity to appear today. My name is Blake Krikorian, and I am co-founder and CEO of Sling Media, a privately held company based in San Mateo, CA.

I am here to speak to you both as a consumer and as an entrepreneur. My brother Jason and I started prototyping our first product, the "Slingbox", in the summer of 2002. We poured much of our life's savings into this idea, and fortunately, in October 2004 we were able to raise our first round of venture financing.

Since then, our company closed a subsequent round of financing in January 2006. Our investors include a number of America's top companies and capital firms, such as Allen & Company, Doll Capital Management, EchoStar Communications, Goldman

Sachs, Hearst Corporation, Liberty Media, Mobius Venture Capital, and Texas Instruments.

The initial launch of the Slingbox was in July 2005. It was available on day one nationwide at Best Buy and CompUSA. This nationwide launch was an unprecedented feat for a new product coming from a new U.S.-based consumer electronics company.

The Slingbox is currently available at over 3,000 stores throughout the US. It retails at $249 and does not require any additional monthly fees or subscriptions. Needless to say, after years of development, we are thrilled to bring our product to the American public.

Sling was inspired by our love of the San Francisco Giants. Back in 2002, Giants were poised to make the playoffs for the first time in years. My brother Jason and I are diehard fans, and the Giants playoff run had us simultaneously thrilled and very frustrated. As young entrepreneurs we spent our lives in the office, on airplanes, and in hotel rooms – in short, everywhere but in front of our living room TVs watching our favorite team.

In desperation, we tried various commercial products, but quickly realized that there was no way we could do want we wanted – simply watch **our own TV** while in another location. Our frustration led us to develop the Slingbox.

While the VCR and digital video recorder, such as a TiVo, allows a consumer to "timeshift" – record a TV program for viewing at a more convenient time – the Slingbox adds a new dimension to TV viewing, which we call "placeshifting".

Quite simply, the Slingbox placeshifts your living room TV, thereby empowering you to watch your TV from virtually any location and on any device. For a real life scenario, I am actually sitting in my kitchen as I type this testimony on my wireless laptop and at the same time, watching my living room TV in a small window on my laptop display. In this case, the Slingbox in my living room is placeshifting my local news from my cable box to my laptop in the kitchen.

We have found that consumers use the Slingbox to placeshift their living room TV to other rooms in their home, to their desktop computer at the office, and even to their laptop computers and mobile phones while on the road or anywhere in the world they have broadband Internet connection.

Personally, I have been as far away as a hotel room in China and watching my favorite TV shows back home. I have even been on a WiFi-equipped commercial airliner at 40,000 feet above the Atlantic and able to placeshift the baseball playoffs from my living room to my seat in 37C!

Most of the time, however; I find myself using my Slingbox on my desktop PC at the office, typically tuned into the local or national news throughout the day.

To respect the rights of content holders, we have taken voluntary steps to ensure the Slingbox is **a personal-use system**. The Slingbox will only placeshift to one device at a time, meaning that multiple parties cannot consume the content simultaneously. Moreover, each Slingbox has a 32-bit unique ID, password protection, and encrypted messaging between the Slingbox and the client device.

The Slingbox does not make a copy, or allow indiscriminate redistribution over the internet. It simply takes the TV programming that you have already bought and paid for, and "slings" it somewhere else. Rather than "P to P", the Slingbox enables "me to me".

Beyond the applications that I have described, I am delighted that Americans are developing new and unanticipated ways to use the Slingbox's placeshifting technology.

For example, Disney is using Slingboxes in their movie post-production process by enabling workers to remotely view daily filming from virtually anywhere. A Dairy Queen franchisee has installed Slingboxes in several of his restaurants for remote security and surveillance purposes. Comcast has deployed dozens (if not hundreds) of Slingboxes around the country to monitor remote ad servers.

Even our local firefighters are exploring ways to use the Slingbox to placeshift the local news helicopter video feed from the fire station to a mobile phone at the scene of the fire, thereby providing the firefighting crew with an overhead view.

And of course, our technology allows members of Congress to set up their Slingbox in their district office, and watch their local news live from their computer in the Rayburn Building.

We are pleased that the Slingbox has been eagerly embraced by consumers. In addition to empowering tens of thousands of Americans to enjoy their local TV programming beyond the confines of the living room, the Slingbox has been recognized by many leading popular publications. TIME Magazine named the Slingbox one of the Best Inventions of 2005. Popular Mechanics acknowledged the Slingbox as one of its Breakthrough products for 2005. Fortune Magazine named Sling Media one of the 25 Breakout Companies of 2005. In addition, Business Week named the Slingbox one of the Best Products of 2005.

Thank you for allowing me to introduce the Slingbox and the notion of placeshifting. I look forward to giving the Committee a personal demonstration of Slingbox technology.

## APPENDIX

Recent Press Coverage

**Video:**

CSPAN interview (aired March 25, 2006) (RealPlayer required):
rtsp://video.c-span.org/project/de/com032506_krikorian.rm

**Print:**

Select articles attached below.
Please see www.slingmedia.com/news for a more complete set of coverage.

**Slingbox Video Streaming Not Perfect, but Remarkable**
Washington Post
By Rob Pegoraro  Thursday, March 23, 2006; D05

I watched television while I walked to the Metro on Tuesday morning -- and during my trip through the subway, then at my desk at the office. My TV set was a Treo 700w "smart phone," my antenna was the phone's wireless data connection, and the broadcast came from a small silver rectangle parked next to the TV in my living room.

This experience had a lot in common with the first days of video on the Internet, complete with irritating dropouts. But getting a full spread of satellite-TV channels on the screen of a phone was a sufficiently remarkable feat that I could overlook those flaws.

The technology behind this feat came from Sling Media Inc., a San Mateo, Calif., start-up. Its $250 Slingbox debuted last year, allowing users to stream any video source -- over-the-air TV, cable, satellite, DVD, whatever -- to a broadband-connected computer running Sling's software.

The Slingbox did that reasonably well and generated an impressive level of hype in the process, but it also required some finicky configuration and hit one nagging relevancy issue: How often are you within reach of broadband Internet but not TV?

Since then, Sling has fine-tuned its setup software, and today it's introducing the ability to stream video to a Windows Mobile handheld organizer with a broadband Internet connection -- either WiFi or the wireless carriers' data services.

This new feature both extends the reach and utility of Sling's product and helpfully expands the ongoing debate over television's future.

Installing a Slingbox took far less work than last year. I didn't have to turn off my computer's firewall (Sling's software requires Windows 2000 or XP, with a Mac OS X version due by midyear) or restart the candy-bar-shaped Slingbox over and over. The only real hassle was the wiring: audio and video cables to a satellite-TV receiver, an "IR emitter" to send commands to that box's remote-control sensor, and an Ethernet cable to link the Slingbox to a wireless router.

(A WiFi receiver and digital-television tuner built into Slingbox could immensely simplify things.)

After identifying the satellite receiver in the Sling program and adjusting a security setting on my wireless network with the help of clear directions on Sling's Web site, the setup concluded with my installing SlingPlayer Mobile -- a beta release that will cost $30 for people who buy a Slingbox after April 26 -- on the Treo.

And so I found myself watching a spring-training baseball game on the Metro. Later on, I watched a handful of other live programs, plus a couple of recorded shows stored on the satellite box's hard drive.

Sling's mobile software can function even on such slow data links as the 50 to 70 kilobits per second of Verizon's NationalAccess, at the cost of awful image quality (players in that baseball game looked like the faceless characters of an early-1990s video game) and frequent dropouts.

But with the 200 to 300 kbps of Verizon's BroadbandAccess, Sling-relayed TV looked a lot more like TV, aside from hard-to-read text in news tickers.

Like its desktop counterpart, Sling's mobile software lets you control the video by selecting buttons in an onscreen remote control; the lag between selecting a command and seeing its effects seemed longer on the Treo, however.

With all of its trying moments -- say, when the Verizon broadband would mysteriously shrivel away to 30 or 40 kbps -- Sling video also looks pretty good compared with other options for on-the-go TV watching.

Unlike Apple's iTunes downloads or the mobile-video services of wireless carriers, Sling doesn't require you to pay for each show or cough up a subscription fee. Unlike video recordings transferred from a Media Center PC, it doesn't require running complicated software before syncing large files over to your handheld.

On the other hand, networks, broadcasters and cable or satellite operators don't make anything extra off the Slingbox either. Some people in those businesses seem uneasy about the way the Slingbox gives customers so much more control over their TV viewing.

Like that's a bad thing.

*Living with technology, or trying to? E-mail Rob Pegoraro atrob@twp.com.*
© 2006 The Washington Post Company

**TV Here, There, Everywhere**
New York Times
By David Pogue, March 23, 2006

IN the olden days, Americans gathered in front of the television sets in their living rooms to watch designated shows at designated times. You had a choice of three channels, and if you missed the broadcast, you'd feel like an idiot at the water cooler the next day. Quaint, huh?

Then came the VCR, which spared you the requirement of being there on time. Then cable TV, which blew open your channel choices. Then TiVo, which eliminated the

necessity of even knowing when or where a show was to be broadcast. What's next — eliminating the TV altogether?

Well, sure. Last year, a strange-looking gadget called the Slingbox ($250) began offering that possibility. It's designed to let you, a traveler on the road, watch what's on TV back at your house, or what's been recorded by a video recorder like a TiVo. The requirements are high-speed Internet connections at both ends, a home network and a Windows computer — usually a laptop — to watch on. (A Mac version is due by midyear.)

Today is another milestone in society's great march toward anytime, anywhere TV. Starting today, Slingbox owners can install new player software on Windows Mobile palmtops and cellphones, thereby eliminating even the laptop requirement.

On cellphones with high-speed Internet connections, the requirement of a wireless Internet hot spot goes away, too. Now you can watch your home TV anywhere you can make phone calls — a statement that's never appeared in print before today (at least not accurately).

Now, if you don't travel much, and even if you do, your reaction to this statement may well be, "So?"

Sure enough, the Slingbox has always been intended to fill certain niches. It's for people with a fancy satellite receiver downstairs in the living room, but who want to watch upstairs in bed before retiring. It's for the hotel-room prisoner who wants to watch a movie on a TiVo at home, having realized that it's cheaper to pay $10 for a night of high-speed Internet than $13.95 for an in-room movie. It's for the traveler who wants to keep up with his hometown news while away.

And if you have friends who can't see the big game because of a local broadcast blackout — really, really good friends — you could even let them download the free Slingbox player software and watch your local broadcast, though the Slingbox folks don't endorse this last use.

Now that all of this is available for cellphone viewing — with no monthly fee — well, the mind boggles.

THE Slingbox itself is truly eccentric-looking. Picture three squares of chocolate broken off a Nestlé bar, cast in silver and blown up to 10.6 by 1.6 by 4 inches. ("It's supposed to be an ingot," a spokesman corrected me.)

For most people, setting it up is a 15-minute prospect, according to the company. An Ethernet cable connects the Slingbox to the router on your home network. (Wireless networks aren't fast enough to handle the Slingbox's video reliably. If there's no Ethernet jack handy, Sling will sell you a $100 Powerline adapter, which you plug into an electrical socket; it makes the electrical wiring of your house part of your network.)

Another cable connects a spare video recorder or TV output to the Slingbox itself. It has inputs for RCA and S-video cables; you can switch between sources from the road. A third cable is designed to control the channel-changing and other functions of your recorder or cable box; it terminates with two so-called infrared blasters, which are meant to be taped in front of the infrared "eyes" of your TV equipment.

But suppose you're not most people. Suppose you're a newspaper reviewer with bad karma and a router that Slingbox doesn't recognize. In that case, setting up a Slingbox can be a more time-consuming ordeal. Anyone still puzzling over the phrase "the router on your home network" might be in trouble, too.

Once the setup is done, though, and once you've installed the necessary software, your PC's speakers burst to life — and there, on your computer screen, is whatever's on TV right now. By clicking a photographic on-screen representation of your actual remote control, you can change channels, see what's available to play on your TiVo, pause or rewind, or even tell the TiVo to record something. All of this works equally well at home (across the network) and on the road (across the Internet), although your components at home take a couple of seconds to respond.

(Unless you've bought a cable splitter, changing what's on the TV screen from the road also changes it at home, which could alarm anyone who happens to be watching TV in person at the time.)

The sound is excellent — and at home, viewed across your home network, so is the standard-definition video. Viewed away from home, the video is only O.K. There are blotchy patches here and there, not to mention periodic temporary freeze-ups; all of it depends on the Internet connection speeds at both ends. The video resembles a VCR recording, which is still perfectly fine for talk shows, reality shows, game shows and movies where sweeping visuals and special effects aren't the main attractions.

Once that's all running, you can embark on the next adventure: tuning into your Slingbox from a palmtop or cellphone. This task involves downloading and running another installer from slingmedia.com — free to Slingbox owners until April 26, and a one-time $30 payment thereafter.

At that point, you can use tiny tappable on-screen controls to tune in to your home TV and video recorder, and control all their functions, just as you can with a laptop. The Slingbox can direct its video to only one gizmo at a time, however; you can't watch on your cellphone while someone else is using a laptop.

Once again, all you need is high-speed Internet access. For PocketPC palmtops (like the HP iPAQ and Dell Axim), that usually means finding a Wi-Fi hot spot in a hotel, airport or coffee shop. Life is even easier if you have a cellphone with a $60-a-month high-speed cellular data plan like Verizon's EV-DO network (Palm Treo 700w, Samsung i730, and so on); in that case, you can tune in from anywhere in the 100 major cities with coverage. You can kill time watching your own TV while in cabs, friends' houses and the line at the Department of Motor Vehicles.

The mobile Slingbox player also works over Bluetooth or U.S.B. connections to the Internet, meaning that you could watch on your palmtop over an Internet signal provided by a nearby laptop. But that's sort of pointless — if you have a laptop, why not watch your TV on it and enjoy the much bigger screen?

On the small screen, the video once again has perfectly adequate VHS quality. If the Internet connection is very slow — for example, if your cellphone is outside those 100 cities covered by EV-DO — you can opt for "slide-show mode" (one frame of video a second, accompanied by full audio).

On the pocket player, Sling Media has yet to fashion photographic remote-control replicas for all 5,000 different TV components offered by the laptop version. Still, the most important buttons are all available as generic rectangles; they appear when you tap the right "soft key" on your palmtop or phone. Keyboard shortcuts are available for most functions, too: to control a TiVo from the Treo's thumb keyboard, for example, you can press R for record, P for play, F for fast-forward.

The Slingbox isn't the only video-to-go option, of course. TiVoToGo, the iPod TV store and Archos pocket players all let you carry TV shows and movies on your travels — but only if you record material and transfer it before the trip. Orb (orb.com) is free and also works with some cellphones, but gets its video from a PC with a TV tuner card, not from your actual TV and video recorder. And, of course, your cellphone company will be happy to sell you short TV shows — a canned selection of their choosing, not yours — if you're willing to pay a monthly fee and watch exclusively on your phone (not your laptop).

The Slingbox and its simple, satisfying new cellphone/palmtop player join those portable personal-video options. It seems clear that along with traditional TV schedules and traditional TV channels, the next victim of high-tech progress may be the traditional TV couch.

**Take Your Cable Channels With You on the Road**
New York Times
By KEN BELSON, December 21, 2005

In 2002, Blake Krikorian and his brother Jason were beside themselves. Their beloved San Francisco Giants were in a pennant race, yet Blake and Jason, two Silicon Valley engineers, were traveling so much that they missed many of the games on television.

Desperate, they signed up for a service that offered live audio and video of the games over the Internet, only to find that subscribers from San Francisco could not watch Giants games because of blackout restrictions.

The idea for Slingbox was born. The Krikorians decided to find a way to let cable and satellite television customers watch what was on their home televisions while they were on the road. After several years developing the product, their company, Sling Media, released its first boxes in July.

"I was paying $80 a month to Comcast, and I have a broadband pipe in my house and all these other displays," Blake Krikorian said. "So why can't I just watch the TV coming into our house?"

Just as TiVo and other digital video recorders ushered in the concept of "time shifting" a few years ago, the Slingbox promises to make "place shifting" a reality for households. By letting consumers connect with their cable or satellite hookups when they travel, Slingbox has the potential to splinter further the way television is watched.

For instance, even people living far from their hometowns could get a Slingbox, allowing them to watch their local television in another city or even country. Sling Media does not endorse this use of its device for fear of antagonizing cable and satellite companies, which may see it as illicit sharing.

As with music, where many younger consumers are forgoing CD's in favor of downloadable songs, television viewers - with the help of devices like Slingbox - are expected to download more and more of their programming when and where they want it.

"The trend over the past 30 years is towards fragmentation," said John Mansell, a cable industry analyst at Kagan Research. "It makes life a little more complicated" for cable and satellite operators and programmers.

For consumers, however, Slingbox could not be simpler. The size of a shoe, it sells for $250 and unlike TiVo does not require a monthly subscription. The box can be hooked to a cable set-top box or a digital video recorder, and must be linked to a broadband line so the video can be "streamed" to a laptop or other device. Faster connection speeds provide better video quality.

Users install software on laptops that communicates with the Slingbox over a high-speed Internet connection at a hotel or other remote location. (Again, faster connection speeds make for better viewing.) Users can watch what is playing live on the cable or satellite service at home, or anything stored on a digital video recorder. A virtual remote control that appears on the laptop allows users to change channels or play, pause or rewind a recorded program.

For all its convenience, few people are all that interested in watching programming intended for full-screen televisions on laptops, especially if connection speeds are slow and the picture is jerky. But Mr. Krikorian, who has worked as an engineer in Silicon Valley for 15 years, says he has developed a solution called stream-optimization technology.

Through a sophisticated software program, it automatically adjusts the video stream to match the quality of the broadband connection. Mr. Krikorian named the technology "Lebowski" after his favorite movie, "The Big Lebowski."

"Our product allows the video to abide by the network conditions at any time," Mr. Krikorian said, paraphrasing the line "the dude abides," delivered by the film's star, Jeff Bridges.

The technology is one reason Slingbox already has a cult following among travelers like David Garrison who crave a touch of home while on the road.

Mr. Garrison, the chief executive of iBahn, a company that sells technology to hotels, travels to Asia once every three months and is in Europe every six weeks. He loves to ski at home in Salt Lake City and can make plans to hit the slopes by watching the local news to check the weather conditions in Utah. He also watches University of Utah sports teams and programs from the Golf Channel that he records on his TiVo.

Mr. Garrison says he watches just as much television in hotels as he did before. But now he is more likely to watch what interests him rather than flip through the channels on the hotel television in search of something appealing.

"Before I had the Slingbox, I would turn on the TV and do the guy thing and spend two seconds on each channel before turning it off," said Mr. Garrison, who uses a laptop with a 12-inch screen, connected to headphones. "Now, I feel like the time is better spent than just zoning out in front of the TV."

Mr. Garrison said the picture quality on his laptop was adequate and the sound quality superb. Laptops that have an S-video output jack can connect to a television for better viewing.

Slingbox is already stocked in almost 4,000 stores, including Best Buy, CompUSA and Circuit City. Mr. Krikorian said unit sales were nearing "six figures." The company has lined up financing from Doll Capital Management, Mobius Venture Capital, Hearst and Lenovo, the Chinese computer manufacturer.

There are drawbacks, though. In addition to having to watch programs on a small computer screen, Slingbox users may also interfere with their family's viewing back home; in some cases when channels are changed remotely, the television at home moves with it, and vice versa.

For now, video streamed from a Slingbox cannot be viewed on an Apple Macintosh computer, though Mr. Krikorian says his company will announce a solution to that problem in January.

And as with TiVo, which has lost market share because cable and satellite set-top box makers have developed their own DVR's, imitators are catching on. Sony, for instance, sells LocationFree, a $350 device that connects to a home entertainment system and beams television signals to a PC or hand-held device anywhere in the world. Others are sure to follow.

Down the road, programmers, particularly sports teams, may object to Slingbox's ability to sidestep their blackout restrictions. Cable and satellite operators could also oppose attempts by their subscribers to use Slingbox to give others free access to their programming.

But Mr. Krikorian sees opportunity in these potential conflicts. He is talking to cable companies that could lease Slingboxes to their subscribers, he said, giving them fewer reasons to switch to a rival provider and more reasons to buy a faster broadband connection. Down the road, Web content, including advertisements, could be linked to shows beamed from the Slingbox.

For now, though, Mr. Krikorian is optimistic that the Slingbox will do for travelers what TiVo did for couch potatoes.

"You should always be concerned about competition," he said. "But I think we're in a good spot because no one has the technology we have. We've got a head start."

**Gadget of the Year – 2005**
Jupiter Research
**Michael Gartenberg** , December 28, 2005

This one was another really hard category. Lots of interesting things that came to market this year. I was looking for something new, different and ground breaking for this category. There's still lots of choices but it came down to one for me. The *Slingbox* from the folks at Slingmedia.

What's Good – The Slingbox is amazing. From the unique design and the wonderful setup experience, the Slingbox does one thing and does it really well. (For fun, try accessing your music and pictures too using the TiVo home media option.) Like all groundbreaking devices, it doesn't fit into some neat category, it creates a whole new one (and a new buzzword, place-shifting). For the weary road warrior killing time in an airport or sitting in a hotel room in a place far away, the Slingbox brings some of the comforts of home to your laptop and soon to other devices. If you travel a lot (or just like the idea of accessing your content from anywhere in the world) and you have a good broadband connection, you need to get one of these things. At $249, it's one of the best bargains in consumer electronics.

What's Missing – Setup is excellent but if you're working in a slightly funky network setup, you're going to stumble. Sling's challenge is going to be to keep updated with all the new stuff coming to market while increasing support for legacy stuff. It will also be nice to see support for more platforms beyond Windows. Smartphone, PocketPC, Mac OS and the like are all in the works and hopefully we'll see them soon.

**Slingbox lets your TV travel with you**
Clever design lets you watch, control your home TV from a PC screen
MSNBC
By Gary Krakow, Updated: 1:11 p.m. ET Dec. 21, 2005

You know a device is ground-breaking when it doesn't fit into any particular category.

Slingbox might be called a personal video broadcast box. Or a cable TV-over-computer box. Or a junction box that lets you access your cable, satellite, DVD, or VCR from anywhere on the planet.

This very clever device works by letting you "broadcast" an audio/video signal — via your high-speed Internet connection — and watch the result on a PC or laptop. You can watch that feed on any computer running the Slingbox software, anywhere in the world.

Slingbox is pretty sophisticated and needs your PC and home computer network to be sophisticated as well. Aside from that high-speed Net connection, minimum requirements include a PC running Windows XP or 2000 SP4 and an Ethernet connection to your router. You can get the full list on the company's Web site.

At approximately 10.5 by 4 by 1.5 inches, the Slingbox is nice and compact. You can place it anywhere; in my case it rested perfectly on top of the cable TV control box.

First, you need to connect your Slingbox to your video source, which can be a cable TV box, a satellite service, a DVR such as TiVo, a DVD player or even a VCR. Slingbox has antenna (good), composite video (better) or S-video (best) inputs for the incoming signal.

Next, you hook Slingbox to your computer network via its Ethernet port. That can be tricky if, as in my case, your high-speed networking hub is nowhere near your living room TV setup. It would have meant more than 100 feet of Ethernet cable running through the living room. You try explaining that to the spouse.

Slingbox has thought of that, fortunately, and there is an easier way. You can purchase a separate Netgear 802.11 wireless game adapter and configure it to your home network's wireless settings while it is attached to your computer. Then you unplug it from the PC and plug it into the Slingbox.

The last step is to install the Slingbox control software onto your computer and follow the step-by-step, on-screen instructions. During that process, the software assigns a 32-digit, alpha-numeric identification tag to your Slingbox. That ID allows any PC running the Slingbox software to search for — and find — that box via any Internet connection.

What that means is once you install and configure the software you can control and watch your Slingbox anywhere you can access a high-speed Internet connection. That's very cool. The system also allows you to use and choose from multiple Slingboxes installed in your home.

I particularly like the on-screen remote controller. As part of the set-up process, you tell the Slingbox software which cable or satellite service you're using. When you're finished, the Slingbox remote control window on your computer screen acts like the actual TV remote control — right down to button placement.

I have to admit that I was skeptical about Slingbox's worth until I actually started using the system. Now it's difficult to stop. I find myself keeping a Slingbox screen open on my computer desktop all the time — sometimes with the sound muted — and then taking advantage of the latest news bulletins, weather, traffic reports and the occasional football game or two. (You thought you weren't getting any work done as it was.)

One interesting note, regular TV channels produce a larger computer image than their high-definition equivalents. That's because Slingbox lets you watch a 4:3 image on your computer, but the 16:9 HD images just look cut-off.

The bottom line is that Slingbox works exactly as described and is addictive. It allows you to watch and listen to TV wherever you are. Video quality is very good whether you watch inside or outside your home. I haven't yet tried it overseas but I plan to in the very near future.

Slingbox is available online and retails for $249.99. They're currently offering $50 online discounts as well. It's a good deal.

Looking toward the future, it would be great if the Slingbox gurus could extend this remote control TV service to mobile phones. I know I would be near the front of the line for the software when they accomplish that.

© 2006 MSNBC Interactive
© 2006 MSNBC.com
URL: http://www.msnbc.msn.com/id/10546353/

**Remote Control**

**Never miss a game again while traveling. The new Slingbox sends your home's TV channels to a laptop**

October 3, 2005

If you're a traveling sports fan who hates to miss your home team's games, technology has just thrown you a lifeline. The Slingbox, from Sling Media Inc., a tech firm in San Mateo, Calif., plugs you into your own living room, enabling you to use your

laptop to watch every television channel that you get on your home TV. Fred from Philadelphia can sit in a Tokyo hotel room and watch the Phillies on his computer screen, and Harry Kalas's calls will lose nothing in translation.

Blake and Jason Krikorian, who along with Bhupen Shah cofounded Sling Media, say they were inspired to invent the Slingbox in 2002 when they were traveling often for work and had a hard time following the San Francisco Giants, who were in a pennant race. They thought, What if it were possible to tap into your home TV signal through the Internet? Three years later they've made it happen. On a trip to Singapore in May, Blake was able to watch the UCLA women's water polo team -- coached by his brother Adam -- win an NCAA title because the game was broadcast on CSTV, part of his cable package back in California. "I was lying in bed watching it in my hotel room just like I was back home," he says.

The Slingbox, which costs $250 (no subscription fees), is a brick-sized piece of hardware that connects to your home cable or satellite box and works with software that you load onto your PC laptop. (A Mac version is in the works.) True, you need to have both feet firmly planted in the 21st century to use this device -- your home must have broadband and a router, and when accessing your programming, you must also have a broadband connection at your remote location. Installation takes between 15 minutes and an hour. While the tech-savvy should be able to do it, you can pay someone at CompUSA or BestBuy (currently the only brick-and-mortar retail outlets for Slingbox, though more are expected) an extra $100 or so to handle the installation.

Once you get Slingbox installed, it's easy to operate. You change channels by clicking on a remote-control interface on your computer screen. Your home TV need not be on. The video quality is not as clear as a TV's, but it's not bad. I watched a Mets-Phillies game on a public wireless connection in New York City's Bryant Park, and I could make out Tom Glavine's pitches O.K. But when the Phillies' David Bell stroked a ball into rightfield and the broadcast switched to a wide-angle shot, I could no longer follow the ball and had to read the body language of rightfielder Victor Diaz to see that it was dropping in for a hit. Text on the screen was clear; I could read the ESPN news crawl just fine.

Improving the picture quality is a big part of the company's mission. Since the commercial release of Slingbox on June 30 it has issued three free software patches to make the picture better. But such quibbles aside, it's a wonder that you can flip through the channels on your home TV from anywhere in the wired world. And you can watch *any* programming, not just sports. You can even access your TiVo and watch those stored episodes of *The Sopranos*. Your TV can be as portable as a laptop.

One potential complication: You are not just watching TV, you are watching *your* TV, so if you're tuning in while on the road and someone at home wants to watch a different program, you may be in for a long-distance tug-of-war over the remote.

MR. STEARNS. Thank you. Mr. Feehery.

MR. FEEHERY. Thank you, Mr. Chairman. I am the guy that is following him. I am John Feehery and I represent the Motion Picture Association of America. Our members companies are made up of the seven major studios, Fox, Disney, Paramount, Warner Brothers, NBC/Universal, Sony Pictures, and MGM. As you can see, these are very interesting times in the movie business. Since the Supreme Court declared unambiguously, in the Grokster v. MGM decision, that Internet business models based on the principle of theft were not legitimate and should cease operations, we have seen an incredible burst of creative and legal business activity.

The market for visual distribution of motion pictures is still very young, yet we have already seen the following very important developments: feature films are now available for download from all the major studios through online services that include Movielink and CinemaNow. Disney is offering legal downloads of some of its most popular television shows, including Lost and Desperate Housewives for the video iPod. NBC/Universal and Viacom followed suit. You can see Dora the Explorer, Spongebob Squarepants, and the Daily Show on your video iPod.

Apple hit the one million download mark within three weeks, and today there have been more than 12 million video downloads through iTunes and more than 50 TV shows are available. Fox, NBC/Universal, Disney, and Viacom have all entered into agreements with Verizon to distribute TV and video content through its new FiOS network. Disney and Verizon struck a deal to provide episodes of Lost, created

specifically for the V-Cast network. Warner Brothers is partnering with AOL to launch the first broadband television network, In2TV. This network offers the largest collection of free on-demand TV shows on the web, including Welcome Back Cotter, Chico and the Man, Kung Fu, Lois and Clark, and Maverick, my personal favorite. NBC/Universal has announced the licensed peer-to-peer distribution of some of their films and TV shows through Wurldmedia. It also announced an agreement with Aeon Digital to make similar content available on demand over the Internet.

Disney has spun out MovieBeam, a video-on-demand movie service, with the help of Cisco, Intel, and others. This service offers the first wireless distribution and on-demand access to high definition films in the U.S. And Sony released the Universal Media Disc format for its Play Station Portable. This specialized format has led to over 350 titles being licensed by our movie studios. This explosion in activity, legal activity, has happened for a very simple reason: what is bad for the black market is very good for the legitimate marketplace. And, Mr. Chairman, what is good for the legitimate marketplace is very good for the consumer. It is also good for policymakers such as yourselves. It means more tax revenues for Federal, State, and local government. It creates jobs. For example, the U.S. motion picture industry employs nearly 750,000 people nationwide. These jobs are not just in California. Increasingly, major motion picture productions are created all across the United States, including Florida, Mr. Chairman, Texas, Louisiana, New York, and, Ms. Ranking Member Schakowsky, my home State of Illinois. And a legitimate marketplace encourages even faster digital developments in the long run. That in turn means more choices and more convenience to consumers.

The Grokster decision has provided us with commonsense rules of the road that inspire the legitimate marketplace to move forward. The Congress should continue down that road by ensuring that content is adequately protected as we move ever further into the digital age. Both broadcast flag and analog hole legislation will help spur the transition to digital television and a robust digital marketplace, rich with more choices for consumers. But by weakening copyrights and promoting freeloading, we will hurt the legitimate marketplace. Piracy devices that circumvent content protection should not be protected in law. The so-called analog hole shouldn't be allowed to persist and slow down the transition to a vibrant digital marketplace for audiovisual content. And a mistaken understanding of the fair use doctrine that will lead to greater piracy shouldn't be codified in law.

All too often, the content industries and the consumer electronics industries have been pitted against one another in legislative battles. But

choosing between technology and content, and the content it carries, is like choosing between Florida and the sunshine. It doesn't make any sense and it is a false choice. The content and technology industries are working together, as I show with the different examples, to provide consumers the best and the most entertaining value.

Mr. Chairman, it is impossible to predict with any accuracy what is going to happen in the future. You can see all of these new developments that we knew nothing about three or four years ago. That is the nature of a vibrant marketplace. But it is possible to predict that if commonsense rules of the road that respect copyrights are established, if freeloading is discouraged, and if the marketplace is allowed to work to provide consumers the most choices at the best prices, at the end of the day, the consumer will win and that is how it should be. Thank you.

[The prepared statement of Mr. Feehery follows:]

PREPARED STATEMENT OF JOHN FEEHERY, EXECUTIVE VICE PRESIDENT, EXTERNAL AFFAIRS, MOTION PICTURE ASSOCIATION OF AMERICA

Mr. Chairman,

Thank you for this opportunity to testify before your Committee today.

My name is John Feehery, and I am Executive Vice President for External Affairs for the Motion Picture Association of America.

Our member companies are made up of the seven major studios: Fox, Disney, Paramount, Warner Bros., NBC/Universal, Sony Pictures and MGM.

These are interesting times in the movie business.

Box office receipts were down about eight percent last year.

No one knows exactly what caused this decline. Perhaps it was the movies themselves. Perhaps it was piracy. Perhaps it was the prevalence of home theaters.

But while the box office may be disappointing, the movie business itself is adapting in many exciting and unpredictable ways.

Since the Supreme Court declared unambiguously in the Grokster v. MGM decision that internet business models based on the principle of theft were not legitimate and should cease operations, we have seen an incredible burst of creative business activity.

The market for digital distribution of motion pictures is still very young, yet already we have seen:

- Feature films now available for download from all of the major studios through online services that include Movielink and CinemaNow.
- The video iPod together with the announcement from Disney that it was offering legal downloads of some of its most popular television shows, including Lost and Desperate Housewives.
- NBC-Universal and Viacom followed closely thereafter. You can now see episodes of popular shows like Dora the Explorer, Spongebob Sqaurepants and The Daily Show on your video Ipod.
- Apple hit the 1 million download mark within three weeks, and today there have been more than 12 million video downloads through iTunes and more than 50 TV shows are available.
- Fox, NBC-Universal Disney and Viacom are all entering agreements with Verizon to distribute TV and video content through its new FiOS network.

- Reports that Disney has struck a deal with Verizon to provide so called episodes of the popular television series "Lost" created specifically for distribution to telephones through Verizon's V-Cast network.
- Jon Stewart lovers can also get The Daily Show on their Verizon V-Cast phones.
- Warner Bros. partnered with AOL to launch earlier this month the first broadband television network—In2TV—that offers the largest collection of free on-demand TV shows on the Web, including such Warner Bros. classics as "Welcome Back, Kotter"; "Chico and the Man"; "Kung Fu"; "Lois and Clark"; and "Maverick."
- NBC Universal announcing the licensed peer-to-peer distribution of some of their films and TV shows through the Wurldmedia network, as well as an agreement with Aeon Digital to make similar content available on-demand over the Internet.
- The announcement of MovieBeam, a video-on-demand movie service spun out of Walt Disney Co. with the help of Cisco, Intel and others, which offers the first wireless distribution and on-demand access to high-definition films in the U.S.
- Sony's release of the Universal Media Disc format for its Play Station Portable, with movie releases being supported in this specialized format by many of the major studios which together have licensed over 350 titles.
- Announcements by each of the major studios in support of next-generation, high-definition DVD formats.
- MTVNetworks, a division of Viacom, has already launched 4 Internet broadband channels—Comedy Central's The Motherload, Nickelodeon's TurboNick, MTV's Overdrive, and VH1's V-Spot, all of which offer consumers a rich array of on-demand, interactive content.

This explosion in activity has happened for a very simple reason: what is bad for the black market is very good for legitimate market place.

And what is good for the legitimate marketplace is good for policy makers such as you.

A legitimate market place means more tax revenues for federal, state and local government.

A legitimate marketplace creates jobs and is good for America's economy. For example, the US Motion Picture Industry employs nearly 750,000 people nation-wide.

The average motion picture employs 350-500 people (listed in the film's credits) and with larger special effects driven films that number can be in the thousands.

In short, the motion picture industry means jobs for middle class Americans who make, on average, $47,000 per year.

These jobs are not just in California either. Increasingly, major motion picture productions are created all across the United States, including in Florida, Texas, Louisiana, New York, and my home state of Illinois.

When Hollywood goes on location, it not only benefits the people working on the movie, but the entire community as well.

A major motion picture on location contributes up to $200,000 per day to the local economy, with people filling gas tanks, using the local dry cleaners, caterers, stores, hotels, etc.

Finally, by encouraging the legitimate marketplace, our entertainment products drive demand for improved technologies and broadband services.

In turn, that means more choices and more convenience for consumers.

As we move into the digital future, the Congress faces a simple choice.

It can take steps to help foster a more robust, more creative and more exciting marketplace for consumers, content providers and tech manufacturers.

It can enact and enforce laws that respect copyrights, inspire cooperation between tech and content, and crack down on freeloaders and pirates.

The Grokster decision was a good start, by providing us common sense rules of the road that inspired the legitimate market place to move forward.

The Congress should continue down that road by ensuring content is adequately protected as we move ever further into the digital age.

Both broadcast flag and analog hole legislation will help spur the transition to digital television and a robust digital marketplace, rich with more choices for consumers.

But by ignoring copyrights and promoting freeloading, we will hurt the legitimate marketplace.

You shouldn't protect in law piracy devices that circumvent content protection.

You shouldn't permit the so-called analog hole to persist and slow down the transition to a vibrant digital marketplace for audiovisual content where DRM technologies can function properly.

You shouldn't codify in law a mistaken understanding of the fair use doctrine that will lead to greater piracy.

Fair use does not mean that our content is fair game for anyone who wants to take it and consume it without paying.

All too often, the content industries and the consumer electronics industries have been pitted against one another in different legislative battles.

But trying to choose between technology and the content it carries is like trying to choose between Florida and Sunshine.

It is a false choice. The content and technology industries must work together to provide customers the best and most entertaining value.

Mr. Chairman, it is impossible to predict with any accuracy what the future holds. That is the nature of a vibrant market place.

But it is possible to predict that if common sense rules of the road that respect copyrights are established, if freeloading is stopped, and the market place is allowed to work to provide consumers the most choices at the best prices, at the end of the day, the customer will win.

And that is how it should be.

Thank you, Mr. Chairman.

MR. STEARNS. I thank the gentleman. Mr. Denney. I just need you to put the mike on.

MR. DENNEY. There we go.

MR. STEARNS. Yes.

MR. DENNEY. Thank you, Mr. Chairman and Ranking Member Schakowsky and all the members of the subcommittee. Thanks for having me here today. Before I get going, I just want to say, Blake, I feel bad for you as a Giants fan, but you should try being a Cubs fan some day. That will be even better.

TiVo was founded in 1997. We have been working since then to bring innovative and compelling new consumer experiences, television experiences to consumers. Currently, we have a little above four million subscribers. New innovations often challenge existing business interests. Live performers resisted the player piano. The recording music industry resisted radio. The broadcast industry didn't like the idea of cable television. It was feared that the VCR was going to destroy the movie

and television industries when it first debuted. Innovation, while sometimes threatening, is ultimately good for the consumer, the innovator, and the content industry. To address what the point is here, we are not critiquing current efforts that the industry has, just raising the fact that sometimes technology can be threatening.

Current law provides a solid base for innovation. It has provided a balance between the copyright holders' rights and innovation that can delight consumers and give birth to new markets. The key to this success is providing flexibility in allowing the market and the court system to determine the reasonable balance between copyright holders' rights and the consumer's right to enjoy legally acquired content on their own terms. The dynamic balancing act has allowed the cycle of innovation to continue.

A longstanding interpretation of the Copyright Act makes it clear that the act was intended to punish bad behavior rather than stifle innovation itself. Innovators like TiVo must be free to concentrate on developing compelling new ways to enjoy legitimately acquired media. Innovation can create business opportunity and benefit the consumer at the same time. The TiVo DVR has given users unprecedented flexibility in finding and watching television. TiVo provides the ability to pause live TV, record each episode of your favorite TV show, find shows that are of interest to you. Online scheduling capability ensures that you won't miss your favorite show, even if you forget to record it after you left the house. Our new KidZone feature allows parents to create what they deem to be a safe environment for their children based on their own personal values and interests.

None of these innovations would have been possible without the fair use provision of the Copyright Act. Consumers must be allowed to make personal copies of shows that they want to watch in order to watch them when they want to watch them. Much of the innovation of fair use has enabled increased consumption of media by consumers and new opportunities for content providers. At the time TiVo debuted in the market, many in the television industry predicted the demise of ad-supported television. The actual result has been that TiVo subscribers often watch more television than they did before. Broader audiences are able to watch shows that they otherwise would not have watched. Educational and informational programming for children is not always available when it is convenient for parents or the children. TiVo is always working on innovative tools for advertising on the DVR environment as well, and working on tools that are attractive to both the consumer and the ad and content industry at the same time.

Finally, TiVo is a strong supporter of protecting content against piracy. We condemn piracy and take strong measures to protect content

stored on the TiVo DVR. There is no room for piracy in striking the reasonable balance between innovation and the content owners' interest and consumers' needs. However, we don't believe the right approach is to legislate the need for particular technology, but instead believe the marketplace and industry should be left to determine the right approach. Indeed, TiVo has recently been criticized by some members of the open source community for implementing certain content and system protection schemes. We believe that the fact that our direction causes tension on both sides of the issue probably indicates that we are on the right path to balance.

The balance provided in our Copyright Act by the fair use doctrine has served our Nation well. It is fostering an environment that has propelled the United States into the current leadership position in technology and innovation. It has served consumers by enabling them to lawfully acquire content in new and compelling ways. And it has benefited the content providers by providing unforeseen markets and demand for new content. We urge this committee and Congress to preserve fair use and ensure that it is not undermined or weakened. I would be happy to answer questions that you may have, and I have an opportunity for a short demonstration of TiVo capabilities.

MR. STEARNS. Sure. Go ahead. Hold on just one second. You can't hear? We need you to use the mike so that it is being recorded.

MR. DENNEY. Is that okay?

MR. STEARNS. Yes.

MR. DENNEY. Okay, I will try to make that work. So one of the key capabilities of TiVo is controlling live television, so we don't have a live television signal, but it basically works this way.

[Video.]

MR. DENNEY. I am watching television. If the doorbell rings, I can now hit pause. The television signal that is coming in my house is now paused. It is constantly being buffered--every half-hour of live television. So I can basically be interrupted from the television and be able to walk away. I can also record television, so as I record television, it creates what we call a now-playing list. So a now-playing list is a list of recordings that exist on my TiVo DVR. So this is a list of all the shows that I have recorded. These are things that I have deemed that I am interested in. We can also help people find interesting content or content that are of interest to them. So in this case, I know that I want to watch 24, but I don't remember exactly when it is on or I know that there are different reruns that might be on. I can use tools like search by title, which allows me to enter a program show, and it will list all the airings of the show coming up. In this case, you see 24 is on quite a bit on satellite. I can set to record this episode. I can get a season pass. If I get

a season pass to this, I can record every episode of 24 that comes on. I can say only record new episodes. Don't record reruns. So I can hone in on what I want to watch.

Another thing I can do is set up what is called a wish list. So if I have a particular interest that I want to find content about, in this case, I might be interested in cooking or I might be interested in chocolate in particular. I can set a wish list and then this will go off and find shows that fulfill that particular interest. So in this case, this is cooking and chocolate and I can look at the shows that are coming up and I can shop through the shows coming up to find the things that might be of interest to me.

The last thing I wanted to show, recently we announced that we have an initiative called KidZone, and what KidZone allows you to do is take the shows that you have recorded and allow the parent to determine what is appropriate for their children. So we leverage both V-Chip-like ratings, allow the parent to set up their own criteria, identify shows that they want their children to be able to watch, and what it does is take that now-playing list and then filter it down to only the shows that are child-appropriate. So now your children are within this environment and they have full control over what they watch, but it is what you, the parent, have determined. Without the ability to record, I wouldn't be able to create this environment and set this up for my kids. We are also working with third parties like Common Sense Media, like other third parties for recommendations to leverage search tools that allow parents to find appropriate television, including taking the EI data, the educational and informational data, that comes in the broadcast signal and a lot of people do hone in on educational and informational programming. Thank you.

[The prepared statement of Mr. Denney follows:]

PREPARED STATEMENT OF JIM DENNEY, VICE PRESIDENT FOR PRODUCT MARKETING, VIVO, INC.

Chairman Stearns, Ranking Member Schakowsky, and other members of the Subcommittee, my name is Jim Denney. I am Vice President for Product Development at TiVo. I want to thank the Subcommittee for inviting me to testify on the vitally important issue of fair use and its impact on innovators, consumers, and content providers. As an innovator, TiVo depends equally on the ability to continue innovating to create products consumer want and the continued creation of compelling content to be consumed on TiVo® devices. Accordingly, I applaud your willingness to examine the vital role of fair use that has contributed to our nation's leadership in both innovation ***and*** content creation.

Founded in 1997, and located in Alviso, California, TiVo pioneered a brand new category of products with the development of the first commercially available digital video recorder (DVR). Sold through leading consumer electronic retailers, TiVo has developed a brand which resonates boldly with consumers as providing a superior television experience. With a continued investment in its patented technologies, TiVo is revolutionizing the way consumers watch and access home entertainment. Rapidly

becoming the focal point of the digital living room, TiVo's DVR is at the center of experiencing new forms of content on the TV, such as broadband delivered video, music, and photos.

**Summary**

As an innovator TiVo depends upon strong intellectual property rights. Yet we also depend on the fair use doctrine to bring benefits to consumers and content creators. Fair use insures that innovators, content creators, and consumers reap significant benefits from a copyright system that promotes innovation, that guarantees consumers are able to enjoy content they legitimately acquire, and that provides incentives to content creators. Indeed, fair use has enabled the United States to maintain unparalleled leadership in ***both*** innovative technology and content creation.

**The Challenge of Innovation**

New inventions have always challenged existing business interests. At the turn of the last century the copyright industry was challenged by the player piano. Later the radio was seen as the devil's instrument, giving away music for free. Television was to be the death of movies. When that proved false, it was the VCR that would destroy both movies and television. Fortunately for innovators, consumers, and copyright owners, the content industry was saved from itself. Each time the content industry failed to eviscerate those technologies in court or before Congress. After failing to throttle the new technologies, the content industry successfully co-opted each new technology and turned such "threats" into significant profits.

Fair use has maintained the balance between the copyright holder's exclusive rights and the promotion of progress by innovators. The fair use doctrine ensures the balance our founding fathers put in the Constitution when it gave Congress the power "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries…." The secret of our nation's success is that Congress wisely codified judge-made fair use law in a special way. Rather than laying down rigid black and white rules, Congress continued fair use as a flexible test allowing judges to carefully examine the facts of each case to determine whether the use of the copyrighted material was appropriate. In Section 107 of the Copyright Act, Congress laid out four non-exclusive factors that allow courts to determine a reasonable balance between the content owner's exclusive rights and the consumer's right to enjoy the content, which in turn permits further innovation. It is fair use's dynamic balancing act that has continued the cycle of innovation.

**Fair Use Benefits Innovators**

Both the fair use language and the Supreme Court's interpretation of the Copyright Act make it clear that the law was intended to punish bad behavior rather than inventions that can be used for good or ill. It is the hallmark of our law and the secret of our world technical and content creation leadership that our nation looks to punish those that misuse inventions rather than throttle innovation itself. In the famous *Sony Betamax* case, the content industry sought to have the producers of the VCR held liable for making a device that could copy video content. Fortunately, after examining user conduct under the fair use provision, the Supreme Court held that the VCR had legitimate uses, such as time shifting scheduled TV programs; the Court found Sony not guilty of secondary copyright infringement. After the decision, the content industry leveraged the VCR's popularity and, from zero at the time of the Court's decision, developed a $23 billion home video market.

Thus, innovators like TiVo are free to concentrate on developing new and innovative devices such as TiVo's DVR. Innovators need merely ask themselves, will this device enable consumers to better enjoy their legitimately acquired content under the

fair use doctrine. Indeed, often the innovator doesn't even know all of the possible uses of the innovation. Thomas Edison, for example, did not invent the record for music. He believed his wax recording cylinder would be used to eliminate business letters – everyone would dictate and mail wax cylinders. It was a small company that licensed Edison's invention – RCA – that thought people might wanted to listen to recorded music in their home. What if the sheet music publishers and live performers had been able to stop RCA in court? We wouldn't have the over $13 billion recorded music industry today.

The flexible fair use doctrine, honed over two hundred years of court decisions and Congressional action, benefits innovators and is a significant weapon in the battle for world leadership in technology.

**Fair Use Benefits Consumers**

Each new innovation in consumer technology has enabled consumers to better enjoy and consume more content. The player piano allowed listening (and singing along) to music in one's own home without learning to play the piano. The radio brought all sorts of information and entertainment into the home that most consumers would never have experienced. TV added moving pictures. The VCR allowed consumers to watch shows they would have missed because they were not home. TiVo's DVR has given consumers unprecedented flexibility and has revolutionized how people watch TV.

TiVo gives consumers simple but powerful features such as pause so you won't miss a single part of the program because the phone rings or the delivery person is at the front door, as well as advanced but easy to use features as: SeasonPass® which remembers to record your favorite series so you won't miss an episode; WishList® that can record all the movies by a favorite director or actor or favorite team's games, so that you won't miss the program because you weren't home; Online Scheduling which allows you to "phone home" and remotely program your TiVo DVR if you are stuck at work and will miss a special program you wanted to watch. These and many other features have brought unprecedented value to consumers. They can enjoy their TV programs when they want and not miss a single program because they had to work late or were tied up in traffic. Moreover, TiVo benefits consumers by allowing them to store and easily access their personal photographs, home videos, and their music collection.

One of the most exciting consumer benefits is TiVo's recently announced KidZone. In concert with leading family organizations, such as Parents' Choice Foundation, Common Sense Media, and Parents Television Council, we have developed a safe place for parents to make decisions about what their kids can watch based on their personal interests and values. In 1990 Congress required TV broadcasters to air at least three hours of children's educational and informational programming each week. Yet most of such programming is broadcast early in the mornings or weekends; not the ideal time for viewing. TiVo KidZone will help solve this problem. In addition to its other child friendly features, KidZone will make sure parents can automatically program their TiVo's KidZone with a menu of children's Educational and Informational programming, or select their favorites from it. I am extremely proud of the new KidZone service. I could not have summed it up better than Congressman Fred Upton, Chairman of the Subcommittee on Telecommunications and the Internet:

> "As a father of two teenagers, I understand that parents are the first line of defense - I commend TiVo for providing parents such a valuable and easy to use resource to determine what programming is best for their kids. This major breakthrough of technology through public and private cooperation directly addresses the goals that Congress and the FCC had in mind when they created the children's Educational and Informational programming category."

Yet none of these consumer, family, and child friendly features would have been made available had it not been for the fair use provision of the Copyright Act. Clearly,

consumers must be allowed to make "copies" of the programming in order to watch it when they want to watch. Parents must make copies of the educational and informational TV programs to create a kid-safe viewing experience for their children. It is the fair use doctrine's wise balancing of rights that foster these consumer benefits.

**Fair Use Benefits Content Creators**

As discussed above, much of the innovation that relies on fair use has sparked new and increased legitimate consumption of content. This is not surprising as one portion of the fair use balancing test is to insure that the use will not cause excessive economic harm to the copyright owner. It was obvious to the Supreme Court that allowing a person to watch a TV show at that person's convenience would not harm the market for that content. Much like Edison's wax cylinder, few could have predicted a $23 billion dollar home video market enable by the *Betamax* decision. That is the elegance of the fair use test. It is flexible enough to allow innovators to create new devices that allow users to use legitimately acquired content in new ways. The end result has almost invariably been increased legitimate consumption and, in the case of the VCR, creation of a new profitable market for the content creator.

The same is true of TiVo. TiVo's innovative technology has resulted in consumers watching more television. Yet at the time TiVo debuted in the market, many in the television industry predicted the demise of free over-the-air TV. Indeed one DVR manufacturer was sued into bankruptcy. But once again it turns out that the innovation has not only been a boon to consumers but to the content industry as well. Studies have found that TiVo users actually watch more television than before. Again, a new innovation has increased the demand for content.

But equally as important, innovative devices such as TiVo are able to take advantage of recent innovations in broadband, wireless, and cellular technology to continue expanding the market for video content. TiVo recently announced a partnership with Verizon Wireless that lets TiVo subscribers schedule recordings on their TiVo device directly from their Verizon Wireless handset. Moreover, forward looking content distributors such as ABC and NBC are offering consumers the option of paying to download commercial free episodes of their TV programming over the Internet as an alternative to viewing the programming with advertisements without charge. Thus, once again, the innovation fostered by the fair use doctrine has expanded to market for content and not harmed it.

Finally, TiVo is a strong supporter of copyright protection of content. We condemn piracy and take strong technical measures to protect content stored on TiVo DVRs. Indeed, when TiVo's TiVoGuard protection system was scrutinized by the Federal Communications Commission, the Motion Picture Association of America said:

> "It appears to contain a strong level of security, including well vetted algorithms and a well designed multi-layer security architecture. It is upgradeable, so that it can be repaired in the event of a compromise, and it includes the capability for device revocation and system renewability."

TiVo believes that the reasonable balance between innovation, content, and consumers does not mean anyone should engage in piracy. Rather, commercial piracy can, has, and will continue to be fought while at the same time preserving fair use for consumers and innovators. Such a balance will continue to create incentives for content providers by expanding markets.

**Conclusion**

The balance provided in our copyright by the fair use doctrine has served this nation well. It has fostered innovation that has propelled the United States to its current leadership in technology and innovation. It has well served consumers by enabling them to use lawfully acquired copyrighted content in new and compelling ways. Finally, it has

benefited content providers by opening new, often unimagined markets resulting in the demand for more content. We urge this Committee and Congress to preserve fair use and ensure that it is not weakened or undermined.

MR. STEARNS. Thank you. Mr. Mitchell?

MR. MITCHELL. Thank you, Mr. Chairman, Ms. Ranking Member Schakowsky and members of the subcommittee. I thank you for the invitation to appear here today and to give you a glimpse of the entertainment software industry's new technology. The Entertainment Software Association serves the business and public affairs needs of companies that publish video and computer games for dedicated game consoles, for personal computers, and the Internet. Our members collectively account for more than 90 percent of the $7 billion worth of entertainment software that was sold in the United States in 2005.

MR. STEARNS. Mr. Mitchell, is this part of your presentation?

MR. MITCHELL. Yes, it will be in just a moment. I will introduce--

MR. STEARNS. Oh, sure. No, that is fine, that is fine, that is fine.

MR. MITCHELL. If I may take just a moment to set the stage for our presentation?

MR. STEARNS. Sure.

MR. MITCHELL. In the 34 years since the Magnavox Odyssey first emerged on the market, considered the first home console, our industry has grown tremendously. Estimates place the global video game industry at about $27 billion worth of sales of hardware and software each year, and perhaps even more remarkably, that figure is expected to double to $55 billion by 2009. Much of this growth is propelled by enthusiasm for an entirely new generation of video game consoles, the first example of which is already with us and has been for several months, and that is the Microsoft XBox 360, which we will be demonstrating for you today. The other new generation consoles which will be out later this year are Sony's Playstation3 and the Nintendo Revolution.

More of the industry's growth, too, will come from the increasing popularity of online games and mobile games, particularly in Asia. As I mentioned, the first of the new generation of consoles has arrived and I would like to ask ESA's anti-piracy investigator, Tim Tire, to take you through the play of an extremely popular racing game called Project Gotham Racing. It is a game that is now in its third generation. Tim is controlling the black car that you see there and the other cars that you see on the road are actually being controlled by the Project Gotham software program. However, if we were to take this console live online through the XBox Live service, then it would give other players the opportunity to join in the game, actually up to seven other players, and they would

control the cars that Tim is racing against. Tim, would you like to give us a little volume on that, as well?

MR. STEARNS. How fast are the cars going? Does it have any speed?

MR. MITCHELL. There is a mile per hour indicator. He is at about 115 now, before breaking, and back down to a more reasonable 80. I should add, too, that the XBox Live service also allows for the download of additional cars and additional tracks in addition to multiple player game play. Thanks, Tim. You can turn that down for just a moment. There are also other out-of-game features to the XBox Live online service that includes a live messaging service. An XBox Live subscriber can actually invite friends to join in multi-player games, send voice or text messages, and initiate one-to-one voice chat with other players all without interrupting game play. You would be able to jump right back into your game from the point that you left.

There is also a feature called a friends list where subscribers can identify which of their friends are currently online and actually view the game that their friends are playing at any given time. There is also a feature called XBox Live Marketplace where subscribers can download additional game features. In this case it would involve additional tracks, additional cars. It may also be full versions of arcade-style games, game demos, and more.

Many are taking advantage of this XBox Live marketplace feature, by the way. Microsoft announced just last week that the ten millionth download had been made through the XBox marketplace. Importantly, too, XBox and XBox Live and in fact, all of the new generation of consoles will offer enhanced parental controls. XBox Live offers an entire suite of password protected parental controls which are called family settings that permit parents to tailor the types of entertainment experiences that children are exposed to online as well as in offline game play.

While Tim is on a roll here, I would encourage him to keep going, but I would also like to talk about some of the other technology that has been circulating among the panel this afternoon and that has to do with handheld game technology. Nintendo essentially created the handheld game device with its tremendously popular line of Gameboy products that emerged in 1989 with the original Gameboy and has been succeeded since by multiple generations. Estimates place the number of Gameboy units sold at over 120 million. Nintendo's newest handheld device, it is the silver device that is circulating among you up there, is called the DS, for dual screen. When you get a chance to work with the dual screen, you may want to take note that the bottom of the two screens is actually

touch sensitive and it is one of the controllers that you can use in game play.

Sony has also entered the handheld marketplace in March of last year with a revolutionary device called the Playstation Portable or PSP. I believe there are a number of PSPs circulating among you, as well. Those are the black devices. The PSP is capable of displaying still images, movies, and audio files stored either on removable disks or on memory sticks. One of the PSPs we are circulating is playing a game and the other one is actually playing a full-length feature film, Spiderman 2. And so in addition to being a game playing device, it is a movie playback device, as well.

The PSP is possible because of an entirely new generation of storage media called the Universal Media Disc, or UMD. It is a very small encased optical media disk that actually stores 1.8 gigabytes of data and makes it possible for it to contain not only a full game, but also a full-length motion picture. Even though the PSP was released last March, it only took until the end of the calendar year, first for Sony Studios, but by the end of the year, all of the major motion picture studios, to recognize that this was a technology that was very much in demand by consumers and began making movie content available in this UMD or PSP format. These handheld devices also use blue tooth and other wireless technologies to enable multi-player game play.

I don't want to put too much of a damper on the party, but I would like to make just a couple of policy points, if I may. The first one being that all of these technologies that you have seen demonstrated are predicated on the ability to control and regulate access to the game play experience, whether it is access to software on disks or other storage media or access to servers that contain software or connection capabilities. The technologies that you have seen here and the access control technologies make it possible for consumers to get exposed to more products than they would otherwise if access control technologies were not available. It makes it possible, for example, for someone to download a full version of a game and actually try it for a limited period of time or even share it with friends and family or over the Net before making the decision whether to purchase that particular game.

These technologies provide consumers with enhanced flexibility. It is at the heart of the parental controls that I spoke of just a few minutes ago, that allow a parent to regulate their children's access to game content. It allows our industry to open markets that we never imagined we would be in before. Access control technologies are at the heart of some of the industry technology that is being used in China right now by Nintendo and some of our other companies, as well.

Our industry knows how to use this technology and implement it in ways that consumers appreciate. Our products have always been digital and so we have always had to combat digital piracy, but we struck upon ways of doing it in a manner that does not interfere with consumers' enjoyment of legitimately acquired product. You have helped us to a great extent with that by giving us the anti-circumvention provisions and other protections that we need to defend our products.

And my final message is that we believe these laws are working extremely well. They were well conceived, initially; they continue to serve their purpose even when applied to today's technologies. There are effective checks and balances with respect to the anti-circumvention provisions. As a matter of fact, just this afternoon, there is a hearing going on at the Library of Congress on the Section 1201 rulemaking proceeding, which is one of the vital safety valves that keeps a check on whether non-infringing uses are being inhibited by these technologies.

We don't believe that any further changes to these laws are warranted. I thank you very much for the opportunity to demonstrate our technology and look forward to answering your questions.

[The prepared statement of Stevan Mitchell follows:]

PREPARED STATEMENT OF STEVAN MITCHELL, VICE PRESIDENT, INTELLECTUAL PROPERTY POLICY, ENTERTAINMENT SOFTWARE ASSOCIATION

Mr. Chairman and Members of the Subcommittee:

My name is Stevan Mitchell, and I am Vice President for Intellectual Property Policy with the Entertainment Software Association. We are the U.S. association dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet. ESA members collectively account for more than 90 percent of the $7 billion in entertainment software sold in the U.S. in 2005, and billions more in export sales of U.S.-made entertainment software.

We are entering another dramatic phase in the growth of this young and vibrant industry. Every day we learn more about the promise of a new generation of game consoles that bring previously unimagined levels of computing power and graphics processing capability to consumers' homes.

In the 34 years since the release of the Magnavox Odyssey, computer and video game sales have grown to over $27 billion worldwide, and are projected to double again, to nearly $55 billion, by 2009. Much of this growth will be propelled by enthusiasm for the new generation of video game consoles, including Microsoft's XBox 360, Sony's Playstation3, and the Nintendo Revolution.

Still more growth will come from the dramatic expansion of demand for online and mobile game play -- particularly in Asia. The OECD took particular note of these growth opportunities in its studies, last year, of the Online Computer and Video Game Industry and on Mobile Content.

Our industry's products were born digital and have always been digital – meaning that the industry has always had to stay ahead of digital piracy. But we have done so with care and have learned a great deal in the process. Entertainment software publishers learned long ago, through experimentation with various copy-protection technologies in the 1980s and early 1990s, that consumers would vote by closing their

wallets for technologies that were inconvenient or that interfered with their enjoyment of legitimately acquired products.

Accordingly, entertainment software publishers have learned to employ technological protection measures, including digital rights management (DRM) and various forms of disc-based authentication, in ways that not only protect publishers' investments in their intellectual property, but that enhance consumer exposure and promote consumer choice.

1) Enhancing consumer choice

These technologies make it possible, for example, for consumers to obtain full versions of games on a "try-before-you buy" basis – which would simply not be possible without the ability to achieve varying levels of access to these products. These technologies even allow sharing of trial versions with family, friends, and over the 'Net.

2) Expanding consumer features, including parental controls

These technologies also increase flexibility for consumers. While parental controls have been a feature of some consoles since 2001, in the next generation, all video game consoles will feature parental controls that allow parents to control children's access to game and movie content based on established industry ratings. The technology that allows parents to permit access to some games but not others is also a variant of the DRM technology built into every console and game.

3) Opening markets previously believed unavailable

Elsewhere in the world, technological protection measures make it possible for consumers to enjoy access to games in markets that were not previously regarded as viable due to astronomical piracy rates for traditional, "disc-bound" copies. In China, for example, DRM technologies are being used by Nintendo to deliver games to owners of its iQue consoles, at very competitive price points, in ways that are highly resilient to piracy.

Also in China, and other high-piracy markets, technological features of online games allow publishers to authenticate users and hardware, and to control access to the game experience through the sale of pre-paid access cards. So publishers, long plagued by piracy rates exceeding 90 percent, are actually beginning to see a return on investments made in online games and are responding accordingly – including by investing in further game development.

4) Implementing technology in ways that consumers appreciate

There is compelling proof of the appreciation of these technologies in the industry's growth – measured not only by the number of games sold but by the proliferation of new and successful game platforms.

Consider the healthy market we are seeing for sales of handheld games. Last year Nintendo announced having surpassed 10 million units in sales of its Dual Screen (DS) handheld device. And Sony's PlayStation Portable (PSP) has successfully launched an entirely new media format for games and movies that can now be found on Universal Media Disc (UMD). Although the PSP was released last March, it took only until the end of the calendar year for all of the major movie studios to begin making content available on the new format.

At a time when some would argue that consumers are being oppressed by DRM technology, our industry provides consumers with an unprecedented level of flexibility to determine where, when and how they wish to enjoy a full range of digital products – with new delivery mechanisms coming on line every day.

Our industry continues to drive broadband uptake and adoption of a wide range of technology-based consumer products. Our industry and our member companies pledge to

keep making compelling entertainment experiences available, on an ever-increasing number of platforms.

And to do so, they continue to rely on certain baseline legal protections, like the anti-circumvention provisions of the DMCA. We do not believe changes to this legislation are warranted. Adequate "safeguards," to the extent they are needed, already can be found within the four corners of that legislation.

The Copyright Office's Section 1201 Rulemaking obligates the Copyright Office to remain vigilant to instances in which non-infringing uses of certain classes of works are likely to be adversely affected. This process, we believe, has served as an effective "safety valve" and has been administered in a way that has not adversely affected the growth and success of the entertainment software industry.[1]

Entertainment software publishers invest millions of dollars so that consumers are assured of seamless and reliable access to the digital products they have lawfully acquired, and that technological protection measures do not interfere with consumers' entertainment experiences.

The measures that publishers take to furnish access to their products are constantly scrutinized, by the consuming public, and through healthy competition with one another, over factors including convenience, reliability, and ease of use. To this, U.S. consumers have responded favorably, with their purchases of more than two hundred million PC and video games each year since 1999 – and those numbers continue to grow.

We appreciate the tools that Congress has created, that allow this industry to protect its technologies and products, while at the same time delivering on the expectations of hundreds of millions of satisfied customers. I thank the Subcommittee for its invitation to appear here today, and welcome the opportunity to respond to your questions.

MR. STEARNS. Thank you and I have given each of you a little extra time so you can show your demonstration. I will start with the questions first. Mr. Krikorian, when I saw your demonstration, I thought to myself if some Americans maybe have a second home, why would they need cable in their second home? If they had the ability to get broadband, then they could have cable at their second home through their computer or possibly tied into their existing TV, and then they wouldn't have to pay the $50-$60 a month for cable. Is that true?

MR. KRIKORIAN. Well, I mean, first off, you probably know a lot more people that have second homes than me, but--

MR. STEARNS. Well, let me put it this way. Could a person do that, if they had a second home?

---

[1] As we reported earlier this year in our Joint Reply Comments -- since the 2003 rulemaking, over 1800 new console games, 700 handheld games, and over 2200 PC games have been made available to the public.

MR. KRIKORIAN. If a person had a second home and they had broadband access that they were paying for in their home and they wanted to connect back to their primary residence, they absolutely could do that. I think, realistically, if someone has enough money to own a second home, they are probably going to want high-definition, they are going to want to have a nice, big 80-inch screen.

MR. STEARNS. But some day high-definition is going to come through broadband. Once you get broadband at three million kilobytes per second as opposed to DSL, then you will be able to have broadband through your computer, you are a third generation wireless, which means--

MR. KRIKORIAN. Sure.

MR. STEARNS. So the question I have is don't you think there is one of privacy, or don't you think the cable companies are going to get upset about that?

MR. KRIKORIAN. Well, I think for the cable company this is a great thing if you look at it across the board. You look at it, number one, from a local broadcaster perspective. This is one of the technologies that I think lets them, the local broadcasters, stay relevant in this day and age when they are getting bombarded actually by the studios, and the broadcasters actually circumventing them. I think for the cable company, let us say I have Comcast in my primary residence and I am fortunate enough to have a secondary residence; I think a product like this actually is going to help drive their services. It is going to probably get me, let us say there is this three million bits per second service. Here is actually a compelling application why you actually might want to pay for it incrementally and get access to it. So I view it as a very additive thing, as well.

MR. STEARNS. Mr. Feehery, we know what the iPod has done for music, and Mr. Jobs is going to come out with an iPod for digital movies, and someday you are only limited by the possibility of the storage. So that you have here this Sony Playstation2 in front of me, and it has a disk in it that I have here and I can watch a movie. So what is wrong with me making a copy of this and putting this in my computer at my office and then having a copy that I give to my son or a copy that I have in my home. What is wrong with making a copy of that?

MR. FEEHERY. Well, I think that as you go through this process, you want to make sure that the same thing can be said about making a copy of anything.

MR. STEARNS. Well, let me just ask you a question. Do you agree with the idea of allowing the consumer, if he has his Playstation that he carries around and he goes to a business; he puts it in his pocket; if he wants to make a copy of this and leave it with his child or with his wife

or in his home, do you agree that he should be able to make that one copy? Yes or no.

MR. FEEHERY. It is complicated. I think that we need to be part of that value-chain discussion so that we can offer consumers that choice.

MR. STEARNS. Well, your predecessor, who came here and testified, said he didn't want one copy made. I just want to know if the Motion Picture Association is still taking the position that the consumer cannot make one copy?

MR. FEEHERY. Well, it is more complicated in the sense that we want to make sure--

MR. STEARNS. Well, he was pretty clear. He put it up and said we don't want one copy made. Is that still your position?

MR. FEEHERY. We want the marketplace to work, so we are giving the opportunity through this to provide people with copies if they choose to pay for it or not. I mean, that is what we are working for.

MR. STEARNS. Are you saying you can't make one copy unless you pay for it? That is your position?

MR. FEEHERY. Well, we want to let the marketplace work on that, so--

MR. STEARNS. Well, but if you want to make ten copies of this. They want to make more than one copy. We have had people testify that CDs, they make more than one copy. Sometimes they make just one copy, but I guess the question is, I am just trying to see. You have got to convince us that not making one copy is your position and that you are sticking by it or are you going to say if the marketplace works out that you can make one copy by putting a flag on it, you will accept that?

MR. FEEHERY. This is what the marketplace does.

MR. STEARNS. Okay.

MR. FEEHERY. We hope to give consumers those kinds of choices and we are working towards that, but I don't think that we can say we want to give our stuff away for free.

MR. STEARNS. Mr. Mitchell, Sony's Playstation, which I just showed you, do you have any concern about erosion of consumer rights in this area, movies and music as well as games. Are you concerned at all about something like this in the software side?

MR. MITCHELL. Not at all, Mr. Chairman. It is an enabling device.

MR. STEARNS. Okay.

MR. MITCHELL. It enables consumers to take with them their music, their photographs, and other media. It creates more opportunities to enjoy those products.

MR. STEARNS. Mr. Denney, in your opinion, has the evolution of the Fair Use Doctrine struck the right balance between content protection and a consumer's right to enjoy content?

MR. MITCHELL. We think that so far, it has. There has been a good balance.

MR. STEARNS. Okay. You know, you saw Mr. Feehery, the TiVo demonstrations. They can download TV shows and put it in the TiVos, and we are hopefully some day they will be able to do it just like they do for the iPod. Do you see anything wrong with what is occurring that way?

MR. FEEHERY. Well, this guy, he is a Giants fan and he is a customer. I am a White Sox fan, but I am not a copyright lawyer. I would say that we understand the importance of consumer convenience with the respect of portability as well as remote access. The key is facilitating consumer convenience while ensuring that it does not become a shield for infringement or piracy. MPA is interested in working with providers of remote access and time shifting technologies to help ensure that safeguards such as identity mechanisms and cryptographic controls are in place to strike that appropriate balance.

MR. STEARNS. Okay, my time is expired. Ms. Schakowsky.

MS. SCHAKOWSKY. Thank you, Mr. Chairman. Mr. Krikorian, you make a big assumption that I actually know how to use my remote anywhere and so I guess my question is would you show me how to use--no. And Mr. Denney, when I am at my grandchildren's home, I love the TiVo, but again, I am trying to figure out how to get to where I want, so that is kind of where I am. What I wanted to ask, though, Mr. Feehery and Mr. Mitchell, of the things that Mr. Krikorian showed and Mr. Denney showed, is there problems for you in those, and if there are, I just want you to tell us where you see the problem and go ahead.

MR. FEEHERY. Well, like I said before, I am not a copyright lawyer, so I don't want to get into the technical difficulties. We think that there are great possibilities to offer consumers, lots of choices. We want to work with anyone that has provided these kinds of remote access devices to make sure that we have the proper safeguards in place and we want to work with them to make sure that it doesn't lead to greater piracy and that is our biggest concern, piracy is a huge problem for industry. We already see what has happened to the music industry.

MS. SCHAKOWSKY. And so I am asking, since we have seen some pretty exciting technologies from a consumers standpoint, are you looking at those and seeing problems for your industry, and I just wanted you to say if there are.

MR. FEEHERY. Well, we want to make sure that the proper safeguards are in place and that is our, as we work with these industries, make sure that the proper safeguards are in place so that piracy does not happen. So that is what we are working with them on.

MS. SCHAKOWSKY. Well, let me ask Mr. Mitchell. I will come back to you, Mr. Krikorian.

MR. MITCHELL. Yes. Well, I am a lawyer. I come from the enforcement side and furthermore, the criminal enforcement side, and we tend to take a fairly black and white view of these things. So from a perspective of making infringing reproductions, I was quite relieved to hear Mr. Krikorian's technology, for example, would only allow access by one user at a time, which took away some of the initial concerns that I had flagged in my own mind. Beyond that, we would be happy to provide a more detailed analysis. I am not sure if I could do that for you on the fly today.

MS. SCHAKOWSKY. Okay. Mr. Krikorian.

MR. KRIKORIAN. Just one thing I wanted to point out is I agree with everybody on this panel in trying to find a middle ground between content and technology, but in all the examples that these gentlemen brought up, it is not to their fault, at all. Those are deals that are done with mega-corporation to mega-corporation, Apple and the studios. And one thing that is very important, I hope that you all continue to think about the two guys or gals in a garage who are working on some innovative technologies and are reliant on some level of fair use so they can actually innovate without going and asking for permission in advance, because I could never get these types of meetings with folks in the studios and the broadcasters, as hard as we actually tried.

MS. SCHAKOWSKY. Well, maybe this will help.

MR. KRIKORIAN. Now we can, which is great and this is helpful, so it brings everyone to the table, but it is a difficult thing when you are small company and that is where a lot of the true innovation comes from, is that garage.

MS. SCHAKOWSKY. Well, let me ask you, I am just curious. How successful has Slingbox and Sling Media been?

MR. KRIKORIAN. Well, when we launched the product and actually, it is quite interesting. We started the company in June of 2004. By July of 2005, 12 months later, we had actually deployed the product in over 1,000 stores nationwide in Best Buy and CompUSA, which was very interesting because you never could build a company like this ten years ago. We are actually using a Sony factory that was sold to a private party in Singapore, and it is really interesting how you can virtualize and build an organization. Since then we have expanded into over 3,000 stores, and while we don't publicly disclose the specific numbers, we are now into the six figures of products sold, which is a pretty big deal for a small company. We are fortunate enough to raise our Series B round in January, so I have a job for at least another 12 months, I think.

But one thing that was really interesting, when we first started, it was very difficult to raise money and we were sort of living under this shadow of potential litigation all the time and investors were quite, quite nervous about it. Fortunately enough, we had a few folks that gave us a shot and we tried to act very responsibly with some of this one-to-one and so forth that we have been able to get to this point, but it is tough living under that shadow when you are first starting out.

MS. SCHAKOWSKY. Well, of course, the devil is in the detail, so I appreciate, though, the attitude of everybody at this table that we want to work out a way that we can satisfy consumer demand and not stifle innovation and still protect the products and the creative products that you create, so thank you.

MR. TERRY. [Presiding] Mr. Ferguson.

MR. FERGUSON. Thank you, Mr. Chairman. I just want to revisit one thing. I do have a couple of questions, but I am sorry Chairman Stearns has left, but I just believe that was a false choice that Mr. Feehery was being asked to make. It seems to me that when we are talking about making a copy for your use of a video game or something, when we are talking about the technology and we are talking about legislating, we are not talking, I, anyway am not very interested in somebody who makes a copy of their video game for their wife, for their child or something. How do you distinguish between the person who is going to make one copy of their video game for their child or their spouse or something, and the guy who is going to make 100 copies and start selling them on the street corner?

The problem is technology allows both, and if we start going down the road of well, it is buy one, get one free, what would happen if you bought a car and you said well, because I paid for this car, I am actually entitled to a second car. If that is what happened in the automobile industry, you would see two things happen real fast. Number one, the price of cars would shoot up and the amount of innovation and R & D that goes into finding new cars would go down really, really fast. We talk a lot about prescription drugs these days. What happens if you got a prescription from your doctor and you went to the pharmacy and you bought your drugs and you say well, actually, I know that I am buying a month's supply, but I should really be able to have two months' supply or a year's supply.

It is preposterous to suggest that that wouldn't have an impact. We can have an argument of whether it is right or wrong, but it is preposterous to suggest that that would not have an impact on the price of those goods and on the amount of innovation and future R & D that goes into the development of those goods, so I don't know how one can possibly contend that loosening copyright protections will lead to an

increase in products and an increase in products getting to consumers. So I think that needs to be said and I think Mr. Feehery was being put in a difficult position to have to answer a yes or no question to a question which frankly doesn't have a yes or a no. It is a very complicated question. I don't know if you want to comment any further.

MR. FEEHERY. Mr. Ferguson, I thank you for that comment. I would say that the fact of the matter is the consumers want to make a copy and there is a marketplace for that and we have the critical protections in place so it doesn't go crazy and we are giving everyone you know thousands of copies if we give them one. If we have the critical protections in place and if the marketplace is allowed to work, we will do that, but the fact of the matter is the marketplace has to work and we have to have the critical protection technology in place so that it doesn't get out of hand and lead to mass piracy that will kill our industry.

MR. FERGUSON. I appreciate that and I am short on time, so I just want to get to my questions and that is kind of where I am going. Just a couple of questions for Mr. Denney. In the past few years, especially since the Grokster decision, we have seen an explosion in the amount of content that is being made available to consumers legitimately. We have these agreements after agreements after agreements that are being worked out. The market seems to be working, yet folks who are working on legal and legitimate content distribution, doesn't better content protection lead to more content being distributed to the marketplace legitimately?

MR. DENNEY. As we said, content production is an important aspect of what we design into the product. We are conscious of it, we make deliberate steps to deter piracy so yes, we do think it is an important thing. Should that be legislated or how should that be implemented, I think, it is up to the marketplace to figure out.

MR. FERGUSON. We all seem to be talking about the marketplace and people seem to have different definitions of that. In your testimony, you cited several examples of your new partnerships, as well as new technologies in the marketplace. Doesn't this mean the marketplace is working? I mean, you have got agreements that you are working out with folks?

MR. DENNEY. We believe that the marketplace is working. If we have a concern, it is access to content, so you can work this out. So it is access to cable signals, it is being able to have access to some of the content so you can do innovative things.

MR. FERGUSON. But are you advocating, what are your thoughts on some of the legislation that has been introduced and that is being bandied about amongst some of the committee here?

MR. DENNEY. Which, I guess, which one in particular or do you want me to generally comment?

MR. FERGUSON. Sure.

MR. DENNEY. Okay.

MR. FERGUSON. H.R. 1201.

MR. DENNEY. So we appreciate things that solidify--

MR. FERGUSON. I like what I hear, what I think I hear you saying, but where the rubber hits the road, how do you feel about H.R 1201?

MR. DENNEY. Well, again, I am not an attorney. I can speak to some general--

MR. FERGUSON. We are in the same boat on that one.

MR. DENNEY. We believe that, generally, we support things that support access to content and fair use. We have some concerns about some specific issues, but in general we are appreciative of things that preserve fair use the way it is today.

MR. FERGUSON. I would only suggest, and my time is up. I would think we agree. We all seem to rhetorically agree that the marketplace should be able to handle these things, but the difference is that the sands are shifting very quickly because of technology. Technology is a wonderful thing, but technology is enabling incredible new opportunities for piracy that, frankly, weren't available just a few years ago and that is where, frankly, I have a concern, a number of us have a concern, and if the balance is shifting toward enabling and really encouraging piracy, I sure don't want to see that pendulum swing any farther in that direction. I want to bring it back more towards the center.

MR. DENNEY. We agree, piracy has got to be controlled. We do not advocate piracy. We work against it. We think that the content providers in the market have tools, such as Grokster is an example, where the court decided it was making the distinction between people who encourage piracy and technology that could be used for other purposes.

MR. FERGUSON. Technology is fast, courts are slow.

MR. DENNEY. I agree.

MR. FERGUSON. It would be nice if we had some understood rules of the road that everybody had to live by from the beginning rather than having to adjudicate and go through a court battle every time we had a disagreement.

MR. DENNEY. Agreed, but they do create guidelines; when we make product decisions, we adhere to what we believe those guidelines to be and we take particular steps. And one other comment about, you had a question about other legislation that is pending. One comment that I did want to make is about analog. In general, the legislation that is pending is not something we advocate, and we believe it doesn't work for the

consumer. There are concerns about access to signal, there are concerns about its impact on the ability to innovate around content. And that said, we are completely open to working out what the correct solution is, so the forum to do that, I think, is within the industry.

MR. TERRY. Ms. Baldwin.

MS. BALDWIN. Thank you, Mr. Chairman. As we look to the future of digital rights management technology, one thing that has struck me is that there are so many different DRM standards that exist in the current market. For example, a TV show downloaded from iTunes is not going to work with Real Video streaming software. Recently, Sun Microsystems, Incorporated announced a project called the Open Media Commons Initiative, which is aimed at creating an open source, royalty-free, digital rights management standard. I am going to ask this to any of the panelists who wish to comment. I would like to hear your comments generally on such a DRM model and also, do you think that such an idea could still fully protect the rights of content owners, and why don't we start with you, Mr. Krikorian?

MR. KRIKORIAN. Yes. First off, I think you are hitting the nail on the head. This is one of the most critical things and items and personally, I don't think it is being addressed. You see what Apple has now done and they have created a DRM that is very proprietary and ties the content and the consumer to Apple-only products. That is definitely not a free market effort and with their strong stranglehold on the industry. Let us say I wanted to make a distribution product in the home to be able to stream my content around legally and securely, so forth.

I can't get access, as a company, into that DRM, so I believe the notion of an open DRM that is truly interoperable across many, many devices makes a heck of a lot of sense. I mean, at the end of the day the devil is in the details and the execution in making sure it is truly robust, but we are going to see a lot of consumer backlash, I believe, in the next couple of years, of people who have bought stuff from iTunes and they don't quite understand all the limitations that come with that content. And again, it is not the studio's issue at all, it is Apple's, keeping everyone focused just on their products alone, and that will definitely stifle innovation, there is no question in my mind.

MR. FEEHERY. Boy, I am really glad you said it wasn't the studio's thing.

MR. KRIKORIAN. It is not.

MR. FEEHERY. Just talking to some of our folks, I think that this is something that with the risk of not getting into too much detail, I would say that this is something that we would like the marketplace to work out right now and I think that is where we are. I wasn't talking about that

particular thing in this hearing, but I think that where we are is let the marketplace work itself out.

MR. KRIKORIAN. Just one other thing. I wish the studios and the broadcasters actually, in terms of the marketplace deciding, I wish that they would actually push that and require that whenever they do a deal. They say look, this has to be open DRM standard because I think unknowingly what is happening, is that they are creating another cable monopoly but they don't quite understand that. So I would urge marketplace perspective, that the broadcasters and the studios actually go and require that when they do deals.

MR. FEEHERY. The most important thing for us is protecting our content so it doesn't lead to mass piracy, but other than that I think for these particular things, let the marketplace work itself out.

MR. DENNEY. In general, we are supportive of the concept of Sun's proposals, the exact right solution. I think interoperability is a big issue that as time goes along, consumers are going to be burdened with navigating and we are generally supportive of protecting content, so we think that is the right thing. We agree that some proprietary protection schemes out there are basically impossible to work with, so you will never be able, as an innovator, you will never be able to break into that realm, so that is a concern that we have.

We are actually, in our next generation, the Series 3 box that we announced in January, we are going to support Windows Media DRM as part of that box, and we are doing it because it is something that we actually have the ability to license and is used in the marketplace generally widely, but it does mean that we license that from Microsoft, so we will be tied to Microsoft's terms and conditions for that. Not saying they are overly onerous, but I think the idea of interoperability is something that consumers are going to have to grapple with as time goes along.

MS. BALDWIN. Mr. Mitchell, did you wish to comment on that?

MR. MITCHELL. No.

MS. BALDWIN. All right, I yield back.

MR. TERRY. Thank you. Mr. Mitchell, did you provide these for the committee's observations?

MR. MITCHELL. We did.

MR. TERRY. Well, on behalf of the committee, we will have to mark these as exhibits and keep them. I don't know if you understood that at the beginning. Not really. But there are several of us on here that have already purchased those types of equipment. But I guess the ultimate question, and Chairman Stearns has hit on it, but I want to ask it more succinctly and plainly to everyone up here, from your unique perspectives in the marketplace, both with TiVo and Sling, various

niches and then Mr. Feehery representing, kind of, the big dog producers here, you said that right now the marketplace is kind of taking care of it, but we keep hearing that perhaps we need to tweak laws here and there by various parties with various interests.

I am just curious to hear from you whether or not you think that Congress should act in some certain way, and you fill in the blank. What would you tell us that we need to do to make sure that we protect both content and consumers' rights? And I guess what I will say, to frame it a little bit more is doesn't it seem like Congress helped create the PSP or the new XBox 360s or the new PS3 that will come out eventually, twice delayed now, but we won't get into that because that is just saving me whatever they are going to sell it at in the market. So it doesn't seem to me that Congress needs to interfere with anything right now, but at least with content protection, we are constantly being told that we need to. What do you think, Mr. Krikorian?

MR. KRIKORIAN. I think, and I wish I could give you a very specific item, but I think in general, you need to help preserve or keep a marketplace, if you will, or an environment where innovators can work under the fair use provisions to truly innovate without going and getting advanced approval. So let us take something specifically--and I am not an attorney, but when I look at the DMCA as it has been described to me, let us say I could make a product right now where I could make one copy of a DVD and I could specifically make sure that that could be audited, and I would allow only the person who bought the DVD to make one copy and put it on, let us say, another display device like a cell phone. It doesn't even matter whether that is fair use or not. Basically, I have now violated the law. I have violated, I have circumvented encryption to actually make that work and so that is what is particularly troubling to me, is just having hard and fast rules sometimes, I think, prohibit that innovation because you can't possibly make a hard and fast rule because no one could possibly think what is coming down in the future.

MR. TERRY. Mr. Feehery, I am interested in your answer, particularly.

MR. FEEHERY. Well, I would say that, in our view, greater content protection leads to greater innovations in the marketplace because it gives us a chance to get our content to more eyes in more different ways and look at what happened to DMCA and the direct development of the DVD and how many people now enjoy DVDs because of what happened to DMCA. I think that two things that we would really like, because Congress mandated that digital television, that we have broadcast flag and analog hold was the two things that we have asked for and that means with greater content protection there will be more consumer

choice and more products that people can view our content on, which is ultimately our goal.

MR. TERRY. Mr. Denney, you had partly answered that question in your discussion with Mr. Ferguson.

MR. DENNEY. Yes. So just to follow up, we think generally things are working the way they are today. We are not asking for modifications. We would be a little concerned about mandating a particular technology in the marketplace, so mandating a certain DRM or some other technology, which I think creates the environment where you have to go ask permission or you are basically, you are forced to innovate down a certain path, so we would have concern about that, but in general, we think things are working the way they are today.

MR. TERRY. Mr. Mitchell.

MR. MITCHELL. Thank you. First, if I can have just a moment to respond to Mr. Krikorian. He said that a hard and fast rule against circumvention was likely unworkable and I think Congress had anticipated that within the four corners of the DMCA by creating the Section 1201 rulemaking, and I would suggest that the appropriate forum for his issue is that proceeding, which is a recurring proceeding; it comes up every three years and it gives the opportunity to basically issue exemptions to this or to any particular prohibitions. Hearings are going on now. Brewster Kahle, when he was seeking an exemption for his Internet archive enterprise, went to the copyright office and in fact, was issued an exemption, which he continues to make use of today. So I think the mechanisms are there to permit that flexibility without opening up the book on the law, itself.

MR. TERRY. Thank you. Should I go to--

CHAIRMAN BARTON. Has Mr. Gonzalez been recognized?

MR. TERRY. You would be next, but you are the Chairman of the full committee.

CHAIRMAN BARTON. No, no, no. We alternate.

MR. TERRY. Mr. Gonzalez is recognized.

CHAIRMAN BARTON. After his snide remarks at full committee this morning, he still deserves the right of recognition before I do.

MR. GONZALEZ. Thank you for saying that, Mr. Chairman. I did appreciate that. But that has been my quote from the day that I got that operation, so it wasn't anything. I know that my colleague, Mr. Terry, said that Congress didn't have anything to do with the invention of the PSP. I want you all to know that Al Gore had one of these 20 years ago. You have to have a sense of humor. He didn't know how to use it, but he had it. Anyway, why not get in trouble with both sides of the aisle?

Mr. Krikorian, I think you indicated that if you are in New York, you have got your laptop, y one user at a time can log in back home, right? It

is not going to be like everyone in the dorm is going to be logging into that one student's, right?

MR. KRIKORIAN. Correct.

MR. GONZALEZ. Because that was a concern and is a curious one. And I think that it was Mr. Ferguson who was talking, and we are talking about piracy devices and so on, and copyright and patents and all of that, yet there are other things that occur as a result of technology and the advances and the products that you are already discussing. And there was a story regarding Sling, and I am going to go ahead and read a couple of the quotes, and I am not even sure where we end up with this particular issue and I am not saying that it is going to be this committee or Judiciary or wherever it is, but this is the quote from the Wall Street Journal. "The TV industry has long been alarmed about the problem of digital piracy on the rise now, that more viewers watch shows via the Web, iPods, and cell phones. The concerns about the industry's geographic structure are a newer and more complex issue. Geographic lines that have held certain parts of the TV business together are being eradicated into big concern."

Then the other quote, this is an analysis: "The whole business model in the broadcast industry is based on geographic exclusivity. The potential use of the Slingbox fractures that." How do you see the consequences of devices of the type that you have out there in the market impacting the way we do business now and broadcasters and such?

MR. KRIKORIAN. Right. I am really glad you brought that up. The funny thing was the day after the writer wrote that I had the opportunity to meet with her and walk her through, and the funny thing was, she flipped all the way around and realized that what we are doing is probably the best thing since sliced bread for the local broadcasters. So let us pretend for a second that you are a local broadcaster, okay, let us say you are KORN TV in San Francisco and I live in San Francisco. What the Slingbox does is it gives you, that broadcaster, the ability, a longer leash, if you will, to reach me on more displays and more places than you ever could. So let us go in sort of concentric circles. In the home, you have continued to lose me as a customer because I am spending more time on the Internet. What the Slingbox does is let you get your content to me on these displays where you have lost me. Now I am sitting in the office place in my cubicle. I am still in the same geographic area. And so what now is happening is that you are able to reach me, another ten hours a day that you never could reach me before. Now, let us go ahead and say that I am also a Nielsen household, okay?

MR. GONZALEZ. Okay.

MR. KRIKORIAN. And one of the arguments that I hear right at the very beginning, someone says well, that is good that you are able to

reach me, but you are not getting credit. That is not true, at all. If I am a Nielsen household, what ends up happening, let us say I had a set meter, as an example. The Slingbox fits in very synergistically with that whole system, so now I am watching it on my display at the workplace. That meter is running even more. You are getting more and more and more credit. So now let us say, for example, that now I am in Washington, D.C. in a hotel room, like I was today, watching my KORN back home. One of the arguments could be well, this is a bad thing because the local D.C. affiliate is not being able to be seen in the hotel room. Well, first off, that local affiliate is not getting any credit from me watching it in the hotel room, anyway; that is one of the flaws in the whole Nielsen system; whereas, I am watching my local KORN back home, they are getting credit. And then if you really looked at it from an advertising perspective, anyways, I am watching a Toyota ad back in San Mateo. What is more effective, for me to watch that Toyota ad when I am sitting here in D.C. because I might buy the Toyota on the weekend, or is it better for me to watch a Washington, D.C. ad? So I think what is happening is we get down to this and what people end up realizing is this is actually a good thing, but historically it is bad because you are questioning the geographic boundaries and just historically, emotionally, it is a bad thing. But if you will look at it economically, I do think it is very additive thing.

MR. GONZALEZ. Well, it must be in its infancy stage as far as the debate itself and I appreciate your views on it and your explanation, because I found it somewhat confusing because I thought it could be an advantage, but like I said, it remains to be seen and we will hear from the other side on this. But my time is up and I thank you.

MR. TERRY. Chairman Barton.

CHAIRMAN BARTON. Thank you. I appreciate the hearing being held today. I know Chairman Stearns is not here in the room at the time, but I do appreciate that. My first question, I am trying to understand what the Slingbox really does, since I have never seen one. Do you have to have your TV on, the home TV, the base TV?

MR. KRIKORIAN. No, you don't. In fact, you don't even necessarily have to have a TV plugged in to it. So you take the Slingbox, put it in your home, plug your TV signal into it, your satellite, your cable, your over the air, whatever, connect it to your home network and then wherever you happen to be you can watch your TV. In fact, if you can switch over to the display right now, I have to--

CHAIRMAN BARTON. That is okay. I just--

MR. KRIKORIAN. Well, just--

CHAIRMAN BARTON. So what you do is transfer the home signal?

MR. KRIKORIAN. Correct.

CHAIRMAN BARTON. Okay.

MR. KRIKORIAN. Right, we ship the home signal.

CHAIRMAN BARTON. Okay.

MR. KRIKORIAN. I am watching my TV right now, if you look up on the screens. This is my TV. I promise I haven't been watching it the whole time.

CHAIRMAN BARTON. Oh, that is okay.

MR. KRIKORIAN. And I can go ahead and change the channel and do whatever I want. I just said watch CNN and I am tuning to CNN. This is my TV signal live at my house in San Mateo right now on a laptop you provided me.

CHAIRMAN BARTON. Now, we have had several hearings on this general concept of fair use versus copyright protection over the last several Congresses and it is no secret that I am a co-sponsor of Mr. Boucher's Fair Use Bill, which we still have hopes to move this year. I don't know who to ask this question to, probably Mr. Slingbox down there, since you developed this technology. Is it possible to have a technological solution to fair use so that we can protect the legitimate copyrights of the content providers that the Motion Picture Association represents, but yet let average consumers make a copy or two of particular video or a music CD that they wish to? Is there a technological solution that can allow what Mr. Boucher and I call fair use, but not give a commercial application to somebody that wanted to pirate dozens or hundreds or thousands of tens of thousands of the same CD or video?

MR. KRIKORIAN. I think if you set forth certain rules, for example, to say that the consumer has the right to make one copy of a DVD or what have you, I believe that you can come up with a technological solution to address that. To look at blanket technological solution that can address all possibilities that we don't even know if it is going to come down the pike, I think that is a pretty difficult thing. But unfortunately, I don't know as much as I probably need to. Ask me in another couple of months. I seem to be spending a lot of my time worrying about this.

CHAIRMAN BARTON. Mr. Denney, how would you answer that question?

MR. DENNEY. I would say that the beauty of technology is anything is possible. Would it be to consumer satisfaction and is it viable in the marketplace, is something I think we would have to look at a little more closely to give you a solid answer. We can go on the record if you want. But I think, certainly, there is a possibility of having such an environment.

CHAIRMAN BARTON. And, Mr. Feehery, you raised your hand.

MR. FEEHERY. I would say that--

CHAIRMAN BARTON. Are you going to surprise me and semi-agree with me?

MR. FEEHERY. Well, I would say that because of DRM and the marketplace, it is already happening. In England, UA and Universal made a deal. They get three copies for just the price of one DVD. So the marketplace and the--

CHAIRMAN BARTON. So your solution is to just give them three copies from the beginning.

MR. FEEHERY. Well, to give them the ability to make three copies. I think that the marketplace is working and I think, as Mr. Denney says, if given the chance to work, we can make this work for consumers who want it.

CHAIRMAN BARTON. So you are saying that one of your companies has signed an agreement that has in the original video the ability that it can be copied twice. Is that what you are saying?

MR. FEEHERY. What it says is that they get three copies for the price of just over one. I am not sure of the technicalities of it, if you do it yourself or if they give you three copies. Mr. Chairman, what I would like to do is--

CHAIRMAN BARTON. Well, that is a big difference.

MR. FEEHERY. I know. I understand. I understand that.

CHAIRMAN BARTON. I mean, if you sell a CD or a video that you can copy twice and it works, that is a technical solution as opposed to giving them a coupon. If you want a couple more copies, turn the coupon in and we will give you two more copies.

MR. FEEHERY. My understanding of what has happened is you get one copy on the DVD, one copy on your computer and one copy on a portable for just over the price of a DVD. And what I would like to have happen is that our company, at some point in time, could come and talk to you about all the things that are happening technologically in the marketplace and where they plan on going, because I think that there is ways to make this work without a government mandate.

CHAIRMAN BARTON. All right. Mr. Mitchell you are the only hardware guy here, and I haven't given you a chance.

MR. MITCHELL. Thank you, Mr. Chairman. I actually represent the software side, but we did bring along our hardware to be able to demonstrate our software. We believe that there are some real problems with running together at high speed. What was originally understood to be two entirely separate bodies of law, copyright law on one hand and the law against circumvention of technological protection measures on another. We think that some unintended consequences could come from depending on one at the same time, or looking for violations of both and

only enforcing violations of both. The reason is because we know, probably better than anybody in the video game business, that there are real economic incentives out there for bad actors who would otherwise be producing infringing reproductions of our software to produce circumvention devices that will enable pirated games to be played on video game consoles. There are some very advanced technologies that are built into video game consoles, that are built into video game software, such that if you were to download a pirated version of a piece of video game software and put it in the console there, that X-Box 360, the X-Box 360 would recognize it as an infringing copy. It would fail to play it. And so being the arms race that it is, some enterprising entrepreneurs have created devices, not for the 360, but for other video game consoles that actually allow for the play of pirated games. They are called mod-chips. They are circumvention devices. These are devices that are clearly prohibited by the DMCA. They sell for about $40 or $50, and why not? Because once you have voided your warranty, once you have soldered this chip into your console, the whole world of pirated games become available to you. And so there are real economic incentives to produce a circumvention device, even though I may never have an underlying copyright infringement.

CHAIRMAN BARTON. If I may reclaim my lapsed time, we are not trying to circumvent anything, this committee. We are trying to get a law that is workable that protects your copyright and your software, but also allows the consumers of America to make one or two copies for personal use and do it legally, and that is more like my original question, is there a technological solution? You know, right now we don't have a political solution, but if we at least started with the premise that we could have a technological solution, we might get a political solution, that is all, and no one on either side of this issue wants people to buy the device that you just mentioned and use it so that they can run pirated games or videos or whatever. I don't think there is any support on either side of the aisle or in any committee in Congress for that. That is not what this hearing is about. We are totally with you on trying to prevent that. Mr. Chairman, I am going to yield back my time, but thank you and thanks to the panelists for being here today.

MR. TERRY. Mr. Chairman, you were last Member, so if you would like a second round of questioning, you are entitled. With that, I will thank all of you for spending your afternoon with us. It has been very interesting as well as educational, and we now stand adjourned.

[Whereupon, at 2:46 p.m., the subcommittee was adjourned.]

# DIGITAL CONTENT AND ENABLING TECHNOLOGY: SATISFYING THE 21ST CENTURY CONSUMER

**WEDNESDAY, MAY 3, 2006**

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 2:00 p.m., in Room 2322 of the Rayburn House Office Building, Hon. Cliff Stearns [chairman] presiding.

Members present: Representatives Stearns, Bono, Terry, Murphy, Blackburn, and Schakowsky.

Staff present: Will Carty, Professional Staff Member; Chris Leahy, Policy Coordinator; David Cavicke, General Counsel; Consuela Washington, Minority Counsel; Alec Gerlach, Minority Staff Assistant; and Billy Harvard, Legislative Clerk.

MR. STEARNS. The subcommittee will come to order and I think we will go ahead and start. The Ranking Member is on her way and we have other Members that have things we have to sandwich in together, so good afternoon. Today we continue our look at the future of digital content, new media distribution channels, and what all of this means for the consumer. That is what we are here today to talk about. In part two of our hearing, we will focus our attention to the audio and software side of the issue. I realize it has been over a month since our first hearing on digital content and a lot has happened just over the past few months.

Apple celebrated its billionth download, a number of content and device companies announced a new string of deals, and the market has continued to excite us with new gadgets and innovative content almost weekly it seems. I am excited to get back into this issue and hear from the distinguished group of experts from the digital device and content communities that are here before us today. Interestingly enough, Apple, a company with a great story to tell in this area chose not to join us this afternoon. Obviously, I am disappointed, as a legislator and a long time Mac user. I think I am one of the few. There are only three or four of us

in the Senate and House, out of 535 Members here in Congress that use Mac today, so I am very disappointed.

This is not an investigation. I think they thought it was an investigation; it is not. And when I talked to their counsel, they said that they just did not want to participate for any reason and so they were pretty adamant about that, and I tried to tell them that it is just an opportunity for them to talk about the digital revolution that is quickly changing our marketplace, and to talk about devices. There is nothing proprietary that we are divulging here, but I could not convince them.

I would like to sincerely thank those folks, that have come, for their openness and assistance in helping us better understand the implications of new digital content and the distribution technology for the American consumers that exist today. You are doing all of us and the public a great service by joining us this afternoon. I think Ms. Schakowsky should be here momentarily, but I think, at this point, I will let the gentlelady from Tennessee give her opening statement, Mrs. Blackburn.

[The prepared statement of Hon. Cliff Stearns follows:]

PREPARED STATEMENT OF THE HON. CLIFF STEARNS, CHAIRMAN, SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

Good afternoon.

Today we continue our look at the future of digital content, new media distribution channels, and what all of this means for the consumer. Part two of our hearing series will focus our attention to the audio and software side of the issue. I realize it's been over a month since our first hearing on digital content and a lot has happened over the past few months -- Apple celebrated its billionth download, a number of content and device companies announced a new string of deals, and the market has continued to excite us with new gadgets and innovative content, almost weekly it seems. I'm excited to get back into this issue and hear from the distinguished group of experts from the digital device and content communities before us today. Interestingly, Apple, a company with a great story to tell in this area, chose not to join us today. I must say I'm disappointed as a legislator and a long-time Mac user. Please understand this is not an investigation it is rather an opportunity for members to learn about a digital revolution that is quickly changing the nature of the device and content market. I therefore again would like to sincerely thank you all for your openness and assistance in helping us better understand the implications of new digital content and distribution technology for American consumers. You are doing us and the public a great service by joining us this afternoon.

With that, I would like to turn to my friend and colleague, the ranking member, Ms. Schakowsky for a few words. I also would like to encourage members to allow us to go straight to our panel unless a member did not offer a short statement at part one of our hearing series would like to do so now. I also would like to remind members that all statements can be included in the record and that statement time is always added to question time if you chose not to use it when called.

Thank you and welcome.

MRS. BLACKBURN. Thank you, Mr. Chairman. I do want to thank you for holding this hearing and for your attention to the issue of digital

content and technology that helps enable that content. I want to thank the entire panel for being here with us today, for submitting those testimonies to us, but I especially want to thank Bob Regan, who is the president of the National Association of Songwriters International. As co-chairman of the Congressional Songwriters Caucus, I believe that it is important that our songwriters have a voice here on Capitol Hill and having Bob be here today for our hearing is significant, and I appreciate his efforts.

A little bit about him. He is an accomplished songwriter and you may recognize some of his credits, which include Keith Urban's hit, "You're Everything," and for an old man like the Chairman, he might remember Billy Ray Cyrus' song "Busy Man." Tricia Yearwood--he wasn't listening. He didn't catch that. Tricia Yearwood's "Thinking About You," and Reba McIntire's "Til Love Comes Again." Thank you for coming today, Bob. I am thrilled that you are here and appreciate your time.

There are several issues that are important that we should be considering today and as we go through looking at the digital content issue. Congress gave the satellite services a compulsory license to perform music so that subscribers could listen to it. Sometimes in this discussion we forget where we began. At last week's Senate hearing, the witnesses were asked whether new devices used by these services go beyond the law because it enables your subscribers to cherry pick songs and build a library of music, making what some believe the law calls a distribution of the work.

Victoria Shaw, a songwriter from Nashville, spoke for a great many of my constituents and a great many artists all over this country when she noted that this new device used by the satellite industry is not merely designed to play music, but to distribute that music, as well. It seems more similar to an old iTunes download or a record sale and she rightly seeks fair compensation for the distribution. I think her quote at the hearing summed it up very well for these artists who are behind the scene and don't enjoy the popularity of most performers, but are integral to the creative process. And her quote, "I don't tour. I make 9.2 cents a song, that is a song. That is how I feed my children. I am the parent that works out of the house."

Mr. Chairman, my State is home to some of the most creative songwriters and artists in the world. They are entitled to be paid fairly when their music is used according to the law, and from what I have learned, this new device is terrific, but many believe it is not just a performance device. I know the companies involved in the process are negotiating to address this issue and I know my constituents who would like to see closure on this issue. I look forward to the testimony of the

witnesses; I look forward to the opportunity to ask some questions of the witnesses; and I hope that we can agree to explore both protecting content while providing new platforms for artists to distribute and market their product and send a message to the world that we are serious about protecting creative content. I yield back.

MR. STEARNS. I thank the gentlelady and I think we will move right to the panel since we have no more opening statements. We have Mr. Gary Parsons, Chairman of the Board of XM Satellite Radio; Mr. Michael Ostroff, General Counsel and Executive Vice President, Business and Legal Affairs, Universal Music Group; Mr. Dan Halyburton, Senior Vice President and General Manager, Group Operations, Susquehanna Radio, on behalf of the National Association of Broadcasters; Mr. Robert Regan, President of the Board, Nashville Songwriters Association International; and Mr. Jeffrey Lawrence, Director, Digital Home and Content Policy, Intel Corporation. Thank all of you for being here and Mr. Parsons, we will start with you.

**STATEMENTS OF GARY PARSONS, CHAIRMAN OF THE BOARD, XM SATELLITE RADIO; MICHAEL OSTROFF, GENERAL COUNSEL AND EXECUTIVE VICE PRESIDENT, BUSINESS AND LEGAL AFFAIRS, UNIVERSAL MUSIC GROUP; DAN HALYBURTON, SENIOR VICE PRESIDENT AND GENERAL MANAGER, GROUP OPERATIONS, SUSQUEHANNA RADIO, ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS; ROBERT REGAN, PRESIDENT OF THE BOARD, NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL; AND JEFFREY LAWRENCE, DIRECTOR, DIGITAL HOME AND CONTENT POLICY, INTEL CORPORATION**

MR. PARSONS. Thank you very much, Mr. Chairman.

MR. STEARNS. Just pull the mic up a little closer to you and I think they are on.

MR. PARSONS. Is that better?

MR. STEARNS. Yes, okay.

MR. PARSONS. Thank you very much, Mr. Chairman and members of the subcommittee, and thank you for inviting XM to speak on behalf of the satellite radio industry, our customers, and actually, more broadly, to defend consumers' rights to enjoy radio content for their own personal use. We believe it is possible to promote consumer rights and at the same time to protect the interests of content owners because we are a company that has been built by both. We hope to grow the music industry by enhancing the discovery of music by our 6.5 million

subscribers, and that is actually 13 to 15 million listeners across the country.

We are excited about our potential at XM, but we are still an industry in its infancy. We will only succeed by keeping our existing listeners happy and by attracting new subscribers going forward. Today, XM Radio subscribers pay approximately $120 per year to listen to over 170 channels of entertainment, sports, news, talk, and other programs, including 69 channels of commercial-free programming. Until recently, most of our subscribers heard their favorite programs only at home or in their cars; they wanted more. They wanted the ability to enjoy the service wherever or whenever they had a chance to listen.

So we have launched these new radio devices that give the subscribers the portability that they sought, the opportunity to store up to 50 hours of programming from XM and the opportunity to purchase additional music tracks, even entire albums with ease from the new legal Napster on line music service. Offering a convenient way to buy music that is heard on XM is important to us. Our research shows that XM subscribers buy more music and over time buy a broader range of music and attend more concerts than most music consumers. We built our entire business in compliance with the laws that the music industry supported.

Today, the music industry gets paid twice for the music that our subscribers enjoy. First, through the royalties that we pay under Section 114 of the Copyright Act of 1998 and then a second time, through the royalties paid under the Audio Home Recording Act, which go to the songwriters, among others. Under current law, we already pay more than any other company in copyright sound recording performance royalties, annually generating tens of millions of dollars in revenue for the music industry. In fact, we are about to enter a new round of negotiations to determine the new performance royalty rates for the next five years. But even under the current rates, satellite radio royalties to labels and artists would be in the hundreds of millions of dollars over the next five-year period.

Additionally, we will pay songwriters and music publishers hundreds of millions of dollars, as well, with our ASCAP, BMI, and CSAC licenses. And as the newest radios are just starting to roll out, if they are successful, this would generate tens of millions in additional royalties through the Audio Home Recording Act. Our new devices let consumers do the same thing that many of us have all done for the last 50 years with the convenience of digital technology. If a song comes on the radio you simply hit a save button right in the middle of the unit, just like recording off of FM radio. You can hear that song again later, if you want to.

You can set the radio by hour and channel to record at a given time, just like TiVo allows you to time shift your favorite TV shows, so for example, if you or your staff were busy at ten o'clock this morning when the debut of Bob Dylan's new show on XM came on, you can set the radio by time and channel to record it and listen later at your convenience, or if you could have saved a late night West Coast baseball game last night to enjoy this morning. This traditional fair use activity is well known to all of you. In the analog era, we used to do it with reel-to-reel tape recorders, cassette tapes, VHS tapes. Now, in the digital age, satellite listeners and TiVo owners use new technology to do it more conveniently.

But making it easier does not necessarily make it illegal. Let us be clear about what the devices do not do. A song saved on the radio is locked to the device. It can't be moved, it can't be copied to another device. It can't be burned to a CD. It can't be e-mailed to a friend. It can't be put out on the Internet; all of the things that you do if you actually own a property. You can hear it only as long as you are an XM subscriber and only on this individual personal radio. You can't get what you want immediately when you want it. An XM subscriber can only save a song on this device when and if an XM disc jockey has decided to play it.

In the past, Congress has rejected similar complaints to the ones that are being voiced today, the same complaints that seem to be raised every time a new technology emerges. But striking the right balance between the rights of users and rights of content owners, Congress gave entrepreneurs the freedom to innovate, which gave consumers, in turn, the right to purchase VCRs, TiVos, CD burners, even MP3 players. We hope that you will continue this consistent record of innovation by allowing satellite radio subscribers the opportunity to enjoy the services for which they have paid, wherever they are and whenever they can listen. Thank you very much.

[The prepared statement of Gary Parsons follows:]

PREPARED STATEMENT OF GARY PARSONS, CHAIRMAN OF THE BOARD, XM SATELLITE RADIO

Mr. Chairman and Members of the Subcommittee, I am pleased to appear on behalf of our 800 employees, who have made XM Satellite Radio America's most popular satellite radio company. Thank you for inviting XM to speak on behalf of the satellite radio industry and our customers, and more broadly in support of consumers' right to enjoy radio content for their own personal use. Like the Members of this Subcommittee who long have promoted fair use, we believe it is possible to both support consumers' personal rights to time-shift and record from broadcasts, and protect the interests of content owners.

As we look to the future, we hope to help grow the music industry by enhancing the discovery of music by our six and a half million subscribers and an estimated thirteen to

fifteen million XM listeners across the country. We're very excited about our potential at XM, but we still are an industry in its infancy. We will only succeed by keeping our existing subscribers and attracting lots of new ones. And we can only do that through constant innovation to improve listeners' experience.

Today, XM subscribers can expect to pay approximately $120 per year to listen to over 170 channels of entertainment, sports, news, talk, and other programs, including 69 channels of commercial-free music programming. Until recently, most of our subscribers heard their favorite programs only at home or in their cars and trucks. To add to their enjoyment, we first developed a hand-held device that could receive XM live and store up to five hours of programming. In response to growing consumer demand, we are bringing new portable personal products to market that, for the first time, will give our subscribers the ability to receive live XM satellite radio, "time-shift" XM programming for later listening, and listen to their own MP3 music collection, all in a single, convenient handheld device. These new generation portable radios will allow subscribers to store up to 50 hours of XM programming, to enjoy their music on the go, and to purchase additional music tracks--even entire albums--with ease from the new Napster online music service.

Our research shows that XM subscribers buy more music, and over time buy a broader range of music and attend more concerts, than other music consumers. Despite this fact, the recording industry wants to stop these new products from coming to market, that is, unless we let them take control of designing the features we build into the devices. As a result, we have been threatened with litigation and now face the prospect of device-crippling legislation in this and other Congressional Committees.

*About XM*

XM is one of the great American high-tech success stories of this decade. Using spectrum purchased at auction for nearly $90 million, we launched our subscription service late in 2001. Since then, we have invested nearly $3 billion in building a state-of-the-art network for the delivery of radio programming. Despite the challenges of launching a business in an economic recession and at the height of the dot.com bust, XM has grown into an enormously popular consumer business. And we hope for it to be a cash-positive business soon as well.

We built our entire business in compliance with the law, particularly the Audio Home Recording Act and the Digital Millennium Copyright Act of 1998. As a result, the record industry gets paid twice for the music our subscribers enjoy; once through the royalties we pay under Section 114 of the Copyright Act of 1998, and a second time when our device manufacturers pay royalties under the Audio Home Recording Act.

We continue to make huge investments not only in technology, but also in gifted individuals. We employ rocket scientists, electrical and broadcast engineers, consumer electronics wizards, athletes, a public radio legend, traffic reporters, marketing experts, and some of the world's foremost music experts. Unfortunately, we also have been forced to employ more and more lawyers.

*Relationship to the Music Industry*

Since the launch of our service, XM and the music industry have enjoyed a symbiotic relationship. Without compelling content, our multi-billion dollar, state-of-the-art delivery system would not have attracted more than six and a half million subscribers. Nor would the music and recording industries, and songwriters and performers have received tens of millions of dollars in royalties from us. Having made that investment, we are now delivering a wide diversity of music to millions of enthusiastic, paying music fans. We have demonstrated that you can build a business that promotes the interests of both consumers and the music industry.

As an industry, satellite radio is the single largest contributor of sound recording performance royalties to artists and record labels. In fact, XM and Sirius pay more in such performance royalties than all other digital broadcasters and webcasters combined. Likewise, XM and Sirius pay huge royalties to composers and publishers. We respect, appreciate, and *compensate* creators of music. In short, through the investment of enormous amounts of risk capital, we have created a new source of royalty payments for rights holders.

In addition to these new royalty payments, we continue to provide the music industry with a powerful promotional platform. Airplay has long been an essential promotional tool for music. In fact, Congress exempted traditional radio from paying sound recording performance royalties precisely because it recognized its promotional value. XM provides the same if not greater promotional value to artists and labels, and yet we do not enjoy this same exemption. Even for HD digital radio, terrestrial broadcasters are exempt from the sound recording performance royalty obligations that XM pays. In fact, as you know, recent payola allegations suggest that record labels (that *collect* money from satellite radio) actually *pay* traditional radio stations to play their music. Despite this disparate treatment, we are not here today to ask you to change current law, but instead to help you understand the competitive environment in which we operate.

Over the past two decades, playlists at traditional radio stations have been shrinking, forcing the public to endure an endless repetition of the same handful of songs. The variety of formats has declined as well. By contrast, XM offers our subscribers 69 channels of commercial-free music. We have over two million titles in our collection, and play approximately 160,000 different tracks each month.

We have something for everyone: 24-hours per day of bluegrass, blues, classical, country, hip hop, jazz, opera, pop, and rock and roll. We have channels devoted to emerging artists. We have a channel for artists that as yet are unsigned to any major record label. Our "Deep Tracks" channel has helped to reinvigorate the careers of many rock stars of the 1960s and '70s, and we have provided the opportunity for bands to perform live in the "XM Café" at our recording studios. XM presents a series called "Artist Confidential" and music shows hosted by stars as diverse as Bob Dylan, Quincy Jones, Tom Petty, Wynton Marsalis, and Snoop Dogg to help our listeners understand more about music from the artists' perspective. Our channel 73, "Frank's Place," features the greatest singers of American Popular Song, from its namesake Frank Sinatra to greats such as Ella Fitzgerald, Sarah Vaughan, Tony Bennett, and Rosemary Clooney.

At the touch of a button, XM listeners see the name of the performing artist and the name of the song they are hearing. Unlike broadcast radio stations, which rarely announce what they play, XM is a powerful tool for educating consumers hungry to discover and buy more music. In so doing, we provide promotional value and royalty compensation never offered to the record industry by traditional radio. And yet the music industry continually attacks us for bringing great new products to market.

*New Devices*

From the outset, we have been committed to offering consumers the best and most innovative products, while respecting copyright. Our subscribers want more than just the ability to hear great music at home or on the highway. Last year, we introduced a line of products called XM2GO. These portable products allow consumers to listen to XM live or to record up to five hours of programming, and thus to enjoy XM even when they cannot receive a satellite signal, such as at the gym or on an airplane flight.

We are building on the success and the functionality of the XM2GO devices with the Pioneer Inno and the Samsung Helix. Like the XM2GO, these new personal portable devices enable consumers to listen to live XM or to record content they receive over satellite radio. A subscriber can program these devices, like "time-shifting" on a VCR or

TiVo, to record a program that they cannot listen to live. Just as you can time-shift the television broadcast of a baseball game for later viewing on your VCR or TiVo, you can use these new XM portable devices to time-shift the radio broadcast of the game from XM. The devices also will offer the type of functionality consumers have come to expect from their everyday personal portable music devices. The XM Helix and Inno players give consumers the ability to organize the content they have recorded so they can listen to that content in any order they choose. In addition, the new devices include the ability for consumers to store songs from their personal music collection, as they can do with any MP3 player, and to mix those songs with new music they hear on satellite radio. And if they enjoy a song they have heard or recorded, they can "bookmark" a song to buy it later on CD, or, they can connect to their computer and purchase the song lawfully online from the new Napster and have it downloaded directly to the device.

As a responsible business, we specifically designed our products to comply with the Audio Home Recording Act (AHRA). When it adopted the AHRA in 1992, Congress created the legal framework for companies like XM to manufacture and distribute devices that can record digital music. As you will recall, that legislation allows consumers to digitally record music from CDs and broadcast transmissions for personal use, but prevents making digital copies from copies. In addition, under the AHRA manufacturers pay royalties on the sale of devices. The millions in revenues paid by manufacturers are shared with everyone in the music industry, under a formula enacted by Congress with the support of all music industry stakeholders. In return, manufacturers, distributors, retailers, and consumers are immune from lawsuits based on copyright infringement. This represented a balanced compromise that won unqualified support from the recording industry, the music industry, and the consumer electronics industry.

Congress intended the AHRA as a comprehensive and forward-looking compromise solution for the recording industry's concerns, for all new digital recording devices.

And so did the recording industry. Then-RIAA president Jay Berman testified before Congress that the AHRA "will eliminate the legal uncertainty about home audio taping that has clouded the marketplace," and "will allow consumer electronics manufacturers to introduce new audio technology into the market without fear of infringement lawsuits... ." In supporting the passage of the AHRA, Mr. Berman assured Congress that they would not have to revisit the home recording controversy for every new generation of digital recorder, proclaiming that the AHRA "is a generic solution that applies across the board to all forms of digital audio recording technology. Congress will not be in the position after enactment of this bill of having to enact subsequent bills to provide protection for new forms of digital audio recording technologies."

Similarly, on behalf of the songwriting and music publishing community, then-president of the National Music Publishers Association, Edward P. Murphy, testified before Congress in support of the AHRA, "[Our] enthusiastic support for the Audio Home Recording Act … stems from its comprehensive approach to audio home taping issues. The proposed legislation incorporates the critical royalty component, and it extends to all digital audio recording technologies, not just to DAT."

In reliance on the AHRA, XM has invested in the design and manufacture of our new generation personal portable radio products. In compliance with the AHRA, these new generation devices do not allow any of the recorded content to be moved off the device in digital form. Content saved to the device from XM *stays* on the device, and cannot be copied or moved. The only output on these devices goes to your headphones, in analog form. The new Helix and Inno products promote personal listening enjoyment, not Internet piracy.

Despite our payment of millions of dollars in performance royalties and millions more in AHRA royalties, and the limitations we designed into the devices so that XM content will not be uploaded to the Internet, XM still faces opposition from the music industry. We have heard it said that allowing consumers to record satellite radio turns our

radio service into an unlawful download business. We disagree. We have heard it said that we are now giving consumers for the first time the ability "to slice and dice" music as they see fit. We disagree. And we have been told our devices will cannibalize the sale of recorded music, rather than promote sales as XM has done since its inception. We emphatically disagree.

As an initial matter, we strongly reject the music industry's efforts to roll back the long-established ability of consumers to record off the radio for personal use. We are particularly disappointed that the head of the RIAA has sought to vilify our law-abiding customers in testimony before the House Judiciary Committee, when he accused home tapers using new technology of "boldly engag[ing] in piracy with little fear of prosecution." XM listeners are avid music fans and some of the music industry's best customers, not pirates. And XM, and the consumer electronics manufacturers which build our new products in compliance with the AHRA, are not pirates either.

Recording content off satellite radio is <u>not</u> the same as downloading music and has nothing to do with piracy:

- When a consumer wishes to download a song from the new Napster or iTunes, he can acquire that specific song on-demand within seconds of entering the name of the song. By contrast, XM subscribers have no ability to choose what XM plays or, therefore, what songs they can record. XM decides what is played.
- When a consumer buys a download from an Internet service, she can typically copy the song onto multiple devices and even burn it on to CDs. If a subscriber records a song from XM, the song is output only to her headphones. It cannot be burned directly to a CD, moved to any other device, or uploaded to the Internet.
- When a consumer purchases a download, he gets the full song from beginning to end. When a subscriber records a song off of XM, the recording is no substitute for the original. Just like recordings made using a tape recorder from FM radio, songs recorded off XM include DJ talk, overlapping parts of the preceding and following songs, and they may even have a few seconds cut off.
- A download service, unlike XM, knows exactly what the consumer is downloading and can charge for every download. XM, like any radio service, has no way to know how many subscribers are listening at any given time, no less whether or what any subscriber may be recording. That is precisely why Congress created a royalty payment pool under the AHRA of funds to be shared among the music industry, based on general digital recording for personal use.

In short, we are providing our subscribers greater value from their XM subscription: the ability to take XM with them everywhere, on the go in their busy lives.

These new personal portable XM devices are merely today's equivalent of recording off the radio, with the flexibility consumers have come to expect from new digital technology. We are giving our subscribers the tools to enjoy music they have lawfully acquired, with the capability to listen to that music in any order they want, to skip over songs they don't like, and to put together lists of songs for listening when jogging, commuting, or shopping – including when shopping for CDs. When a consumer records television programming on a TiVo, he or she can search for a particular episode and disaggregate it from the other recorded content. Like TiVo, we give consumers the tools to maximize their personal, non-commercial listening experience. But unlike TiVo, we cannot offer a program guide to tell our subscribers what songs are coming or when to record – because the law prohibits us from doing so.

As in the days of reel-to-reel tape and later with analog cassettes, consumers can record from XM programming and decide when and in what order to listen to it. No doubt a few of you remember the experience of recording a song off the radio, using a

razor blade to cut the tape, and with the help of Scotch® tape re-arranging the songs to make a party list of favorites. Our devices, like many other lawful products on the market today, simply update the tools for personal recording of radio into the 21st century. Had Congress heeded the objections of the content industry to each new technological innovation, consumers never would have had the right to enjoy the analog cassette recorder, the VCR, the CD Recorder, the MP3 player, the TiVo, the Slingbox – or, now, XM's new generation portable satellite radios. Our new devices offer our subscribers the convenience of digital recording technology that they get from every other new digital media device they own. But just because a device makes personal recording convenient does not, and should not, make it illegal.

*Conclusion*

Today, XM offers more than six and a half million subscribers and thirteen to fifteen million listeners the ability to enjoy music wherever they go. We are doing so lawfully, pursuant to the statutory framework Congress established in 1992 and 1998. We are doing so in a way that delivers tens of millions of dollars in new royalty payments to the music industry and millions more in additional royalty payments under the AHRA. And we are doing so in a way that facilitates the purchase of music and thus gives the music industry another way to compete against illegal P2P networks.

In short, we are doing it right. We are following the laws that Congress designed to apply to XM and to our new generation portable personal products. Like the companies behind every new technology from the transistor radio to the iPod, XM Satellite Radio is giving consumers new lawful ways to take their music wherever they go. We provide compensation to songwriters and music publishers both through performance rights and the AHRA. And, in addition to the AHRA payments on our devices, satellite radio pays more performance rights royalties to sound recording copyright owners and performing artists than any other industry.

Thank you for your consideration of our views and thank you again for standing up for the rights of innovators to bring new products to market and consumers to exercise their fair use rights.

MR. STEARNS. Thank you. Mr. Ostroff.

MR. OSTROFF. Chairman Stearns and members of the committee, thank you for inviting me here today. My name is Michael Ostroff and I am General Counsel of the Universal Music Group. I am going to use my time to highlight the ways in which Universal has welcomed the opportunities that digital technologies provide artists, record companies, and music fans around the globe. The music industry has gone through a very difficult period. On-line piracy has caused substantial losses over the last six years.

Thankfully, we are starting to climb out of the hole, in part because of the support that we have received from the Administration and the Congress. This committee helped educate the public about the dangers posed by peer-to-peer technology. Your hearings informed parents, teachers, and the news media on the ways that pornography inhabited PDPs and the ways that services inserted viruses, spyware and other dangerous software on a user's PC.

A key reason for our recovery is digital technology, which enables consumers to enjoy music in new ways. Today, I am going to show you

several devices and services that we have authorized to perform, distribute, or reproduce Universal's vast repertoire; oldies and today's hits, from Mozart to Motown to Mariah Carey. I want to emphasize that the services that I am going to describe got off the ground through free market negotiations: a willing buyer; an entrepreneur with an idea; and a willing seller, music companies that own the rights guaranteed by the Copyright Act struck a deal.

Let us start with the ringtones that people use to personalize their phone. We will use Matt's phone. When I call him, he knows it is me because his phone plays a song by Universal artist Cheryl Crow that mentions Santa Monica. That is where my office is located. Now let me show you what you hear when you call Matt. This is called a ringback, another way for a consumer to personalize his or her phone. When you call Matt, you hear "Xs and Os" by the Universal artist Trisha Yearwood. When Matt gets a call from Morna, he receives a music video as his ringtone. You will have a hard time seeing it from the dais, but the image is remarkably good. While the call is coming in, he can watch 30 seconds of a music video. The mobile phone industry seized the value of music personalization and is using music to promote their networks. As seen here, Verizon and others also offer their subscribers downloads of full-length songs through the cellular network.

[Slide.]

The slide shows Moby TV, a service that streams music video to your mobile phone. With a stream, the music video is not stored on the phone; the consumer subscribes to a channel and watches and listens to videos on the fly.

[Slide.]

Now let us move from mobile phones to personal computers and portable music players. This is iTunes and this is the iPod. We sell our recordings to iTunes which sells music downloads by the single song or as an album.

[Slide.]

The next slide displays music subscriptions. For a monthly fee, a consumer can download over one million different tracks, again, old songs and new releases that you can store for as long as you subscribe to the service. Music from Rhapsody can be transferred to over a hundred different portable devices like those that I brought with me here.

[Slide.]

The next slide is of a particular kind of subscription service that focuses on the college market. Piracy on university networks is a huge problem for us, so we have heavily discounted our prices in order to encourage colleges and their students to go legit.

[Slide.]

Next is an example of an on-demand music video service. Music fans can now go to sites like Yahoo and view the music videos of their choice. We also have worked out a deal with a company that offers music videos on demand through cable television.

[Slide.]

Here is another service we authorize Yahoo to offer: an interactive, personalized Internet radio service. With Launchcast, you tell the service what your favorite songs and artists are and a customized station based on those preferences is created for you.

[Slide.]

Another noteworthy development is the rollout of legitimate authorized licensed peer-to-peer services. This product would not have been feasible but for the Supreme Court's unanimous decision in support of artists and creators in last year's Grokster case.

Mr. Chairman, I was glad that you asked me to highlight the devices in a legitimate digital marketplace and I could have shown many more. These examples make it clear that we are ready, willing, and able to license viable business models. We can be as flexible as necessary to build a partnership with any business that wants to play by the rules. Indeed, we are working closely right now with our long-time partners, the radio broadcasters, to come up with a way to support the expeditious rollout of HD radio. We are working on a consensus on digital radio copy protection.

We hope and expect that in the future we will be licensing the sale of downloads and other services with your local broadcaster as our business partner. I remain hopeful that we can also work out a marketplace accommodation with XM, a company we have worked well with over its critical first years. We did not object when Congress gave the satellite services a compulsory license to perform our music so that their subscribers could listen to it. We helped them get started by agreeing to below market payments from them. Now XM wants to contort the government imposed performance license into a service that allows their subscribers to make permanent downloads of our individual songs.

The new device permits consumers to record satellite programming; see a list of songs recorded; select the specific tracks they want to hold on to, as well as those they wish to delete; and a library to select the tracks for future use. It is a great device. In fact, it is much like an iPod, but unlike an iPod, you don't have to pay for the music you keep. Sirius Radio sells a similar device, which I have here. It is not as robust as the new XM products, but similar. We brought our concerns to Sirius and entered into a satisfactory agreement with respect to their S50 and look forward to productive business discussions regarding the distribution of future products.

Again, we are ready to license our rights on behalf of the artists and creators we work with and hope to do so not only with XM, but with a great many other services that approach us in the years ahead. Mr. Chairman, thank you. I look forward to your questions.

[The prepared statement of Michael Ostroff follows:]

PREPARED STATEMENT OF MICHAEL OSTROFF, GENERAL COUNSEL AND EXECUTIVE VICE PRESIDENT, BUSINESS AND LEGAL AFFAIRS, UNIVERSAL MUSIC GROUP

Chairman Stearns, Ranking Member Schakowsky, and Members of the Subcommittee, thank you very much for requesting our views on the issue of digital audio content and meeting consumer demand in the marketplace. My name is Michael Ostroff and I am General Counsel and Executive Vice President, Business and Legal Affairs, for the Universal Music Group. Music has been at the forefront of the electronic marketplace and we at Universal have worked hard over the past several years to provide consumers with the most choices and the best digital music experience possible.

We are driven in the marketplace by consumers, and consumers are demanding quality, convenience and choice. Today, consumers have more choices in how they obtain their music than ever before: online downloads such as iTunes; subscription services such as Napster and Rhapsody, including portability features such as Napster to Go, and special discounted rates for subscription services at colleges; ringtones; ringbacks; mobile downloads; mobile videos; online videos on demand; kiosks in retail stores; legitimate peer-to-peer services; interactive web radio; and instant post-concert recorded CDs are just some of the new formats in which we are making music available. These are in addition to new physical formats such as DVD-Audio, Super Audio CD, and DualDiscs.

Considering that all of the products and services listed above have appeared in just the past few years – almost a blink of the eye in the long history of music distribution – you can only imagine what is yet to come in the near future.

Universal is excited about licensing and selling our music in these and other new digital formats to bring more music to more fans from both our vast catalog as well as new artists. And we are flexible in the way we craft digital agreements, so that consumers can use the music they purchase conveniently and in ways that meet their reasonable needs, while at the same time protecting the content against illegal redistribution and other forms of piracy.

We believe that marketplace negotiations have worked best, allowing us to set appropriate rates and ensure reasonable content protection. Such negotiations have worked far better than compulsory licenses, such as those granted to satellite, cable, and Internet listening services. Our legal obligation to make our music available due to this compulsory license leads to situations like one we are facing right now – in which XM satellite radio is offering its customers the ability to download music and create a digital music library on its portable devices, in much the same way that iTunes offers permanent downloads. Of course, the big difference is that in the case of iTunes, Apple compensates artists, creators and copyright owners through a distribution fee.

Let's be clear. Congress gave the satellite services a compulsory license to perform our music, so that their subscribers could listen to it. Our company and others in the industry helped the satellite services get started by agreeing to below market payments for our property. We worked with them to help them develop interesting channels featuring interaction with our artists. Now XM wants to stretch and reinterpret the government imposed license into a service that enables their subscribers to make permanent copies of our music.

Universal Music does not object to XM offering its subscribers a distribution service in addition to a broadcast service, so long as XM agrees to pay us for the distributions. Rather than working to reach a fair accommodation through marketplace negotiations, however, XM claims that the compulsory performance license it enjoys enables it to distribute our content as though it's just another aspect of performing our music, and that its payment for performances covers what are in fact distributions. XM also claims that, instead of paying an appropriate distribution fee, its manufacturing partners are merely required to pay royalties under the Audio Home Recording Act, a payment system that was intended only to cover serial recording on Digital Audio Tapes and was never intended to replace the licenses required for distributions of music.

Allowing XM to make distributions while paying only performance fees is unfair to the legitimate music distribution services like iTunes, Napster, Rhapsody and Yahoo!, that are just starting to gain traction in the face of competition from illegitimate, unauthorized services that have been giving away our music for free. And it is unfair to the music companies and artists who deserve compensation for the blood, sweat, tears and capital they invest in creating new and innovative sounds. The growth of digital distribution in its many forms – via cellphones, internet, cable and now via broadcast signals -- depends upon a legitimate marketplace. A legitimate marketplace, in turn, depends upon the ability to protect content effectively.

The emerging digital formats are made possible because content protection is able to set levels of "ownership" of a copy of our music at different price points. For streaming music, consumers pay at one price point; for permanent downloads, consumers expect to pay at a higher price point. Just like a consumer has a different expectation of price when renting a musical instrument versus buying it. Without the ability to define the parameters of use, without the ability to protect the content, distributors could only offer consumers music on a one-price-fits-all basis; and, in order to cover all platforms and services, that price would necessarily be higher. That, of course, is not good for consumers. In short, content protection presents more opportunities for content creators and providers, which ultimately leads to more opportunities – and choice – for consumers.

In last year's unanimous *Grokster* decision, the United States Supreme Court gave the legitimate digital marketplace a boost. By holding liable those services that facilitate piracy, the Court opened the door for the legitimate digital marketplace to succeed and emphasized the importance of protecting copyrighted works. Weakening copyright and allowing for the circumvention of content protection is antithetical to the Court's holding; and, by decreasing the market opportunities for both media creators and distributors, the circumventing or "hacking" of content protection ultimately harms consumers.

Unfortunately, a bill has been introduced and referred to this Subcommittee, H.R. 1201, that would undermine the legitimate marketplace by granting a "hacking" right to consumers. It would allow the removal of copy protection contained on a digital product, as long as it is done for "fair use" purposes. This legislation distorts the meaning of fair use and would lead to the exact escalation of piracy the *Grokster* case sought to prevent. Fair use has never meant "free access." If you want to copy a portion of a chapter of a book to quote in a book report, you cannot steal the book in order to do so. Yet, that is exactly what H.R. 1201 would allow. It is the equivalent of allowing a consumer to buy a "black box" to get HBO for free, as long as the consumer is only using it to watch programming for "fair use purposes." And, of course, once the content protection is removed, that protection is compromised for *all* purposes. Given that licensing practices in the marketplace already allow for personal uses that meet consumer expectations, this bill is unnecessary and dangerous.

H.R. 1201 would undo much of what this Committee and the Congress accomplished in 1998 when it passed the "Digital Millennium Copyright Act." Since

passage of the DMCA, the digital marketplace for content has exploded. Weakening it would stymie future growth.

In fact, the Congress rejected in 1998 the language proposed in section 5 of H.R. 1201. Instead, under the leadership of the Commerce Committee, Congress created a procedure to ensure that adequate public access to copyrighted materials is maintained: the Librarian of Congress, working with the Commerce Department, investigates, every three years, whether public access to copyrighted materials is being harmed or threatened. In both 2000 and 2003, the Librarian considered broad exceptions similar to H.R. 1201, and rejected them, because proponents could not demonstrate harm.

Another proceeding is in process this year. There is no evidence the Congress made a mistake in 1998. Just the opposite: the Congress got it right, and there is no basis for undoing that decision now.

H.R. 1201 would also undermine efforts to fight piracy and promote respect for copyrights worldwide. Because U.S. copyrighted works dominate world markets, the U.S. Congress and Administrations – Republican and Democrat – have all worked hard to upgrade copyright law and enforcement internationally. Because America has such a huge stake in intellectual property protection, we set the standard that we hope the world will follow. In recent years, this effort has paid special attention to protecting encryption and similar technologies against hacking. H.R. 1201 would pull the rug out from under these efforts, and expose U.S. works to greater risks of piracy in markets around the globe.

We ask that this Subcommittee reject H.R. 1201, and allow the marketplace to continue to meet consumer expectations. The many different options consumers have today in which to get their music is a function of that legitimate free marketplace. This proves that one thing is certain – if music distribution is left to the free market, we will find a way to license these and many more uses of our music with functionality consumers can only imagine today. Universal has embraced and made deals for numerous different distribution models, and we look forward to welcoming many more in the future. We are extremely eager for consumers to have increasing numbers of options for where they get their music and how they experience it. The better the experience for consumers, the better it is for us as well.

There are instances, however, where we do not have rights, in which the free marketplace is not allowed to work, necessitating changes in the law to maintain a legitimate marketplace. This is perhaps most evident with over-the-air radio. The next generation of new HD Radio devices would allow listeners to record, sort, and permanently store individual songs in a digital jukebox, replicating a sale made from a digital download service such as iTunes. But we have no performance right for over-the-air radio, which means that we have no leverage when seeking to negotiate appropriate use of our music.

Fortunately, we are already in productive discussions with the broadcast industry to ensure that the functionality of these new HD Radio devices does not substitute for sales in the marketplace. In part because of our longstanding relationship with broadcasters, and additionally at the urging of Senators Stevens and Inouye during a January hearing on Broadcast and Audio Flag before the Senate Committee on Commerce, Science and Transportation, representatives of the music and broadcast industries agreed to meet to work out the issues. Since then, there have been several meetings, including a very productive one in New York between senior executives of both industries, resulting in the formation of two negotiating groups, an Audio Flag Task Force and a Technical Implementation Working group. We remain optimistic about these talks, are committed to a swift rollout of HD radio, and continue to believe that the best solution is one that comes from free marketplace negotiations.

But it is important to remember that there remains a marketplace failure due to our lack of an over-the-air performance right – our bargaining power is limited by the fact

that we cannot simply say, "no, you may not use our music." Therefore, while we are encouraged that the broadcasters will continue to negotiate in good faith, we appreciate the introduction of legislation such as H.R. 4861, The Audio Broadcast Flag Licensing Act. This bill, introduced by Representatives Ferguson, Towns, Bono, Gordon and Blackburn, addresses this marketplace failure by granting the FCC jurisdiction to promulgate rules regarding content protection for digital over-the-air radio. The bill requires digital radio services that use the government spectrum to implement certain content protection technology. H.R. 4861 strikes the right balance between creating new radio services that bring more choices to consumers, and protecting the property rights of creators. The bill also prevents unfair competition between radio services and download services, by appropriately providing for private market negotiations of an "audio broadcast flag" that will differentiate between radio broadcasts and download services, and require a market license only for download services.

The bill assures that no one device or technology manufacturer has an advantage over another and will maximize the range of broadcast receiving devices made available to the public. Further, it makes clear that the adoption and implementation of an audio broadcast flag will in no way delay the final operational rules for digital radio and assures that legacy devices are not affected. By using broadcast flag technology, devices already on the market prior to the enactment of legislation will not be made obsolete, but will remain fully functional.

At the same time, we agree with the leadership of the Senate Commerce Committee that it is preferable to find a marketplace solution, and appreciate that they have asked the parties to work toward such a solution and report to the Committee periodically. As Senator Stevens said, "the creative content side and the distribution side of the music industry should seek mutual ground that supports business models for both."

And we greatly appreciate NAB President David Rehr's acknowledgement of his industry's "strong interest in collaborating to find a workable solution to content protection issues associated with terrestrial digital radio broadcasting," and his agreeing in a joint report to the Committee that the scope of the negotiations on flag implementation would include usage rules preventing the disaggregation or "cherry-picking" of songs from surrounding content transmitted over HD radio, and assurance of an expeditious rollout of HD radio nationwide. Following the positive initial meetings between our industries, we think we are on the right track.

The future of the digital marketplace is a great one for consumers in the 21st century. Wouldn't it be great if you could push a button and buy a song when you hear it on the radio that is automatically charged to your credit card? Or to push a button on your iPod that automatically purchases an individual track? Or to play any song on demand on your portable player any time you want for a monthly fee? All of this is possible in the free market in a manner that maintains the incentive to create and invest in music. Robust content protection, and preventing against the hacking of that protection, will assure that possibility for consumers, and provide a return on investment for creators, broadcasters, device manufacturers, and all other parties that bring new and exciting entertainment to market.

Thank you for focusing on this important issue.

MR. STEARNS. Thank you and you could have added there are no commercials, right? These are not our products. We have a vote, but I think we have some more time, so Mr. Halyburton, go ahead.

MR. HALYBURTON. Thank you, Chairman Stearns and members of the committee. My name is Dan Halyburton, I am Senior Vice President and General Manager for Susquehanna Radio. I am here today on behalf

of the National Association of Broadcasters where I serve as the chair for the NAB Audio Flag Task Force. The NAB is a trade association that advocates on behalf of more than 8,300 free local radio and television stations, as well as broadcast networks, before Congress, the FCC, and the courts. Local broadcasters are engaged in an exciting transition to digital. Currently 777 AM and FM stations are on the air in digital, and many more will roll out in the near future.

Digital radio not only offers crystal clear audio, it also permits the broadcasting of multiple free over-the-air program channels. Radio stations will be able to bring additional local service to the public with their current spectrum, while at the same time providing expanded opportunities to promote more varied artists, music, and local information services. Digital radio also offers greater format diversity for listeners. In 1993, radio offered about 32 formats while expanding to over 70 formats in the year 2004. HD radio offers listeners an even greater expansion of programming, choice, diversity, and variety.

2006 and 2007 promise to be pivotal years for this revolution in radio. Auto makers are signing up for factory-installed radios, retail outlets are featuring many new digital radio products and we are doing our part to spur the transition. Major radio groups are engaged in a massive marketing campaign to make sure consumers are aware of digital radio and educated on its benefits. The future of digital radio also involves a discussion of content protection. Local broadcasters are content producers ourselves and oppose piracy in all forms. To that end, the NAB is working with the recording industry to develop options for content protection so long as those options don't slow down radio's digital transition.

These discussions have been very constructive and the NAB strongly believes that the broadcast industry and the recording industry and other stakeholders can work toward a consensus on digital radio copy protection systems. While our discussions will explore many options, one approach we both agree is not viable involves encryption at the source. No proposal should be allowed to derail the HD radio rollout by making obsolete thousands of receivers already on the market, as well as millions more in the manufacturing pipeline.

As our discussions with the recording industry continue, we urge the Congress and the regulators to allow these private negotiations a chance to work. At this time, we should refrain from adopting an unnecessary legislative mandate or pushing a premature adoption of a quick fix for copy protection and digital radio. Mr. Chairman, as I mentioned, HD radio will also enable broadcasters to better serve our local communities and remain competitive in the evolving digital media marketplace. All of

these new digital services will amplify radio's traditional strength; free, over-the-air service to the community.

As a public license holder, local broadcasters cover issues of concern to local communities, adhere to regulations on over-the-air content, play a vital role with emergency services including Amber Alert, and initiate and partner in public service campaigns. Some of the discussion today from other witnesses may involve calls for parity with over-the-air radio, including calls for a new performance right tax on broadcasters. Local broadcasters have a deep, extensive relationship with the recording industry in promoting new music and artists, a relationship that has been upheld by Congress on many occasions. This partnership works and should not be changed.

I would also draw the committee's attention to satellite radio's desire to ultimately provide local advertising and local content. As a national service, satellite radio is not required to serve local communities and is not subject to content regulations and many other public service obligations. Local broadcasters appreciate the 125 cosponsors of H.R. 998, including Congressman Chip Pickering and Congressman Gene Green. H.R. 998 clarifies satellite radio's role as a national only service and preserves the local role of the broadcaster.

Mr. Chairman, the successful deployment of digital radio holds much promise and will significantly improve services for our listeners and your constituents. Thank you.

[The prepared statement of Dan Halyburton follows:]

PREPARED STATEMENT OF DAN HALYBURTON, SENIOR VICE PRESIDENT AND GENERAL MANAGER, GROUP OPERATIONS, SUSQUEHANNA RADIO CORPORATION, ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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.[1]

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

[1] H. Rep. No. 92-487, 92d Congress, 1st Sess. at 7 (Sept. 22, 1971) (emphasis added).

intended to be comprehensive, forward-looking legislation designed to end, once and for all, the "longstanding controversy" surrounding the home recording of prerecorded music.[2] 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*."[3]

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."[4] 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."[5] The Ninth Circuit confirmed this conclusion in *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (9th Cir. 1999).

**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,

---

[2] *See* S. Rep. No. 102-294, 102d Cong., 2d Sess. 30, 51 (June 9, 1992).

[3] 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).

[4] S. Rep. No. 102-294, at 51.

[5] 138 Cong. Rec. H9029, H9033 (daily ed., Sept. 22, 1992) (statement of Rep. Hughes) (emphasis added).

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.[6]

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."[7] 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."[8]

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.[9] 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 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

---

[6] *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.").

[7] 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.").

[8] *Id.* at 17.

[9] 17 U.S.C. §114(d)(1)(A).

> 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.[10]

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."[11] 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.

**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.

MR. STEARNS. I thank you. We have about three or four minutes left, so we are going to take a short break and we have three votes, so if you will be patient with us, we have got one; it is almost over, and then we have got two more in five minutes, so we should be back in about 15 minutes or less.

[Recess.]

MR. STEARNS. The subcommittee will reconvene and Mr. Regan, thank you, and all of you, for your patience here and I welcome your opening statement.

MR. REGAN. Mr. Chairman, members of the subcommittee, thanks for allowing me to speak today on behalf of songwriters. My name is Bob Regan. I am the current President of the National Songwriters Association International, the largest not-for-profit trade association for songwriters in America. I have heard it said that writers really have only one story to tell, their own. With that in mind, I would like to give some insight into the profession of songwriting, what we call America's smallest small business and what content creation actually entails.

---

[10] 1995 Senate Report, at 15.

[11] *Id.*

Forty years ago I sat in my bedroom with the Beatles songbook, my first guitar, and my first broken heart. As I fumbled with the chords to "Norwegian Wood," I experienced the healing restorative powers of music, though I doubt I would have put it that way at the time. In college, when I played "Louie Louie" at frat parties, I saw firsthand the exuberance and release that a song can bring about. Think 20 Sig Eps doing the Gator on the floor. I witnessed songs like Bob Dylan's "Blowing in the Wind" or Merle Haggard's "Walking on the Fighting Side of Me" become far more than content or entertainment. They were anthems and battle cries that cut as deep as the rifts in society at that time.

Upon graduating from college, I postponed applying to law school for a year to try the music business full time. Eight years later, I landed a recording contract with a major label in Los Angeles. To that point, the songs I had written were of value only to my friends, family, and myself. They were performed at weddings; they commemorated the birth of my children and the passing of my parents. Was my recording debut a success? Unfortunately, I was one of the large majority of recording artists who never make a dollar or make a second record.

At age 35, I gave myself three years to write a hit or pack it in. I moved my family across country to Nashville, Tennessee. There I was one of the lucky ones. I signed a contract as a staff writer for $100 a week, fully recoupable from future royalties, by the way. I had a few songs recorded and then right at the three-year mark, Reba McIntire recorded and released a song which I had co-written. I finally had the hit and the validation that I had been working and praying for. Was I now wealthy? Well, I received about $35,000 for my share of the royalties, paid over two years. Going forward, I was able to become a business partner and co-owner of my copyrights.

Over the past two decades, I have had many songs recorded and had several hits on country radio. I have been blessed beyond all my expectations and have the greatest occupation anyone could ask for. Am I now wealthy? Well, consider this: if I am lucky enough to co-write a song on a million selling CD, my writer's share is about $23,000. Congress, by the way, determines that rate.

The title of this hearing speaks to "Satisfying the 21st Century Consumer." We songwriters and the artists who record our songs are more than willing, as we have always been, to provide content for new technologies. We welcome the opportunity. We are, however, opposed to business models that attempt to devalue our music, to redefine how we are compensated, or to turn a radio signal into an on demand record store. We only ask that we are able to make a living; not a killing, a living.

Songs and songwriters are the tip of the inverted pyramid upon which the entire multi-billion dollar music industry is balanced, and others can speak far better than I to the specifics of pending legislation. As I said, I never did make it to law school. I am, however, familiar with Article I Section 8 of the Constitution which guarantees me the exclusive right to my creations. In addition, common sense tells me that we need to have parity for all digital delivery platforms if any are to succeed and if we are to all reap the benefits of the digital age.

As I said, I have only my own story to tell, but it seems my songs have told the stories of many others, as well. Who knows? Maybe somewhere right now there is a kid in his bedroom with a guitar and a broken heart trying to learn one of my songs. If that should lead him to embark upon a career in music today, he will have many wonderful outlets that I never had. Let us value his creations fairly and give him the chance to tell the stories of the next generation. Thanks.

[The prepared statement of Robert Regan follows:]

PREPARED STATEMENT OF ROBERT REGAN, PRESIDENT OF THE BOARD, NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL

Mr. Chairman, and Members of the Committee, thank you for allowing me to speak today on behalf of songwriters. My name is Bob Regan. I am the current President of the Nashville Songwriters Association International, the largest not-for-profit trade association for songwriters in America.

I've heard it said that most writers really have only one story to tell…their own. With that in mind, I'd like to give some insight into the business and profession of song writing and into what content creation actually entails.

Forty years ago I sat in my bedroom with a Beatles songbook, my first guitar and my first broken heart. As I struggled to play the chords to "Norwegian Wood," I experienced the healing, restorative powers of music, though I doubt I'd have put it that way at the time. In college, when I played "Louie Louie" at frat parties, I saw first hand the exuberance and release that a song could bring about. Think 20 Sig Eps doing the Gator. I witnessed songs like Bob Dylan's "Blowing in the Wind" or Merle Haggard's "Walking on the Fighting Side of Me" become far more than entertainment. They were anthems and battle cries that cut as deep as the rifts in society at that time.

Upon graduating, I decided to postpone applying to Law School for a year to try song writing and the music business full time. One year turned into five which became ten before I landed a recording contract with a major record label in Los Angeles. To that point, the songs I had written were of value only to friends, family and myself. They were performed at weddings; they commemorated the birth of my children and the passing of my parents.

Was my recording debut a success? No, I was one of the large majority of recording artists who never make a dollar or make a second record.

At age 35, I gave myself three years to write a hit or pack it in. I moved my family across country to the songwriting capitol of the world, Nashville, TN.

There, I was one of the lucky ones. I signed a contract as a staff writer for $100 per week, to be repaid from future royalties. I had a few songs recorded and then, right at the three-year mark, Reba McIntire recorded and released a song which I had co-written. I finally had the hit and the validation that I had been working and praying for. Was I now

wealthy? Well, I received around $35,000 for my share of the royalties. Going forward, I became a co-publisher and co-owner of my copyrights.

Over the past two decades I have had many songs recorded and several of those have been hits on country radio. I have been blessed beyond all my expectations and have the greatest occupation anyone could ask for. Am I now wealthy? Hardly. If I'm lucky enough to co-write a song on a rare million selling CD, my writer's share is $22,750. Congress, by the way, determines that rate.

The title of this hearing speaks to "Satisfying the 21st Century Consumer." We songwriters are more than willing, as we have always been, to provide content for new technologies. We welcome the opportunity. We are, however, opposed to business models that attempt to devalue our music, re-define how we are compensated or turn a radio signal into an on demand record store.

Others here can speak better than I to the specifics of pending legislation. As I said, I never did make it to Law School. I am, however, familiar with Article I Section 8 of the Constitution which gaurantees me the exclusive right to my creations. In addition common sense tells me that we need to have parity for all digital delivery platforms if any are to succeed and if we are all to reap the benefits of the digital age.

In closing, I may have only my own story to tell but it seems it has been the story of others as well. Who knows, maybe somewhere right now there's a kid in his bedroom with a guitar and a broken heart trying to play one of my songs. If that should lead him to embark on a career in music today, he will have many wonderful new outlets for his work. Let's value his creations fairly and give him the chance to tell the stories of the next generation.

Thank you for this opportunity.

MR. STEARNS. Thank you, Mr. Regan. I think that is a rather touching story for all of us. Mr. Lawrence.

MR. LAWRENCE. Thank you, Mr. Chairman. Wow, that is really hard to follow. My name is Jeff Lawrence. I am the Director of Content Policy at Intel Corporation and I think that, you know, the perspective that I want to bring here today is a sort of step back. There are a lot of hot issues out there that people are focusing on, sort of micro-issues, if you will, but I want to step back a little bit and take a look at progress that has been made over the last decade and where we might end up in the next decade.

Intel has this vision of a digital home. It is a vision that I share. It is a world where consumers can enjoy the content of their choice that they have lawfully acquired; any device, any place, any time the way that they want to. To realize that vision, content protection is actually a necessary part of it. And Intel has spent the better part of a decade working to build a reasonably protected digital infrastructure in the home and elsewhere to support these new emerging digital business models.

And what we do is we get together with a lot of companies across the industry, with content creators, IT companies, and CE companies, and we get together to try and strike deals with respect to content protection to enable new business models, to look out for the rights of consumers, to make sure that it all works in the ecosystem because one thing that we have learned for sure is that if there is some part of the ecosystem that

doesn't work for them, then it doesn't work for the whole ecosystem. And we are actually fairly confident, and we have a high degree of optimism, when you look back, when you look forward a decade that we are, in fact, going to realize that digital home.

And there are a couple of principles that we think are important whenever we talk about content protection. One is respecting intellectual property rights and respecting consumer issues and consumer rights. Two, the reality that some form of a reasonably protected environment is necessary to support that digital infrastructure and you know, one of the things that is most important to me is the idea of a protected environment is one that should actually enable all kinds of new and cool consumer uses. It isn't one that necessarily has to lock it all down and prevent consumers from doing things, rather it should actually open the locks and allow people to do interesting and new things with the content that they have acquired.

Lastly and very importantly is the notion that markets and not mandates are the things that actually deliver these solutions, and I agree with many of the comments of my colleagues here. And we have focused a lot of our efforts out of the marketplace, you know, be it at the DVD, CCA, which is in response for DVD video, content protection, or the next generation optical media. There is a group out there that is called AACS that does the content protection for that, enabling new consumer experiences, learning from the mistakes of the DVD in the sense of the limitations.

Debate goes into the next generations. To home networking technologies to making sure that devices can interoperate, we are there. We are confident, so I guess my message is yes, there are some issues, but I don't think the sky is falling and looking from a larger, longer term perspective with a reasonable balanced approach to the issues, letting the market go out there and drive them, we are confident that the digital home will be realized. And with that, I am going to stop and I don't know if I was the closer or the opener, but I appreciate it, Mr. Chairman, and thank you very much.

[The prepared statement of Jeffrey T. Lawrence follows:]

PREPARED STATEMENT OF JEFFREY T. LAWRENCE, DIRECTOR, DIGITAL HOME AND CONTENT POLICY, INTEL CORPORATION

**Good Morning Mr. Chairman**. I am Jeff Lawrence, Director of Content Policy and Architecture for Intel Corporation. Intel, the world leader in silicon innovation, develops technologies, products and initiatives to continually advance how people work and live. Intel is based in Santa Clara, California and currently employs approximately 100,000 people around the world, of which about 60% are located in the United States.

As Director of Content Policy and Architecture, I am responsible for all of Intel's many content protection engagements, from public policy and legal matters like the

Broadcast Flag, to Cable Plug and Play, and a host of market based initiatives where companies from the IT, CE and content industries come together to find private, market based solutions to advance new consumer experiences in digital media. Some of the initiatives that you may be familiar with include Advanced Access Content System (AACS), for next generation high definition optical media like Blue Ray Disk and High Definition DVD, Digital Transmission Content Protection (DTCP) used to move compressed digital content in a protected home network, and High-bandwidth Digital Content Protection (HDCP) used to protect outputs to new digital displays. I appreciate the opportunity to provide some perspectives on the consumer digital media experience that I anticipate in the next ten to fifteen years.

I share a vision that Intel calls "Digital Home", where consumers are able to consume the content of their choice any time, any place and in any device.[1] It is a vision based on interoperability among a wide range of intelligent devices, such as PCs, game consoles, home gateways, cell phones, other peripherals, traditional and innovative CE devices, and a host of new innovative devices that are sure to emerge as the engine of innovation churns on. The Digital Home will be a place where consumer choice, flexibility and portability enables consumers ease of use and a multiplicity of compelling new media experiences. Mr. Chairman, it is my belief that we will in fact realize the Digital Home vision in the next decade, and that the market place will resolve the issues that some may perceive as obstacles or threats to that progress. The key is to bring a balanced approach to the digital media ecosystem. I firmly believe that such a balanced approach should include the following fundamental principles:

- Respect for Intellectual Property, Rights holders and Consumer interests
- Reasonably Protected Digital Environment is Necessary Infrastructure For the Digital Future
- A Reasonably Protected Digital Environment Should Provide Consumers Flexibility, Portability and Choice
- Markets, Not Mandates, Stimulate Innovation and Deliver Consumer Value.

I have been actively engaged in the digital media transition for the past eight years, and Intel has engaged for the better part of a decade. The path of technical innovation with respect to digital media is rapid, and although there are many challenges relating to rights management and content protection, we have seen tremendous progress toward a realization of the digital home goals. With such a wide range of often competing interests, it is sometimes easy to lose sight of the tremendous progress that has been made, that is being made now, and that will continue to be made into the next decade. It is my opinion that in a decade from now, the digital home vision will be realized, and that what are often characterized today as mountainous roadblocks to realization of that effort, will then be forgotten in large measure or simply viewed as small bumps along the digital highway**. Here are just a few of the reasons why I am optimistic that "new media" will continue to evolve in ways that support an enhanced consumer experience while fully protecting the rights of content creators and owners.**

***DVD Video***. In 1996 the motion picture, consumer electronics and information technology industries got together to develop a compelling new consumer experience known as the DVD. Many said that consumers would reject content protected disks and content protection generally, but they were wrong. The DVD has proved to be the most successful consumer entertainment media of all time. As consumer expectations with respect to DVDs are changing, permitted DVD usage models are also evolving (even if slowly). For example, today, you can stream DVD content in your IP based home network using technologies like DTCP over IP and Windows Media DRM, something completely unthinkable just a few short years ago, and the industries are exploring ways to enable new uses, such as managed copies and DVD download to disk. While the road

[1] As authorized.

may be bumpy with impatience, I'm confident that these new experiences will be delivered in time.

***High Definition Video***. The CE, IT and content communities have gotten together again to work on next generation high definition optical media, including Blue Ray Disk and High Definition DVD. From the outset, these industries have recognized that consumer flexibility and portability are key factors to meeting the expectations of today's and tomorrow's consumers, and from the outset have developed those specifications and content protection schemes such as AACS with those capabilities in mind.

***Digital Music on Demand***. In a few short years we have seen a revolution in the way consumers buy and consume music. "Napster", which was once associated with unauthorized peer to peer file sharing, is today a thriving, legitimate, online music business, and nothing needs to be said about Apple's iTunes and the iPod, which have been immensely successful in the marketplace.

***Interoperability***. There are a growing number of efforts in the market place to address interoperability issues, including for example the Digital Living Network Alliance which currently cites DTCP over IP as the first interoperable digital link for protected content. From beginnings like this, I am confident that the market will deliver a range of interoperability solutions, including those that are device based and those that are network based. It might take a little time to sort through all of the business model issues associated with interoperability, but I am confident that consumers will ultimately get what they want, and that the market will pass by this bump on the road and never look back.

***Consumer Notice***. One of the most important factors in establishing an effective and functioning digital market place is consumer choice based on knowledge of the rights and limitations associated with a particular digital offering.

Mr. Chairman, these are just a few of the examples why I am optimistic about the future for consumers in the new digital age. We have come a long way already, and although there is still a long way to go, some of the world's best and brightest are fully engaged to address the problems and issues along the way. Keeping a balanced perspective on where we have come from, where we are going, and the needs and expectations of consumers and other interested parties, will surely make the Digital Home vision a reality.

MR. STEARNS. Well, you are the closer and so I have an opportunity to start out the questioning. And I guess, perhaps, I will ask Mr. Regan this question and then I will ask Mr. Ostroff this question. I will start with you, Mr. Ostroff. Article I Section 8 of the Constitution states, "The Congress shall have power to promote the progress of science and useful arts by securing, for a limited time, to authors and inventors the exclusive right to their respective writings and discovery." And this is where the argument goes, this limited time. What does that mean to you? Do you agree that the exclusive rights should be only for a limited time, I guess that is the question I have and then for you, too, Mr. Regan. Since you are an artist, you probably feel this more keenly, and then I will go into a little bit on the fair use aspect of it, so go ahead.

MR. OSTROFF. Well, far be it from me to disagree with the Constitution, so I don't have a problem with Article I Section 8 and the Supreme Court recently ruled on that issue, so no, I don't have an issue with that provision.

MR. REGAN. As far as for me, I would be delighted for my children and my grandchildren to be able to reap the benefits of my labor, much like anyone who creates anything else. I would point out that when Life Plus 70 was passed, the songwriters, at the same time the restaurant bill was passed which removed our royalties from any retail commercial establishment under 3500 square feet, I believe, so we did get that extension, but we did pay dearly and just real briefly speaking of--

MR. STEARNS. When you say you paid dearly, what do you mean by that?

MR. REGAN. Up until that point we had received ASCAP and DMI received licensing revenues from all retail businesses that used our music under 3,500 square feet, which is, I would venture to guess, the vast majority of retail establishments, so that is not really germane to the question, but we got Life Plus 70, but the songwriters paid a price.

MR. STEARNS. Um-hum.

MR. REGAN. Speaking of time, just real briefly, just this morning we are talking about content versus technology. It doesn't seem as though technology is the problem. I pulled up from this week in 1956 the top ten songs, number one, "Don't Be Cruel," number two, "Hound Dog," "Singing the Blues," "Heartbreak Hotel," "Love Me Tender." 1966: "I'm a Believer," The Ballad of the Green Beret," "Winchester Cathedral," "Soul and Inspiration," "Monday, Monday," et cetera, et cetera. 1976: "Tonight's the Night," Rod Stewart; "Silly Love Songs," "Play That Funky Music." There was astounding content long before there was astounding technology, so we can have all the tech in the world. Without great content, it is dead in the water. That is what is going to satisfy consumers.

MR. STEARNS. And I think most of us in this room have heard the songs you mentioned and have felt the same euphoric, almost obviously spiritual feeling that you can't even get, probably, any other way except music. So Mr. Parsons, you have been accused of hiding behind the law here and in defending his products against criticism, I thought I would give you an opportunity to respond. You heard some of the criticism here and so you might want to take a chance to do that.

MR. PARSONS. Thank you very much, Mr. Chairman.

MR. STEARNS. I think you have to put your speaker on.

MR. PARSONS. Thank you very much. Yes, we very carefully followed the law and I guess I was accused of hiding behind the Audio Home Recording Act, which we are in full compliance of. The important element of it the Congress has set, in a number of different laws, is a seamless web of protection for the music industry, appropriately, and for the songwriters, appropriately, where they receive different payments for different uses of their property in various ways. We have tried to not

only design our devices, but design our business to comply with all of those and actually, I think I am the only person here at the table that pays under all of those. I mean, this is not early Napster or illegal file sharing or an illegal downloading situation.

We pay under each and every one of the mechanisms that have been put in place. And frankly, when Congress took up the Audio Home Recording Act it was in an effort to deal with how do you fairly compensate for that underlying property and balance that with a consumers' right that they have always had to make an impulse recording of that for their own use and the focus, obviously, at that point in time was very clearly on ensuring that it really was for their fair use; only to record something off the radio, not to put it on the Internet, not to distribute it, burn multiple copies. And so the payments that we make are in full compliance with all of the laws.

We pay all of the performance elements, a percentage of our revenue comes in and goes to the music industry and the songwriters for the right to perform it. We pay through the manufacturing partners and the Audio Home Recording Act for the right for our consumers to record it.

MR. STEARNS. Right.

MR. PARSONS. And then to the extent that this is used actually as an MP3 player, which it does serve that--

MR. STEARNS. Mr. Parsons, could I take that, after I record a song could I play that through my hi-fi?

MR. PARSONS. You could hook it up to any speaker system.

MR. STEARNS. I could play it in my car or I could play it in my--

MR. PARSONS. Yes.

MR. STEARNS. Okay.

MR. PARSONS. Or you can play it through the ear buds.

MR. STEARNS. Right.

MR. PARSONS. But the only way to get the music out is through this audio jack.

MR. STEARNS. Right. But when I play it through my hi-fi system, I can record it with a cassette. Can I record it with a cassette once it is going through my hi-fi set?

MR. PARSONS. Chairman, I think that virtually any device that can be heard can then be re-recorded and then abused inappropriately.

MR. STEARNS. You could burn it on a CD.

MR. PARSONS. We have just taken to ensure that there are no ways that any digital copies can be made, it cannot be abused in that way and that was the substance of the Act.

MR. STEARNS. We might do a second round here, but Mr. Halyburton, I just want to ask this question. You mentioned that the

NAB and the RIAA are in discussions about digital broadcast copy protection.

MR. HALYBURTON. Yes.

MR. STEARNS. Can you give us an indication of what is on the table? Are you looking at technical solutions? Is there still preservation of a consumer's right to make fair use of a digital copy of a digital broadcast? That is the key aspect.

MR. HALYBURTON. Yes, there is and the discussions have been going very well. They probably break down into two areas: usage rules, which, I think, are probably the more complicated part of it because that kind of drives the technology, and what kind of tech will come to play. But I think on the radio side, we are starting to understand the issues of the recording industry and understand their needs and concerns. They are learning about our business because there are some issues that I don't think they knew, necessarily, about how we ran radio, so I think we are finding some common ground and I think we are making good progress.

MR. STEARNS. Can you reveal what the technical solutions are?

MR. HALYBURTON. We are not there yet.

MR. STEARNS. You are not there.

MR. HALYBURTON. We have had four meetings; we have had one good technical meeting just a couple of weeks ago, but we are making good progress.

MR. STEARNS. Okay.

MR. HALYBURTON. It took a long time to do the television flag. I am hoping that we can make progress and get further along and more quickly than they did.

MR. STEARNS. My time is expired. I welcome the Ranking Member, Ms. Schakowsky.

MS. SCHAKOWSKY. I want to apologize first to you, Mr. Chairman, and then to our witnesses for my inability to hear all of your statements and also, I am not going to be able to stay any longer. I wanted to just tell you kind of where I am coming from, as you probably know. This is really the second half of hearings that began in March and I hope that this dialogue will continue and I appreciate your input. Not all of us are as technically advanced as others and so it is really helpful for you to inform our opinions.

And it is just a fact that in the age of the Internet that digital rights management is among the most contested issues in the legal world. Copyright principles and technological capabilities are constantly changing, are challenging each other and it is not always easy to strike the appropriate balance between protecting copyright holders and consumer rights. In a way, the battle against piracy has pitted content providers against consumers, who are not the true enemies, but

unfortunately, each time there is a new gadget for consumers to use to hear their favorite music or classic movie, or enjoy a book, piracy advances as new opportunities to steal and in the end, it is both the consumers and the artists who end up paying the cost.

Since we began these hearings, I have been talking with artist groups, content providers, consumer groups, and technology developers and I believe, I hope not naively, that we can work together to fight pirates and not each other, so I appreciate this hearing today to see how technology has developed under the DMCA and what challenges have arisen in the process. And as I said, I hope that we can constructively move forward. So I thank you, Mr. Chairman, and all of you.

MR. STEARNS. I thank you. Ms. Bono.

MS. BONO. Thank you, Mr. Chairman, and I thank all of you panelists for your time today. First of all, I guess, for Mr. Parsons; the past two months I have bought two new cars, one for my 18-year-old son and one for myself. Important to those vehicles, I didn't even open the hood to see what kind of engine they had, but I know they both have Bluetooth and satellite radio. And those are important selling points for that car. But if Nissan, in my son's case, said I am going to sell this Nissan with satellite capability but you don't have to pay for the satellite capability, is that fair business practice?

MR. PARSONS. I think you can certainly purchase the radio with it in order to subscribe to the service.

MS. BONO. But I found magically the code to the satellite and now I am not going to pay you for your service, but the selling point for that vehicle was that satellite radio, which is now stealing your signal, would you be in here screaming like a banshee if that were happening?

MR. PARSONS. Congresswoman, absolutely so. Stealing and piracy and not paying for this are, you know, something I think everyone on this committee and certainly, everyone on this panel are completely against.

MS. BONO. Well, I wouldn't say stealing is, but the problem we are wrestling here with your technology, and first of all, I love your product, but it is not stealing, but you are not referring it to distribution and I think the Chairman was referring to can I walk this around to multiple hi-fis, my car, my PC, how many platforms can I integrate this with? This is mobile now and you know, it is interesting. It is set to record my favorites and as I scroll through my play list, I am told, like the Rolling Stones and The Who and Led Zeppelin and blah, blah, blah, and I got the song called "Do, Do, Do, Do" and I had to wrack my brain and never heard of it, so you scroll through the Rolling Stones, gee, I like that song, too, great. Give it to me. Never heard of it, but now I actually just got a brand new song for free, distributed to me. So the difference to me, you

are saying this is a performance and I am saying it is just distribution, correct?

MR. PARSONS. I think that is the essence of it, yes.

MS. BONO. The essence of it. Well, I own this and again, this is when you said analog versus digital way back when, we loved that argument. But the truth is, and you said this is an MP3 file or the equivalent thereof, so it is not, I mean, it is a copy of a copy. This is like a copy of a master, which is not the same as saying gee, I have taken my little stereo and recording it analog onto tape. Isn't it entirely different than that?

MR. PARSONS. Congresswoman, actually it is not, for the following reason. I mean, clearly, we pay for each one of those issues. There may be debates upon whether the rate for each one of those functions is correct; whether our performance royalty should be more, which obviously, the recording industry feels it should be, and we will go through a negotiation and we will have an arbitration on that and determine it.

MS. BONO. And thank you, I--yes.

MR. PARSONS. And whether the amount that is paid by the manufacturer for that right to record is correct, Congressionally established and we pay under that for that right to record. But the essence that you talk about, the ability to take it from one place to another, you may have taken your audio cassette from one place to another and dropped it in your cassette player in multiple different locations, but that didn't change the fact that you recorded it once. What was the difference between analog and digital? The real difference between analog and digital and the fearful aspects of digital, everyone in this committee dealt with and effectively had to be addressed in the Audio Home Recording Act, was digital can make multiple copies and distribute them in perfect form. The first copy is really not much different.

MS. BONO. That is my point.

MR. PARSONS. And in essence--

MS. BONO. Let me reclaim my time here.

MR. PARSONS. Sure.

MS. BONO. My time is limited. That is my point to you; I am glad you are reiterating it maybe a little bit more articulately. It is a copy of a master, so the quality of that is entirely different. So I think we are talking about the same thing and I want to, you know, it is all semantics here and is it, you paid major league baseball and Oprah Winfrey tens of millions of dollars to promote your product, but you don't want to pay the songwriter the distribution right, correct? And so isn't it that you are building your business model based upon the back of the ordinary

songwriter and in my case, you know, it is personal for me and I hate to do that, because you never know when you end up in the press being terribly quoted, but my son, as I said, starts college in September and thank God for Sonny's royalties because I could not afford college if Sonny's royalties weren't paying for that in September. So it is personal for me and I do take it very, very seriously. But you know, I think if we need to define the difference between distribution and we need, in Congress, to say what you are doing is distributing the product, then we will work on that. I mean, is your model different from Sirius?

MR. PARSONS. No, Congresswoman, it is very similar and in fact, the difference that has been defined between distribution and performance is the reason that we are paying separate rates for each and we are the largest single payer. I mean, we clearly believe--

MS. BONO. But I am sorry. So you are paying a distribution to the songwriter?

MR. PARSONS. If it is done on a download basis, there is a distribution--

MS. BONO. Come on, come on, come on, come on. So you are saying this is not a download, I am saying it is. That is the difference here. We are back to the same game.

MR. PARSONS. Correct. And I am saying that the laws that were established that defined what a download was versus what a distribution--no, Congresswoman, the only thing that can get off of this device is the artist and song title.

MS. BONO. How is that?

MR. PARSONS. We have restricted it such that nothing else can come out.

MS. BONO. With what? With what?

MR. PARSONS. The encryption within--

MS. BONO. The DRM. Okay, so Congress right now is debating that it could be legal to circumvent that DRM, right?

MR. PARSONS. Correct, in a different bill, yes.

MS. BONO. Yes, in a different bill, which gets to the same point. So now we are hooking this, I don't know where that is going to go, but potentially, if you can circumvent the DRM technology in this, suddenly this is on the Internet. Your song that you gave me, I am now uploading to whatever file sharing network I choose to.

MR. PARSONS. Correct. And in that case, everyone at this table will be on the same side to try to prevent that from occurring because right now, when only the artist and song title comes out, it is so that can facilitate a legal download with Napster, our partner, so in fact that distribution is paid. The things that cannot be done out of this, it can only make one copy. It only makes this personal copy. It cannot move

beyond this device. It cannot be burned to CDs, it cannot be distributed over the Internet. All of the classic things that would be done, if in fact it was a distribution and we had paid underneath those amounts, so we pay the performance; we are the largest single payer of performance rights.

MS. BONO. Of performance. We got that point.

MR. PARSONS. And--

MS. BONO. And thank you, by the way. Thank you very, very much.

MR. PARSONS. And we would like other people paying this, too, if we are going to debate that particular piece of it. And then we also pay, once again, for the right to record under the amounts established by Congress, and then we facilitate the payment for a distribution by only allowing off of this device the artist and song title and then linking it up with Napster so that, in fact, you can get a legal download and pay the third way.

MS. BONO. I know I have overstayed my time. I thank you, Mr. Chairman, but Mr. Lawrence, you said the sky is not falling. The sky is bluer than ever for all of us in this room if one industry or one particular component of it doesn't make it on the back of another and that is my only point, but the sky is bluer than ever and I am encouraged by all these technologies and the content providers, everybody, but I don't like to see one, in your case, you profit on the backs of the songwriters. So with that, I will yield back, Mr. Chairman.

MR. STEARNS. I thank the gentlelady. Mr. Murphy.

MR. MURPHY. I am going to ask some more questions, so you can listen to me. Mr. Lawrence, you are sort of an expert here, Director of Digital Home and Content Policy of Intel Corporation, so we want to get to you here. I have got three questions for you. The first question is, please explain how some of the current DRM technologies used in the music business limit consumer use, particularly in music purchased on line from such services as Apple's iTunes?

MR. LAWRENCE. Sir, I am not an expert in iTunes other than the fact that I subscribe to it.

MR. MURPHY. Okay.

MR. LAWRENCE. But fundamentally, it is a deploying of a digital rights management technology and there is really a wide range of them. Microsoft builds one, Real Networks builds one. There are a number of them out there and they are fundamentally based on encryption at the source where the point of distribution, the content is encrypted and then it is delivered to a device and when the device receives it, in order to actually decrypt the content and use it, it has to have a key and to get that key, to build the device, come a variety of rules that decide, that dictate

how robust against hacking it has to be and also dictate the usage rules, you know, what is the device allowed to do.

And you know, the thing that is interesting about iTunes is actually it is a very flexible consumer usage model and they had to. Had to, maybe that is not the right word, but they adopted a model that consumers would find usable in their everyday lives. And so you can move it around to a couple of PCs and you can even make a backup copy because they met those consumer expectations. But they are all fundamentally based on the notion of distribution at the source where it is protected, meaning it is encrypted. And once it is encrypted, you know, there is a variety of just sort of tools that you can use to manage the content and decide where it goes, and that is why we try to build an environment where that content can move around in a protected manner and consumers can still enjoy it.

MR. MURPHY. In the discussion, the gentlelady from California was talking about the difference between distribution and downloading and you heard their conversation, what is your opinion? I am putting you on the spot a little bit on distribution and downloading. Would you say what he is doing is downloading or distributing?

MR. LAWRENCE. Well, you are putting me on the spot. I knew I was the odd man out.

MR. MURPHY. This is just an open discussion.

MR. LAWRENCE. Yes.

MR. MURPHY. I mean, you can give your reply here in a way that can be from a technical standpoint.

MR. LAWRENCE. I will tell you what--

MR. MURPHY. I think it is an important point she made.

MS. BONO. Just clarify real fast between distribution and performance.

MR. LAWRENCE. So without giving you a specific legal opinion.

MR. MURPHY. Yes.

MR. LAWRENCE. You know, I think that we do have the case where we have a statutory regime that was developed in an analog world and for analog business models, and now we have the digital world and digital business models and they don't oftentimes mesh together very well. And you know, as we talk about how do we address and fix some of these problems, I think that is a real challenge, but there seems to be, or there is often a tendency to want to point to the makers of devices, IT devices or CD devices, and ask them, through a government mandate or something to try and fix a problem that isn't really fixable there. It needs to be fixed at a more fundamental place where the business relationship between the rights holders and the broadcasters, that needs to be ironed out more clearly. So without giving you the legal answer, I don't think it

is a technical problem so much as it is a business problem and an old regime.

MR. MURPHY. I accept that. Yes?

MR. OSTROFF. Can I make a comment on the DRM point?

MR. MURPHY. Sure.

MR. OSTROFF. I think DRMs have gotten a bad rap, an unfair rap because if you look at these devices here, if you look at the DVD, none of those would be possible without DRMs. It is probably one of the areas, few areas at this hearing where Mr. Parsons and I will disagree. Without DRMs, his XM satellite service can be hacked.

MR. MURPHY. Do you two disagree or agree?

MR. PARSONS. No, we agree.

MR. OSTROFF. You know, when it comes to our intellectual property, our copyrights, which we only have for a limited time, unlike other property, we have to be able to market them and we want to be able to make our content, our music, what Mr. Regan produces, what our artists produce, available to as many people as possible in as many ways. And it is just that we want to get compensated for them and DRMs is what makes that available. That is what allows iTunes; that is what allows the subscription services. And I just want that point to be clear here today.

MR. MURPHY. Good. Mr. Lawrence, again, what are the limits and the capabilities of DRM technologies? What limits do you believe may be imposed on consumers by these technologies? And this is sort of a tradeoff from what he is talking about.

MR. LAWRENCE. Yes, that is actually a really open-ended question, as well, because you know, as a technology developer, there is almost an unlimited range of things that you can do. But when you build a digital rights management technology, you have to take into a number of important considerations, such as the cost of implementation and what is the actual goal that we are trying to solve and so I think that from a technical perspective, you can do a lot of stuff, but it may not be practical to deploy a highly complicated, overly sophisticated sort of military-grade style security system. The real goal is to keep honest people sort of honest. We say that a lot, I know, but also to support a reasonable infrastructure that will support the digital business model.

And so when you go to build the technology itself, you actually take--it is one place where you actually balance a whole host of interests, you know what the goal is. How do we reasonably keep it secure; how do we enable consumers, you have all these policy things that go in, and what is the cost of building and implementing. Because one thing that is interesting is consumers really don't pay extra for content protection and it needs to be something that is seamless and friendly to them because if

they reject it, if it doesn't work for them, then they find alternatives. So you can do a lot of stuff, but in practice what works is a different matter.

MR. PARSONS. Mr. Chairman, I will also note on that, that the physical DRM, the inability to get something off, is very important. Really, it is the object to make that which is legal very easy, very convenient and that which is illegal, make it very complex and very difficult to break, and that is the best shot that a developer, if you are looking at creating a new device, what you are trying to do is to allow the fair use elements to be done easily, seamlessly, but ensure that the illegal activities or things that make serial copies are very difficult to accomplish.

MR. STEARNS. You used, Mr. Lawrence, in your statement you said that "reasonably protected digital environment" is essential for the future of this business. I guess the question is, can you define more quantitatively what that means?

MR. LAWRENCE. In terms of what is reasonable?

MR. STEARNS. Yes.

MR. LAWRENCE. Yes, I think that goes back to that interesting balancing of interest tests that we talked about. You know, it is ultimately a cost-benefit analysis and content protection because we could build, for example, military grade security that would be astronomical in the cost perspective to implement, and that wouldn't advance any of these business models. The other piece is that law enforcement is really an important part of dealing with piracy. The things we have learned in the DRM world is that the determined hacker, the determined pirate, he will defeat whatever you build and so this is balancing, there is an important role for law enforcement in content protection.

It is the only thing that is effective against pirates and then is sort of a reasonable degree of protection which is effective to encourage consumers to behave in a reasonable way. And so you have to balance those things when you build your technology and deploy it. And you know, to the rights holders community over the years, they have really come to appreciate the fact that, and look at the cost factor. DVDs are really inexpensive now, you know, and if they were still $600 apiece, then there is not as big a market and so there really are a lot of cost benefits that go in.

MR. STEARNS. You know, we had a hearing on the Boucher bill that was referred to here earlier, and Jack Valenti, when he was still the president of the Motion Picture Association, was adamant that he did not want one copy made of a DVD, period. And then right next to him was a man who was making lots of copies of CDs and recordings and he probably, judging from his testimony, shouldn't have been doing as

much as he did, because he was making a whole library and providing for his friends, and so as he kept talking, we started to realize he probably was going much too far. But when you heard Jack Valenti be so strict that we could not make, a family could not make one copy of a DVD, this goes to the understanding of what is reasonably a protected digital environment. Under that scenario, what is your opinion, now it is just your opinion; do you think a family should be able to make a copy of a DVD, one copy for their own personal use?

MR. LAWRENCE. So that is a great loaded question.

MR. STEARNS. It is a loaded question.

MR. LAWRENCE. Yes. No, that is really good one. So what I think, and what they are working at at the DVDCCA, they are considering a variety of ways to enable recording of DVDs because whether it is appropriate as a legal matter or not, almost doesn't matter. The reality is consumers want to do it and if they can do it in a way that rights holders are still compensated, it really ought to be enabled and all of the content protection efforts that we have been involved in, you know, we have tried to stay away from the argument of what is legally fair use or not fair use. Because in practice, when we build this protected environment and they pump this high value entertainment content in it, ultimately all of our customers are those consumers, and if they can do a variety of cool things that go way beyond what the law would describe as fair use, then that is going to be the most successful and compelling business model, we believe.

MR. STEARNS. Okay. I am going to close by unanimous consent I am going to put into the record Mike Ferguson's statement. Mr. Ferguson has the Audio Broadcast Flag Licensing Act of 2006, it is H.R. 4861. He has done a wonderful job on this bill. He regrets he could not be here, but I want to give high praise to his H.R. 4861 and to put his opening statement into the record and with that, Mrs. Blackburn.

[The statement follows:]

PREPARED STATEMENT OF THE HON. MIKE FERGUSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. Chairman, thank you for holding this hearing. This subcommittee can serve an important role in this area, shining a light on exciting new technologies, examining how to effectively protect digital content, and ultimately, ensuring that consumers get access to new products in a quick, reliable – and responsible – fashion.

Today's hearing will focus on digital audio devices, content protection on those devices, and the effect on the American consumer. This is an area of keen interest to me, as I have introduced legislation that is designed to facilitate deployment of digital radio services, ensure consumer choice and protect the property rights of content creators.

The Audio Broadcast Flag Licensing Act of 2006 is designed to ensure that intellectual property rights are respected and that those who create content are duly compensated, with the end goal being more consumer choice on the marketplace. Most

importantly, my bill makes sure that the marketplace, not Congress, is where these negotiations happen. It is not the role of Congress to pick winners and losers but to ensure that all parties are competing on a level playing field.

The legislation first requires digital radio services using government spectrum to acquire the same licenses from music creators that download and subscription digital music services currently must obtain to provide the same services. Some have claimed that these new services fall under the Audio Home Recording Act (AHRA). The AHRA was passed in 1992 at a time when even the Internet was mostly unknown to legislators and consumers.

The fact remains that Congress could not have foreseen that some would choose to turn their performance license into a distribution licenses, without paying for the privilege. I find it hard to believe that Congress, while deliberating the AHRA, would agree that creators should be compensated $2 million a *year* under the AHRA when they are currently making almost $2 million a *day* from legal download services.

Additionally, services such as Rhapsody and Yahoo! have both radio services and distribution services currently in the marketplace. They negotiated their licenses in the marketplace and did not claim that they would fall under the AHRA. Why is it that others, wanting to provide that same service, have decided to claim they are covered under AHRA?

The bill also provides for private market negotiations of an "audio broadcast flag" that will ensure that digital radio broadcasts are not indiscriminately disseminated over the internet.

While the bill is clear in its intent to protect content, it also ensures that American consumers remain unaffected. Legacy devices already in the stream of commerce would remain unaffected, and the bill specifically states that the HD Radio rollout remain unimpeded.

Of course, the preference is to see these issues resolved between the respective parties in the private sector. And I hope they can be resolved – in quick fashion. But the fact remains that digital audio products are on the market today that allow authorized downloading and carry a risk of illegal uploading to the World Wide Web.

This is an issue that undoubtedly deserves Congress' attention, but may also need Congress' *direction*. The Audio Broadcast Flag Licensing Act is not only for the good of content creators, more importantly its for the good of the consumer – our constituents. To ensure that these exciting products continue to flow to consumers, intellectual property needs be protected. There must be a balance.

MRS. BLACKBURN. Thank you, Mr. Chairman. I appreciate that and I appreciate you all bearing with us as we have another hearing going on downstairs and we have had votes in the middle of this, but we do appreciate the work that you do and that you are here to talk with us. I will have to tell you it is so interesting to me to listen to the conversations taking place, having so many creators in my district. And I love to tell people about my district, you know, because we have creators, songwriters, producers, original thought thinkers and it is a great community and a great place to be creative, and I think it is so important that we realize what that creativity brings to this country as an economic development issue, as a trade issue, entertainment being such an enormous, enormous part of the exports that we have.

And some of you that are sitting there right now rolling your eyes and acting so bored with my little dialogue, I would just like to say we

are here to protect what you create, too. And one of the ways that we do that is to be certain that people understand that we should respect copyright law in this country, so thank you all for coming and sitting down with us because working this out is something that we want to do. You know, Mr. Lawrence, listening to you talk, I hope that you are paying attention and I am sure that you are and I am sure that the good folks that work with you are paying attention to Section 107 of the Copyright Act because that defines the difference in something that is there for personal use and something that is there for commercialization.

And also, it is where we get into talking a little bit about what is fair use and what is free use, or as one of my songwriter friends says, fairly useful way to steal my music. And that is where we have to draw this line. We have to send a message to all the creators in this country and to our trading partners that we are going to respect what we create in this country. That we recognize it is private property, and that we hold it to be something uniquely wonderful and uniquely American.

Now, I do have a question I want to ask you. The Chairman just mentioned the broadcast flag bill that Mr. Ferguson has worked on and I do wish that he was able to be with us today. Ms. Bono and I have both co-sponsored that piece of legislation and we were talking a little as we were going down to vote about the compensation methods and the business models and how things are structured. And so Mr. Parsons and Mr. Halyburton, let me come to you with my question on this. It seems, as we look at the broadcast flag issue and having that audio flag in there, and you have talked a little bit about the HD and the satellite radio work, that we want to be sure it doesn't translate into a download service.

You want to be sure that you protect your business model that you have invested hundreds of millions of dollars to put into place and we respect that because we like for companies to be successful. But it seems to me that the audio flag would be a way for you to help protect that content and still, at the same time, ensure the profitability of your business. Do you want to comment on that?

MR. PARSONS. I think, actually, Mr. Halyburton began that conversation with some prior descriptions of it. They are in the midst of a negotiation and discussion about exactly how that is to be implemented and those negotiations and discussions are going on to look at how the technology can do it. Essentially, one element that I think we all agree on, whether it is an audio flag purpose, whether audio flag is the way that you achieve it versus other ways that you achieve it, there has to be some way to ensure that digital content that comes over a delivery mechanism cannot, then, subsequently be abused for more than personal use.

I mean, we are big defenders of fair use or personal use and we believe we are correctly doing it, but we are also just as passionately

defenders that it not go beyond that. That hurts us, that hurts the recording artists, that hurts everyone to have it beyond that point. So from our standpoint, we essentially put a physical restriction on it. You just simply cannot get off of the device to ever distribute it, so we don't see a need in that system, since we have a closed protected system.

MRS. BLACKBURN. So you would consider it to be redundant?

MR. PARSONS. We would consider it to be redundant to our system. It may not be to the HD radio system, because theirs is going to be a more open system where they may not be able to restrict it without it, but I will turn that to Mr. Halyburton.

MR. HALYBURTON. Yes, I think--

MRS. BLACKBURN. I think we are almost out of time and I have got one other quick question.

MR. HALYBURTON. Okay.

MRS. BLACKBURN. Go ahead.

MR. HALYBURTON. Okay. Yes, I think that ours is a kind of unique issue that the broadcasters are working on. We have had very good meetings with the recording industry. We are understanding their issues and they are understanding our operations and I think the meetings have gone very well in the direction of finding a way to protect that content.

MRS. BLACKBURN. Okay, anybody else want to issue anything there? I have got one other question. Mr. Parsons, you, in the beginning, mentioned that you were paying hundreds of millions of dollars to creators and performers and that you were paying twice and you spoke in the aggregate. Would you like to, at this point, break that down so you are talking about what you are paying the performer, what you are paying the songwriter per play? Would you like to do that?

MR. PARSONS. Congresswoman, it actually doesn't end up being per play, it ends up being as a portion of all of our revenue.

MRS. BLACKBURN. Okay.

MR. PARSONS. So whatever amount of revenue that we make--

MRS. BLACKBURN. For the record, would you like to explain that so that it is clear in the record?

MR. PARSONS. Yes. Okay, clear in the record, the agreements that we have in place right now, we have operated under five years of the agreement. We are currently renegotiating those rates for the coming five years on a performance basis. Those amounts come to tens of millions of dollars now and with the growth of our industry under the current existing rates, will be hundreds of millions of dollars over the coming five years. It roughly equates to 6 to 7 percent off the top of all of our revenue and then by the statutory requirements, that is broken down by a percent that goes directly to the recording artist and distributed; a percent that goes to the publishers; a percent that goes to

the composers; each of those get a designated portion under the compulsory license.

The second area of payment that we referred to is a different distribution.

MRS. BLACKBURN. Okay, now hold on just a second there. You said they are going to get 6 to 7 percent of your total revenues and then that is going to be split between your performers and your songwriters and your publishers.

MR. PARSONS. Correct. We have different agreements with BMI, ASCAP, CSAC for those purposes. We have different agreements. We actually have a breakdown of what percentage each group gets out of that.

MRS. BLACKBURN. That is great. For clarification for the record, as we go ahead looking at the issue, just reading the testimony, I had a feeling that you might want to clarify that for the record as we move forward. Mr. Ostroff?

MR. OSTROFF. Yes, if I could make a point on that. What Mr. Parsons is referring to as the second payment is payments that are made under the AHRA by the device manufacturers. The music industry, recordings and music publishers, songwriters combined this year, we expect to make $2 million from all of the AHRA payments. In contrast to that, for downloads today, we are going to sell two million copies of digital downloads. Every day we are selling two million copies. On an annual basis, the comparison is two million versus close to a billion, so what the XM device, which is a distribution device, is paying less than peanuts for that ability.

MR. PARSONS. May I note on that? However, that is because there are very few devices that have been manufactured and if this is half as popular as an iPod, it is tens of millions per year.

MRS. BLACKBURN. Mr. Parsons, I am now three minutes and 52 seconds over.

MR. PARSONS. Yes, ma'am.

MRS. BLACKBURN. And I need to yield back to the Chairman and then he may want to continue with the line of questioning, but thank you all so very much. We want to find a resolution to this issue and we appreciate your work today. Mr. Chairman, thank you for your generosity with the time.

MR. STEARNS. Oh, sure. Okay, Mr. Murphy, I am sorry I didn't get you earlier. Go ahead.

MR. MURPHY. You know, I have written a few songs in my time, I play guitar and I would be glad to audition for any of you. My concern is, let me make sure I understand this. So let us say my song is a hit, I am backed up by Marsha Blackburn and her Tennessee Gitpickers or

something like that. We have this great song. I wrote it, she has a back-up band, she sings harmony. If I sell, we will be modest, a million CDs, how much money do I get from that?

MR. REGAN. As I mentioned, if you--

MR. MURPHY. Give me a number. Make me excited here.

MR. REGAN. Well, you won't get excited, I am sorry to report. But the mechanical rate at this point is, I believe, 9.1, 9.2 cents. As I said earlier, if you co-write the song, which almost all Nashville songs are co-written, and we have a publisher, you will reap approximately $23,000 for that million selling CD.

MR. MURPHY. And what if this gets played on XM Satellite Radio, how much do I get?

MR. PARSONS. I wouldn't be able to tell you what the formula is for that.

MR. MURPHY. If a million people download it.

MR. PARSONS. Well, they don't download it, but it is how often is it played.

MR. MURPHY. Wait a minute.

MR. PARSONS. How we pay under this is--

MR. MURPHY. But they can record it; they can keep it, right?

MR. PARSONS. Correct.

MR. MURPHY. Okay, so they kept the song now, so it is on their personal file. They got it from XM. How much money--

MR. PARSONS. It would depend on how frequently they were played.

MR. MURPHY. Every time they play it on their own personal--I am not talking about every time you play it.

MR. PARSONS. No.

MR. MURPHY. If you play it once and a million people say I like that, I have got to get this song and they keep it now, how much money do I get?

MR. PARSONS. It is a different percent that gets paid--

MR. MURPHY. Give me a ballpark figure. If you don't know, you shouldn't be in this business. Give me an idea. How much money do I get? Don't avoid the question. Give me an idea. I want to know. This is not making me happy and--

MR. PARSONS. It will purely depend on how often you were played.

MR. MURPHY. Or her, either.

MR. PARSONS. It is just like this.

MR. MURPHY. Do I get a million dollars, do I get 23 cents, $20,000? What do I get?

MR. PARSONS. It depends on how often you were played.

MR. MURPHY. Geez, Mr. Chairman, this is not good. We are not getting cooperation from the witness. Come on. If a million people decide to download it, would that make any difference in how much I get? Yes or no.

MR. PARSONS. If a million bought it on Napster through our flagging of it, it would be one fee.

MR. MURPHY. Okay. How much?

MR. PARSONS. If a million plays were done on our service on an ongoing basis, it would be a different fee.

MR. MURPHY. Give me an idea.

MR. PARSONS. Well, it depends on how popular and how many you make.

MR. MURPHY. I just told you. A million people heard it, they said I want to keep that song.

MR. PARSONS. Okay, we will have to break it down. Over the next five years we are paying hundreds of millions--

MR. MURPHY. We will just assume--Mr. Chairman, I would love it if you could ask him to write a response to this question because of my time.

MR. STEARNS. Will the gentleman yield just for a second? As I understand it though, if people, a million people download that onto your radio, you don't pay anything, isn't that true? If a million people are recording it over the air? If they have your radio and they say by golly, the announcer says we are coming up with "Don't Be Cruel," and a million people download that into their radio, you don't pay anything and those people can listen to that. You said in your opening statement they can listen to "Don't Be Cruel" again and again and again.

MR. PARSONS. Mr. Chairman, that is--no. We cannot, by the way. There are restrictions. We cannot say that this is what is coming up.

MS. BONO. Actually, if I might, you don't have to say it. I just told my gizmo for the next 30 days find anything by Elvis Presley and download it for me while I am asleep, so nobody needs to announce it.

MR. STEARNS. No, I am just saying, I mean, if you have got, if you have worked out that you don't pay anything, just tell them. I mean, it is no big deal in the sense that he is trying to make a point and I am trying to help you answer the question, which I think is you don't pay anything.

MR. MURPHY. Is the answer zero?

MR. PARSONS. The answer for each recording of this would be zero.

MR. MURPHY. Thank you very much. Boy, it took me a long time. I hope you will give me a little bit more time here. Okay, and here is my concern. I talk to a lot of high school and college classes, students, and I use, as an example of, does Congress have a role in their life because a lot of them think there is really nothing I am interested in here. You talk

about highways and roads and deficits, things like that. But I ask them, I bring up questions about the Constitution and the issues involved in the Constitution from the onset about copyright law and patent laws. And I ask them do they think it should be illegal for them to take music and download it without giving any compensation to the songwriter, the performer, the recording company, the gaffer, the janitor, all those people involved.

And they say things to me like well, I don't really want to buy CDs because nine out of ten songs, insert appropriate teenage slang here, aren't very good or the musicians already make so much money; it doesn't matter or it is available, so it must be okay; or I don't have the money to get it all, so I just load it on or also, if I put it on my iPod and I break my iPod, I have lost everything, so I make multiple copies and my friends all share them. What should I tell teenagers and college students today about the Constitution and ethics? I hear these things so often. What should I tell them? Gentlemen.

MR. OSTROFF. Well, I think that you are asking the right questions.

MR. MURPHY. Because that is your audience.

MR. OSTROFF. But not getting the right answers. I think that there has been a shift in recent years because of the things that we and others have done. For one simple example, I buy a CD, there is only one good song. I can go to iTunes and buy that one good song for 99 cents and the different ways that we have now made music available, I think satisfy consumers', kids' needs and you know, it is still very, very difficult to compete with free.

MR. MURPHY. So let us talk about the ethics of this.

MR. OSTROFF. The ethics, I think, are pretty clear. Theft is theft and people put their hard work, their blood, their sweat, their tears--Mr. Regan can speak of that, you know, much more than me; I am just a mere businessman--to create these wonderful songs and wonderful recordings. And to just take it without paying the people who did the work is just wrong.

MR. PARSONS. And Congressman, I agree 100 percent with that. We have fought that and that is why we do pay. We are the largest single payer of all these performance--

MR. MURPHY. We have already established you pay them zero, so let us move on. Anybody else?

MR. REGAN. Well, I would just say if all we have to make is a moral argument, it is extremely difficult. My own son, I have caught him with burned CDs. He doesn't do it in my house, but his very Nikes are dependent upon the proceeds of intellectual property and I try not to beat him, but sometimes I can't stop myself. If all we have is the moral

argument, it is extremely difficult. That is why we have to have Congress help us out to protect this stuff and--

MR. MURPHY. Mr. Lawrence, you were going to comment?

MR. LAWRENCE. Yes, I can't let this pass. We completely agree that, you know, in a digital age and a digital society where the assets are different than they have been in the past, the ethics and honest behavior is a critical part of a successful digital marketplace, it just is. And it has to become a fundamental piece of our society and it is incumbent on us, as parents who have children and parents who, you know, just no children and even amongst ourselves, the education piece is just paramount and never has ethical behavior been more important and it is a fundamental American value and we really, really do need to stress and drive that home.

MR. MURPHY. Thank you. I know I am over time. One other thing I would just like to ask for, for the sake of parents of young children. I no longer have a young child, but one of the things that is valuable for parents is, you know, for those DVDs they have already played 6,000 times, many times parents would prefer if I can keep the master copy hidden away and give my kids a copy so when it gets covered with peanut butter and jelly and milk and everything else there, we can always make a new one. Is that something the industry would find a way to permit?

MR. LAWRENCE. Yes. So you know, with respect to the content, industry has recognized that people want the ability to do managed copies and that they want the ability to burn backups and so when the next generation optical media formats, which are high def DVD and blue rate disc, they are going to come with those basic capabilities, you know, that if you want to do a backup, you can do it. If you want to move it to a portable device, those things will be enabled. When we did the DVD, you know, there was some doubt that even consumers would accept content protection at all, but they clearly do. The consumers' expectations or their desire to make backups and such like that has changed over time and so there is actually an effort in the DVDCCA to try and address that, and I think that the content community, to their credit, have said this is what our consumers want and demand and we need to find a way to make a proposition that is acceptable to all parties to make it happen.

MR. MURPHY. Given all that is taking place, I hope we will be able to draft legislation that keeps up with the technology because by the time we type this up, everything will change, so but thank you very much for your testimony. Thank you, Mr. Chairman.

MR. STEARNS. I thank the gentleman. The gentlelady, Ms. Bono.

MS. BONO. Thank you, Mr. Chairman. Okay, if I take my iPod and I hire Mr. Lawrence because he is clearly very brilliant and I say put some antenna on my iPod and let us go around southern California and start streaming music via wi-fi or EDVO or whatever the terrestrial Internet is going to be, doing wirelessly, how is that different if my iPod could suddenly start doing that, why would I need this if I could do that with my iPod?

MR. PARSONS. Congresswoman, there are different rates that are established for each one. The wi-fi may, in fact, not be paying a performance, it might be paying on a download basis. Many of these devices don't pay under the Audio Home Recording Act. They don't pay a performance, but do pay on a download. The device that was shown here, which is actually a video iPod, if you wanted to watch Desperate Housewives for free, you watch it over the air for free. If you want to put it on your TiVo and record it to watch it later, you do that, as well, for free. If you didn't remember to record it, like you would have on this, then you have to download it from iTunes and it costs you $2. Each one of those--

MS. BONO. It would have been like I would have had to remember on this?

MR. PARSONS. Pardon?

MS. BONO. Just 17 songs have been downloaded on here. I haven't done a thing.

MR. PARSONS. Right, and if you had set up your TiVo to record those, you might have gotten it or you might not have. Each one of those, the consumer is willing to pay and willing to experience a different environment--

MS. BONO. Then why aren't you? Why aren't you? I mean, again, I love your product, but why aren't you? You know, he--God, he was good for a psychologist. He can put you in your place. I hate to be on your couch. But he got you to say it. I mean, why don't you--and I have a feeling you will. I think at the end of the day you are going to hear footsteps coming from Congress that are going to hopefully let you know that we think you ought to be paying, that this is a distribution model, not a performance model.

MR. PARSONS. Well, Congresswoman, you really do hit the exact issue, which is it a distribution or is it a fair use recording over the air? Because that makes all the difference.

MS. BONO. Well, we seem to think, as consumers, it is a distribution.

MR. PARSONS. Correct. You are saying it is a distribution and I am saying that in Section 114 of the Audio Home Recording Act, Congress

very carefully said this is a distribution; this is fair use over the air, and established exactly what those rules were.

MS. BONO. I am sorry. What year was that written?

MR. PARSONS. 1992. But at that point in time--and it was written for a digital environment. As a matter of fact, it was--

MS. BONO. Mr. Lawrence, do you think in 1992--you were probably at MIT or somewhere, Cal Tech or something.

MR. LAWRENCE. I wish.

MS. BONO. But did you anticipate in 1992 this is where we would be? I mean, in 1992, I mean, to go to something that is completely antiquated. I mean, literally, as I said, my son and I bought cars that are--I will let you get to it. I am on a roll. But I bought a car that is basically a cell phone and satellite radio; so did my son. I mean, mine is a BMW, his is a Nissan, but that is where we are today, so I am sorry, please.

MR. LAWRENCE. You know, when you look back at some of the efforts that have been made through laws to address innovations that are happening in technology and business models, when I go back to 1992, for me it shows that it is just oftentimes not effective because we don't see where it is going. And so if we can level the playing field so that the problem can be solved in the business world where it really ought to be solved and let the markets address them, that is important. It goes back to my point earlier about we have got one regulatory regime and a new world and there has been a lot of discussion about efforts to try and address the problem.

And I want to reiterate again that, you know, our industry is not really a part of any of those discussions and there is a lot of talk about technical solutions and there is a lot of talk about ways to do it. But I fear that again we are going to go back and try and impose a fix on technology providers or innovators; it is not going to fix the problem. In fact, if you go back and look at some of the devices that were regulated, I mean, it effectively just made them obsolete and everybody moved to something else. We need to fundamentally address the problem and not look for a band-aid solution.

MS. BONO. But it is so, I mean, clearly from the discussions about the illegal downloading, my son, you know, my children previously doing all sorts of PDP things, at the end of the day it is the songwriters, the intellectual property rights holder who always gets hurt. But it is always, and this is the case here, that they know that they can squeeze out this guy, the intellectual property rights holder, because at the end of the day this is the hardest argument to make, that that guy who wrote the song, sitting in Nashville or sitting in Sunset Boulevard in Hollywood, has a right to what he owns. That is the hardest argument to make and the easiest guy to squeeze out of the equation, wouldn't you say?

MR. LAWRENCE. That may be true under the current regulatory statutory regime and that is why I think that is a problem. I can't disagree with your point. It is where do you try and fix it. I just think that the history of sort of government mandates on technology providers, you know, like device makers, to try and fix a lot of these problems, I just don't think it has been effective and going forward, I don't think it is effective but, you know, sometimes if there is some sort of a mandate that by consensus all the people agree is appropriate, like the broadcast flag where there was a process that people got together.

We had a material hand in participating. In fact, the guy who worked for me drafted a big chunk of that regulation. There was a consensus, there was an agreement that a particular technical approach was narrowly tailored to solve a particular technical problem, a particular problem and also, that the rules around it were reasonable and were agreed to. And in fact, that it was the right legislative approach, if you will, or the right regulatory approach, to solve a problem. And that a regulatory approach was maybe the right way to do it. And the thing that is really concerning for me is there seems to be this, a group that is going down that path rapidly and we are standing by watching and none of those other elements that went into the broadcast flag, for example, seem to be--I mean, there is a variety of proposals out there and some are closer than others, but that is a real concern, that none of that sort of consensus process--we have consensus with some of the affected parties, but the rest of us.

MS. BONO. Well, our doors are always open, all of us, I know and we will welcome your input and guidance at any point in time. But I just have one last question because again, the Chairman has indulged me with too much time, for any of the panelists and I don't know the answer, but with all of this that we are talking about and the international world, the global marketplace, are we giving ourselves an advantage or a disadvantage? Are we strengthening or weakening our hands here? And just food for thought, are we--because I know the laws are different in Europe and we face that battle, as well, but are we strengthening or weakening our hands with distribution versus--and on that note, if I have this for 30 days and I download every song that I like, can I just discontinue my service with you without a penalty?

MR. PARSONS. No, Congresswoman, you cannot and as long as you continue paying us, then a significant portion of our revenue goes to pay for the--

MS. BONO. Performance royalties, but--

MR. PARSONS. And actually, one of the things that worked well out of that, by the way, for the small guy was the compulsory license because what actually happens on there, I mean, we constantly get

positive things from smaller artists. The record labels do tend to take care of the big artists, but under the compulsory license, because we play a much wider variety, what actually happens is the percent of our revenue that flows in to compensate songwriters or artists or the musicians ends up tending to go to the much smaller ones. There are artists now getting checks for the very first time in their history that never really got them or underlying performers that got them for that reason.

MS. BONO. But I can cancel my subscription after my device has all of my favorite songs on it without a penalty?

MR. PARSONS. No, Congresswoman, you cannot. You cannot access that.

MS. BONO. I see.

MR. PARSONS. The only time you can access it is if you continue to pay your subscription and therefore continue to pay the recording--

MS. BONO. From my pay list?

MR. PARSONS. Correct.

MR. LAWRENCE. Could I comment just briefly from a technical perspective? You know, I think that if we would start by using the technologies that are available to us and encrypt our content at the source, you know, protect it, really protect it instead of just distribute it out there in the clear, that it would go a long way to addressing a lot of these issues.

MS. BONO. So you are against H.R. 1201 which makes it legal to-- right.

MR. LAWRENCE. Yes, you know, we have built a lot of technologies and we understand what consumers want to do, but the fundamental problem is you build a lock and if you tell people they can distribute keys, then what is the point in building a lock and that is just-- it is one of these, you know, there are probably some exceptions that are appropriate, but they have got to be really narrowly tailored and just as a general matter, I am afraid it is the exceptions that swallow the rule, I mean, just in practice, when I lock it.

MS. BONO. In my international--

MR. OSTROFF. It is very important to this country. Intellectual property, movies, music, other creative works are one of the country's major exports. If we don't set the right standards, and the rest of the world follows us in many respects, then our creative works won't be protected anywhere in the world.

MS. BONO. Thank you. Thank you very much, Mr. Chairman.

MR. STEARNS. I thank you and I think we are concluded with our hearing today. Mr. Regan, I am just curious. What was the name of the song that after you finally hit and got paid for that succeeded?

MR. REGAN. Reba McIntire's "Til Love Comes Again."

MR. STEARNS. Oh, okay.

MR. REGAN. I mentioned that I made a certain amount of money. The monies have gone up significantly.

MR. STEARNS. It was $23,000 I think you said.

MR. REGAN. Well, that was about 35 for a top five single back in 1985. It has gone up significantly.

MR. STEARNS. What would it be today?

MR. REGAN. Well, top five radio hit co-written, maybe performance is $150,000.

MR. STEARNS. Okay.

MR. REGAN. Good year. By the way--I may make it all in one year.

MR. STEARNS. Zero the next.

MR. REGAN. Eaten alive tax-wise.

MR. STEARNS. Well, let me just conclude and thank the witnesses for their patience while we voted. We are going to vote again here and I am going to conclude. I think there has been enough interest on this that we might have another hearing or at least a study and so we appreciate your time and effort and the committee is adjourned.

[Whereupon, at 4:20 p.m., the subcommittee was adjourned.]

RESPONSE FOR THE RECORD BY GARY PARSONS, CHAIRMAN OF THE BOARD, XM SATELLITE RADIO

**Questions from the Honorable Joseph R. Pitts**

***1. For many years, we have made the assumption that songs played on traditional radio promote music sales. How would you compare the promotion value of your satellite service to traditional radio?***

Response:

On behalf of XM Satellite Radio, I thank Congressman Pitts for posing a question that illustrates one of the many beneficial aspects of XM Radio for recording artists and recording labels. Airplay always has been a primary promotional vehicle for the sale of recorded music, and XM is no exception. Our research shows that XM promotes sales of recorded music, and that our promotional impact is deeper in key respects than traditional radio's.

Today's typical FM radio dial presents the listener with a choice among a small number of music styles and formats, and a limited playlist of artists and songs. Consequently, traditional radio stations do an admirable job of promoting sales of a few "hit" records by today's recording stars.

By contrast, XM features 69 channels of commercial-free music characterized according to genres and themes: by decade from the 1940's to 1990's; channels of today's hits; country and folk channels; Christian music channels; classic and alternative rock; jazz and American popular song; blues; classical; hip-hop and soul; dance channels; Latin and world music; and many more. Even channels dedicated to 40's Big Band music, Bluegrass or Southern Gospel music, clearly play music that would receive little airplay without satellite radio. Several XM channels are devoted to the discovery of new artists, such the "Hear Music" channel. XM has a library of more than 2.2 million recordings, and we estimate that during a given month XM channels feature more than 160,000 different sound recordings.

In addition, XM Radio subscribers can hear special music programming developed by XM solely for our listeners. Programs hosted by artists as diverse as Bob Dylan, Quincy Jones, Wynton Marsalis, Tom Petty and Ludacris, take listeners inside the musical minds of innovative and enduring artists for their unique perspective on American music. XM presents concerts recorded live in other locations or at the XM performance space in our studios here in Washington, D.C., featuring stars of the 1960's through the present day. Many of XM's announcers get behind the music to talk about the artists, and program the music in ways that connect the songs by style or by theme.

As a result, XM subscribers are exposed to a far more diverse range of artists, genres and songs than traditional radio listeners get to hear. They can see on their radios the names of the artists and the songs we play, and so can more easily become familiar with new artists and new styles of music. Our research indicates that XM subscribers enjoy XM more than traditional radio because they are able to enjoy and learn about music they cannot hear elsewhere; and, not surprisingly, that they tend to purchase more recorded music and concert tickets than the average consumer.

Artists featured on XM tell us that the airplay and artist specials they receive on XM have benefited their careers, and we hear this from artists as diverse as those who had their "hit singles" decades ago as well as "up and coming" artists just starting their careers and looking for their first big break.

All in all, XM believes that for those consumers who listen to "hit" radio channels on XM instead of traditional terrestrial radio, XM, just like FM radio, is a great vehicle for of promoting sales of those hits. But moreover, for the vast majority of recording

artists who have extraordinary musical talent but don't top today's limited playlist charts, we believe that XM is a far more effective promotional medium than traditional radio is or ever has been.

RESPONSE FOR THE RECORD BY MICHAEL OSTROFF, GENERAL COUNSEL AND EXECUTIVE VICE PRESIDENT, BUSINESS AND LEGAL AFFAIRS, UNIVERSAL MUSIC GROUP

RESPONSE TO QUESTION OF THE HONORABLE JOSEPH R. PITTS

**QUESTION: In his testimony, Mr. Parsons points out that consumers have been making "mix tapes" of their favorite songs for decades. I was struck by Mr. Parsons' argument that making something simpler or more convenient doesn't make it illegal. Why does the recording industry object to something consumers have been doing for decades?**

**ANSWER:** Our objection to the new portable satellite radio/mp3 players offered by XM has nothing to do with customary or traditional recording off the radio by listeners. Specifically, we object to XM's allowing subscribers to record up to 50 hours of XM programming, see a list of tracks that have been recorded (by artist, song title or genre), cherry pick the specific tracks they want to keep on the device, and delete the rest – *without payment of a license fee for that activity*.

Congress gave the satellite services a compulsory license to ***perform*** our music, so that their subscribers could ***listen*** to it. Our company and others in the industry helped the satellite services get started by agreeing to below market payments for our property. Now XM is stretching and reinterpreting the government-imposed license into a service that enables their subscribers to make permanent copies of our music. This service goes beyond mere performance – in copyright law, such services are characterized as distributions. When music services want to ***distribute*** recorded music, they must seek a marketplace agreement with the copyright owners of the music they plan to offer. Just as other music services had to come to companies like ours to reach market agreements on their new "simple and convenient" distribution service, we believe it is only fair that XM do the same.

During the hearing Congressman Tim Murphy asked the Chairman of the Board of XM how much a songwriter would make per song if 1 million XM subscribers used the new portable device and the new service XM is offering to record and store a song. After some hemming and hawing, the XM Chairman finally responded: "The answer for each recording is zero." That fact is contrary to the policy at the heart of the compulsory license and unfair to creators who rely upon royalties from music sales for their livelihood.

RESPONSE FOR THE RECORD BY DAN HALYBURTON, SENIOR VICE PRESIDENT AND GENERAL MANAGER, GROUP OPERATIONS, SUSQUEHANNA RADIO, ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

**QUESTIONS FROM THE HONORABLE JOSEPH R. PITTS**

1. Are you concerned that the recording industry is trying to persuade Congress to require broadcasters to begin paying money in order to broadcast music in high definition?

Yes, broadcasters are very concerned. For decades, the recording industry sought and Congress has consistently rejected providing a performance right for sound recordings.

Congress specifically and definitively rejected applying performance rights in sound recordings played by terrestrial analog and digital radio stations because they posed no threat to sales of sound recordings and for the following additional reasons:

- Congress has long recognized that the recording industry reaps huge promotional benefits from the exposure given its recordings and artists by radio stations. These include airplay of the recordings, on-air interviews, and concert promotion publicity. Many stations, such as WGMS here in Washington provide specific opportunities to feature new and emerging artists.
- In the words of the Senate Judiciary Committee: "Free over-the-air broadcasts are available without subscription . . . and provide a mix of entertainment and non-entertainment programming and other possible interest activities to local opportunities to fulfill a condition of the broadcasters' license."
- Again, in the words of the Senate Judiciary Committee, Congress did not want to "upset longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades."

With respect to this last point, the symbiotic relationship among the various industries is a complex one. Music composers and publishers receive enormous compensation through public performance licensing fees paid by broadcast radio stations to performing rights organizations such as ASCAP, BMI and SESAC. In 2006, the radio industry will pay these organizations approximately $435 million in royalties. Music producers and publishers also receive some royalty payments from producers of sound recordings that record their works, but those sums are small relative to the receipts by the record companies from the sale of recordings.

The record producers and recording artists, on the other hand, receive the vast majority of their revenues from the sale of sound recordings. While receiving no copyright fees from broadcasters, they enjoy tremendous promotional values from fee over-the-air broadcasting. In 1995, Congress granted record companies a very limited performance right with respect to interactive and subscription digital audio transmissions of sound recordings (over both cable systems and the Internet). The granting of this new limited right was <u>not</u> premised on any recognition that the producers and performers of sound recordings were suddenly entitled to a new revenue stream. Rather, the rights were granted in response to recording industry concerns "that certain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for their work." Senate Commerce Committee, 1995 Report.

The recording industry and others also like to trot out the “free spectrum” argument in their call for a performance right. While it may be true that pioneer radio broadcasters

receiving allocations decades ago paid no fee for their spectrum, virtually every current radio broadcast operation has paid anywhere from tens of thousands of dollars to tens of millions of dollars to acquire those operations and collectively the industry has paid hundreds of billions of dollars in such acquisition costs. Our industry also has paid billions of dollars to build and upgrade our facilities, and bring value to the American public over what is otherwise simply air. Terrestrial radio broadcasters continue doing so today as we convert to digital. These acquisition costs include the cost of acquiring the right to use the spectrum on which these stations operate. Second, since 1997, new commercial radio stations must obtain their licenses by way of auctions just like any other spectrum user.

In addition to the points above, it should be noted the unique role broadcasters' play in serving local communities – these licensing and public service obligations are by no means insignificant. Licensing requirements include: providing and reporting on programming giving significant treatment to community issues; providing "equal opportunities" to candidates and favorable rates to certain candidates; program sponsor identification; regulated contests and promotions; indecency regulations; maintaining public inspection files; and regulation of lotteries. In 2003, the radio industry provided $6.7 billion in free air time and fundraising for worthy causes. Results for 2005 will be available shortly.

RESPONSE FOR THE RECORD BY JEFFREY T. LAWRENCE, DIRECTOR, DIGITAL HOME & CONTENT POLICY, INTEL CORPORATION

Answer of Witness Jeff Lawrence to Supplemental Question for the Record of Mr. Pitts

**Questions from the Honorable Joseph R. Pitts**

1. As a major intellectual property owner, Intel obviously cares about protecting its hard work from theft by pirates. At the same time, you seem to have a very open approach to letting consumers make fair use of content, recognizing that there probably will be some leakage in the system. Tell us how you strike the balance to achieve the right equilibrium.

**A: Intel believes the balance is struck by the proper use of DRM technology in a manner that recognizes consumers' legitimate fair use interests in utilizing all or portions of a work, while protecting the legitimate commercial interests of content owners. Intel has worked hard to bring to the market discrete DRM functionalities that allow consumers to make limited copies of all or portions of a work for fair use purposes - whether it be the making of a limited number of personal copies for use in different platforms, or the copying of small portions for purposes of parody, scholarship, etc. Intel does not subscribe to any approach that would encourage or allow consumers to make unrestricted use of content in the name of "fair use", and we support the right of content owners to seek legal redress for products or services that are marketed with the principal objective of facilitating copyright infringement.**

**Content owners are now beginning to embrace such fair use functionalities in DRM tools as a means of providing greater value to consumers.**

SUBMISSION FOR THE RECORD BY GARY PARSONS, CHAIRMAN OF THE BOARD, XM SATELLITE RADIO

**gary parsons**
CHAIRMAN

May 12, 2006

The Honorable Cliff Stearns
Chairman
Subcommittee on Commerce, Trade and Consumer Protection
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Jan Schakowsky
Ranking Member
Subcommittee on Commerce, Trade and Consumer Protection
Committee on Energy and Commerce
564 Ford House Office Building
Washington, DC 20515

Dear Chairman Stearns and Congresswoman Schakowsky:

Thank you again for giving me the opportunity to testify at the May 3, 2006 hearing of your Subcommittee on "Digital Content and Enabling Technology: Satisfying the 21st Century Consumer," and to tell the Subcommittee about XM Satellite Radio and the innovative services and devices that we offer to our more than 6.5 million subscribers. Several questions were raised during the hearing about the capabilities of a new personal portable radio device we recently introduced to the market, and how the four kinds of royalties facilitated by the XM service are allocated among recording labels, performers, music publishers, and songwriters. I address these questions below, and would appreciate your including this letter and the attachment in the hearing record.

I wish to elaborate on my responses to the following key points:

- Current law distinguishes recording radio transmissions for personal use, on the one hand, from "distribution" by downloading, on the other. The new XM portable radios are *not* a distribution service. They allow subscribers to record individual songs or segments from channels programmed by XM; unlike "distribution," our subscribers cannot choose what we play or when (and thus cannot request particular works on demand), and XM cannot control what subscribers may save. Moreover, the songs stored on a device cannot be moved from it, burned onto a CD, or distributed over the Internet, and they disappear from the device if the user stops subscribing to our service.

1500 ECKINGTON PLACE NE WASHINGTON DC 20002-2164 PH 202 380 4000 FAX 202 380 4500 WWW.XMRADIO.COM

- These devices enable precisely the type of recording covered by the Audio Home Recording Act where, just like a tape or CD recorder, the consumer and not the service or manufacturer controls what, when and how much to record. Royalties paid under the AHRA benefit all elements of the creative community, from songwriters to performers and from music publishers to record labels. XM designed its devices in full compliance with the AHRA and all applicable laws, and no one at the hearing contended otherwise.

But first, I would like to clarify for the record the functions of our new personal radios.

What Our New Portable Devices Really Are About

Our new portable radio devices, known as the "Inno" (by Pioneer) and the "Helix" (by Samsung) combine functions that until now were not available in a single device. They receive live XM transmissions (for which performances we pay royalties to composers, performers, music publishers and record labels), so you can listen to XM whenever you are in range of our satellites or repeaters. They display live data feeds such as sports scores and stock quotes, as well as identifying song titles and artist names. They enable you to store your own MP3 files up to half the storage capacity of the device. They allow you to save content recorded from XM -- to "time-shift" programming you cannot hear live, to listen to saved XM programs where you cannot receive the live signal, or to save particular songs to listen to at later time (for which royalties are paid as prescribed by the Audio Home Recording Act to composers, performers, music publishers and record labels). The devices also facilitate purchasing of downloads of songs our subscribers hear on XM through our partnership with the new Napster service (for which fees and royalties again are paid to composers, performers, music publishers and record labels).

Combining all these functions into a single device has been recognized by many technology writers as a major step forward for satellite radio, for personal technology, and even for e-commerce. For example:

"getting live XM Satellite Radio, being able to see constantly updated scores for the New Jersey Nets, and listen to my own MP3s and WMAs all on the same device is pretty much my holy grail of audio devices." PC Magazine, review April 7, 2006

"XM Radio, Samsung, Pioneer open the door to the promise of 'see it, hear it, buy it' era." Advertising Age, February 20, 2006

"If you hear a song you like right when you're out of the house, well, you just bookmark it, go home and plug it into your PC. The device will purchase the song from Napster. A brave new world out there." CNN Live Today, January 4, 2006

These are but a few of the reasons why these devices have received accolades not only from technology journalists, but also from consumers -- whose votes awarded these devices a Consumer Electronics Show award in 2006 as a "Best in Show."

What Our New Devices *Don't* Do

We have developed these new portables in a balanced way which safeguards the interests of the music industry while satisfying the reasonable and legitimate expectations of today's digital device consumers. To clear up some of the more common misconceptions about our devices:

*They do not "download" content from XM.* The devices allow XM subscribers to record off the radio for their personal use, just as radio listeners have always been permitted to do. Unlike downloading, consumers cannot get a particular song they want, when they want it. XM chooses the programming, not the subscriber.

*They do not enable "automatic" recording.* The "artist alert" feature described at the hearing is *not* linked to recording. For several years, our devices have notified subscribers when a song by a particular artist they have listed on the alert feature has begun playing on another channel. The subscriber then may decide to change to that channel to hear the artist. After changing the channel, the subscriber can manually record the rest of the song already in progress, similar to pressing the record button on an analog cassette deck or CD recorder.

*They do not make "perfect" copies.* Like recording off the radio, the beginnings and endings of songs may be incomplete, or include portions of an announcer overlay, channel announcement, or adjacent song. These are the same shortcomings consumers have experienced with "mix tapes" of songs recorded off terrestrial radio. But unlike recording from radio, which can be retained forever, XM programming saved to the device can only be accessed while the user subscribes to XM (and, therefore, continues to make payments that compensate the recording industry and performing artists).

*They do not allow digital copying or uploading to the internet.* Content recorded from XM on these devices is encrypted, and cannot be digitally transferred or copied from the device.

Consumer Recording from XM is Not a "Distribution."

Recording from XM Radio is *not* a download or distribution. The type of recording enabled by our new devices is no different in kind than the recording off the radio for personal use that consumers have been permitted to do for the last 50 years.

Congress has long and studiously maintained the fundamental distinction between distributions and recording from radio performances. In fact, Congress preserved that distinction in the context of digital distribution, transmission and recording, when it passed the Digital Performance Right in Sound Recordings Act of 1995. That Act accomplished two essential purposes. The first was to grant the recording industry and performing artists a limited performance right in digital transmissions, under a statutory license in Section 114. The second, distinct purpose was to ensure that the Section 115 mechanical license right to make reproductions of sound recordings would extend to distributions of music by digital transmission. While people colloquially refer to these today as "music downloads," these distributions under the DPRSRA are called "digital phonorecord deliveries" or "DPDs."

Pursuant to the 1995 DPRSRA, the first sentence of Section 115(d) of the Copyright Act defines a "digital phonorecord delivery" as:

> each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.

The key phrase in that definition, "which results in a *specifically identifiable reproduction,*" distinguishes transmissions of songs that the sender specifically causes to be recorded from generic transmissions which are recorded at the election of the home consumer. The former are to be characterized as DPDs; the latter are to be treated in the same manner as traditional home taping.

The House Judiciary Committee in its Report on the DPRSRA emphasized this bright-line distinction. To be a distribution by DPD, the entity making the transmission must cause and intend that the recipient record that specific song:

> The phrase "specifically identifiable reproduction," as used in this definition, should be understood to mean a reproduction specifically identifiable to the transmission service. A transmission recipient making a reproduction from a transmission is able to identify that reproduction, but ***the mere fact that a transmission recipient can make and identify a reproduction should not in itself cause a transmission to be considered a digital phonorecord delivery.***

H.R. Rep. No. 104-272, at 30. This language clearly showed Congress' intention to distinguish between distribution by downloading and home recording of broadcasts, and Congress' deliberate determination that a home recording made solely at the instigation of the transmission recipient should *not* be considered a distribution.

The Senate Judiciary Committee recited similarly specific examples to underscore that recording from transmissions exactly like XM's should not be considered DPDs:

> For example, a transmission by a noninteractive subscription transmission service that transmits in real time a continuous program of music selections chosen by the transmitting entity, for which a consumer pays a flat monthly fee, would not be a ''digital phonorecord delivery'' so long as there was no reproduction at any point in the transmission in order to make the sound recording audible. Moreover, ***such a transmission would not be a "digital phonorecord delivery" even if subscribers, through actions taken on their own part, may record all or part of the programming from that service.***

S. Rep. No. 104-128, at 45. XM is a noninteractive subscription service (since users cannot determine what songs XM will transmit, and XM makes the same channels available to all of its service

subscribers). XM subscribers pay a flat monthly fee. It thus is clear under current law that the mere possibility of consumer recording of XM transmissions does not convert the XM service into a "download" or "distribution" service.

Just as broadcast radio listeners may record songs from broadcast radio, XM subscribers may choose to record all or part of the XM programming; but the decision of whether or what to record or to save is solely the decision of the subscriber, and is solely within the subscriber's control. Just like consumers who use their VCRs primarily for playback, many XM subscribers will use their radios to listen to the live XM signal and rarely, if ever, record at all. Some will record talk, special programs, or music channels for later listening, the same way consumers time-shift using a TiVo. Some will only listen to the recordings continuously, as if listening to live XM. Some may save songs for later listening. Some may do it occasionally; some may do it a lot. But all those decisions are made solely by the consumer – not by XM.

To focus the sharp contrasts between distribution vs. home recording from XM, consider these attributes of each:

| ***DPD Distribution*** | ***Recording from XM Radio*** |
|---|---|
| • The consumer chooses the specific songs to be transmitted. | • The consumer cannot choose *any* song to be transmitted. Songs are selected only by XM DJs. |
| • The consumer chooses when to receive a particular song. | • The consumer never knows when a particular song is going to be played by XM. Indeed, there is no guarantee that a particular song will ever be played on XM. And the law forbids us from publishing a list of upcoming songs. |
| • The download service knows exactly when and what the consumer records. | • XM does not know whether, when, or (if so) what anyone is recording. |
| • Every copy is pristine and complete. | • Songs recorded from XM are like recordings from the radio: with DJ voices, or overlapping beginnings and ends of adjacent songs, or are truncated. |
| • The consumer can copy and listen to the music on a PC or handheld device, burn it to CD, and share those CDs with friends and relatives. Any song burned to a CD can be sent to the internet. | • Any songs recorded from XM are locked to the device. They cannot be copied, transferred, burned to CD, shared with anyone else or sent to the internet, and the device has no digital output. |
| • The consumer keeps the downloaded recording forever. | • Content is recorded over, on a continuous basis when the user records new content. If content has been saved to a playlist, the consumer can only hear content from XM as long as the consumer remains an XM subscriber, thus ensuring performance royalties continue to flow to the recording industry. |

In sum, when in 1995 Congress enacted both a limited digital performance right in sound recordings, *and* a compulsory mechanical license for distribution by digital transmission, Congress clearly distinguished between digital performances and distributions. These legal distinctions are well-justified by their fundamentally different factual characteristics.
We at XM recognized the differences between download distribution and recording off the radio when we designed our devices, and we know that our subscribers would see those differences too. That is why we partnered with an established online download service, the new Napster, so that our customers who want the download can buy one. Our devices make it easy for our subscribers who enjoy a song they hear on XM to buy a full uninterrupted version of the song they can keep forever on their PC, burn to a CD, transfer to the XM portable radio, or transfer to a different compatible MP3 player, all in accordance with Napster's copy protection limits -- and for which all music industry participants are paid royalties and fees.

**The XM Devices Comply with, and Compensate Creators Pursuant to, the Audio Home Recording Act as Congress Intended.**

I would like next to address briefly two additional points from the hearing, with respect to the purpose and workings of the Audio Home Recording Act, legislation in which the Energy and Commerce Committee played a major role from drafting through passage.

First, the Audio Home Recording Act clearly covers the new XM devices and was intended to do so. The AHRA covers devices that record from digital radio signals. It defines devices that are covered by the Act to include those that record copies that are made "from transmissions." 17 U.S.C. § 1001(1). The Act requires that royalty payments made under the AHRA be shared among record labels, performers, songwriters and music publishers whose works have been "disseminated to the public in transmissions." 17 U.S.C. § 1006(a)(1)(B).

In reporting out the legislation, this Committee noted that the AHRA was intended to address in a balanced way the potential impact to the creative community by digital recording of all types. "The reported legislation is designed to respond to the threat that the perfect copying capability of the digital audio recorder presents to those engaged in creating and introducing music into commerce in the United States. Also, ***the reported legislation would cover all digital audio recording technology that exists now or is developed in the future***." H.R. Rep. No. 102-780, at 19.

The then-Chairwoman of the Subcommittee on Commerce, Consumer Protection and Competitiveness similarly observed that the AHRA was intended to be a forward-looking solution to a decades-old dispute over whether home recording should be a permitted fair use activity: "[D]igital audio recording technology is not new and neither is the bitter debate that persists between the recording industry, electronics industry and consumers regarding the legality of home taping. ***The Audio Home Recording Act of 1992 is designed to put an end to these debates and facilitate the wide scale introduction of digital audio recording technology to the American consumer.***" 102 Cong. Rec. H9035 (Sept. 22, 1992).

Thus, the AHRA does and was intended to cover digital audio recording technologies that record from digital broadcast transmissions, like the new XM devices. Every element of these devices has been available on the market in other devices for a long time. Digital audio recorders that can record digital transmissions, handheld digital recorders, and the ability to create music playlists, all have existed since the 1990s. Technology predictably has advanced so as to integrate these features into a single, convenient device. The major difference between now and 1992 is that, back then, digital radio was experimental and not yet a reality. Today, HD radio is just beginning, while satellite radio launched first. **Just because our device realizes all of the aspects that were addressed in the AHRA does not mean that the AHRA is out of date. To the contrary -- that this new XM device *complies* with the AHRA should be viewed as evidence that Congress well anticipated a legislative solution for digital audio, and that the AHRA works.**

Second, there was some confusion during the hearing regarding the amount of money an individual artist or songwriter would receive from saving a single song on an XM device. The complexity in answering the question is that the compensation provided for this type of personal recording is not assessed on the basis of a single "play" or a single "save."

The simplest answer is that recording of XM Radio (or FM radio, or Cable TV or DBS, etc.) constitutes a consumer "fair use" and does not entail a specific, additional charge to the subscriber (nor a separate payment to the artist). This was characterized by Congressman Murphy as "paying nothing." However, Congress provided -- with the support of songwriters, music publishers and record labels -- that all these creators would receive compensation for recording on digital audio recording devices from a pool of funds collected under the Audio Home Recording Act. This makes it impossible to answer the question: "How much does the songwriter make for each recording?" The key here is that XM *does* provide for compensation content recorded from XM in two ways: under the Audio Home Recording Act, and under performance rights payments (since, under XM's subscriber requirements, the subscriber cannot access any content saved from XM if he or she does not continue to pay his or her monthly subscription).

At the hearing, Representative Blackburn suggested that it would be helpful to have in the record an explanation of the pertinent royalties provided for under the Copyright Act with respect to the performance, home recording and download distribution of sound recordings. In overview, XM's new devices enable four royalty streams for the benefit of the music industry:

- Performance royalties to composers, songwriters and music publishers
- Performance royalties to recording labels and performers
- Royalty payments for personal recording off XM, under the AHRA, to all these parties
- Payments to all these parties for downloads purchased from XM+Napster

While the amount of each of these payments is not public, our 10K annual report for 2005 states that the amount XM paid for performance royalties as more than $22 million. Even at current rates, it would be expected that satellite radio would pay hundreds of millions of dollars over the next license term. It is well known that XM pays more in performance royalties to the recording industry and

performing artists than any other single payor, and that satellite radio as an industry pays more than all other payors combined. Attached to this letter is a chart that sets forth the categories of payments and the allocation of payments among the members of the creative community.

Thank you again for the opportunity to present to the Subcommittee additional information about XM, and about our about the significant benefits of our service to our subscribers and to all aspects of the music industry. Please feel free to contact me with any additional questions you may have.

Very truly yours,

Attachment

**Allocation of Music Royalties Paid by XM and/or XM Partners**

| Royalty | Agency | Recipient | Recipients' % of Royalty |
|---|---|---|---|
| Section 114 Performance Royalties | RIAA/SoundExchange | Record labels | 50.0% |
| | | Featured artist | 45.0% |
| | | Non-featured musicians | 2.5% |
| | | Non-featured vocalists | 2.5% |
| | | | 100.0% |
| AHRA Royalties | Copyright Office | Record labels | 38.0% |
| | | Featured artist | 25.0% |
| | | Non-featured musicians | 2.0% |
| | | Non-featured vocalists | 2.0% |
| | | Publishers | 16.5% |
| | | Songwriters | 16.5% |
| | | | 100.0% |
| Songwriter/Publisher Performance Royalties | ASCAP | Songwriters/publishers | 100.0% |
| | BMI | Songwriters/publishers | 100.0% |
| | SESAC | Songwriters/publishers | 100.0% |

SUBMISSION FOR THE RECORD BY THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

The American Society of Composers, Authors and Publishers ("ASCAP"), on behalf of its almost 250,000 songwriter, composer and music publisher members, thanks the Subcommittee for the opportunity to comment on the issues discussed at the May 3, 2006 hearing, "Digital Content and Enabling Technology: Satisfying the 21st Century Consumer." ASCAP commends the Subcommittee for its timely hearing on the crucial issues facing the creators, owners, users, and consumers of copyrighted works in connection with emerging digital technologies, and respectfully offers its perspective for the Subcommittee's consideration. In summary:

- ASCAP and its members embrace and encourage music performances by new digital technologies. ASCAP has developed and offered innovative licensing arrangements for satellite radio, Internet, and wireless services which perform copyrighted musical works created and owned by ASCAP's members. Thousands of those services hold ASCAP licenses.
- ASCAP supports enactment of H.R. 4861, the Audio Broadcast Flag Licensing Act of 2006. This bill would protect creators and owners of music from online piracy, while preserving ASCAP's ability to track and monitor performances for the benefit of creators and copyright owners, including its songwriter, composer and music publisher members.
- In the digital world, the transmission of a copyrighted musical work does not have to be <u>either</u> a "performance" <u>or</u> a "distribution." Rather, under the Copyright Act, the digital transmission of a musical work is <u>both</u> a performance and a distribution, and both rights should be fairly compensated.

**<u>About ASCAP</u>**

ASCAP is this nation's first and largest performing rights organization ("PRO"), with almost a quarter-million composer, lyricist, and music publisher members, and a repertory of many millions of copyrighted musical works. On behalf of its members, ASCAP licenses the nondramatic public performance rights in musical works to a wide range of users, including television and radio broadcasters, online services, background/foreground music services, hotels, nightclubs, and colleges and universities. ASCAP represents not only American writers and publishers, but also hundreds of thousands of foreign writers and publishers through affiliation agreements with PROs in more than 80 countries. Under those agreements, ASCAP licenses the foreign PROs' repertories in the United States, and the foreign PROs license the ASCAP repertory in their countries. Because performances of American music are a popular export product worldwide, ASCAP collects between 4 and 5 times as much from foreign PROs as it pays out to them, generating a trade surplus for the United States.

ASCAP's repertory is as richly diverse as this country's history. ASCAP composers and lyricists write in nearly every musical genre including pop, jazz, symphonic and concert, film and television scoring, rock, country, new age, hip-hop, Latin, gospel, and rhythm and blues, and their works range from some of the most familiar standards to the latest hits. As creators and owners of this vast array of musical works, ASCAP's writers and publishers have an important stake in ensuring that the copyright law adequately protects their rights, both now and in the future.

**ASCAP Welcomes and Encourages the Spread of**
**<u>New Digital Technologies to Consumers</u>**

ASCAP understands that emerging technologies often require flexible business models. We have long worked with music users to offer innovative licensing arrangements to meet the needs of these new technologies – arrangements which must

also secure a fair return to writers and music publishers for the commercial use of their intellectual property. ASCAP never wants to cut off or limit the public performance of music. We license any user who requests a license, and ask only that a reasonable license fee be paid to compensate songwriters, composers and music publishers for the use of their property.

To this end, ASCAP has been at the forefront of licensing new technologies like satellite radio, Internet, and wireless music services:

- When satellite radio first entered the marketplace, ASCAP was there to help supply the music. ASCAP entered licenses with XM and Sirius in 2002, ensuring that these services could build and expand diverse arrays of programming for their customers.
- ASCAP first began offering Internet music license agreements in 1995. Since that time, we have worked with many operators of Internet sites and services to develop the best licensing solutions for the ever-growing number of online music uses and business models. ASCAP has continued to update its online licenses to adjust to changing times, and currently offers two versions of our widely-used Internet web site and service license agreements: the "ASCAP Experimental License Agreement for Internet Sites and Services Release 5.0" for non-interactive sites and services, and the "ASCAP Experimental License Agreement for Interactive Sites and Services Release 2.0" for interactive sites and services.
- Since 2001, ASCAP has offered a license agreement designed specifically for providers of "ringtones," "ringbacks," and other music-related products and services offered on wireless devices. Today, the "ASCAP Wireless Music" license agreement authorizes a wide variety of such performances.

But songwriters, composers and music publishers still face significant challenges in the digital marketplace. We must ensure that, as new technologies and uses take hold, any legislative solutions will protect our members' rights and ensure adequate and fair compensation for performances of musical works in the new media.

**ASCAP Fully Supports H.R. 4861, the**
**Audio Broadcast Flag Licensing Act of 2006**

ASCAP wholeheartedly endorses and supports the enactment of H.R. 4861, the Audio Broadcast Flag Licensing Act of 2006 introduced by Rep. Ferguson and co-sponsored by Reps. Towns, Bono, Gordon, and Blackburn. It is apparent that the unauthorized distribution of musical transmissions over the Internet and otherwise, made possible by digital technology, harms the economic well-being of ASCAP's members and America's entire musical community. H.R. 4861 would authorize reasonable licensing conditions on digital audio radio broadcasts which would prevent that harm, while ensuring that home listeners could continue to enjoy music through all the means they have traditionally enjoyed.

H.R. 4861 also contains specific provisions that would enable ASCAP to continue an activity that is crucial to its operations and those of other creators and copyright owners—the digital monitoring of broadcasts and transmissions. ASCAP has long tracked music performances to ensure that its members are properly compensated. In recent years, ASCAP has developed the leading digital fingerprinting technology that, today, electronically monitors the broadcasts of nearly 2,500 radio stations in almost 200 U.S. markets. Using this technology, ASCAP tracks each of the millions of over-the-air performances that occur every day in these radio markets. Digital monitoring services are vital for ASCAP to serve its members, and H.R. 4861 would preserve ASCAP's ability to continue employing such technologies for signals with an audio broadcast flag.

**Digital Transmissions of Musical Works**
**Are Both Performances and Distributions**

At the May 3 hearing, the discussion turned to the question of whether certain digital transmissions of music were "performances" or "distributions," and accordingly, how such uses should be compensated. The uses and statutory rights that are implicated in digital transmissions, however, are not an "either-or" proposition, as some assumed. Digital transmissions of musical works implicate both the performance and the distribution right. In particular, all such digital transmissions involve a public performance protected by copyright.

The Copyright Act states this much when it defines "perform" as "to recite, render, play, dance, or act" a work, "either directly or by means of any device or process . . . ." 17 U.S.C. § 101. A transmission is precisely such a recitation or rendering, and no one particular technology limits it. The Senate and House reports accompanying the Digital Performance Right in Sound Recordings Act of 1995 addressed this very point and confirmed that digital transmissions of musical works are public performances:

> Under existing principles of copyright law, the transmission or other communication to the public of a musical work constitutes a public performance of that musical work. The digital transmission of a sound recording that results in the reproduction by or for the transmission recipient of a phonorecord of the sound recording implicates the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein. New technological uses of copyrighted sound recordings are arising which require an affirmation of existing copyright principles and application of those principles to the digital transmission of sound recordings, to encourage the creation of and protect rights in those sound recordings and the musical works they contain.

S. Rep. No. 104-128 at 27 (1995); H.R. Rep. No. 104-274 at 22 (1995).

We should note that just because digital transmissions of musical works involve both performance and distribution rights, both rights need not be compensated equally. Understandably, the value of each right depends on appropriate marketplace considerations, including which use predominates. But when it comes to such digital transmissions, giving compensation only for the distribution and not for the performance (or vice versa) would deny the full value of the use to the creators and owners of musical works. Any legislative enactment that affects digital copyrighted works and the technologies for transmitting them must preserve both the performance and distribution rights that are inherent in the transmission.

**Conclusion**

ASCAP thanks the Subcommittee for the opportunity to share its perspective on behalf of its songwriter, composer and music publisher members. As the Subcommittee considers the impact of new digital technologies on the creators, users, and consumers of digital copyrighted works, we trust Congress will continue to recognize that songwriters, composers and music publishers must receive the proper protection for all their rights under the Copyright Act.

○