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THE AUDIO AND VIDEO FLAGS: CAN CONTENT PROTECTION AND TECHNOLOGICAL INNOVATION COEXIST?

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

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THE AUDIO AND VIDEO FLAGS: CAN CONTENT PROTECTION AND TECHNOLOGICAL INNOVATION COEXIST?

TUESDAY, JUNE 27, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:05 p.m., in Room 2322 of the Rayburn House Office Building, Hon. Fred Upton (Chairman) presiding.

Members present: Representatives Stearns, Gillmor, Cubin, Shimkus, Bass, Walden, Terry, Ferguson, Blackburn, Barton (ex officio), Markey, Engel, Wynn, Gonzalez, Inslee, Boucher, Towns, and Gordon.

Also present: Representative Bono.

Staff present: Neil Fried, Counsel; Will Nordwind, Policy Coordinator; Anh Nguyen, Legislative Clerk; Jaylyn Jensen, Senior Legislative Analyst; Johanna Shelton, Minority Counsel; and Davis Vogel, Minority Research Assistant.

MR. UPTON. Good afternoon. Today's hearing is entitled "The Audio and Video Flags: Can Content Protection and Technological Innovation Coexist?" I would like to think that the answer to the question posed in the title of this hearing is: "yes, they can coexist." In fact, the marketplace is replete with examples of that fact, which is a good thing since one of our Nation's most precious resources and exports is the creative genius and artistic ability of her citizens, otherwise known as intellectual property.

This then begs the question of where, if at all, is it wise or appropriate for the Government to intervene in the marketplace and mandate specific content protection technologies, like the audio and video broadcast flags which are at issue in today's hearing. In my view it is those who advocate intervention in the marketplace and federal technology mandates that bear the burden of the persuasion in this debate.

Today's hearing is divided into two panels, one on the audio flag and the other on the video flag. This subcommittee has a long record on the video broadcast flag since it was a major issue in the subcommittee's

examination of the transition to digital TV. We held a number of hearings in which the broadcast flag was addressed, and under former Chairman Billy Tauzin's leadership we held many, many, numerous multi-party roundtables which were, in part, responsible for industry consensus on a video broadcast flag.

It was that consensus that helped pave the way for the FCC's video broadcast flag order, which was ultimately struck down by the D.C. Circuit on the grounds that the FCC lacked authority to issue such rules, not on substantive grounds. So, today's hearing will help refresh our record on this important issue, which, at its heart, was always about preventing illicit mass distribution on the Internet of digital over-the-air broadcast content, a goal that I strongly support.

However, this will be the first hearing that we have held on the audio broadcast flag. I want to commend Mr. Ferguson for his motivation and for focusing our attention on it. As I stated at the outset, I believe it is those who advocate intervention in the marketplace and Federal technology mandates who bear the burden of persuasion in this debate. I believe that digital TV transition, which is government driven with a hard date now set into law, is very different than the digital radio transition which is purely market driven. It does not require a separate spectrum and does not require the shut-off of analog service. As such, I believe that the radio marketplace will be much more sensitive to government intervention and Federal technology mandates than the TV marketplace, and that is of great concern to me.

In any event, my understanding is that the NAB and the RIAA have been engaged in a productive dialogue over the audio flag issue, and I commend those organizations for their diligence. I would hope that the parties to that dialogue could be expanded to include other interested parties to ensure that, if there is ever to be a consensus on audio flag, that it is a broad-based consensus. I know from our experience with the video broadcast flags that these issues are highly technical. There are important consumer issues at stake and ample time needs to be given to careful consensus building before the Government intervenes, if a case is to be made that it intervenes at all.

With that, I look forward to hearing from our witnesses today, and with perfect timing I recognize the Ranking Member of the subcommittee from Massachusetts, my friend, Mr. Markey.

[The prepared statement of Hon. Fred Upton follows:]

PREPARED STATEMENT OF HON. FRED UPTON, CHAIRMAN, SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

Good afternoon. Today's hearing is entitled: The Audio and Video Flags: Can Content Protection and Technological Innovation Coexist ?

I would like to think that the answer to the question posed in the title of this hearing is: "YES, they can coexist." In fact, the marketplace is replete with examples of this fact, which is a good thing since one of our nation's most precious resources - and exports -- is the creative genius and artistic ability of her citizens, otherwise know as intellectual property.

This then begs the question of where, if at all, is it wise or appropriate for the government to intervene in the marketplace and mandate specific content protection technologies, like the audio and video broadcast flags which are at issue in today's hearing ? In my view, it is those who advocate intervention in the marketplace and federal technology mandates that bear the burden of persuasion in this debate.

Today's hearing is divided into two panels, one on the audio flag and one on the video flag.

This Subcommittee has a long record on the video broadcast flag, since it was a major issue in the Subcommittee's examination of the digital television transition. We held a number of hearings in which the broadcast flag was addressed, and, under former Chairman Billy Tauzin's leadership, we held numerous multi-party roundtables which were, in part, responsible for industry consensus on the video broadcast flag. It was that consensus that helped paved the way for the FCC's video broadcast flag order, which was ultimately struck down by the D.C. Circuit on the grounds that the FCC lacked authority to issue such rules, not on substantive grounds. So, today's hearing will help us refresh our record on this important issue, which, at its heart, was always about preventing illicit mass distribution on the Internet of digital over-the-air broadcast content -- a goal I strongly support.

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With that, I look forward to hearing from our witnesses today, and I thank them for their participation.

MR. MARKEY. Thank you, Mr. Chairman, and I want to commend you for calling this hearing today on content protection technologies for broadcast audio and video content. Protecting copyright in the digital era is unquestionably important for content owners. The inability of content owners to safeguard their financial and creative interests in digital versions of their copyrighted products could have an adverse impact on

jobs innovation and the widespread availability of digital audio and video programming for consumers.

Content owners have a reasonable and lawful expectation that privacy of their products will not be condoned in the marketplace or countenanced by entities charged with enforcing copyright laws. And I believe it is important that we stress as we move even further into the digital era our strong opposition to the theft and illegal distribution of copyrighted content. The content community has several tools to combat piracy. The content community has utilized lawsuits against individuals who engage in massive illegal infringement on-line.

It has also prevailed the Supreme Court in the Grokster case which held that distributors of technologies used for infringement by others could be held liable for such activity. The content community has also worked closely with universities around the country on educational programs about theft and piracy and the risk of lawsuits to students and faculty. In addition, many companies have experimented with digital rights management and technologies to provide consumers with copyrighted content in a way that permits limited reasonable subsequent use by consumers.

In recent years content providers have also promoted the use of other technological tools and protection measures, most notably the so-called broadcast and audio flags. Such technology flags, particularly digital content with imbedded content protection instructions in order to thwart unauthorized use. The broadcast video flag has been advanced by leading providers of video content as a technological tool to help impede widespread theft of digital content. In contrast, many consumers view the broadcast flag as potentially frustrating or prohibiting their ability to fully utilize their home electronics equipment, including what they view as reasonable use of their computers and the Internet.

The broadcast flag rule that the FCC promulgated was successfully challenged in the D.C. Circuit which ruled in May of 2005 that the Commission lacks sufficient authority to adopt the regulations. Presumably this legal interpretation of the Commission's authority would also hold for the broadcast audio flag for radio. Broadcast radio, like its television counterpart, is also moving towards digital technology. Yet unlike broadcast television, broadcast radio can migrate to digital without the need for additional spectrum.

As a result, hundreds of radio stations across the country are already broadcasting in digital form. In addition, satellite radio providers, XM and Sirius, are providing a digital subscription radio service. Each of these satellite radio providers offers a device in the marketplace which permits subscribers to store songs transmitted over their services. With the rise of both terrestrial and satellite-delivered digital radio the music

industry has sought implementation of audio flag technology to limit unauthorized copying or distribution of content.

I want to thank you, Mr. Chairman, for calling this hearing today. I believe this is a very useful inquiry. As we considered developing a regulatory approach to these issues, particularly technology regulations that will impact a consumer's use of digital technology and the Internet, I believe it is vitally important to assure the public that any new regulation appropriately balances the legitimate concerns of both consumers and content owners.

I would also like to welcome Andy back to the committee today. It has been a long time since he has paid us a visit. I yield back the balance.

MR. UPTON. His year is up, I think. Mr. Gillmor.

MR. GILLMOR. Thank you, Mr. Chairman, and I appreciate the opportunity for us today to discuss the matter of content protection in the digital age. Digital age has presented us with some unexpected and exciting public policy challenges, many of which we continue to debate. Protecting content has become one of, if not the paramount issue. Many of our favorite music, TV, and movie selections are now being distributed in digital formats. These advanced digital distribution formats give consumers a better listening and viewing experience, certainly much better than the grainy images from the 1948 seven-inch TV that my family first bought when I was a small child, while at the same time offering consumers an increased ability to manage the use of both their audio and video content.

The ability of a consumer to manage his or her experience has led many to question the appropriate nature by which this content is protected from illegal use and distribution. Striking a balance between consumer fair use and the protection of creative and intellectual property is extremely important, and addressing this problem is going to require some insight into what technology may yield in the years to come.

Dealing specifically with the broadcast video flag, I am glad to see that all stakeholders worked together to reach an agreement and, given the court's decision on the FCC's ability to implement such rules, it is now incumbent upon us to act in a responsible manner to ensure the protection of the video content. A matter of greater contention surrounds the issue of audio flag. Unlike the video flag, I believe it would be in the best interest of all consumers and the future of the industry to sit down with all affected parties and again try to work out a privately negotiated agreement rather than rely on a legislative solution.

However, those talks cannot be allowed to be drawn out. I think they have to be a priority because as we all know from the 1996 Telecom Act, the tech sector changes rapidly. Furthermore, from my discussions with

industry representatives, a privately negotiated solution is preferred because recent Congressional efforts have fallen short of a consensus approach, and as that negotiation goes forward I would hope that the members of this committee could be kept informed as to how it progresses. And I yield back, Mr. Chairman.

[The prepared statement of Hon. Paul E. Gillmor follows:]

PREPARED STATEMENT OF THE HON. PAUL E. GILLMOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

MR. CHAIRMAN: Thank you for holding this important hearing. I appreciate the opportunity to openly discuss the matter of content protection in a digital age.

The digital age has presented us with many unexpected and exciting public policy challenges—many of which we continue to debate. Protecting content has become one of, if not the paramount issue as many of our favorite music, TV, and movie selections are now being distributed in digital formats. These advanced digital distribution formats give consumers a better listening and viewing experience—much better than the grainy images from the 1948 seven-inch TV that my family first received when I was nine years old—while at the same time offering consumers an increased ability to mange the use of both their audio and video content.

The ability of a consumer to manage his or her "experience" has led many to question the appropriate nature by which this content is protected from illegal use and distribution. Striking a delicate balance between consumer "fair use" and the protection of creative and intellectual property is extremely important. Addressing this dispute will require not only knowledge of the present, but also insight into what technology may yield in the years to come.

Dealing specifically with the broadcast video flag, I was glad to see all stakeholders work together to reach an agreement. Given the court's decision on the FCC's ability to implement such rules, it is now incumbent upon us to act in a responsible manner to ensure the protection of video content.

A matter of greater contention surrounds the issue of the proposed "audio flag." Let me be clear on my current position, like the video flag, I believe it is in the best interest of all consumers and the future of the industry to sit down with all affected parties to, again, work out a privately negotiated agreement—rather than rely on a legislated solution. However, these talks cannot be allowed to be drawn out—they must be a priority because, as we all know from the 1996 Telecom Act, the tech sector changes rapidly. Furthermore, from my discussions with industry representatives, a privately negotiated solution is preferred because recent Congressional efforts have fallen short of a consensus approach.

Mr. Chairman, I look forward to the testimony from today's witnesses and to working closely with you on these lingering public policy issues. Additionally, I would respectfully request that should any industry negotiations take place that this committee be kept informed of the ongoing status of those discussions. Again, thank you Mr. Chairman for yielding me this time.

MR. UPTON. Thank you. Mr. Boucher.

MR. BOUCHER. Thank you very much, Mr. Chairman. I have no hostility to a statutory authorization for a TV broadcast flag if certain key conditions are met and are clearly accommodated in the authorizing statute. First, there should be clearly stated exemptions from the flag

mandate for news and public affairs programs and for content subject to the TEACH Act. These programs should never be flagged. News and public affairs broadcasts erode in value over time and should be broadcast in the clear so that excerpts can be easily e-mailed from one interested party to another.

The TEACH Act specifies content that under existing law is available for use in distance learning applications. The TV broadcast flag should not be permitted to interfere with this well-functioning law. The Senate, in fact, has acknowledged these principles in the draft of the bill that is being considered in that body. Secondly, it is essential that Congress reinforce fair use principles. The DMCA broadly undermined fair use for digital media and actually empowers the creators of digital content to eliminate fair use altogether.

I want to commend Chairman Barton for his determination to protect fair use rights for the consumers of digital media and for his announcement that the TV broadcast flag will only be considered in the broader context of assuring fair use protections for digital media consumers. I also appreciate Chairman Barton's co-sponsorship of H.R. 1201, which is pending before this committee. That bill is the right policy. The proposed audio broadcast flag, however, is an entirely different matter. Unlike the TV flag, there is no agreed-upon technical standard for an audio flag.

After years of work the inter-industry forum known as the Copy Protection Technical Working Group produced a TV broadcast flag standard which the diverse interested parties have accepted as both being workable and effective. That work has really not taken place for an audio flag. In fact, even though the technical group has been meeting monthly, the industry representing the recording companies elects not to attend those sessions, and this is the forum that is comprised of the equipment manufacturers and in fact all interested parties.

The work to create a technical standard for a broadcast flag has in essence not even started. Moreover, if there were agreed-upon technical standards, those standards could be effectively implemented without Congress having to pass a statute. The technology for high definition radio was developed by a company called iBiquity, which holds the intellectual property for the equipment the high definition radio stations are using. Without Congress doing anything, if a technical standard for an audio flag is some day created, iBiquity could easily incorporate that standard into its license agreement with radio stations and could have the flag implemented simply through that private arrangement.

This matter clearly lends itself to a complete private-sector resolution, with the private parties creating and implementing the technical standard. And I would add my voice to others expressed here

today encouraging that work to occur. Congress really need give the matter no further consideration. Thank you, Mr. Chairman, and I yield back.

MR. UPTON. Mr. Shimkus.

MR. SHIMKUS. Thank you, Mr. Chairman. We ought to have our colleague, Rick Boucher, just testify. He always puts us to shame and we appreciate how smart he is.

MR. UPTON. His handwritten notes.

MR. SHIMKUS. Here is mine. I think you hear the message. A lot of us would like to see private negotiated agreements involved in this process and let the system work out. I always talk about in this debate you had Guttenberg with the printing press. You had Xerox with the copy machine, 8 tracks, cassettes. I am showing my age. Now MP3. My wife is a church organist, and we have an artist here and there is an issue of church choirs Xeroxing music that should be protected and compensated for when the church choirs use that, and my wife went through and threw all the Xeroxed copies out.

Now it didn't make the church council very happy because that means they had to pay for the sheet music for the entire choir but it is an issue of compensating the artist for their work. And so we have a tremendously difficult balance here to make sure that we continue to encourage the artist and those, and I am not for one, I just married one so I now know all this stuff whether I wanted to or not. And as my friend, Mr. Boucher, would say the fair use issue and what you pay for is what you can use, but what you pay for is not what you can sell in essence.

So we appreciate you coming here. We are going to learn a lot, and, Mr. Chairman, I yield back.

MR. UPTON. Mr. Gonzalez.

MR. GONZALEZ. Thank you very much, Mr. Chairman. I think regardless of the subject especially in this subcommittee on telecom it always strikes me that many times people will say because of the technology and it is fast moving and developing and so on, somehow it lends itself to different criteria than we have adopted and relied on for many, many years in this country, and those are just general principles. One of those principles of course is the legislative one and that is not to act unless you really have to to let the market forces play out, let the innovation, let the stakeholders get together, and obviously we have already referred to that.

Yet, because--now technology does add something that maybe legislators or members of our society and the legal system did not deal with, and that is that it moves quickly--here is a whole lot more creativity. There is change every day and sometimes the law has to anticipate some of that but it surely has to react in a timely mode. So

technology has narrowed the window of what I refer to as timeliness. We are not there yet. I don't believe that. And I would like to think that we are still going to have all stakeholders actively engaged knowing that they have a vested interest in this before Congress acts because there is one eternal truth and that is when we do act very few people walk away truly satisfied and many times the problem is not really improved measurably.

And with that, I look forward to the discussion today and to the testimony. And I really had never heard from the artists and the writers and the producers until I went to Austin last March to attend South by Southwest, and that was very encouraging and enlightening, and for anyone that may have been out there, I thank you for engaging in that particular discussion. When it comes to industry and others, I have had ongoing discussions for a couple of years now and I appreciate your input.

What I ask now is your active participation as a stakeholder in trying to arrive at some solution and giving us some direction. I was talking to staff today, and, Mr. Chairman, the Wright amendment, the infamous Wright amendment regarding Southwest flights to Dallas finally was resolved among the stakeholders. And I thought, gee, if you are a Texas and you can resolve that, you can resolve anything.

However, he did remind me they took 20 years to come to that. We do not have 20 years. And if you indulge me, Mr. Chairman, at this time I do want to introduce one of our witnesses who is a fairly new resident to my home town of San Antonio, and of course that is Andy Levin, who served on the staff of this committee from I think 1995 to 2002, invaluable service, was here for some monumental legislation, and I am sure that bears some of his handiwork and fingerprints of the outstanding job that he does for Clear Channel. And I need to tell you that Clear Channel is one of our leading corporate citizens, not just of course in San Antonio but throughout the State and this Nation. And the leadership that he has brought and the direction that he has provided the past years there is exemplary and has really assisted not just the community but I think all of what is going on out there with the broadcasters.

And, Andy, I want to say welcome. I wasn't here when you served on staff but I have heard great stories about you and they are all fine and good. And with that, I yield back.

MR. UPTON. Mr. Ferguson.

MR. FERGUSON. Thank you, Mr. Chairman, and thank you for holding this hearing. Our subcommittee can serve a constructive role in the area of digital content protection in the surest way to insure that competition in the marketplace and encourage creativity and innovation. This hearing is particularly timely regarding the digital audio flag issue.

Protection and compensation for content and new technologies have been the subject of negotiations, settlements, and litigation.

And as we hold this hearing today, the Senate is considering language in their cable franchise and legislation that includes both audio and video flags. These are exciting times for consumers. There are more options available in the marketplace than ever before. Apple's iPod has permeated the marketplace and is a stunning success story. Digital audio can now be heard across multiple platforms from Web casts to wireless. The advent of consumer consumption and ultimate success of these products was not born out of circumventing copy protection technology under the banner of fair use, and it was not achieved by ignoring the property rights of those who create content.

The preference, of course, is to see the issue of digital content protection resolved between the respective parties in the private sector, and I hope it can happen and happen quickly. But the fact remains that digital audio products are on the market today that allow unauthorized downloading and for the potential for illegal uploading to the World Wide Web. This is an issue that deserves Congress' attention but if these issues are not resolved soon it may also require Congress' direction.

Early this spring I introduced the Audio Broadcast Flag Licensing Act of 2006. The goal of this legislation is to promote maximum consumer choice in the marketplace by ensuring that intellectual property rights are respected and that content creators are treated fairly. Specifically it provides that technical licensing agreements currently taking place between satellite and HD radio and developers of digital audio broadcast systems include a broadcast flag or similar technology that limits the unauthorized dissemination, duplication, and redistribution of content.

If the products in question allow downloading that was not legally authorized, the parties would need to come back to the table with content creators and work out fair royalties. My bill makes sure that the marketplace and not Congress is where these negotiations happen. Some have claimed that these new services fall under the Audio Home Recording Act. The AHRA was passed in 1992 at a time when even the Internet was mostly unknown to legislators and consumers. This argument has a shaky foundation at best. Considering the rapid pace of technology, it is hard to believe that Congress could have foreseen over a decade ago that some would choose to turn their performance license into a distribution license without paying for it.

While my bill is clear in its intent to protect content, it also insures that American consumers remain unaffected. Legacy devices already in the stream of commerce would remain operational, and the bill specifically states that the HD radio roll out remain unimpeded. The

bottom line is that if private-sector negotiations are unsuccessful in ensuring a level playing field between content creators and distributors, it is our responsibility, Mr. Chairman, to help jumpstart those talks in the private marketplace.

The goals of the Audio Broadcast Flag Licensing Act are not only for the good of content creators, more importantly they are for the good of our constituents, the consumer. It simply requires that if you are going to use these products, make sure it is done fairly. That is my definition of fair use. I would like to thank the witnesses for taking out their time to be with us today and in particular recognize and commend Sirius Satellite Radio in recently negotiating with the recording industry to ensure that content creators are compensated with regards to their S50 satellite radio and download service. It is my hope that your industry peers will also follow suit.

Mr. Chairman, thanks again for holding this hearing. As we begin to debate this issue, we should not focus only on the products marketed today but rather the products that will be made available in the future. Do we want to see a marketplace where there is a constant flow of new and exciting technology to our constituents? Do we want to ensure the most options? If we do, then there must be a balance among new radio services, property rights of creators, and fair competition among all parties. It is our responsibility to ensure that this balance is achieved.

Thank you, Mr. Chairman. I yield back.

MR. UPTON. Mr. Gordon.

MR. GORDON. Thank you, Mr. Chairman. Our remarks are beginning to sound a little repetitious so I will ask that my remarks be made part of the record, and just quickly say that I am a co-sponsor, original co-sponsor, of the audio flag bill because I think we do need to have a balance between technology and content. Hopefully the parties can develop that but if they can't, we will let the FCC do it and it should be done. Thank you.

MR. UPTON. I would just make a unanimous consent request for all members on the subcommittee that their statements be entered as part of the record. And with that, I recognize Mr. Towns.

MR. TOWNS. Thank you very much, Mr. Chairman. It is true that everything has been said but everybody didn't get a chance to say it. The copyright industries, movies, television programs, and music and recording, books, video games, and software provide jobs for 8 percent of all United States workers. As Members of Congress, I feel it is important that we never lose sight of this human element. These jobs all depend on protection of copyrighted works from being devalued by piracy and unauthorized use. I call upon all of my colleagues to keep this in mind as we proceed.

As many of you know, I have been a long-time advocate of flagging technology because I feel it provides important protection to our artists and content providers. In an age when digital radio broadcast can be copied and redistributed worldwide over the Internet, I worry that our current piracy prevention methods do not go far enough to stem the tide of audio and video theft. I share in the concerns of the recording industry that the ability to record digital content will allow users to compile large song collections for free, and I hope we are able to put a stop to this through a solution that is favorable to all of these parties sitting before us today.

All of you are well aware of how widespread piracy has become and I worry about the next wave of creative theft, and I pray that it is not born from the devices that we will be discussing today. It is my belief that if we enact reasonable mutually agreed precautions now we will not leave the door open to rapid manipulation in later years. H.R. 4861 is not an attack on traditional home taping services but rather ensures that fair licensing agreements are negotiated and piracy is thwarted. Most importantly it does this without delaying the final guidelines for HD radio.

I look forward to working with Congressman Ferguson, the satellite radio companies, and the recording industry as we consider H.R. 4861 and work towards a fair and equitable solution to this dilemma. Also, before I yield back, Mr. Chairman, I would like to welcome Andrew Levin back to Capitol Hill and to know that you can survive even after this committee. On that note, I yield back, Mr. Chairman.

MR. UPTON. Thank you. This concludes--oh, Mrs. Cubin. I am sorry.

MRS. CUBIN. I will submit mine for the record.

[The prepared statement of Hon. Barbara Cubin follows:]

PREPARED STATEMENT OF THE HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Thank you Mr. Chairman.

I appreciate that this subcommittee remains engaged on the important issues surrounding digital media. As an I-Pod owner myself, I am very aware of the I-Tunes music store as a successful means of digital content distribution. Additionally, the video component of these devices serves as a great example of how content providers and consumer electronics companies can work together for the real benefit of both businesses and consumers.

Technology continues to advance at breathtaking speeds, however, and with this new technology comes new challenges to strike the right balance between a consumer's right to enjoy their new gadgets, and the content provider's right to be paid for their innovation and performance. It is safe to say that no one on this subcommittee is interested in stifling the innovation of either content providers or consumer electronics

companies. Both provide invaluable service to consumers and both should be promoted as examples of American innovation.

Because both sides in this debate are so integral to each other's success, I am interested in hearing from the witnesses today about any common ground the parties have reached in negotiations that could lead to a non-legislative solution. Congress will act if we must, and I appreciate your leadership on this Mr. Chairman, but I believe that both businesses and consumers are best served by limiting the regulatory involvement of Congress. Innovation will not stop no matter what we do in Congress, that is the wonder of the economic system we have established in this country. So if this hearing can serve as a springboard to a voluntary agreement that benefits all, it will have served its purpose.

Thank you again Mr. Chairman. I look forward to hearing from the witnesses about this important issue. I yield back the remainder of my time.

[Additional statements submitted for the record follows:]

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

Mr. Chairman, thank you for holding this hearing today. Digital content, services, and devices allow more artists to create new and innovative content, and allow consumers to enjoy that content in increasingly exciting and convenient ways. But the digital age also makes it easier to copy and redistribute content in unauthorized ways.

There is no question that content creators and owners are entitled to compensation for their content. Without compensation, they have neither the resources nor the incentives to produce more of the music and video content that we enjoy. At the same time, consumers are entitled to legitimate ways of enjoying that content. And device manufacturers are entitled to make devices that permit consumers to enjoy audio and video content. It is critical that we strike the right balance between these interests. I also believe that any broadcast flag legislation should include adequate protections for consumers' fair use rights.

We have already heard much about the broadcast video flag, and, as I have previously indicated, I believe there is a compromise that can be struck between content protection and legitimate consumer use. We have heard less about the audio flag, and I look forward to today's testimony so that we can flesh out that issue a bit more.

I yield back.

PREPARED STATEMENT OF THE HON. ELIOT L. ENGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Thank you Mr. Chairman –

I am struggling with this push for an audio flag. I see the broadcasters and satellite radio industry battling the record industry – once again.

And I see the artists, songwriters and performers stuck in the middle along with consumers.

I am a strong supporter of the video flag. The federal government is mandating the switch to digital television. Moreover, the federal government ordered the switch in 1996. And it took 7 years of intense negotiation to find a solution that most found acceptable. That solution was adopted by the FCC but thrown out by the courts – not on grounds that the agreement was flawed but simply that the FCC did not have the authority to implement the agreement. I think the FCC needs that authority.

When it comes to the audio flag, I find myself concerned that negotiations on an audio flag began in April – about 3 months. I must wonder why there is a push for Congress to intervene so early.

I would admonish those who seek quick legislative action that what you hope for rarely is what you get. Instead, it is better for all parties to meet and come to an agreement and, if necessary, ask Congress to pass implementing laws.

I would think that the old Napster problem would be a case study for the recording industry. Don't fight new technologies. Embrace them and find a simple, legal and profitable business plan to meet the needs and wants of consumers. The IPod proves this clearly.

I am told that one of the major concerns is that satellite radio companies have devices that allow people to record a song and create playlists. I am having real trouble seeing how this is an infringement of fair use.

In my day, I could go to the store and by a TDK audio tape, put it into my expensive Kenwood Stereo, tape songs from albums of many record companies, take that tape and play in my cheap car stereo. I make this point because many companies were involved in making music portable for me.

As I understand the satellite radio recording device does not make the music portable. In fact, it can only be played on that device – it *cannot* be transferred to a computer or a CD or even an old audio tape.

But, I am always mindful of the talent, such as the Nashville songwriters. They are the working men and women of the music industry. And they deserve to be compensated for their work.

So I fall back on what I have said many times before. I will continue to strive to find balance. We must ensure the talent is fairly compensated while the fair use rights of the American people are maintained.

I believe we should move forward on the video flag but give the record companies, broadcast and satellite radio, talent and consumers time to work out a solution. I know one can and will be found.

I yield back.

MR. UPTON. Okay. Thank you. This concludes the opening statements. We are delighted to have really two outstanding panels. It will be led by--maybe we should have Mr. Levin go first with all these accolades, a friend on this side of the aisle too. But we welcome Mr. Mitch Bainwol, Chairman and CEO of the Recording Industry Association of America, certainly an old friend of mine for sure; Mr. Andrew Levin, Executive VP and Chief Legal Officer for Clear Channel on behalf of the National Association of Broadcasters; Mr. Stewart Harris, Songwriter, on behalf of the Songwriters Guild of America; and Ms. Ruth Ziegler, Deputy General Counsel of Sirius Satellite Radio from New York.

We welcome all four of you. We appreciate your willingness to submit your testimony in advance. It is made part of the record in its entirety. If you would try to limit your remarks to 5 minutes, that would be terrific. Mr. Bainwol, we will start with you. Welcome.

STATEMENTS OF MITCH BAINWOL, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, RECORDING INDUSTRY

ASSOCIATION OF AMERICA; ANDREW W. LEVIN, EXECUTIVE VICE PRESIDENT AND CHIEF LEGAL OFFICER, CLEAR CHANNEL COMMUNICATIONS, ON BEHALF OF NATIONAL ASSOCATION OF BROADCASTERS; STEWART HARRIS, SONGWRITER, ON BEHALF OF SONGWRITERS GUILD OF AMERICA; AND RUTH A. ZIEGLER, DEPUTY GENERAL COUNSEL, SIRIUS SATELLITE RADIO, INC.

MR. BAINWOL. Thank you very much, Chairman Upton, members of the subcommittee. Thank you for focusing on the timely issues arising from radio's transition to distribution platform for music. Today has special meaning. It is the one year anniversary of the Supreme Court's nine to zero Grokster decision. That unanimous decision reminds us that finding a balance between technical and creative innovation is in fact possible. Not long ago, I read about Clear Channel's new program at their concert venues where the live performance is immediately burned to CDs to sell as people leave, so the venue has two chances to make money, one for the ticket, the performance, and one for the sale of a CD, the distribution.

The consumer though does not get a free copy ownership after paying for the listening experience. They have to buy it. The same should hold true as radio morphs from a place to listen to music to a place for acquiring it. I will back up for a second. Today's marketplace is a dynamic competition between a variety of platforms seeking to become a place where the fans listen to music, discover music, store music, and acquire music. Listen, discover, store, and acquire whether by iPod, by Nano, by cell phone, by Trio, Zen Creative for a subscription service or by a radio device. The competition between platforms increasingly is all about the portable device. That competition is a good thing. Fans will benefit and if the competition is fair music creators will benefit too.

Competition isn't fair. iTunes and Wal-Mart download services pay to distribute our music. Rhapsody and Napster subscription services pay. Cingular and Verizon pay. Even new legitimate P to P sites pay to distribute our music but radio does not. We don't quarrel with the choice by radio to transition their business model. We have done it. But concocting a legal shell game so some radio services can get out of paying for content just isn't right. XM in particular seems to think they should enjoy the unique right to be exempt from paying for the music they give to consumers as a mechanism to attract and retain subscribers.

This is an ad running at Sky Mall magazine. The slogan for XM is hear it, click it, save it. Left unsaid, of course, is don't bother paying for

it. There is a word for this, hutzbah. We also think it is illegal. Regardless, it is unfair and certainly bad policy. Because of anomalies in comp rate law, satellite radio and over the air radio are different when it comes to paying a fee for the right to broadcast. The important point is this, neither is licensed to compete as a distributor.

The situation is also more complicated because different players are pursuing varying approaches. The NAB has joined with us to suggest two goals should be paramount. One, addressing the problem of cherry picking songs from a program in a broadcast, and, two, ensuring that the rollout of HD happens quickly, worthy goals. We applaud the broadcasters for adopting this responsible approach. Sirius, here today, sought a license for its first device, the S50. We hope they view it as a precedent, though I was troubled when Mr. Karmazin was quoted as stating that Sirius might adopt the XM tactic, that the device adheres to the law.

Let me be clear about what unlicensed feature we find concerning. If radio wants to provide traditional TiVo-like time shifting of programs, that is not a problem. If radio wants to provide traditional manual recording features, that is fine too. But it is not okay for radio to allow cherry picking of individual songs from a broadcast program without first obtaining a license so that the songwriter, the publisher, the artist, and the label investor get their due compensation.

Our members want to license radio. Broadcasters are our partners. Fans are enriched when broadcasters innovate, when device manufacturers innovate, and, yes, when creators innovate. You might say it takes three to tango. As broadcasters, manufacturers, and creators do their thing, the concept of a level playing field makes a ton of sense. Platforms should be subject to comparable content protection requirements when providing comparable services, and that of course is the objective underlying the Ferguson bill co-sponsored by Representative Towns, Bono, Gordon, Blackburn, Waxman, Terry, and Davis.

The bill requires the use of a broadcast flag or similar technology to provide content protection that is quickly achievable and not disruptive, allowing digital radio devices to roll out expeditiously, without making older models obsolete. You may hear the time isn't right for legislation or that the issue hasn't been through the rigorous voluntary process that generated the broadcast flag consensus. Well, there is a reason for that. There is a reason that it hasn't worked out. Unlike our video colleagues, we have no performance rights over the air and the license for satellite is compulsory, so we can't withhold our content if we are not satisfied with its protection. Our video colleagues could.

If record companies were able to license in the marketplace like other copyright owners, content protection would be resolved in these marketplace discussions. There is a marketplace failure and that is what we are trying to address. Moreover, because of the limitation on our performance rights, Congress has set up a system that makes record companies almost totally reliant on distribution revenue, yet the limitations on performance rights are now threatening even that revenue stream. That is more than ironic to us. It is our life blood.

We suffered significant losses in recent years. Our glimmer of hope for the future and our ability to invest in new music and new creativity is predicated on the integrity of the emerging digital marketplace. We are now seeing digital revenues replace physical lawsuits. That is very exciting. It is very important, but it highlights why we are so interested in seeing that the problems we have outlined are addressed. Thank you very much.

[The prepared statement of Mitch Bainwol follows:]

PREPARED STATEMENT OF MITCH BAINWOL, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, RECORDING INDUSTRY ASSOCIATION OF AMERICA

- As the music industry struggles to emerge from several difficult years due to online piracy, we are looking to the success of legitimate digital offerings from services such as iTunes, Napster, and Yahoo!. The sales from these services are what songwriters and artists rely on to make a living, and what record labels rely on to be able to invest in new music.
- New devices and services from satellite and HD Radio threaten to replace those sales by allowing listeners to automatically record, sort, label, and store the music they hear on their radios, just like they can do through online stores and subscription services, but without having to buy it.
- We truly understand and appreciate the appeal of these devices and services. In fact, we have no problem with them in themselves. We simply believe that by using such offerings to effectively become a distributor of digital downloads, services should be required to pay the appropriate distribution license fee. That doesn't mean getting rid of the devices; it just means paying appropriately when they are used to transform radio into download services.
- We also do not intend to prohibit any of the activities listeners have come to expect from radio. Listeners can still record as they have for generations and can, in fact, engage in automatic recording (and time-shifting) by time, program, or channel. We only ask that the line be drawn at automatic searching, copying, and disaggregation features that exceed the experience listeners, the FCC, and Congress expect from over-the-air terrestrial and satellite radio.
- Content protection can not only coexist with technological innovation, it is in many ways necessary to drive it. Today, we bring music to consumers in a multitude of platforms and services, all made possible because of the content protection that defines their parameters and safeguards investment.
- Broadcast flag provisions, including those present in H.R. 4861, The Audio Broadcast Flag Licensing Act, are a perfect way to balance the interests of technology and content protection.

Chairman Upton, Ranking Member Markey, and Members of the Subcommittee, thank you for allowing me to participate today in this discussion on audio flag. To answer the titular question posed in this hearing, yes, we believe that content protection and technological innovation can coexist. And we believe that implementation of an audio flag is a fair and effective way to balance content protection and the wide range of new digital features. But to understand why measures such as an audio flag are needed, it is necessary to consider how we arrived at this point.

As you are aware, the music industry has faced an immense challenge in online piracy over the past several years. In addition to sharply declining sales figures, composers, artists, musicians, technicians, and a multitude of others engaged in the music industry have seen their jobs disappear. There are fewer people, and much less money, to invest in new artists and new music. Fewer resources to invest in the future, with an impact ultimately felt by consumers.

In response, we have not sought to stifle new technology, we have embraced it. 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.

Not only does the content protection present on these systems coexist perfectly with the technology that makes them work, these new technologies and services are, in fact, dependent upon that content protection to succeed. Technological innovation requires financial risk, which relies upon an expected return. Satellite broadcast services, for example, protect their signal to prevent others from free riding off their investment. In addition, the content carried on those signals is just as – if not more – valuable. If satellite services knew that anyone would be able to offer the exact same content – including music, sports, and multi-million dollar radio personalities – at a fraction of the cost (or free), they would never have invested in it. This is true for any new platform or service.

As with satellite and other services, content protection has allowed us in the music industry to innovate in the digital world, which has presented us with an opportunity to once again grow after several years of decline. The legal online download market, in particular, has been growing at a spectacular rate. Authorized download services such as emusic, Napster, and iTunes have truly taken root and are, for the first time, promising to offset the loss in CD sales. This year, we are on track to see close to $1 billion in legal online downloads – that is, unless we are derailed.

Unfortunately, just as we are emerging from under the cloud of online piracy, we are facing a new challenge on the digital front. HD Radio and satellite services have begun, or plan to begin, offering features and companion devices that enable listeners to transform the passive listening experience into a download one. These services allow broadcast programs to be automatically captured and then disaggregated, song-by-song, into a massive library of music, neatly filed in a portable device's digital jukebox and organized by artist, title, and genre. Simply, users can download music and create a digital music library on their 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.

To be clear: we are in no way against these new devices themselves. They are undeniably cool and, like everyone else, we understand their appeal. We are truly excited about the new opportunities digital radio and these devices will provide to expose new artists and offer consumers new choices in the way they get our music. Rather, our

concern is when these devices and their corresponding services change radio into a download store without paying the fair market price for licensing music that other services offering the same content must pay. We have no issue with the convergence of radio and downloads, as long as they are licensed for that purpose.

We believe listeners should continue to be able to engage in the kinds of activities they've come to expect from radio, including recording. In fact, we look forward to users' ability to enhance this customary recording, by enabling automatic recording by time, program, or channel, digital read-outs, music purchase options, time-shifting capabilities, in addition to storage and great new sound. Given all of these new amenities, our requests are actually strikingly modest – that the line be drawn at automatic searching, copying, and disaggregation features that exceed the experience listeners, the FCC, and Congress expect from over-the-air terrestrial and satellite radio.

The market for digital music operates on the basis of a continuum of content ownership. Distributors pay rights holders based on how much control over the content they give away. At one end we have radio, where users typically have little or no control over the content – they listen to whatever comes on. For offering this service, satellite pays content owners an amount based upon a statutorily set fee; in the case of terrestrial radio, due to a statutory anomaly, the broadcaster actually pays nothing. As we move up the continuum, through customized radio, tethered downloads, and portable tethered downloads, distributors pay content owners an increasing amount to be able to give their consumers greater control. At the other end of the continuum, we have permanent downloads and other forms of complete ownership, which give consumers the greatest flexibility in use of their content. For this, distributors pay a market rate, deservedly higher than the free or statutory license amount at the other extreme.

What we are seeing with these certain satellite and HD Radio services is a gaming of the system as they leapfrog from the limited control offerings of radio to the greater control of content offered by download services, but without paying the equivalent license fee. This not only fails to properly compensate creators, it threatens the licensed services that are playing by the rules – the very services we and so many others in the music community are relying on to deliver us from years of loss due to online theft. (It is interesting that, as noted above, satellite services guard their investment by protecting their signal but, in the case of XM Radio, fail to understand the need to protect the valuable content they carry. After all, without content protection, there will be less investment in music; and music is the primary reason why customers purchase XM subscriptions.)

XM claims that it is already paying content creators. That is true, but what they are paying for is the *performance* of music – the statutorily-based license fee at the lower end of the ownership continuum. That is very different from (and much less than) the free-market *distribution* license required for download services. One is not a substitute for the other. XM's claim is tantamount to saying that if someone buys a ticket to watch a movie in a theater, he's entitled to take a DVD of the movie home with him afterwards. These are two distinct purchases, worth distinctly different amounts, and this principle is no less true when found in the digital world.

The transformation from a passive to an interactive listening experience without obtaining the proper license to pay the creator is especially troubling because, again, record labels and artists receive *absolutely no payment* from the performance of their works on terrestrial over-the-air radio. This unfair situation means that revenue, if any, comes only from the ultimate sale of that music to listeners. We are told that terrestrial radio's exemption from paying artists and record labels for the performance of their work is appropriate because radio serves a promotional purpose. We fundamentally disagree with this argument (the U.S. is in fact one of only a few countries not to grant artists and labels a performance right) but, even if true, it means nothing if there are no resulting sales. If the broadcast and its accompanying recording and archiving features replicates

the sale it is intended to generate, no amount of "promotion" will benefit content creators. Simply, we rely on sales. Without them, we cannot realize the return necessary to invest in new works and new artists, and songwriters cannot earn a living to continue writing the songs we all want to hear.

Fortunately, there are solutions. These are best worked out in the marketplace, and we have seen progress in that respect on a couple fronts. For satellite, we have entered into an agreement with Sirius that will ensure that content creators are properly compensated for their work. For HD Radio, we have been engaged in extremely productive talks with the broadcast industry. These talks certainly are based on our long and positive relationship with broadcasters, but were facilitated by the request of Chairman Stevens and Senator Inouye in the Senate Committee on Commerce, Science and Transportation during a January hearing on Broadcast and Audio Flag. We have come a long way since then and remain optimistic that a market-based solution that will protect content and compensate creators can be found.

Nevertheless, we are mindful that a true marketplace solution is not necessarily available to us. Unlike our friends in the movie industry, given our lack of a performance right for over-the-air radio and the compulsory license granted to satellite services, we are unable to withhold our content to ensure its proper use and compensation. 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 radio. H.R. 4861 requires digital radio services that use the government spectrum and the government-granted compulsory license to implement certain content protection technology. 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.

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. In the meantime, we look forward to continued discussions with broadcasters and remain optimistic that we can arrive at an acceptable solution for everyone.

As we celebrate the one-year anniversary of the U.S. Supreme Court's decision in *Grokster*, we are reminded that content protection and technological innovation can, in fact, coexist. But the success of technological innovation and content creation is each dependent upon mutual respect for the value of the other. Mr. Chairman, I am here today in the hope that we can all continue on in the spirit of that *Grokster* decision – to recognize the value of creation and the importance of protecting it. Once again, our message is simple: radio services should not be allowed to act like a download service without paying the appropriate license for distributions. An audio flag, and legislation such as the Audio Broadcast Flag Licensing Act which implements it, is an effective way to attain the proper balance of interests. We look forward to working with you and all of our partners in the broadcast and electronics industries to ensure a healthy and strong digital radio future.

Thank you.

MR. UPTON. Mr. Levin.

MR. LEVIN. Good afternoon, Chairman Upton, Chairman Barton, and distinguished members of the committee. My name is Andrew Levin. I am Executive Vice President of Clear Channel Communications. I am here today on behalf of the National Association of Broadcasters, and I thank you for the opportunity to speak on this issue. Just 5 years ago free radio faced a major shift in consumer behavior. Our listeners began to migrate to new digital music platforms, creating some very daunting business challenges for us, but we stepped up to the plate because history is littered with once thriving industries that have failed, some with their heads in the sand, others trying to deny and even to rail the changes in technology and consumer behavior around them.

Consumer shifts are never easy for the businesses that have to adapt to them, but we realize that is the price of admission to compete, so today Clear Channel finds itself a leading programmer for the Internet, for cell phones, the iPod, and even satellite radios. And after nearly 15 years of research and development, countless hours of technology negotiations, millions of dollars in human capital and effort, we are successfully rolling out HD radios, the next generation of free radio broadcasts.

Today, 800 radio stations air their primary broadcasts in HD, 1,200 more will convert in the next year that will cost nearly $100,000 per station. Industry players will spend $400 million over the next 2 years just to promote these new services. HD radios are now shipping from factories, are being sold by retailers like Radio Shack and Tweeter. BMW is now shipping factory-installed HD radios in their 5, 6, and 7 series cars. But getting to this point has been far from easy. Not only has it required a tremendous amount of investment, but also an enormous amount of collaboration across a variety of different industries.

We have had some great successes so far, but this massive rollout of HD digital radio is now entering its most important and delicate phase. Like all new technologies the success of the digital radio revolution will depend on whether a critical mass will follow these so-called early adopters and that will only come if there is reasonable certainty regarding technological requirements and consumer expectations.

Any uncertainty about the ability to meet the reasonable expectations of consumers and the technological requirements that are at the core of this massive effort could deal a fatal blow to the most significant innovation we have seen for free radio in nearly 100 years. We believe the biggest threat to the future of free digital freedom would be pre-emptive legislation mandating a particular copyright copy protection technology and strict usage controls for consumers. These actions would create enormous uncertainty for every major stakeholder involved,

including consumers who will be the ultimate drivers whether this succeeds.

A technological mandate by Congress, at best, would cause a delay to market of at least 2 years, or more likely the disruption and business uncertainty would simply kill the plans of broadcasters, manufacturers, automakers, and retailers, and leave a wake of stranded investment in its path. There is no reason to enact a technological mandate at this point and there are several reasons not to.

First, the affected industries can and will find a solution. Remember that the final inter-industry consensus on the digital television broadcast flag was found without government intervention and without disabling the existing base of digital televisions, nor interfering with consumer uses inside the home.

Second, talks are currently underway between the NAB and the recording industry to forge a consensus on digital radio copy protection. It is still early, but we are confident that if all the affected players are represented at the table, we will find a solution that is acceptable to everyone. And, third, litigation is now pending between the recording industry and XM over the very issue that is essential to the development of a content protection scheme, that is, what constitutes fair use by consumers with regard to today's devices.

Admittedly, it is not easy to adapt to new technologies but that is precisely what we are doing and the jury is still out on how the market will develop. It is simply premature to enact a mandate when we have no idea how the marketplace is going to respond. It would have to be based on little more than pure speculation. Be assured broadcasters completely oppose copyright infringement, but there are a myriad of complex and technical issues at stake, with enormous consequences for the future of a fledging new service.

We believe these issues deserve the requisite scrutiny that is best accomplished through arm's-length negotiations between private parties. We urge the committee to give us that time to develop a well-vetted, industry-wide solution that will move the HD rollout forward while balancing all of the competing interests involved. Thank you.

[The prepared statement of Andrew W. Levin follows:]

PREPARED STATEMENT OF ANDREW W. LEVIN, EXECUTIVE VICE PRESIDENT AND CHIEF LEGAL OFFICER, CLEAR CHANNEL COMMUNICATIONS, ON BEHALF OF NATIONAL ASSOCIATION OF BROADCASTERS

Summary of Written Statement

Good afternoon, my name is Andrew W. Levin. I am the Executive Vice President and Chief Legal Officer for Clear Channel Communications, which operates 1150 local radio stations, 35 television stations, and 140,000 outdoor advertising displays

worldwide. 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 broadcast networks before Congress, the Federal Communications Commission and the Courts.

Free radio is currently investing huge human and financial capital to complete its own transition to digital broadcasting. Given the importance of the digital transition to consumers and broadcasters alike, the design and implementation of an audio broadcast flag must not compromise reasonable and lawful consumer expectations, or in any manner impede the successful rollout of digital radio.

Currently, 824 digital radio stations are on the air and broadcasters have individually committed to upgrade more than 2,000 stations to high definition (HD) radio technology this year, at a cost of $100,000 per station in engineering alone. The possibilities are endless, and drive home the point that we need to make sure these technological innovations are not stopped dead in their tracks.

NAB has been diligently working with RIAA to develop and forge a consensus on a digital radio copy protection system that will 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. Thus, NAB does not believe that legislation mandating <u>any particular system</u> of digital radio copy protection is necessary or appropriate at this time. Rather, we encourage the committee to permit the parties' adequate time to work through these complicated issues.

There is one type of protection system that has been discussed that NAB strongly opposes: encryption at the source. 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.

Further, the issue of an appropriate digital audio copyright scheme has been further complicated by the ongoing lawsuit by the recording industry against XM Satellite Radio, Inc. The federal court in that case will be addressing the very issue that is essential to the development of an audio flag, i.e., what constitutes "fair use" of a copyrighted work, especially by consumers. Any discussion about digital audio copy protection 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.

Nothing in the audio flag discussion is related to nor provides a basis to support a new performance right tax on broadcasters. 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.

Finally, NAB believes Congress should legislate specific authority for the FCC to re-instate its regulations implementing a broadcast flag for digital television adopted in 2003. Although the D.C. Circuit Court of Appeals ultimately decided that the FCC lacked authority to impose regulations, the policy judgments explained in the agency decision remain valid and should be implemented. However, NAB opposes any attempt to exempt broadcasters' news or public affairs programs from the protection of the flag.

In sum, 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. In addition, the issues presented by the audio flag are complicated, involve numerous stakeholders, including consumers and their right to "fair use." NAB will continue to work with RIAA to develop a consensus on digital radio copy protection. Congress should allow this industry process to continue without the adoption of premature legislative mandates.

Good afternoon, my name is Andrew W. Levin. I am the Executive Vice President and Chief Legal Officer for Clear Channel Communications, which operates 1150 local radio stations, 35 television stations, and 140,000 outdoor advertising displays worldwide. 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, loca4l radio and television stations and broadcast networks before Congress, the Federal Communications Commission and the Courts.

Like the television broadcast industry, free radio is currently investing huge human and financial capital to complete its own transition to digital broadcasting. Given the importance of the digital transition to consumers and broadcasters alike, our first and foremost concern is that any content protection scheme must do no harm. By that I mean that the design and implementation of an audio broadcast flag must not compromise reasonable and lawful consumer expectations, or in any manner impede the successful rollout of digital radio.

One thing I'd like to make perfectly clear at the outset: broadcasters oppose piracy in all shapes and forms. But in order to protect against unlawful uses, we believe that a well-vetted, industry-wide solution is the key to developing a system that balances the competing interests of everyone involved. And by everyone I mean, most especially, consumers who will either enjoy the great new benefits this technology can bring, or be left behind with fewer choices and less functionality. Too often it is consumers who are forgotten in the fractious bickering that takes place when new technologies are introduced in the marketplace. We urge this committee to allow the broadcast industry, the recording industry and other vital stakeholders, including consumer groups, to continue working toward a consensus on a digital radio copy protection scheme.

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

Digital audio broadcasting will enable broadcasters to better serve our local communities and to remain competitive in today's ever-expanding digital media marketplace. But we face many challenges as we work toward a successful and timely transition to digital radio. If radio is not allowed to continue this roll out on a timely basis, and remain competitive with other providers of digital audio content, the issue of digital radio copyright protection will quickly become moot. And, as we learned from the broadcast video flag process, there is no "quick fix" technical system to provide copy protection for digital media.

The radio industry in America has begun its massive roll out of digital broadcast transmissions and all-new digital radio receivers. Currently, 824 digital radio stations are on the air. Broadcasters have individually committed to upgrade more than 2,000 stations to high definition (HD) radio technology this year, at a cost of $100,000 per station for engineering alone. In fact, Clear Channel Radio itself already has more than 238 stations offering broadcasts in HD digital quality today, and more are added every day. HD radio not only offers listeners crystal-clear audio, it also permits the broadcasting of an additional free, over-the-air program stream that will bring additional content (including much more local content) to the public on the radio stations' current allocation of spectrum.

In fact, the best part is that these additional streams are currently free of advertising. Clear Channel believes creating new, compelling formats is essential to the future of free radio. Hence, our company's Research and Development Group created the Format Lab in 2004 to create more than 75 brand new niche formats. These exciting new program formats are fully customized by our local programmers to meet the specific needs of their communities and thus create a new radio channel in HD markets all across the country.

This transition to digital radio will enable other great new services, including wireless data providing 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, special music information, news, weather and traffic alerts that are not only local, but will be interoperable with a listener's in-car navigation system. The possibilities are endless, and drive home the point that we need to make sure these technological innovations are not stopped dead in their tracks. Digital radio will allow broadcasters to provide tremendous new services to consumers, and is the only way 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 through the creation of the HD Digital Radio Alliance. And automakers 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 rollout.

NAB has been diligently working with RIAA to develop and forge a consensus on a digital radio copy protection system that will 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. Thus, NAB does not believe that legislation mandating any particular system of digital radio copy protection is necessary at this time. Rather, we encourage the committee to permit the party's adequate time to work through these complicated issues.

Encryption at the Source Should be Rejected

There is one type of protection system that has been discussed that NAB strongly opposes: encryption at the source. 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 risk stalling the digital radio transition by requiring a change in the technical digital radio broadcasting standard that could delay the digital radio roll-out by more than one year. Unlike the video flag, encryption of DAB signals would obsolete receivers now in the field, as well as receivers and component parts currently in the production pipeline. 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.

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

The issue of an appropriate digital audio copyright scheme has been further complicated by the ongoing lawsuit by the recording industry against XM Satellite Radio, Inc.[1] The federal court in that case will be addressing the very issue that is essential to the development of an audio flag, *i.e.*, what constitutes "fair use" of a copyrighted work, especially by consumers. Indeed, any discussion about digital audio copy protection 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:

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[1] *Atlantic Recording Corp., et al. v. XM Satellite Radio Inc*., Docket No. 06 CV 3733 (S.D.N.Y.).

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.[2]

In the Audio Home Recording Act of 1992 ("AHRA"), Congress definitively addressed the issue of home recording of sound recordings and musical works, and in section 1008 provided an exemption for home copying. This Act was intended to be comprehensive, forward-looking legislation designed to end, once and for all, the "longstanding controversy" surrounding the home recording of prerecorded music.[3] 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*."[4]

The lawsuit against XM raises the question of whether the recording, downloading and creating of a personal library of copyrighted music is a permitted "fair use" under copyright law. The lawsuit centers on a recently released device called the Inno, which, among other uses, allows consumers to record up to 50 hours of XM's programming. The Inno gives users the option of disaggregating songs from XM's airing, and storing them on the device for later playback. Although the songs cannot be removed from the Inno, the recording industry's suit asserts that the recording and disaggregating function equates with illegal downloading, and is therefore a copyright violation. XM has stated that the device was designed to comply with fair use principles and the AHRA. The resolution of this lawsuit could well impact the interpretation of what constitutes fair use and, thus, how any digital audio copy protection system should be designed and implemented under copyright law.

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

As NAB has stated numerous times, nothing in the audio flag discussion is related to nor provides a basis to support a new performance right tax on broadcasters. 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

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[2] H. Rep. No. 92-487, 92d Congress, 1st Sess. at 7 (Sept. 22, 1971) (emphasis added).
[3] *See* S. Rep. No. 102-294, 102d Cong., 2d Sess. 30, 51 (June 9, 1992).
[4] 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).

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.[5]

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."[6] Consistent with this intent, the DPRA expressly exempted from sound recording performance right liability non-subscription, non-interactive transmissions, including "non-subscription broadcast transmission[s]" – transmissions made by FCC licensed radio broadcasters.[7]

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.

The DTV Broadcast Flag

NAB believes Congress should legislate specific authority for the FCC to re-instate its regulations implementing a broadcast flag for digital television adopted in 2003. The DTV broadcast flag mechanism was developed over 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 debated at the FCC in voluminous comments and reply comments from affected industry and consumer groups, companies and organizations. Although the D.C. Circuit Court of Appeals ultimately decided that the FCC lacked authority to impose regulations, the policy judgments explained in the agency decision remain valid and should be implemented.

Further, NAB opposes any attempt to exempt local broadcasters' news or public affairs programs from the protection of the flag. While broadcasters freely and widely distribute their news and public affairs programming, NAB believes it vitally important that broadcasters retain the right to protect their copyrighted news and public affairs programs, which typically are the main or only product of local broadcasters. Unauthorized internet redistribution could well eviscerate the program exclusivity of news or public affairs programs of stations in local markets, as well as undermine the original broadcast and its accompanying revenue by re-distributing programs across time zones, thus allowing Internet viewing *before* the original show is seen on local stations in western U.S. markets. Such results would wreak havoc on stations' audience ratings and threaten its continued viability.

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. In addition, the issues presented by

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[5] *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.").

[6] 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.").

[7] 17 U.S.C. § 114(d)(1)(A).

the audio flag are complicated, involve numerous stakeholders, including consumers and their right to "fair use." NAB will continue to work with RIAA to develop a consensus on digital radio copy protection. Congress should allow this industry process to continue without the adoption of premature legislative mandates.

MR. UPTON. Mr. Harris, welcome.

MR. HARRIS. Chairman Upton, Representative Markey, Representative Ferguson, and members of the subcommittee, thank you very much for having me here today to speak on the issue of protecting the value of the songs I write when they are broadcast over a digital radio service that enables consumer to keep it without buying it. First of all, let me say that I love the fact that new technologies exist that will allow consumers to listen to my music in different ways on different platforms, but please excuse me if I insist on being paid for it, even if it is consumed by you in a new and different way.

I have been fortunate enough to write nine number one songs by some of today's biggest artists. However, the number of talented young songwriters who choose to dedicate their lives to music will decrease even more than it already has with the problem of massive piracy on the Internet and now XM format. Choosing to be a professional songwriter has become a risky business.

As a professional songwriter, you are your own business. There is no health insurance or 401K. You live on royalties from the intellectual property you create. When I write a song, I get a royalty when it is performed or when it is played on radio. I also get a royalty when a consumer buys a copy of it. When you go to see a concert you pay to listen to the music. When you buy a download you pay to keep that song.

We are here today because certain digital radio services do not want to pay for music. By allowing listeners to record broadcasts and build up entire juke boxes of music on portable devices, radio services are becoming download services without paying for the download license. I am not talking about recording off the radio. Certainly, we have all done that and I have no interest in seeing that disappear, but imagine my reaction when XM offers a service that allows someone to get an entire collection of my works automatically recorded, labeled, sorted, and transferred to them in pristine, permanent, and portable digital copies without seeing a cent from the sale in return.

This is not radio. This is Napster, Rhapsody, Yahoo or any number of other digital music subscription services that pay the appropriate license for this type of distribution. Those are the services necessary to make the sales we need to survive. Those services cannot compete with others that offer the exact same service without paying the same license. This is a matter of survival for the creators of music and those who

provide legal downloads. Everyone can win in the digital world if we cooperate in creating a fair and equitable licensing system. This has been the tradition since the days of Cole Porter. A song is a commodity like any other. Attorneys are not working pro bono today. If digital radio can pay market rates for their technology, equipment, and legal services, they certainly could pay for the songs because without the songs there is no artist. Without the song there is no XM radio.

I applaud Representative Ferguson for introducing the Audio Broadcast Flag Licensing Act. This allows the songwriters to receive fair compensation for their work. We are all grateful for your insight. On behalf of everyone in the music community, I hope you will support this bill and create for all songwriters a secure digital future. Thank you.

[The prepared statement of Stewart Harris follows:]

PREPARED STATEMENT OF STEWART HARRIS, SONGWRITER, ON BEHALF OF SONGWRITERS GUILD OF AMERICA

Chairman Upton, Representative Markey, Representative Ferguson, and Members of the Subcommittee, thank you very much for having me here today to speak on the issue of protecting the value of the songs I write -- my property -- when it is broadcast over a digital radio service that enables a consumer to keep it without buying it.

First of all, let me say that I love the fact that new technologies exist that will allow consumers to listen to my music in different ways on different platforms. But please excuse me if I insist on being paid for it even if it is consumed in a new and different way.

I have been fortunate enough to write several #1 songs recorded by some of the biggest artists. But getting there was not easy. And the number of talented young songwriters who choose to dedicate their lives to bringing their gifts to American consumers will decrease even more than it already has with the problem of massive piracy on the Internet if they do not get paid as the delivery of music evolves.

Choosing to be a professional songwriter is a risky business. As a professional songwriter you are your own small business – in fact the smallest. You pay your own health insurance and your own retirement. There is no "flex plan." What you get to live on are royalties from the use of what you create. From your property. When I write a song, I get a royalty when it is performed, or broadcast over radio. I also get royalties when a consumer keeps a copy of it. Different uses of my songs deserve separate payments. When you go see a concert you pay to listen to that performance. And when you buy a download you pay to keep that song. But you don't go to iTunes and demand a song for free because you listened to it on the radio or at a concert. Consumers get the difference. Digital radio services should get the difference too.

We are here today because certain digital radio services do not want to pay me when they offer a service that allows a consumer to keep my song instead of having to buy it. By allowing listeners to record broadcasts and build up entire jukeboxes of music on portable devices, radio services are becoming download services – but without paying the download license.

I'm not talking about casual recording off the radio. Certainly, we've all done that and I have no interest in seeing that disappear. I love it when someone runs to the radio to record one of my songs that has come on. But imagine my frustration when XM offers a service that allows someone to get an entire collection of my works, automatically recorded, labeled, sorted, and transferred to them in pristine permanent and portable

digital copies without seeing a cent from a sale in return. This is not radio; this is Napster, Rhapsody, Yahoo!, or any one of the number of other digital music subscription services that pay the appropriate license for this type of distribution. Those are the services we need to make the sales we need to survive. But those services can not compete with others that offer the exact same functionality without paying the same license.

This is a matter of fairness – to other broadcasters, to download services, and to all of us making the music for those services. This is a matter of treating platforms that offer the same services equally.

I applaud Representative Ferguson for introducing the Audio Broadcast Flag Licensing Act, that will allow consumers to continue taping of the radio, but prevent the automatic "collecting" of my songs with no payment to me. You are directly affecting my livelihood with this bill and for that I am extremely grateful.

Seems to me that if digital radio services can pay market rates for their technology and equipment, they can do the same for my music. After all, without songwriters to write the songs, what is there to deliver over all that technology?

I always explain it this way: suppose I was a general contractor and you provided me with all of the bricks I needed to build my project, and then when it came time to pay I said thanks and handed you back your invoice. You would probably punch me in the nose. While I promise there will be no punching here today, I hope you understand how I feel. I am not a lawyer like these other guys at the table. I'm just a songwriter. And all I ask is that when the lawyers for the radio services sitting here get their paychecks, they urge their companies to reward me for my work, too.

On behalf of everyone in the music community, I hope you will support this bill and secure for all songwriters a bright digital future.

Thank you.

MR. UPTON. Ms. Ziegler.

MS. ZIEGLER. Chairman Upton, Congressman Markey, and members of the subcommittee, my name is Ruth Ziegler, and I am the Deputy General Counsel of Sirius Satellite Radio. I very much appreciate the opportunity to appear today on behalf of Sirius and its over four million subscribers. Sirius is bringing exciting technical innovation to American consumers, and at the same time we are opening enormous new opportunities for the music industries, paying the millions of dollars in royalties, and applying strong technological measures to protect their content.

Sirius takes great pride in presenting a breadth and depth of programming that is unparalleled on radio and gives our millions of listeners a way to discover and rediscover music and artists. In less than a decade, Sirius has developed infrastructure necessary to deliver a national satellite service and we now broadcast over 125 digital quality channels including 67 channels of commercial free music, plus over 60 channels of sports, news, talk, and entertainment. Unfortunately, from our perspective, it appears the music industries have declared a multi-front legal assault on innovation on well-settled and congressionally recognized consumer home reporting rights and on legislative agreements they made and Congress enacted.

I would first emphasize and mention that the so-called audio flag proposal in substance bears no resemblance to the video flag that will be discussed by the panel later today. The video flag seeks to prevent mass and discriminate redistribution of content over the Internet. Our products already prohibit such redistribution. Our transmissions are encrypted at the source. In contrast, the audio flag proposals take as their primary target consumer home recording, conduct long considered to be fair use. Moreover, the video flag proposal is the result of years of open multi-industry negotiations. Nothing similar has occurred in connection with the audio flag proposal to date, although the NAB and the RIAA as we have heard have begun discussions.

To be clear, the issue here today certainly with respect to satellite radio is not piracy or mass redistribution. It is about the very first copy a consumer makes in his or her own home of lawfully received broadcasts. Let me tell you a little bit about one of our innovative products, our portable hand-held device called the S50. The S50 is a traditional satellite receiver that allows users to listen live to our programming. It also allows them to save our programming for listening later while commuting, exercising, or simply exercising at a time when you can't receive our satellite signal. The S50 also allows the user to save individual songs from Sirius broadcasts manually with a push of a button.

Contrary to some reports, the S50 does not provide for any kind of automated searches, cannot program the device to seek an individual song or artist. It is our firm view that this ability to record individual songs and to play them back in any order is nothing more than a convenient form of the kind of home recording from radio that the public has been doing lawfully for decades. In the past, Congress has consistently affirmed and reaffirmed the rights of Americans to make copies of music they receive over the air. This right was expressly codified in the Audio Home Recording Act of 1992, at the urging of the recording and the music industries. The S50 was designed to comply with that Act. Songs recorded from the broadcast are encrypted and can't be taken off the device.

Royalty payments required by the Audio Home Recording Act are paid for each device and these royalties are shared by the recording industry and its artists and by the music industry and its songwriters. Those payments are in addition to the enormous royalties Sirius pays to those parties for the right to make its satellite transmissions. Moreover, as you may be aware, despite our rights under the Audio Home Recording Act, Sirius has sought good relations with these industries and we negotiate in good faith and resolve issues related to the S50 with recording companies.

Mr. Chairman and subcommittee members, Congress should not enact legislation unless and until the recording and music industries clearly identify what they seek to prevent with this legislation, carry the burden of demonstrating that they face a concrete and significant threat, and make the necessary showing that the technology exists to implement the solution and it will reduce the threat without unreasonably harming consumers' values, rights, and innovation, and we are far from that point as we sit here today. The law as it now exists has been beneficial to consumers, innovators, and copyright owners. Consumers have rights to record lawfully acquired content for non-commercial purposes in their homes.

We have a legislative framework in the Audio Home Recording Act that protects content and consumers, compensates copyright owners, artists, and writers, and provides some certainty to technology companies. There is no justification at this time in our view to change the successful formula. Thank you for the opportunity to speak with you today.

[The prepared statement of Ruth A. Ziegler follows:]

PREPARED STATEMENT OF RUTH A. ZIEGLER, DEPUTY GENERAL COUNSEL, SIRIUS SATELLITE RADIO, INC.

Chairman Upton, Representative Markey and Members of the Subcommittee, my name is Ruth Ziegler, and I am Deputy General Counsel of Sirius Satellite Radio. I very much appreciate the opportunity to appear today on behalf of Sirius, its employees, stockholders and more than four million subscribers.

Technological innovation and furthering consumer enjoyment are the core of our business. In less than a decade, we have developed and launched the infrastructure necessary to deliver a national satellite service and we now broadcast over 125 digital-quality channels, including 67 channels of 100% commercial-free music, plus over 60 channels of sports, news, talk, entertainment, traffic, weather and data to consumers across the country. We already pay the music and recording industries millions of dollars to make these performances.

The audio flag proposal that we discuss today is part of a multi-front legal assault by the recording and music industries on innovation, on well-settled and Congressionally recognized consumer fair-use home recording rights, on legislative agreements that they made (and Congress enacted), and, specifically, on satellite radio.

Further, the so-called audio flag proposal, in its substance, bears no resemblance to the video broadcast flag that also is being discussed during today's hearing. The video flag seeks only to prevent mass, indiscriminate redistribution of digital broadcast television over the Internet. Home recording is not affected. Our products already prevent Internet redistribution. The audio flag proposal targets private consumer home recording, long considered to be fair use.

Congress has consistently affirmed and reaffirmed the rights of Americans to make copies of music that they receive over the air. This right was expressly codified in the Audio Home Recording Act, legislation negotiated by the recording and music publishing industries with the consumer electronics industry and strongly advocated by all three of those industries as a complete, forward-looking "generic solution that *applies across the board to all forms of digital audio recording technology*."

Nor has a clear audio flag proposal been offered. Rather, the proponents have offered vague buzz words, like "disaggregation," or have tried to redefine previously well understood terms, like "distribution." However, it is reasonable to predict that any audio flag regime will result in the imposition of new encryption obligations on all in-home consumer devices designed to receive or playback radio—not only receivers, but complete stereo systems to which those receivers are attached, recording devices, playback devices, and even speakers.

It is not appropriate to leave the hard public policy decisions to the FCC, which is not an agency that traditionally has concerned itself with copyright law or with consumer fair use rights. Congress should not enact audio flag legislation unless and until the recording and music industries (i) clearly identify what they seek to prevent, (ii) carry the burden of demonstrating that they are facing a concrete and significant threat that outweighs the threat to consumer fair use rights and innovation, (iii) propose a clear, definite solution and (iv) make the necessary showing that technology exists to implement the solution and can be applied in a way that is likely to reduce the threat without unreasonably harming consumers and innovation. We are far from that point today.

The law as it now exists has been beneficial to consumers, innovation, and copyright owners. There is no justification for changing this successful recipe.

Chairman Upton, Representative Markey and Members of the Subcommittee, my name is Ruth Ziegler, and I am Deputy General Counsel of Sirius Satellite Radio. I very much appreciate the opportunity to appear today on behalf of Sirius, its employees, stockholders and more than four million subscribers. I am testifying on behalf of Sirius as a company that is bringing exciting technical innovation to American consumers. We are doing that while at the same time opening enormous new opportunities for the music and recording industries, paying them millions of dollars in royalties and, in addition, applying strong technological measures to protect their content. Sirius takes great pride in presenting our millions of listeners with a breadth and depth of musical programming that is unparalleled on radio and in providing a means for our listeners to discover—and rediscover—music and artists. Such a rich and diverse offering of musical choice benefits all segments of the music industry – today and in the future.

Technological innovation and furthering consumer enjoyment are the core of our business. In less than a decade, we have developed and launched the infrastructure necessary to deliver a national satellite service and we now broadcast over 125 digital-quality channels, including 67 channels of 100% commercial-free music, plus over 60 channels of sports, news, talk, entertainment, traffic, weather and data to consumers across the country.

Unfortunately, the recording and music industries have declared a multi-front legal assault on innovation, on well-settled and Congressionally recognized consumer fair-use home recording rights, on legislative agreements that they made (and Congress enacted) in the past, and, quite frankly, specifically, on satellite radio. In addition to lawsuits and threats of lawsuits, this anti-consumer, anti-competitive front includes advocacy of three different proposed bills.

In addition to the misnamed audio flag proposal that is the subject of this hearing, the equally misnamed "PERFORM" Act and important sections of the Section 115 Reform Act, each seeks to outlaw long-accepted and permitted consumer recording, for which the music and recording industries are already paid a royalty. Each seeks to give the recording and music industries veto power over technological innovation. Each would renege on the Audio Home Recording Act deal, made by the recording and music industries and sold to Congress in 1992 as "a generic solution that *applies across the board to all forms of digital audio recording technology*." And on the promise that

"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."[1]

It is equally important to emphasize that the so-called audio broadcast flag proposal, in its substance, bears no resemblance to the video broadcast flag that also is being discussed during today's hearing. As I will discuss in greater detail, the video flag seeks only to prevent mass, indiscriminate redistribution of digital television broadcasts over the Internet. Our products already prevent all Internet redistribution of SIRIUS broadcasts. In contrast, the audio flag proposals take several ill-defined forms, each of which uses recording and music industry buzz words like "disaggregation" or "distribution," and all of which have as their primary target consumer home recording; conduct long considered to be fair use. The battlefield here today is not piracy or mass redistribution, it is the very first copy a consumer makes in their own home of lawfully received broadcasts.

Sirius and Innovation

Sirius has built its business on innovation. The company began with the invention of a new, miniature antenna technology that, for the first time, permitted the receipt of low power satellite radio transmissions in vehicles. In the late 1990s, the company paid almost $90 million to the U.S. Treasury for spectrum rights auctioned by the Federal Communications Commission. Since then, our company has invested nearly $3 billion in the complex infrastructure necessary to run a state-of-the-art satellite radio company – from satellites to transmitters to innovative new receivers to the programming of our channels by our skilled and creative employees.

There is no question that Sirius is changing the way people listen to music, and for that matter -- sports, news, and entertainment. Operating from our corporate headquarters in New York City's Rockefeller Center, Sirius broadcasts over 125 digital-quality channels, including 67 channels of 100% commercial-free music, plus over 60 channels of sports, news, talk, entertainment, traffic, weather and data.

SIRIUS' music channels cover nearly every genre - from heavy metal and hip-hop to country, dance, jazz, Latin, classical and beyond. The music on each channel is selected, arranged, prepared and hosted by SIRIUS staff, all of whom are recognized experts in their music fields, along with contributing musicians and performers who lend their talent and expertise. This ensures that SIRIUS subscribers can regularly listen to unparalleled music selections, insights and perspectives.

This unique listening experience is available to subscribers from coast-to-coast in the United States. Our service can be used in cars, trucks, RVs, homes, offices, stores, and even outdoors. Boaters around the country, and up to 200 miles offshore, can also hear Sirius. For a monthly subscription fee, Sirius provides premium quality programming delivered by three dedicated satellites orbiting in special orbits to maximize their time directly over the United States.

The nerve center for SIRIUS operations is at Avenue of the Americas and 49th Street in New York City, where the company's state-of-the art studios are located. Artists including Burt Bacharach, The Beach Boys, Emmylou Harris, Dolly Parton, Yo-Yo Ma, Phoebe Snow, The White Stripes, Mary J. Blige, Sting and Randy Travis have visited the studios for performances and interviews.

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[1] *Audio Home Recording Act of 1991: Hearing Before the Subcomm. on Patents, Copyrights, and Trademarks of the S. Comm. on the Judiciary,* S. Hrg. 102-908, 102nd Cong., 2d Sess. 111 (Oct. 29, 1991) (statement of Jason S. Berman, President, Recording Industry Association of America). Mr. Berman also argued "[m]oreover, enactment of this legislation will ratify the whole process of negotiation and compromise that Congress encouraged us to undertake." *Id.* at 120. There could be nothing more deleterious to that process than allowing the recording industry to renege on the legislative deal that it made.

Sirius and Innovative Consumer Recording

In addition, responding to the demands of our subscribers, Sirius has developed a portable, hand-held device called the S50. The S50 is an intelligent leap forward in Satellite Radio technology providing integration of both live content and up to 50 hours of time shifted content storage. The device provides our subscribers with the ability to enjoy their favorite music—on a time-shifted basis—while traveling, exercising, commuting or simply relaxing.

The S50 includes several different capabilities. While attached to its docking station and connected antenna, the S50 receives live SIRIUS broadcasts and includes a short-term buffer that allows the listener to pause and replay those broadcasts.

Apart from the replay buffer, most of the recording performed by the S50 consists of recording the subscriber's three most-listened to channels, while the device is tuned to one of the channels, so that the subscriber can have the full SIRIUS experience while traveling or otherwise away from his or her docking station. These channels are refreshed on a first-in/first-out basis.

In addition, the subscriber can program timed blocks of programming to record and save. These blocks cannot be broken into individual songs or programs. The device also allows the subscriber to upload his or her own collection of digital music files, including MP3 files, from a home computer.

Finally, the device allows the user to save individual songs from SIRIUS broadcasts, while they are playing. The device includes a one-touch record function, to make convenient the kind of home recording that the public has been doing for decades—the kind of recording recognized by the Audio Home Recording Act to be wholly lawful. It is this function that has drawn the attention and ire of the recording and music industries.[2] The S50 was designed to comply with the Audio Home Recording Act. Songs recorded from SIRIUS broadcasts are encrypted and cannot be removed from the device. In other words, there is no threat of Internet redistribution, let alone "mass, indiscriminate Internet redistribution."

And, of course, the royalty payments required by the AHRA are made for each device. These royalties are shared, under a statutory formula, by the recording industry and its artists and by the music industry and its songwriters. Those payments are in addition to the enormous royalties SIRIUS already pays to the recording industry for the right to make public performances of the record companies' sound recordings and to ASCAP, BMI and SESAC for the right to make public performances of musical works. Moreover, as I am sure you have seen in the press, despite its rights under the AHRA, SIRIUS has sought good relations with the recording and music industries. Thus, we have negotiated in good faith over the S50, and reached an agreement with the record companies.

The Audio Flag Proposals Advocated by the Recording and Music Industries Seek To Renege on the AHRA and Ban Conduct Long Permitted to the Public.

Congress has consistently affirmed and reaffirmed the rights of Americans to make copies of music that they receive over the air. This right was expressly codified in the Audio Home Recording Act, legislation negotiated by the recording and music publishing industries with the consumer electronics industry and strongly advocated by all three of those industries as a complete, forward-looking resolution of home recording issues.

When Congress first granted copyright protection to sound recordings in the 1970's, it confirmed consumers' historical right to record radio transmissions:

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[2] Contrary to what some may have heard, the S50 contains no automated search function. You cannot program the device to seek individual songs or artists, period.

> 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.[3]

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. When Congress enacted the record rental amendments,[4] for example, it declined to make any statements or take any actions regarding home taping, instead referring to its previous statements in the Sound Recording Act house report, quoted above, and stating that "no precedential value" with regard to home taping should be given to the fact of the record rental amendment's passage.[5]

Congress squarely addressed the issue of home recording of sound recordings and musical works in the Audio Home Recording Act of 1992. The bill was negotiated by the recording industry, music publishing industry and consumer electronics industry, and was strongly advocated by all three industries as the definitive solution to the home recording issue.[6]

The Senate Report, which discusses the bill in the form negotiated by the recording, music and consumer electronics industries, notes that "the copyright law implications of private audio recording for noncommercial use have been the subject of longstanding debate" and states "[a] central purpose of the [AHRA] is *conclusively* to resolve this debate, both in the analog and digital areas, thereby creating an atmosphere of certainty to pave the way for the development and availability to consumers of new digital recording technologies and new musical recordings."[7]

The legislative history is not ambiguous. The Senate Report opens 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."[8] This specifically includes "the making of [a copy] by a consumer for use in his or her home car, or portable tape player, or for a family member." All are "protected by the prohibition against copyright infringement actions contained in" the AHRA.[9]

The same sentiments were expressed in the House of Representatives. As one co-sponsor in the House explained, the Audio Home Recording Act was enacted to

> make it clear that noncommercial taping of music by consumers is not a violation of copyright law. The debate over home taping of records goes back to 1970 when Congress first extended copyright protection for records but this legislation will end

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[3] House Judiciary Committee Report No. 92-487, 92nd Cong., 1st Sess. at 7 (1971).
[4] Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (1984).
[5] *See* H.R. Rep. 98-987 (Aug. 31, 1984).
[6] *See, e.g.,* S. Rep. 102-294, 102nd Cong., 2nd Sess. 33 (June 9, 1992).
[7] S. Rep. No. 102-294, 102nd Cong., 2nd Sess. 51 (June 9, 1992) (emphasis added).
[8] S. Rep. 102-294, 102nd Cong., 2nd Sess. 30 (June 9, 1992); *id.* at 51 ("key purpose of [AHRA] is to insure the right of consumers to make analog or digital recordings of copyrighted music for private, noncommercial use").
[9] *Id.* at 51.

> the 22-year-old debate and make it clear that home taping does not constitute copyright infringement.[10]

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. No longer will consumers be branded copyright pirates for making a tape for their car or for their children.[11]

The Ninth Circuit confirmed this conclusion in *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (9th Cir. 1999). There, the court found that the purpose of the AHRA "is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use."[12] Even in holding that the Rio device itself did not meet the statutory requirements of the AHRA, the Diamond court noted that "the Rio's operation is entirely consistent with the Act's main purpose – the facilitation of personal use."[13]

Further, the AHRA includes an explicit technology mandate applicable to home recording—the obligation to use the Serial Copy Management System on digital audio recording devices. 17 U.S.C. § 1002. In imposing this mandate, Congress evaluated the competing interests and concluded that first generation copies made by digital audio recording devices should be permissible, and that technology should only act to stop second-generation copies. 17 U.S.C. § 1001(11) (definition of "serial copying"). As the Senate Report described SCMS, "[o]ne can make an unlimited number of copies from the original, but one cannot copy the copy."[14]

The AHRA explicitly addressed home recordings made from digital transmissions, such as terrestrial and satellite radio. The key definition of "digital audio recording device" includes devices with a recording function that has, as its primary purpose, the making of digital copies "from a transmission."[15] Moreover, the Act contains rules governing the encoding of SCMS in digital transmissions intended to protect broadcasters. 17 U.S.C. § 1002(e). The Senate Report eliminates any doubt about Congress's (and the recording and music industries') intent, explaining that SCMS sets

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[10] 138 Cong. Rec. H9033 (daily ed., Sept. 22, 1992)(Statement of Rep. Moorhead).

[11] 138 Cong. Rec. H9029, H9033 (daily ed., Sept. 22, 1992)(Statement of Rep. Hughes, emphasis added).

[12] *Diamond*, 180 F.3d at 1079, quoting S. Rep. No. 102-294 at 86.

[13] *Id.* at 179.

[14] S. Rep. 102-294 at 36. Congress chose SCMS as a pre-approved technology because "SCMS has been subjected to extensive review by the affected industries and relevant international scientific standards bodies," H.R. Rep. No. 102-873 Part 1 at 19. Further, Congress explicitly granted regulatory authority to the Secretary of Commerce, not the FCC, to approve technological protection measures other than SCMS, subject to the requirement that they have the same functional characteristics of SCMS. 17 U.S.C. § 1002(a)(3).

[15] Although the Act uses a set of nested definitions that are somewhat complex, it defines a "digital audio recording device" as a device "the digital recording function of which is designed or marketed for the primary purpose of making a digital audio copied recording for private use." 17 U.S.C. §1001(3). A "digital audio copied recording" is, in turn," a "reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording *or indirectly from a transmission.*" *Id.*, §1001(1) (emphasis added). A "digital musical recording," in turn, is material object in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any."

forth rules governing the receipt of digital broadcasts, and, that "as a result, digital broadcast and cable transmissions generally will be recordable by consumers, but second generation digital copies will not be able to be made from those first generation copies."[16]

Any Resemblance Between the Audio Flag and Video Flag Proposals Are Superficial and Misleading

The audio flag advocated by the recording and music industries bears no resemblance to the video flag proposal being considered at this hearing, either in substance or in the process by which it was developed.

The video flag proposal is the result of years of multi-industry negotiations, held under the auspices of the Copy Protection Technical Working Group, which resulted in a detailed report. While there was not consensus on all issues, there was broad consensus on many, including the issue of the scope of appropriate technological protections. That scope is carefully limited to preventing mass, indiscriminate redistribution of digital broadcast television over the Internet. Nothing similar, to date, has occurred in connection with the recording industry's audio flag proposal.

To the contrary, the audio flag proposal and the restrictions it seeks to impose, have never been clearly defined by the recording industry. The proposal has been circulated in various formulations, which have consistently been wrapped in vague buzz words, as the recording industry attempts to make it look like the video flag. Audio flag language advocated by the recording and music industries has included either undefined, novel terms such as "disaggregation" (apparently intended to prohibit consumers from recording programs and listening in an order of their choosing to the recorded songs) or terms that the recording industry and music industry are seeking to redefine, such as "distribution," which they now argue includes home recording. Nor have any candidate technologies been identified to effectuate the flag regime.

Indeed, there is no evidence whatsoever that either satellite or terrestrial radio broadcasts are meaningful sources of content used for mass, indiscriminate Internet redistribution. To the contrary, broadcasts are a poor source of content for redistribution. They include music segues and DJ chatter. By comparison, the recording industry itself provides millions of unprotected copies of better sources. They are called CDs and authorized digital downloads that may be copied to CD. If there is any redistribution problem, the cause is the content sold by the record companies themselves.

Perhaps most perplexing is the inclusion of satellite radio industry in a proposed audio flag regime at all. The whole purpose of a broadcast audio flag regime is to provide for encryption of content transmitted in the clear. Satellite radio content is fully encrypted at the source, providing the same level of protection against redistribution as the protection provided by the video flag adopted by the FCC. Particularly as applied to the satellite radioindustry, the audio flag makes no sense.

The Audio Flag Proposals Threaten Innovation and Would Establish the Music and Recording Industries as Gatekeepers Over Technology

Without a clear proposal from the recording and music industries it is difficult to assess the full potential impact of the flag regime they seek. However, some of the likely effects of audio flag proposals include:

- the imposition of new encryption obligations on all in-home consumer devices designed to receive or playback radio. The rules would likely affect not only receivers, but complete stereo systems to which those receivers are attached, recording devices, playback devices, and even speakers. Depending on the scope of the prohibitions, existing systems on which consumers have invested

[16] S. Rep. No. 102-294 at 66.

thousands of dollars could be cut off from radio and satellite radio – including systems that do not facilitate any home recording.

- The FCC, or even the copyright owners themselves, would have authority to determine the scope of consumer fair use rights and to determine which technologies should be permitted to be made available in the marketplace. Such a shift of power is not warranted and is certain to only heighten the lack of certainty for consumer electronics companies and deprive consumers of innovative new products and product features.
- Innovative devices will need to license technologies mandated by the FCC. If the radio flag regime ultimately resembles the video regime, those licenses will include further restrictions on products that will be subject to approval from the recording and music industries. Any device that does not conform to the regime would need specific approval from the recording and music industries before it is sold. And if the major copyright owners don't like a feature, don't like the manufacturer, or otherwise seek leverage against satellite radio, consumers will be deprived of the device and potentially desirable features. That is too much power for the copyright holders and too high a price for consumers.

Mr. Chairman and Subcommittee members, it is not enough to leave the hard decisions to the FCC, which is not an agency that traditionally has concerned itself with copyright law or with consumer fair use rights. Congress should not enact audio flag legislation unless and until the recording and music industries (i) clearly identify what they seek to prevent, (ii) carry the burden of demonstrating that they are facing a concrete and significant threat that outweighs the threat to consumer fair use rights and innovation, (iii) propose a clear, definite solution and (iv) make the necessary showing that technology exists to implement the solution and can be applied in a way that is likely to reduce the threat without unreasonably harming consumers and innovation. We are far from that point as we sit here today.

The law as it now exists has been beneficial to consumers, innovation, and copyright owners. Consumers have clear rights with respect to what they can do with lawfully acquired content for non-commercial purposes within the privacy of their own homes and we have a legislative framework—in the AHRA—that protects content, permits consumers to make first generation copies, compensates copyright owners, artists and writers, and provides some certainty to technology companies. There is no justification to change this successful recipe.

Conclusion

Thank you again for the opportunity to present our views on this important issue. We look forward to working with the Subcommittee members and staff to help ensure that traditional consumer home recording rights are protected, technological innovation is encouraged and, just as importantly, the creative works of musicians of every genre are exposed to the millions of people who have discovered and rediscovered their artistic contributions on satellite radio.

MR. UPTON. Thank you, all of you. At this point we will take questions of the panel, each with 5 minutes up here.

MR. SHIMKUS. Mr. Chairman, would you make sure you ask the panelists to make sure their microphones are moved a little closer.

MR. UPTON. Yeah, if you would put the mics a little closer. That happens when you get older, right? I guess the first question I have, Mr.

Harris, is I would like to know your nine number one songs. That was the first thing that I thought.

MR. HARRIS. Well, it has been over a 25-year period. You can tell that I have earned the gray hair along the way. I started out, my first number one song was by a one-hit wonder in 1979, a guy named Leon Evert from South Carolina. He had a number one on CBS Records. And it was great for his career and it was very good for mine. It was my first number one. He had the Hurricane tour and the Hurricane bus and the Hurricane van. And then it all kind of disappeared after that. But my next one was Mickey Gilley's "Lonely Nights." That was in 1982. 1988 was Waylon Jennings' last number one. It was "Rose in Paradise." Then I had three on a young guy from Georgia that I went down and wrote with. His name is Travis Tritt. I had "I'm Going to Be Somebody," "Dream Off to Dream," "Can I Trust You With My Heart," those three. And seven other, actually nine other, cuts on his album during that period of time. Wynonna Judd on her first solo album, I have had what has now become her signature record called "No One Else on Earth." And, let's see, Little Texas, "You and Forever and Me."

MR. UPTON. Mr. Barton would like that one, I know.

MR. HARRIS. The band did very well, and John Berry's "Standing on the Edge of Goodbye." My latest one was a top ten record in 2000 and topped out in 2002, "Angels in Waiting," Tammy Cochran. I also co-wrote the lyrics to America's Funniest Home Videos. So that was--

MR. UPTON. Actually I knew that one. That is one I did know.

MR. HARRIS. It has been primarily in the country field but other artists, I have worked out of London, and I worked with Neil Diamond when he was there on his last album.

MR. UPTON. Ms. Ziegler, in your testimony you indicated you didn't see a need for legislation, and I guess one of the--as I wrestle with this issue and as I hear all parties, one of the things that has been pointed out is that these devices in fact could do these automatic searches so you could get all of Bruce Springstein's albums, et cetera, come up with all these different things. In fact, you indicated that your devices don't allow you to do that, is that right?

MS. ZIEGLER. That is right. There is no--

MR. UPTON. Is there some intent down the road that they will be able to have that technology?

MS. ZIEGLER. We have no present intent to.

MR. UPTON. That is another question for Mr. Shapiro, who is in the audience, one that is on panel two. Mr. Levin, you talked about one of the things that I felt proud to participate in with Mr. Tauzin, Mr. Barton, and others, Mr. Stearns, Mr. Dingell, and Mr. Markey. We had a number of these different roundtable discussions, you might have even been in

those rooms for a couple of those discussions as we tried to see a private solution to this versus a government-mandated one.

In your remarks, you in essence suggested that those be given another chance to give you the time to try and negotiate those. Tell us what is the progress of these discussions. We have heard about--our subcommittee has not been involved like we were once before but where are things?

MR. LEVIN. Well, I think we have made very productive progress so far. I think, obviously the issues are extremely complex. And I was there during the time that you are recalling where all of these different stakeholders in the video flag got together and they spent hours and hours and in fact years actually negotiating out those very complicated issues. And that is precisely, I think, that this kind of thing--

MR. UPTON. One of the reasons, as I recall, was we didn't want to go back with the DCR, the data versus--

MR. LEVIN. Exactly. Exactly. I think we were very interested in making sure that everybody's rights were balanced properly and that the ultimate technology could provide as many benefits as possible to consumers while at the same time protecting the copyright owners. And I think that worked very well, but I think a key distinction between the video flag and what is happening now with the audio flag proposals is that the video flag, as some people mentioned, only dealt with indiscriminate redistribution over the Internet. That was the primary thing that everybody was concerned about over those main years, and it took an awfully long time to figure out just what technology ought to be used in order to be able to prevent that.

With the audio flag it is much, much broader. It is more vague. It is overly broad. And we are frankly concerned that it impinges on consumer's reasonable expectations and lawful uses to a point that not only hurts consumers, but then in turn obviously affects our business model.

MR. UPTON. Mr. Bainwol, do you want to comment on the negotiations?

MR. BAINWOL. Sure. Sure. We began the negotiations in March. They have been fruitful. We have fundamentally--

MR. UPTON. They haven't or have?

MR. BAINWOL. They have been fruitful. We have fundamentally agreed on the proposition that cherry picking is wrong, ought to be dealt with, and that is aggregation of content and without ever listening to the radio choose the songs you want to keep. You scroll down the data and say I will keep this one, that one is Julie Roberts, and that Toby Keith, and this 50 Cent, never listening. You got them stored in your digital jukebox. The conversations have been very good. But the point I think

that is crucial here is that we really don't have market leverage. Getting to yes--we can get to a conversation, it took 3 years to get to the point where we had folks willing to sit down and that was because Members of the Congress said you need to.

But getting over the hump to the point where we say solve the problem, that is an entirely different challenge and we are not going to get there unless we got something that forces action. Now there is one other critical point here. Because we don't have the performance right, we don't have the leverage to move them, but the other difference with the video guys is this. By the time they show up on TV, they have already been in theater. They have got multiple windows of revenue. We sell music. That is what we do. We derive the bulk of our ability to reinvest in new art from the sale of music. It is that very window that has been compromised here. We've got to protect that window or else the venture capital that goes into creativity will dry up.

MR. UPTON. Mr. Boucher.

MR. BOUCHER. Thank you, Mr. Chairman, and I want to say thank you to our witnesses for their informative testimony this afternoon. Mr. Levin, a quick question for you. In my opening statement I mentioned the rather unique position that iBiquity has with regard to high definition radio, having developed the technology and holding today the intellectual property it licenses to the HD stations. Would you agree that if someday a technical standard for an audio flag for HD radio was created that iBiquity through that unique position could implement it without Congressional action?

MR. LEVIN. I think you are absolutely right on the money.

MR. BOUCHER. And so we should defer to the private sector entirely with regard to this matter, first to create the flag and the technical standard to assure that it is effective, and then secondly through iBiquity for its implementation.

MR. LEVIN. I think that works, and at the end of the day if there is a need to come to Congress for implementing legislation, I think the parties can do that without any problem whatsoever. I think we need to come to a solution though before we come to Congress.

MR. BOUCHER. Thank you, Mr. Levin. You are just a great witness. I applaud that answer.

MR. LEVIN. You are a good questioner.

MR. BOUCHER. And we got along this well when he was on the staff.

MR. LEVIN. It is called good staff work, right?

MR. BOUCHER. Always good staff work. Mr. Bainwol, I noted with interest your discussion about the progress of the negotiations, but those negotiations really only include your industry and the broadcasters. It is

my understanding that the device manufacturers who are in my mind a critical part of this are not at the table. Why do you not take this conversation over to the well-established industry forum, which is the Copyright Protection Technical Working Group, a long-standing organization that has been in existence 10 years. It meets every month. Per my information, you haven't been there in 7 years. Why not get the device manufacturers involved in this conversation, because even if you and the broadcasters come to an agreement, if the device manufacturers say, well, this doesn't work for the following 15 technical reasons you really haven't accomplished very much. So why not take this conversation over to the Copyright Technical--well anyway.

MR. BAINWOL. The short answer to the last question is because CPTWG has evidenced no interest in solving this problem. That is a place for this problem to die, not to be solved.

MR. BOUCHER. Well, they are the ones who created the broadcast flag.

MR. BAINWOL. Well, that is because there was marketplace pressure to make that happen. They had no choice.

MR. BOUCHER. They also created the content protection DRM for DVDs. I mean these are the people who have a great track record in making this happen. You haven't even been there to ask them to take it up.

MR. BAINWOL. I have been at the RIAA for almost 3 years, and about 3 years ago, I went to the FCC to say we have got a problem here with the emerging roll out of HD radio. And I was hit on one side by the broadcasters and hit on the other side by the manufacturers. One said premature, no demonstration of harm, the other one said too late. And that is the quicksand that we find ourselves in because we don't have market pressure, we don't have a market right to force people to the table, not just to the table but to get the settlement. We have got a real challenge.

Because of Congressional interest we now have a very fruitful conversation going on with the broadcasters. It is with the broadcasters because that was the request from the Senate.

MR. BOUCHER. Let me ask you a simple question. I understand maybe Senator Inouye had asked you to sit down with the broadcasters. Let me ask you to sit down with the device manufacturers. I think to make this conversation really effective you are going to need the people involved in it who at the end of the day are going to have to pass on whether or not the technical standard really works and you need their input as that is developed.

So a simple question. If the Copyright Protection Technical Working Group, I got it right that time, expressed a willingness and

interest in addressing the subject, would you be interested in taking this conversation to them?

MR. BAINWOL. If they provide you an assurance and us an assurance that they mean business, that they are prepared to get ES, that the scope of the problem is not simply with distribution but also this aggregation, then we will talk to anybody. But let me make one additional point. iBiquity has said to us this is not terribly complicated stuff. This is radio science, not rocket science. What we need help with here is somebody to tell us to do it because we are not here to do it on our own. We need an instruction either from Congress or from the FCC.

MR. BOUCHER. Well, my time is up so let me briefly say I appreciate your expression of willingness to involve the device manufacturers in this discussion, your expression of willingness under rather carefully stated conditions to have that conversation with the group that can make the technical difference. And for my part, I would certainly encourage all of the interested parties to work toward an agreement on this. I had some rather critical comments of the proposals put forward so far, but I think it is in the public interest for us to develop the DRM technology and then have that implemented. That provides the kinds of protections that you are looking for.

And so I share with you the overall goal. I just think legislation is not needed to get us there, perhaps encouraging all the parties to work together is, and your expression of willingness to expand this conversation, I think is a helpful step in that direction. Thank you, Mr. Chairman.

MR. UPTON. Mr. Barton.

CHAIRMAN BARTON. Thank you, Mr. Chairman. I am really stunned that Mr. Boucher made a mistake in one of his questions. You know, I think I know the reason. He got married about a month ago. He used to be a very boring guy who had nothing else to do but study for these hearings. Now he has got other outside interests and he is a much more fun guy, but he slips up every now and then. He has lost focus which is a good thing.

You know, between Mr. Harris and myself, we have nine number one records.

MR. UPTON. You had the big Texas hit, right, not the little one.

CHAIRMAN BARTON. If we get this panel right and we get this hearing right between Mr. Harris and I, we may have one law passed that solves this problem. So my only real question, I am a co-sponsor with Mr. Boucher of the fair use bill, and it would seem to me that technology is converging with political ability and that we might be able to solve two or three issues at one time. We could do a broadcast flag, a video flag, and get some fair use language that help our consumers, so my real

question would--I guess start with Mr. Bainwol. Do you think that is possible? I have seen some technology that was presented to me by the Disney folks that would seem to think we could solve all these problems in one boot, in one swoop. Do you agree or disagree?

MR. BAINWOL. The movie folks have now moved in a direction in the recording industry where we have for many years allowed people to make multiple copies of our product. So your fundamental fair use concern is something that we have accommodated for a long time. We have concerns about Mr. Boucher's bill, H.R. 1201, that we fear will have some serious consequences. If the objective is really fair use for the recording side, that is being satisfied.

And let me make one other point about fair use. We often hear about it from the standpoint of just purely what the consumer is entitled to. The fourth standard in the fair use sequence of four standards is this: You have to consider the effect of the use upon the potential market for or value of the copyrighted work. And the absence of that consideration blows a hole in the digital marketplace, and whatever we do we need to protect that and that is precisely why we are here at the table, because the fundamental value of our copyrighted work, the genius of Mr. Harris, is going to be compromised because there won't be any basis for reinvestment.

What you have going on in society is the iPodization of America. It is all about this device. If you get music from iTunes you pay for it. If you get music from Creative Zone you pay for it. If you get it from satellite radio you don't pay for it. You store it. It says, if you made a purchase of my tunes, Mr. Harris is not being compensated and neither are we. That is fundamentally wrong. That violates our standard and fair use. That needs to be dealt with.

CHAIRMAN BARTON. Well, if we can--for the first time in about 4 years, I really see that there is a possible convergence. I want to protect Mr. Harris, and I want to protect the content providers. They are the geniuses that create the product that you said we consume, but I also want to protect the consumer so that you can make a few copies for personal use, and the technology appears to be there. Now if we can just get the political parties to agree, I think we have got a deal here that we can work on pretty quickly, and I think Mr. Ferguson's bill, with some tweaking to make sure that Mr. Boucher and I are happy, may be the way to do it. So with that, Mr. Chairman, I yield back.

MR. UPTON. Mr. Gonzalez.

MR. GONZALEZ. Thank you very much, Mr. Chairman. I alluded in my opening statement regarding technology, and I am trying to get this all straight and have some working knowledge, and you all can help me

with this. Ms. Ziegler, if I want to subscribe to Sirius, what does it cost me?

MS. ZIEGLER. $12.95 a month.

MR. GONZALEZ. Now I want--is it the S50? I am not sure. What is the feature that allows me to basically store, save?

MS. ZIEGLER. The S50 permits you to--you can listen live but you can also record blocks of recording and you can also, if you are listening live and listening to the recording, save an individual song.

MR. GONZALEZ. And how much does that cost me in addition to my $13 a month, whatever?

MS. ZIEGLER. It costs you $12.95 a month, the same subscription price.

MR. GONZALEZ. It is a feature that is included in my standard fee. In other words, it is not something that is added. It is not a premium that you charge extra for?

MS. ZIEGLER. The device itself, the recording device itself, will cost you more. The service--

MR. GONZALEZ. So let us say the recording device is $100 or whatever it is but to have the S50 feature it is now much more?

MS. ZIEGLER. The S50 feature to the consumer is still $12.95.

MR. GONZALEZ. Okay. I guess what I am trying to figure out is if I am going to have to pay extra in order to have the capability to save and store music, right? I am trying to figure out how much extra would I be paying.

MS. ZIEGLER. It is the cost of the device itself.

MR. GONZALEZ. The device itself.

MS. ZIEGLER. So you could buy a very low end receiver and not have--

MR. GONZALEZ. Now let me ask you, in the marketplace where do I acquire this device?

MS. ZIEGLER. You can buy it at various retailers, I mean most large retailers.

MR. GONZALEZ. Because the question really comes I think in the old days of fair use Charlie Gonzalez goes out there and gets his cassette, double cassette or whatever it is, and, you transfer it yourself. What has happened out there in the marketplace especially with Sirius and such the feature that you are providing now which is pretty unique, and I guess we get prepared for expanding that capability for the reasons that digital or HD radio allows that enhancement and the ability to do these things, quality and such, you are making the distinction though that what you really are guarding against really is just the big boogey man of redistribution.

You hang your whole argument that you should be able to do this because it is fair use. I am recording it for my own use. And there is no danger or anything, nothing is happening by way of redistribution because it is not allowed. The technology that you utilize is not available for that use.

MS. ZIEGLER. Right. We have brought out the S50 in compliance on the Audio Home Recording Act of 1992, and that framework we believe provided a framework that codifies fair use and is in compliance with that statute.

MR. GONZALEZ. And, Mr. Bainwol, what is your argument on that particular, I guess, understanding of the present law and where we are going?

MR. BAINWOL. Let me do two cuts of that. One is, if you take 500 songs and you get them on your iPod or you get them from Zen, then Mr. Harris is compensated. If you get those same 500 songs, you put them into your radio receiver, which is where you store your music, you import your other stuff, this is now your hub. XM calls it the mother ship. It is not a pod. It is the mother ship. So you've got the same 500 songs and not a dime is going to the creator for that distribution for the right to have ownership of that product.

MR. GONZALEZ. This technology is just allowing me an enhanced way of having better quality, greater quantity, but it is still fair use.

MR. BAINWOL. It is not fair use because fair use also requires that the creator be compensated. We have no problem with time shifting. We have no problem with manual recording. But when you can replicate the iTunes experience and not pay for it, that will devastate an industry and that will destroy creativity.

MS. ZIEGLER. Can I comment?

MR. GONZALEZ. Yes, please.

MS. ZIEGLER. Thank you. One part of the Audio Home Recording Act is that we need to pay a royalty on each device and that--

MR. BAINWOL. And may I comment on that?

MR. GONZALEZ. I am going to give you a chance. I got about 42 seconds. You take 20 of those seconds.

MS. ZIEGLER. Okay. I just want to say the artists, the recording labels, as well as the songwriters, are compensated through that royalty so to say that there is no compensation, there is.

MR. BAINWOL. The Audio Home Recording Act pays the industry about $2 million a year. Today in America there will be 2 million downloads or more that will pay the industry about that today, so the Audio Home Recording Act will starve, literally starve, creativity. It is not the right answer. It is for serial copying. It is not for replicating the iTunes or the Rhapsody experience.

MR. GONZALEZ. My time is up. Thank you all very much.

MR. HARRIS. Mr. Chairman, could I comment on that?

MR. UPTON. Go ahead. Why don't you comment, Mr. Harris, and then we will go to Mr. Shimkus.

MR. HARRIS. I would just like to comment on the fact that by someone being able to download in this iTunes mode, and we all have them in the music industry, for instance. But the traditional way has been performance royalties and mechanical royalties. This completely takes any kind of mechanical--mechanical is based on the sale of a record. Every time my song was played on the radio, I got a royalty. Every time that someone bought a CD, I got a royalty. Songwriters make pennies on the dollar. We always have, even since 1928 when they created--1923, excuse me, when they created the intellectual copyright protection laws.

There is no protection in this way when someone can cherry pick, download a particular one. There is no need for them to go out and either buy it on iTunes or to buy the CD itself. There is no reason for them to do that because they get it free. I have been up here before not testifying in a committee, this is all new to me, but lobbying with the National Songwriters Association and the Guild, but since 1997, I and a lot of others, but I, in particular, because my accountant gave me the information, I lost about 28 percent of my income. At my age that is disturbing.

If this goes unchecked without the flag, I could lose another 50 percent on top of that, so that would make it nearly impossible for me to stay in the industry. And I have done well. There are others that will just have to go get jobs.

MR. UPTON. Mr. Shimkus.

MR. SHIMKUS. Thank you. And I want to encourage Mr. Gonzalez and anybody else, this line of questioning and this discussion that Mr. Gonzalez was addressing was just what we need to hear and address and talk about. One thing I learned in one of the private industry junkets to the CEA convention was how artists really drive technology advancements, and I think it was the year they rolled out the MP3, and it was people wanted music and it drove the technology.

You all have a symbiotic relationship that if a part of the chain breaks everyone is going to get penalized and that is why I think we are really working hard to try to come to some agreement and understanding. But this S50 issue is at the heart of I think Mr. Gonzalez's questions and a lot of our questions. Mr. Harris in his opening statement talked about how people can get his songs without compensation--he is not--through your product all his songs are stored on this device without compensation to him other than that we just found out through the device. There is

what you would say minimal compensation provided by the device itself but per song there is not, is that--Mr. Harris, is that what you said, and, Ms. Ziegler, is that what I interpreted right, and then, Mr. Bainwol, am I following this debate correctly?

MR. HARRIS. That is correct.

MR. SHIMKUS. Do you agree?

MR. HARRIS. Basically, I would not receive any compensation with the exception of the performance, which I think has already been negotiated. But it is when a user--and I understand consumers. We have had radio for years. We all thought it was free. I thought it was free when I got in the music business. I wanted to be in the business when I was a young man because I wanted to be a star. Now that I understand the industry, that music was always paid for.

The threat to us now is that it could go out on the airways en masse. If we had pennies on the dollar as we have always had, it would be the greatest thing. This is what all songwriters have said. It would be the greatest thing in the world because then we would be able to reach some Third World countries. We would be able to reach countries that necessarily we were not able to reach before. However, it is such in the psyche of the young generation to be able to download for free. It took us years to get Napster to pay.

And every day, it is going on right now. It is going on. I am losing money as we are sitting here because somewhere, somebody is loving something that I did, hearing it, downloading it on a device, and I receive no compensation.

MR. SHIMKUS. Okay. I don't want to cut you off but I want to make sure we got a chance. Ms. Ziegler.

MS. ZIEGLER. We want Mr. Harris to be paid, and we do pay. We pay two times with Sirius satellite radio. We pay performance royalties that were negotiated and millions of dollars for all of our transmissions. In addition, we pay with respect to the S50 Audio Home Recording Act royalty. That goes directly to artists as well as to songwriters. In fact--

MR. SHIMKUS. Mr. Harris, how do you see that money?

MS. ZIEGLER. We haven't gone through the year yet so it is working its way through the copyright.

MR. SHIMKUS. Okay, so he hasn't received any money yet, the device portion.

MR. HARRIS. I was given some numbers today just for me to look at and they got $150 million for baseball, $50 million for Oprah, $600 million for Howard Stern, $3 billion for technology. These were just numbers that I had, but am I correct, Mr. Bainwol, in that ours is somewhere around $2 million?

MR. BAINWOL. On the audio side, that is about right.

MR. HARRIS. Yes.

MR. SHIMKUS. And we don't want to beat up on Ms. Ziegler because you are here and you are making a good faith effort to work on this. Other folks aren't here.

MS. ZIEGLER. Just to be clear. Performance royalties are in the millions. It is a part of a confidential deal, an arm's length transaction 5 years ago with the label, so that is not a $2 million deal. The Audio Home Recording Act fees, frankly, the S50 just came out and that is just entering the market and those fees are just beginning to be paid. But we do pay. We pay twice. In addition to that, obviously we did sit down and then do a deal with the recording industry.

MR. SHIMKUS. Mr. Bainwol, and then I will--

MR. BAINWOL. You have an anomaly in law. We get paid for distributions on phones like the one that went off, on iPods and on subscription. We don't get paid for the distribution. We get paid for the performance, for the broadcast. We don't get paid for distribution when it comes to satellite. S50 has negotiated a private deal, but as a matter of policy, there is a competitive breakdown in the legal structure here, and what radio is doing is exploiting the loophole in the law and that is what needs to be fixed.

MR. SHIMKUS. That is why you guys need to fix it because if you ask us to, it is going to be a disaster.

MR. BAINWOL. But we can't get them to the table to get to yes. That is the challenge.

MR. SHIMKUS. I yield back.

MR. UPTON. Mr. Gordon.

MR. GORDON. Thank you, Mr. Chairman. Earlier, Mr. Gonzalez mentioned that it took 25 years to find a consensus and a compromise for the Wright amendment. What he didn't mention is it was phased in during over an additional 9 years. So Mr. Harris, despite his pleas, probably can survive that but the next generation of writers can't. And when the music stops that is the foundation of the entire industry and the whole ball of wax collapses, and that is why I think we really have to keep that in mind.

Following up on this most recent sort of trial log, I guess, that was going on, Mr. Bainwol, what is different about the satellite services, new devices, and consumers taping off the radio as they have done in the past and why is it different than say a TiVo device?

MR. BAINWOL. What they used to do in terms of manual recording we are fine with and moving that into the digital age is fine. It is different than TiVo. We are fine with TiVo time shifting. What we are not fine with is this aggregation of a program. When you take out individual songs on an automatic basis, without ever listening to the

radio you have fundamentally transformed what radio is. That is not old-fashioned recording off the record. That is replicating either the iTunes experience or the subscription model and just avoiding payment to the creator.

MR. GORDON. And do you believe that the Audio Home Recording Act of 1992 was intended for digital audio tape players only?

MR. BAINWOL. It was certainly not intended to cover what we are seeing today. 1992 was before the iBiquity of the Internet, it was before broadband surge. Napster had never been conceived. Peer to Peer was a notion that meant something entirely different. Satellite radio was nowhere near rollout, if it had been conceived. It was a totally different world.

You can have lawyers debate whether or not the AHRA covers it, and one lawyer will say yes, another lawyer will say no because we don't think you threaded the needle just right. But as a matter of just basic common sense, as a matter of policy, should you be able to get away with this modest fee to allow you to replicate an iTunes model and a subscription model that is the foundation for reinvestment and creativity, the answer is obviously no.

MR. GORDON. Anyone want to have a comment to that?

MS. ZIEGLER. I have a few comments. As to the Audio Home Recording Act, yes, you can debate it both ways but I think that there were many statements made at the time it was entered into. First of all, it was a private negotiation that was then brought to Congress. It was a deal that was cut. The recording industry was at the table, quotes at the time it is a generic solution that applies across the board to all forms of digital audio recording technology. In fact, what has happened is we have finally exploited that. A technology company has come up and exploited a particular legislative framework, and we get to market and suddenly we hear, oh, that wasn't enough money. That is not enough money. That is not the right framework. We need something new. It is in fact the framework that is there today and it is the framework that we relied upon and we do pay under it.

The other thing that I would just like to discuss for a moment is what we do in fact--

MR. GORDON. Keep it back to this subject. Okay. Mr. Bainwol, would you want to have any rebuttal to that?

MR. BAINWOL. Yeah, just a simple point. If you get 1,000 songs, 5,000 songs--1,000 songs, let us say, you put 1,000 songs on radio, you have not paid a dime for the distribution for the right for ownership. You do it from iTunes. You do. There is a basic question of equity here and no amount of fancy kind of legal footwork gets you through that fundamental point of equity. We have got to deal with the reality here

that you got a wave of new devices coming that we are perfectly happy to license, but we are not happy to have our shirt taken off our back.

Sirius went nuts when people were able to go and tape Howard Stern, so you could access Howard Stern without being a Sirius subscriber. That is how we feel. It is the same thing. We are having our content taken from us without there being a compensation for it. That is absurd. And legal niceties, legal loopholes are interesting legal arguments, but they miss the fundamental point of equity here. Creators are being victimized here, and we need to deal with it.

MR. GORDON. I yield back the balance of my time.

MR. UPTON. Mr. Ferguson.

MR. FERGUSON. Thanks, Mr. Chairman. Mr. Levin, welcome back.

MR. LEVIN. Thank you.

MR. FERGUSON. I wasn't here when you were here, but you obviously have a lot of fans up here so welcome back.

MR. LEVIN. I hope I can keep them.

MR. FERGUSON. My bill, the Audio Broadcast Flag Licensing Act, requires that the implementation of a broadcast flag, not encryption at the source, would be privately done through licensing agreements. It cannot make obsolete legacy devices or slow down the roll out of HD radio. In addition, we have taken great pains to make sure that fair use is protected. These elements seem to comport with the requirements that you lay out in your testimony. Why do you still oppose my bill?

MR. LEVIN. Well, I think that there are a number of things in your bill that obviously will stimulate discussion in a positive, constructive way.

MR. FERGUSON. They seem to have.

MR. LEVIN. Yes. There are a few things though that we are concerned about. Some of the terms are undefined. You give the FCC authority to implement rules, technology prescriptions without really setting out the parameters of what consumers and broadcasters should be entitled to do. You talk about the fair use, laying out the fair use principles that mandate that they must be complied with, but it is very unclear what they are right now.

So I think my main position is that it is simply premature. We are waiting on a court case, the XM court case, to determine what the court believes fair use principles ought to be in this context. And I think, you know, I did want to just mention that Mr. Bainwol's point about the last prong of the fair use requirements that are in law that the content owners be considered in the equation is extremely important but that just reinforces how difficult the debate is.

If it was all one-sided, it would be easy. When we bring in both sides that is when it gets harder so to legislate that would be a very difficult thing.

MR. FERGUSON. And you have talked about how we need more time, the private sector should handle this.

MR. LEVIN. Right.

MR. FERGUSON. It seems that the negotiations didn't really get started from what it sounds like. It didn't really get started until there was a threat of legislation. iBiquity, my understanding is that iBiquity itself which holds the patent on this technology to begin with, they have asserted all along that they need legislation or regulation requiring them to include content protection so it just seems to me this might be exactly how these negotiations can move forward. Mr. Bainwol, you said before, when were the negotiations first begun?

MR. BAINWOL. The actual face to face contact didn't begin until March of this year, but it took us 40 months to get there.

MR. FERGUSON. You said '03, did you say '03?

MR. BAINWOL. We started certainly since I began in '03 and then effort began at that point and it was fruitless.

MR. FERGUSON. Mr. Boucher and others have said we've got to let the marketplace or we've got to let these negotiations happen. Delay helps your side, Mr. Levin, it advantages your side and disadvantages the other side.

MR. LEVIN. I am not sure I would agree with that.

MR. FERGUSON. Talking about bringing new people to the negotiating table, all that is real nice, but the fact remains that today there are devices on the market that allow the abuses that we are all talking about that we think are a bad thing.

MR. LEVIN. Well, Mr. Ferguson, I do want to make the point that there are no HD radio devices today that can record a single song. The HD radios that are being sold at Radio Shack and Tweeter and that are in the production pipeline do not record, and they don't go further to permit people to search for particular songs or do all the things that Mr. Bainwol is concerned about. So I don't really think there is a problem today with free radio.

MR. FERGUSON. I am very short on time. Do you want to comment on that?

MR. BAINWOL. I am just curious whether Andy would be willing to commit to a date certain for closure on this--

MR. FERGUSON. Mr. Levin, how long do you need?

MR. LEVIN. It would be nice to be able to predict how long we need to do it. One of the problems is that we--

MR. FERGUSON. I am willing to give you more time. Do you need a year?

MR. LEVIN. I can't say precisely how long, but I do know that there are all the affected parties at the table. We can't agree to put mandates on device manufacturers without them sitting at the table. I mean it is just not--

MR. FERGUSON. What if they won't come to the table? We are hearing that they won't even come to the table. I think it is a lame argument to say we really need to negotiate this out. We really just need everybody at the table, and as soon as everybody is at the table we can figure this out. If some people are not going to come to the table, that doesn't cut it to me.

MR. LEVIN. Well, I think the recording industry would prefer that the consumer electronics manufacturers--

MR. FERGUSON. Chairman Barton wanted me to ask you if we schedule a markup on my bill next week will everybody be at the table tomorrow?

MR. LEVIN. I would hope so.

MR. UPTON. I am in Michigan, I just want you to know. Are you coming to Michigan?

MR. LEVIN. Mr. Ferguson, we have asked for CEA to be represented at the table ever since day one--

MR. FERGUSON. My time is up, Mr. Levin. I suspect that until we start marking up this legislation or have some other direction as Senator Inouye has kind of directed this, that frankly it is to your advantage to not talk. It is to your advantage to delay. It is to your advantage to say, yeah, we should really figure this out and we are going to do it in due time. But until there is a threat of you being forced to do it, my guess is, and this is just a hunch, is not going to happen.

MR. LEVIN. Well, I would like the opportunity to talk to you more about it because--

MR. FERGUSON. I would be delighted to.

MR. LEVIN. --I disagree with that.

MR. FERGUSON. It sounds like you want to talk a lot but it sounds like we don't want to solve the problem.

MR. LEVIN. We do. We are content owners ourselves. It is our interest to have content protection.

MR. FERGUSON. I am all for talking but I am also for action, and it seems like the action isn't going to happen.

MR. LEVIN. Well, if Mr. Bainwol's laundry list wasn't this big, we might get something done.

MR. BAINWOL. Our laundry list is not that big. I mean the default position right now is for artists and creators to be disadvantaged and that

is not fair, and it is the default position that we have no market leverage. We need to force action. It isn't that complicated. iBiquity has said to us this is simple. Just give us an instruction to do it. So we made it sound like it is building a ship to go to the moon, but it is not. All you have to decide is what those user rules are going to be and then the implementation of it is very simple. And we are not that far apart on usage rules, and I am happy for Gary to be involved in that discussion. He had to be involved, but we need to know that Gary and CEA will say to the question will you support getting to yes, will you deal with the cherry picking problem. Broadcasters have said yes. The satellite folks, it is not clear. And I haven't heard anything near that from CEA.

MR. FERGUSON. Mr. Chairman, my time is up. I think this is a very constructive conversation going on. I thank you and I thank Chairman Barton.

MR. UPTON. I am just glad Mr. Shapiro came early to the hearing so that he will be prepared to answer that question when his time comes up shortly. Mr. Inslee.

MR. INSLEE. Thank you. A small technical question. Mr. Levin, you said there is nothing in the market that can record these songs. Mr. Bainwol made reference to the mother ship. Are you guys talking about the same thing?

MR. LEVIN. No. I think he is talking about XM satellite radio.

MR. BAINWOL. Yeah, that is correct. You have the satellite devices in the market. Sirius has a device which has been licensed. XM has a device which has not been licensed. They refer to that as the mother ship. It is not a pod, it is the mother ship. The HD rollout is behind that. They are comparable issues. It is radio morphing into a distribution service to compete with iTunes and compete with Rhapsody. It is part of this competition.

MR. INSLEE. So, Mr. Bainwol, in regard to that let us assume a consumer gets the mother ship, would want to use it as a replacement iPod essentially is what you are talking about and how they use that infinite number of replays for personal use. What is your position on compensation in that situation?

MR. BAINWOL. What you call personal use here is replicating purchases. When you can automatically cherry pick--this is not a manual record. This is taking a block of programming, scrolling, not live, scrolling through the meta data and saying I want this Toby Keith, I want this Travis Tritt, and that is going to get Mr. Harris, I want this 50 Cent and I want this whatever. That is replicating a sale that is draining our one window of revenue and it is a challenge for us.

MR. INSLEE. Any other comments?

MR. LEVIN. That can be done today. That can be done today by recording off the radio. That can be done today by buying a CD in a record store and making a copy of that and copying that onto your iPod. You can develop a library of music on your iPod through other means. And it appears that they don't want to be able to--

MR. BAINWOL. So let us just let it get worse. Let us go ahead and--

MR. LEVIN. Well, but you don't have any copy protection in the audio CDs that you sell. You know that this is a tough nut to crack because we saw with the Sony experience that as soon as they started to put copy protections in the Sony audio CDs there was a huge consumer backlash and they backed up. But there is nothing to stop record labels from protecting their own content and, instead, we feel that they are trying to shift the burden to us along with the expense, and in effect dampen the appetite for consumers for our products.

MR. BAINWOL. So the consumer is left with a choice. I want to get these ten songs. Do I go to iTunes and make a purchase or do I go to the mother ship and just simply tag them, keep them, and not pay a dime to the creator. A rational consumer will do exactly that, but it is certainly not fair.

MR. INSLEE. Yes.

MR. HARRIS. If I may, they really have referred to this. I didn't realize it wasn't licensed yet, but if this is the mother ship if you would, please, when it comes time to look at this bill, just imagine the songwriter as the wind beneath the wings because that is basically what this is. We will lose tremendously if some kind of agreement, and we are all for it as creators because, frankly, we would like to get on with the business of creating for the future, and this could be to our advantage too. But we do need a license that will guarantee us that when this is downloaded on satellite we have the equivalent of a sale.

MR. INSLEE. Did you write Wind Beneath My Wings, Mr. Harris?

MR. HARRIS. No, sir. I have two good friends that wrote that song and I have told them never to do that without me again.

MR. INSLEE. I think the rule is if they are your friends it is not a copyright violation so we will let that one go.

MR. HARRIS. It is not in this context.

MR. INSLEE. Let me ask generally to each of you to describe philosophical, however you want to describe this, who should have the economic burden of protecting intellectual property here between the three points of the stool. How should that be looked at? Should we look at ease, should we look at it as fairness so that everybody has got the same share? Give me your best arguments that somebody else should do it, I guess is what I am asking.

MR. BAINWOL. Do you want to start?

MS. ZIEGLER. I think that it is a shared burden but certainly we as content distributors take very seriously protection of the content that we put out over our broadcast as well as what is into our product. Our content is all encrypted at the source. It is decrypted when it comes into the receiver. So we take that very seriously and we don't believe that we have any significant issues with respect to piracy with our content.

MR. HARRIS. I am going to respectfully bow out on that and just say that we trust that something can be done for this and that the songwriter would appreciate it very much.

MR. LEVIN. I think it is--I agree with Ms. Ziegler that it is a shared burden. The radio industry has content that it produces that is proprietary, and we also have an interest in protecting that. But at the same time, Congress and the courts have for decades and decades and decades recognized the rights of consumers to record free over the air broadcasts, and so we want to make sure that we do nothing to tramp on those rights.

MR. BAINWOL. We think it is a shared burden, but we think that Mr. Ferguson's bill hits the nail just perfectly. What it does is it says release these devices, don't impede rollout, go ahead and let consumers do what they do in a customary way in terms of home recording. Just don't put the burden on the creator to allow this automatic cherry picking until there is a deal.

MR. INSLEE. Thank you.

MR. UPTON. Mrs. Cubin.

MRS. CUBIN. Thank you, Mr. Chairman. I think I have kind of made up my mind as to which way it ought to go as far as whether or not the artist should be compensated in this situation more than they are, but when Andy was talking and you were talking, Mr. Bainwol, Andy said you have a laundry list about this long and you said you didn't. So besides the issue of the payment, what are the other items that are on your laundry list?

MR. BAINWOL. It isn't even really the payment. The question that I think Andy was referring to is the question of what are the usage rules. And that is something I think our folks have met on a number of times and my sense of those discussions is that they are very productive and these usage rules are very close, that we do need to bring in CEA and others, but I think the usage piece of this is not that complicated. I think it is a false premise to suggest that this is just an enormous challenge. It isn't. You agree on what they ought to be and the fundamental point is don't allow automatic cherry picking which is something that the broadcasters have already said I think is a foundation of the argument, and then you implement it with play.

MR. LEVIN. I think the conversations have also been very productive, and while we agree in concept to the notion of no cherry picking there are nuances to that that still need to be worked out. I think that the recording industry's view at this point is fairly broad with regard to what that means and it would in effect turn back the clock on what is already lawfully used by consumers. So to the extent we were to agree to all of the recording industry's demands, the consumer is the one that gets left out in the cold.

So I think that we really need to take a hard look at just what consumers are entitled to and what their expectations are before we agree on usage rules that get memorialized in any kind of statute or regulation.

MRS. CUBIN. Well, it is certainly those users that elect me to my seat but I don't think that their expectations are that hard-working people shouldn't be paid for what they do. And it just seems--

MR. LEVIN. Absolutely. I am sorry. I didn't mean to interrupt you. But we are talking about things like making a recording off the radio and being able to retransmit that recording through a home network and be interoperable with stereo equipment, existing home audio equipment that is in the house.

MRS. CUBIN. But that isn't what is costing the artists the money.

MR. BAINWOL. And those are issues we can solve.

MRS. CUBIN. Pardon me?

MR. BAINWOL. Those are issues we can solve. That is not the problem. And the Ferguson bill says this, that the implementation shall not be consistent with customer use of broadcast content by consumers, period.

MR. LEVIN. But that is customary as of the date it is written.

MR. BAINWOL. But what we are trying to do is preserve customary practice. This isn't about winding back the clock. This is about devastating the property right of the creator.

MR. LEVIN. But it is also about making sure the consumers can take advantage of the new capabilities and technology that comes down the road.

MR. BAINWOL. But if technology in effect--

MRS. CUBIN. Well, my time is just--

MR. BAINWOL. I am sorry.

MRS. CUBIN. Well, we are just going in a circle. And so I think that if it comes to this committee, this committee, I think that they will probably take some kind of action and it is kind of the motto of Congress, if it is worth doing, it is worth over-doing, so that is not good. So I hope that it can be worked out, but if it can't be, I think, we are ready to get to work and fix it. So I thank you, Mr. Chairman.

MR. UPTON. Mr. Engel.

MR. ENGEL. Thank you, Mr. Chairman. I have been listening to the back and forth, and this has been very helpful to me because rarely do we have hearings where you actually have the back and forth, people answering other people, and it really presents both side of the issue, and, frankly, both sides make good points. I mean for me, and I think for all of us really, it is the issue of fairness because we want people to be compensated. We don't want them to feel they are having this stolen from them.

On the other hand, we want to do what is best for the consumer as well, and so I think it is kind of a delicate balance. Mr. Levin, let me ask you, first of all, how does it feel to be on that side of the table?

MR. LEVIN. It was a lot comfortable up there, more comfortable.

MR. ENGEL. I testified at another committee about 2 weeks ago, and I didn't realize how daunting it was to face all of us. I want to ask you how long did it take for consensus of the video industry to develop before a workable video flag standard was set, how many years was that?

MR. LEVIN. About six.

MR. ENGEL. About six. To develop an audio flag, do you think it will take 6 years?

MR. LEVIN. No, I don't. I don't think that the issues are as complicated as they were, and I think that based on the work of the video flag, if we narrow down the issues to be akin to what was addressed in the video flag rules, I think we could do it tomorrow. The video flag, don't forget that is just about indiscriminate redistribution over the Internet, that is what the film industry was concerned about, broadcasters, all the content owners at the time. Now it seems that the concerns have expanded beyond that.

If we were back on that, we would say as broadcasters absolutely, we will put a flag in and we will protect indiscriminate redistribution tomorrow. It is agreeing on all these other usage rules.

MR. ENGEL. So you have been saying that we need more time to work this out, and the other side has been saying, yeah, but you can't work it out forever because you keep talking and talking. What do you think is a reasonable goal? What are we talking about here in terms of working on it, another year, another 6 months, another 2 years? What do you think is a reasonable or would be a reasonable time?

MR. LEVIN. I would say that we have got two groups. We have got the Audio Flag Task Force that looks at the policy, what the policies are to be, and then we have another group, the Technical Implementation Working Group, that looks at whether or not it is technologically feasible to do what the policy agreements have been. I think if we get the right folks on both of those task forces that we should be able to do it in 6 to

12 months. We should be able to have some kind of an agreement nailed down. I am hopeful that it could be sooner than that but I hate to be late.

MR. ENGEL. So in your view Congress shouldn't rush into anything because you think that in a reasonable amount of time--

MR. LEVIN. Well, that is right. And there is another thing, Mr. Engel, we don't know how the marketplace is going to react to HD radio. We don't believe that recording off the radio or certainly what the recording industry is calling downloads is the killer application in HD radio. That is not why we are developing it. We think the killer application of HD radio is the improved quality and the improved programming that we are going to be doing. You have to remember radio is different. It is not a pristine copy or recording that is made of a CD or a download from Sirius or iTunes or anyone else. You know, you still have the DJ banter. You still have the looping over of one song into another. You have a lot of things that are endemic just to the radio industry. That is the kind of entertainment promotion that we do on radio. So I don't think that it is going to displace sales, but we don't know yet, and I think that is really the key.

MR. ENGEL. Mr. Bainwol, you seem to be jumping out of your skin.

MR. BAINWOL. Yeah, I am, through my suit. If it is not the killer ap, then why not go with the Ferguson bill which gives us plenty of time to work out this aggregation place, this so-called non-killer ap. Why is it so vital that they have to have that for the rollout?

MR. LEVIN. Well, for one thing what you all want to do is to--really you say you are not against the TiVo-like device but in actuality it does become a prohibition on a TiVo-like device because it is not just about prohibiting--it is not just allowing time shifting. What it would do when you say disaggregating with TiVo you are effectually disaggregating.

MR. BAINWOL. You are not watching the monologue when you tape Leno.

MR. LEVIN. You are not watching the monologue. You are specifying which programs you want to watch, and those are the ones that come up on your TiVo. And, frankly, history has shown that when people can do that it hasn't displaced sales, it has increased sales. You go into any video store or Best Buy and all you see are lines. They can't keep enough Family Guy on the shelf or Simpsons or other serial programs that are on television. These sales have skyrocketed despite TiVo.

MR. ENGEL. Mr. Bainwol, let me ask you. Isn't a lot of this compensation too? The Audio Home Recording Act, that would not be at the jurisdiction of this committee from what I understand. Isn't a lot of things you are talking about a need to from your point of view

renegotiate fees under that Act? Would that not be better than you to do it in legislation here?

MR. BAINWOL. Some of our satellite friends said this is about leverage in the discussion about the performance rate, and that is a totally separate question and that is a flawed diversionary argument. This is simply about our one window, our primary window, of deriving the revenue which would reinvest new creativity which is sales. The XM device slogan, it is the mother ship, it is not a pod. What that means is you get content for free. They are giving away our stuff in order to make their service more viable. And I understand why, but it is not fair.

MR. ENGEL. But is it not true, and I would just like to give Ms. Ziegler a chance to respond to that, but is it not true if I purchase Sirius and I record stuff on the S50 and then I cancel, I lose that stuff, don't I?

MS. ZIEGLER. Currently, no, only because we couldn't technically implement it. It is true, all the XM devices and any future device, it should be tied to the subscription, you are correct. I would like to make that distinction. Mr. Bainwol talks about it as a download, it is the same thing. We are much more. We are recording of a transmission that comes from radio. When you get a download, what you want, when you want it. It is available to you. When you record off the radio it is whatever the DJs happen to play, whatever you are there to listen to. The quality is just simply not the same.

There is DJ talk over their segways. There are things in there. It is a much, much lower rate. But most fundamentally what you are talking about, you can only listen to it on one device. If you owned a download you could listen to it on your computer, you could burn it on to CD, you could listen to it on another device. The ownership right is very, very limited. It is just the ability to listen to it on one particular device, and as you are saying it is tied to the subscription. So to talk about it as a complete replacement for a download those are two different experiences, two different products.

MR. UPTON. The gentleman's time has expired. Mr. Bass.

MR. BASS. Thank you, Mr. Chairman. I just have one question. I have been following this discussion, and as others have said I think this is very informative. Can somebody clarify for the record the difference if there is a work out on the video flag but not the audio. If the video flag is okay, what is wrong with the audio flag as well, and why is it different?

MR. LEVIN. The video flag, and it is a great question, the video flag prohibits indiscriminate redistribution over the Internet. That was what all the content owners were very concerned about several years ago and that is the extent to which the video flag regulates the content, the distribution. The audio flag, depending on what proposals you look at,

could very likely affect how the content is distributed within the home, what people can do with it, whether they can take it from their home to the car to the beach to the gym. There are an awful lot of open-ended questions with regard to these proposals that were not a part of the flag.

MR. BASS. Ms. Ziegler makes a point that on the what are being called the S50 the content is lost when you stop subscribing. Is the same true of the iPod?

MR. BAINWOL. In the case of the iPod you don't have to subscribe. You are actually moving--it is total ownership. There is a continuum here. In the old days, you had a radio which you listened to and you had ownership where you bought either an album or a cassette or--

MR. BASS. Mr. Bainwol, are you willing to concede that the quality or the ownership of the material in the S50 is not as good or not the same as the iPod?

MR. BAINWOL. There are two different issues. There is ownership and quality. The quality relative to the iPod for most applications is virtually indistinguishable.

MR. BASS. The voice-over question is when it is vastly overblown?

MR. BAINWOL. This is nitch channeling where it is commercial free. I listen to XM all the time and you get lots of pristine quality. It is not a problem. The ownership question I think is a more complicated one. There was a continuum of ownership in the radio. Now you have all these different elements along the continuum including subscription and this is--

MR. BASS. When that subscription expires there is nothing whereas on iPod when there is no subscription essentially, if the iPod breaks you still have the music on your main storage in your computer. Now you can't use the iPod--is there a difference in quality of ownership between--

MR. BAINWOL. There is a difference in control, correct. We would say that in terms of the user, while they have the subscription, it is very much like the iPod, but in terms of enduring it is closer to the subscription model. It is like Rhapsody. It is like a tethered download that when your subscription expires you have lost. We are not suggesting that this has to be a one for one like an iPod. We are suggesting that you are deriving some control and there should be an additional--

MR. BASS. So there should be some compensation. It doesn't necessarily have to be equivalent. Fair enough. I will yield back, Mr. Chairman.

MR. FERGUSON. [Presiding] I think Mrs. Blackburn is next.

MRS. BLACKBURN. I was trying to be certain that Ms. Bono was not overlooked. She and I kind of like this issue a little bit. We kind of like

this legislation so I wanted to be sure that all of you heard from both of us on this. Mr. Harris, I want to say a special welcome to you. I am sorry that I was not here at the beginning--

MR. HARRIS. Thank you.

MRS. BLACKBURN. --of the hearing, but we appreciate your being here. And I understand what while I have run to the MPAA meeting on behalf of some of my constituents that we had a discussion of what you are paid when you have a paid for performance and comparing that with a download.

MR. HARRIS. Congresswoman, basically under the present format if something can't be worked out I basically will not be compensated at all, which would if you compared it to mechanical royalties as I have received for quite a few years now and performance royalties, those mechanical royalties are basically gone. They are history. And in my case, this varies from writer to writer, but in my case my mechanicals, which are sales, and my performances are approximately equal, I found this out, in sales. So I would be losing at least half of my income.

MRS. BLACKBURN. At least half. Well, you know, Ms. Ziegler said in her testimony that she didn't consider the current situation to be a serious threat so you would disagree with that comment, I guess?

MR. HARRIS. It is very hard for me to understand how people cannot see that as many years as we have been through this in other forms that this is a continuum but now it is threatening the livelihoods of not only the songwriters, but at one point I had my own publishing company in the late '90s and I had secretaries, I had people that pitched songs, I had people working in the tape room making copies so those people could go out and pitch the songs. All these people had to be paid. There are so many--over half of those--

MRS. BLACKBURN. To a songwriter or a publisher it is a serious threat.

MR. HARRIS. It is a serious, serious threat. These are things that are around the songwriter now who independently employ somebody because things have gotten tighter and tighter and tighter.

MRS. BLACKBURN. Okay. Mr. Levin, I think I want to come to you. I found your choice of words, you made a reference to protecting content and paying for performance, paying those royalties as a content protection scheme. I found that an interesting choice of words. You know, I think that the Constitution is a pretty good protection scheme if that is going to be your choice of words for being certain that our creative community in this country are fairly compensated for the works that they do create.

So I think that they deserve to have that compensation. I have got another question for you. You know, is Clear Channel or the NAB

working with the device manufacturers to look at the next generation devices that are going to operate similarly to the XM and Sirius device, and how do you plan to address the download licensing issue for that next generation of devices?

MR. LEVIN. I talked to our chief engineer yesterday and asked that very question, and the answer was that there are no discussions right now on the next generation devices. Right now all of the impetus and all the energy is being put into getting first generation devices produced. It is a market-driven phenomenon unlike the DTV transition. Consumers don't have to adopt digital radio, and so we are in a very precarious position in trying to persuade consumer electronics manufacturers to produce the devices, trying to persuade retailers to sell them, and trying to persuade auto makers to stick them in the cars.

It is really a Catch 22 because you need to have consumers out there who will demand them in order for all of those different constituencies to agree to produce them. Much different than DTV where everybody needs to buy a digital television set or a DTV converter box or they won't get television. Totally different. This is completely market driven.

MRS. BLACKBURN. Well, my time is up. I have some other questions. I think we could keep you here asking questions all day long but thank you for your interest in the issue.

MR. FERGUSON. Ms. Bono, do you have a unanimous consent request?

MS. BONO. Thank you, Mr. Chairman. Just a UC that I might be allowed to ask a question since I am not a member of the subcommittee.

MR. FERGUSON. Without objection. Hush, Shimkus.

MS. BONO. Boy, he is crotchety today. Thank you, Mr. Chairman, and Mr. Shimkus for allowing me to ask a question. And I am going to jump ahead, I guess, before Greg if that is all right. Thank you. Again, being so close to last so many great questions have been answered and there have been moments I think between Mr. Levin and Bainwol, you two look like you are negotiating a prenuptial agreement. It is postnuptial and you are beginning to say--one of you said we need this, and the other one argued you don't need it, but if you don't need it as Mr. Bainwol said then why not go ahead and do it.

And I think the question that was just asked, Mr. Levin also said no discussions on next generation devices. Then why not do it anyway? You know, last night I saw a commercial for I think it was a Nissan Quest, and I talked about this in the last hearing we had, this Quest, and again it might be another minivan, whatever it was, it was showing you probably the plug in for the iPod, it was showing you probably the rear boom box speakers that now lower down out of the lift gate. It not once

talked about the engine that was beneath the hood, the tires that were on the vehicle, the brakes that were on the vehicle or the air bags. But it really talked about iPods and boom boxes.

So clearly there is a value on music in our society that goes well beyond this discussion today. So when we talk about Mr. Levin said it is not a problem today, I am one of the first people who can criticize the music industry for failing to react to the Internet. I have always said the Enter key is the artist's greatest tool whether it is your songwriter, performer, whoever it might be. And now we are simply saying we don't know what the future holds but we know that the songwriter deserves protection. I think that is a laudable goal.

MR. LEVIN. I agree with you, Congresswoman Bono, and in fact we are involved in those discussions, and those discussions do extend to the capabilities of future devices even though we are not currently negotiating those kinds of specs with the device manufacturers.

MS. BONO. But, you know, years ago I sat with the Magineers from Disney and they talked about the future actually not even coming into place for the written word. There is no question, we don't know where we are going to go, and for you to say currently we are not talking about this, that does not mean innovation nor high school--I mean college students are going to entirely break your system and start downloading your HD radio. Even though you don't think it will happen, we don't know that it won't. So I am just encouraged to hear my Chairman say let us mark it up. I was very encouraged to hear him say that.

I would like to go a little bit to a point that he made. And again I will--and I know with Mrs. Blackburn, Mr. Ferguson, Mrs. Cubin, a number of us will encourage the Chairman to go ahead and move for a markup. But I am curious, I would like to actually--Mr. Bainwol, he talked about something that is problematic for me too and that is including H.R. 1201 in that because I still--we have come a long way and the Chairman believes now that we are at this perfect point, with DRM, the iPod, that is fair use. How many devices can you marry now your iPod to--how many--one computer can support how many iPods, six, five?

MR. BAINWOL. With Apple you have lots of flexibility both with the number of downloads you make of a single song and the number of applications that you use it for.

MS. BONO. But again the H.R. 1201 to me, the basis of it is so we can make it legal to circumvent encryption technologies that are the very thing that we are touting today as being so good, so why would we want to marry H.R. 1201 into the broadcast flag?

MR. BAINWOL. I think Mr. Barton, Chairman Barton, was referring to a desire to make sure that there can be backup copies, and the music

community is long past the point where we have made that available. The challenge we spoke about at some point before in terms of copy protection was about copy protection. It was about allowing multiple copies. We are fine with that. If a consumer buys Stairway to Heaven and they want to play it in a cabin and play it in the car and play it at home, that is perfectly fine.

And I think that is what Mr. Barton wants to see happen across the content community. I don't know that he necessarily was making reference to the anti-circumvention piece of this.

MS. BONO. Thank you. Mr. Harris, I just wanted to also let you know that Mrs. Blackburn and I hosted a town hall meeting in Nashville about 2 weeks ago during Fan Fare Music Fest. We had a very constructive dialogue with a number of songwriters, and I just wanted to actually take this opportunity to point out what a champion Marsha Blackburn has been. And as we were in Nashville, we had a songwriter talk about the INO, which we haven't talked about the INO devices much today as we should have. But this songwriter was actually in tears when she said that her livelihood, that her mother--she saw this device, the advertisement for it and she told her mother, Mom, my future has just been written out, that I no longer have the opportunity to make a living to take care of my children. So, Mr. Harris, if you want to make any last comments--oh, I have got 9 seconds. It is all yours.

MR. HARRIS. I would only thank you for that story, that it is just one in literally thousands over the last little bit, and as I was saying to Congressman Blackburn, they come in all forms, songwriters and all of the support people that go along with the fact that these songwriters can no longer make the kind of living to even have publishing deals and publishers are cut way back, so all of this has transpired since about 1995. That is when it really started to go down the hill. We had been on a roll prior to that.

But it is quite sad and what pains me when I was growing up, I listened to Cole Porter, I listened to the songs that Sammy Kahn wrote, and then of course Elvis came along and changed all of that for me, and moved on into a new genre. But I am desperately afraid that the talented people that want to make music now if we don't do something now, if we don't do something at this point, we will be up here as we have for the last 20 years over and over and over and over with every new technology.

MR. FERGUSON. Mr. Walden is next.

MR. HARRIS. Thank you.

MR. WALDEN. Thank you, Mr. Chairman. Mr. Levin, there was some discussion about I think the term was indiscriminate redistribution

on the Internet that either you or Mr. Bainwol have opposition to some sort of flag to preclude that, is that accurate?

MR. BAINWOL. That is correct. It is not sufficient but it is necessary.

MR. WALDEN. And obviously I think I am the only person here that is actually in the radio business so I always just claim that up front for 20 years. And I thought back to something my father told me. He started in radio in 1934. When television came along everybody in radio said, well, that is the end of radio. And there are those who say with satellite coming along it is the end of radio or it is the end of something else. And I go back far enough to remember when we would track albums at night. The recording industry wasn't exactly excited about that because you would have the whole album tracked at night.

And that was something that was objected to. I am just trying to figure out how we roll out a new technology here in HD radio that still allows for the artists and all to be compensated but also allows the consumer to take advantage of a new device. I know I have an iPod. I have one of those gadgets you plug in. I shouldn't admit this but sometimes I am out of the range of the over the air broadcast and I refuse to sign up for satellite for different reasons.

But none of those have done away--it seems like we have enhanced the marketplace and enhances to gather music. Now I am trying to sort out here. I know when I download or my son does onto the computer or iPod a song, that remains resident on my computer. It can be put onto his iPod. We can still use our computer and connect it into our home audio system, and you don't have any problem with those uses, correct?

MR. BAINWOL. Correct. That is fine.

MR. WALDEN. So if I have it on my digital player device, you don't have a problem if I collected that song.

MR. BAINWOL. We want you to. We simply want to license it.

MR. WALDEN. Okay. But today I could collect that audio off of a broadcast over the air, correct, and put it on some device. Now the question is quality of that audio.

MR. BAINWOL. Correct. Quality and ease.

MR. WALDEN. Well, now talking about ease.

MR. BAINWOL. What you can do in today's world and the analog world is press record button as you are listening to the radio so you are listening, you do have talk over issues, you do have timing issues. It got to be part of it. This is an entirely different animal. This is scrolling through and saying by meta data I am going to keep this one, that one and that one.

MR. WALDEN. All right. But, Mr. Levin, you are saying you don't have a problem with trying to restrict that, right?

MR. LEVIN. That is correct. The devil obviously is in the details but, yeah, we don't want people to be able to go out and cherry pick.

MR. WALDEN. Without listening in order.

MR. LEVIN. Without listening to the radio at all. Obviously, that would be worse for our business more than anything else. But there are certain proposals that you have to record, you know, hours, a big block of time.

MR. WALDEN. Is that what you are saying, Mr. Bainwol, you got the big blocks?

MR. BAINWOL. We have already, I think, agreed on in terms of this piece that--am I allowed to say, where are we?

MR. LEVIN. Well, these are private discussions.

MR. BAINWOL. Put it this way.

MR. WALDEN. In the theoretical. Do you have any problem with recording in blocks of time and then--okay, let me put it this--I get Led Zeppelin and I have the whole CD, and there is one song I really like and I want to get rid of the rest.

MR. LEVIN. You can't do that under their proposal.

MR. BAINWOL. That is automatic cherry picking and that we have a problem with, but a block of programming, time shifting, not a problem. Manual recording, not a problem. Ability to scroll through data and say I am going to keep these top 20 hits instead of going to the store to buy them, that we have a problem with.

MR. LEVIN. So it is like recording three hours of prime time in the evening just to get one sitcom at 9:00, and you have to listen to it in order to get it.

MR. WALDEN. But, you know, Mr. Bainwol, you said you didn't have any problem with TiVo.

MR. BAINWOL. Correct.

MR. WALDEN. With TiVO I can, and I don't have that either, not that I am technologically challenged, I am actually a HAM radio operator, but in the broadcast industry the only way we get paid is through advertising. So what you are saying is it is okay to have TiVo and zap the commercials and only run the programming that you want to see. You don't have a problem with TiVo, you said.

MR. BAINWOL. We are trying to accommodate, and we don't have a problem with time shifting, but this is different than TiVo because what you are doing is you are taking the monologue from Carson or Leno's opening gamut. When you TiVo something you are getting the whole block of the program. A song is not a program. The program is a block--

MR. WALDEN. That I can zap and get just what I want and then only save what I want, can't I?

MR. LEVIN. Yes.

MR. WALDEN. So I can archive only the parts I want, correct?

MR. LEVIN. Yes, but--

MR. WALDEN. So I end up at the same place that you are objecting to.

MR. BAINWOL. But there is a big difference, and that is they get paid when they broadcast over the air, we don't, and that is true over the air and it is not true on satellite.

MR. WALDEN. Well, they are not supposed to localize but anyway that is another subject for another day because they agreed never to do that. But anyway, Mr. Levin, do you have any final comment?

MR. LEVIN. Well, Mr. Bainwol keeps bringing up the performance rights fee and the fact that radio doesn't pay for it and says that that is an issue that is completely separate and a red herring but keeps bringing it up, so I feel like I need to respond to it. Historically, as you know, radio has been exempt from the performance rights fees--

MR. WALDEN. Although we pay ASCAP.

MR. LEVIN. We pay ASCAP. We pay the publishers. We pay all of that. But we don't pay the recording industry for the performance right. And the reason we don't do that is it is a very--there are mutuality--

MR. WALDEN. It is a symbiotic relationship.

MR. LEVIN. It is a symbiotic relationship. We provide a tremendous amount of promotion for those songs which later get sold and so when we talk about artists being compensated, radio air play is the number one way that artists make a living because their music is purchased as a direct result of radio air play and the record labels agree with that.

MR. BAINWOL. I know this has run long and we cut into Gary's time and for that I think I should probably filibuster some more, but let me make two very quick points. One is that it is true in the U.S., and I think only true in China and Singapore, that we don't have a performance right. This is not about the performance right. This is a different fight. But the point is sales is our window of revenue. Okay.

MR. WALDEN. But nobody has a broadcast structure like the U.S. has, do they? It is mostly state run and controlled.

MR. BAINWOL. The reality though is that creators have multiple streams of compensation and, here, the investor and the artist do not enjoy a right, that is factual. So what they are doing is they are creating a device that creates promotional value--I am sorry, broadcast does create interest but they are satisfying that interest with the very device mitigating the probability of a sale so they are promoting and satisfying the promotion. That doesn't do us a whole lot of good. We have one window that generates the reinvestment and new art, and that window is being compromised by this device.

MR. WALDEN. But that is not a broadcast device.

MR. BAINWOL. This particular one is not but in a couple of years we will be right back at the table.

MR. FERGUSON. That is going to have to be the last word. We have a vote on. Ms. Ziegler, Mr. Harris, Mr. Levin, Mr. Bainwol, thank you all very much. We are going to end this panel. We very much appreciate it. This has been very enlightening, I think, for all of us. We are going to take about a 30-minute break for our vote. We have a series of votes. We are going to come back. We will do the second panel in about 30 minutes.

[Recess.]

MR. FERGUSON. We will reconvene. I am sorry. It took a little longer than any of us thought. If I could ask our second panel to be seated at the table. We have Mr. Fritz Attaway who is Executive Vice President and Special Policy Advisor to the MPAA; Ms. Gigi Sohn, who is President of Public Knowledge; and Mr. Gary Shapiro, President and CEO of the Consumer Electronics Association. Welcome to two of the three of you--all three. Here we are. Mr. Attaway, why don't you go ahead, 5 minutes for your opening statement, please.

STATEMENTS OF FRITZ ATTAWAY, EXECUTIVE VICE PRESIDENT AND SPECIAL POLICY ADVISOR, MOTION PICTURE ASSOCIATION OF AMERICA; GARY SHAPIRO, PRESIDENT AND CHIEF EXECUTIVE OFFICER, CONSUMER ELECTRONICS ASSOCIATION; AND GIGI SOHN, PRESIDENT, PUBLIC KNOWLEDGE

MR. ATTAWAY. Thank you very much. Thank you for giving me this opportunity to talk about the video broadcast flag, and I want to emphasize that the video flag is very different from the audio flag, so take everything that you learned in the last panel and file it away for a few minutes and focus on the video flag. I also should mention that the National Association of Broadcasters is very supportive of the video flag so it is a little different position that you heard on the audio flag.

You have my written statement in which I have attempted to set forth a comprehensive view of why the video broadcast flag is in the public interest. In the few minutes I have here, I would like to just focus on a couple of key points. First of all, the flag is narrowly focused to prevent mass redistribution of digital content, nothing more. The FCC news release when the rule was adopted makes clear that the flag will not require consumers to purchase new equipment. It will not in any way effect the ability of consumers to make digital copies. It will not limit functionality of existing devices and yet will not affect digital VCRs,

DVD players, computers, or any other device that does not contain a digital tuner.

When the broadcast slide was in effect, only 13 technology applications were filed with the FCC for certification. These 13 technologies were sufficient to implement the video flag in every covered consume, device that was scheduled to enter the marketplace when the flag was to become effective in July of 2005. The claim that the FCC would have to pre-approve every TV set, computer, and digital video recorder is simply false. The primary point I want to make today is that the sole purpose of the flag is to provide a level playing field for off-air broadcasters and to protect consumers who rely on free off-air TV for entertainment and information.

I put up a poster there. I know it is hard to read but that is a listing of all the channels available on one of the major multi-channel video program distributors. The vast majority of these program channels are not off-air broadcasts and the content on these channels can be protected against indiscriminate redistribution. Many provide protection against redistribution today, and I point out that at least I am not aware of any consumer complaints.

Only off-air broadcasters, those few that are highlighted in yellow, don't have the ability to prevent redistribution over the Internet and other digital networks. The broadcast flag will give broadcasters the stability so they can continue to attract high value content that must be protected against mass redistribution in order to preserve its value. Eighty-five percent of households subscribe to a multi-channel service that can require content protection. The TV devices in those households will have to provide the same kind of protection that the flag would require.

That is why device manufacturers do not oppose the flag. They are going to have to build devices that have that functionality in any case. Whether or not the flag is reinstituted, the vast majority of digital TV channels received by the American public will be capable of protecting content against mass redistribution. The question presented by this hearing is whether free off-air broadcasters will be able to provide the same protection and continue to have access to high-value content. I hope that you will give them that ability to compete on a level playing field by adopting or reinstituting the broadcast flag. And I also hope that you will not do that while repealing the DMCA, which is unfortunately what H.R. 1201 would do. Thank you very much.

[The prepared statement of Fritz Attaway follows:]

PREPARED STATEMENT OF FRITZ ATTAWAY, EXECUTIVE VICE PRESIDENT AND SPECIAL POLICY ADVISOR, MOTION PICTURE ASSOCIATION OF AMERICA

SUMMARY

Thank you for giving me this opportunity to speak to you today about the Broadcast Flag and whether content protection and technological innovation can coexist.

The short answer is that content protection and technological innovation CAN coexist, and ARE coexisting. American consumers, and indeed consumers around the world, have entered a golden age of access to audiovisual content. Never before have consumers had so much choice in terms of the movies and TV shows available to them and the means by which they are delivered.

Digital rights management (DRM) technology enables secure delivery of movies and TV shows to consumers, exponentially expanding consumer choice. The high-tech and movie industries share a common interest in providing consumers new viewing opportunities, which will create vast new markets for both consumer technology and content.

The greatest challenge facing the motion picture industry today is the widespread trafficking of movies and television shows on the Internet. Because it is transmitted without encryption or other technological protections (*i.e.*, "in the clear"), there is no technological protection against anyone redistributing digital broadcast television content over the Internet and other digital networks. By contrast, cable and satellite, and even authorized Internet, distribution can include protections against such redistribution. The likelihood of wide-scale redistribution of content distributed over digital broadcast television creates a disincentive for program owners to license high value content through that distribution channel. Without this high-value programming, local stations would lose viewership and, correspondingly, revenue. Loss of this revenue would threaten their continued existence, jeopardizing the source of local news and public affairs programming for millions of Americans.

In order to provide a level playing field for off-air broadcasters, and protect the millions of consumers who rely on free TV, the Federal Communications Commission (FCC) adopted narrowly targeted regulations allowing digital TV stations to prevent the indiscriminate redistribution of their programming. The basic outline of the Broadcast Flag was developed and approved in principle by a large and diverse group of consumer electronics, computer technology and video content companies. Use of the Flag allows broadcasters to offer content creators the same protection against Internet redistribution that conditional access systems like cable and satellite can provide. Nothing in the Broadcast Flag regulation requires broadcasters to embed the Flag in content; the Broadcast Flag regime merely allows a content provider to choose whether to include protection against Internet redistribution.

The FCC certified thirteen separate technologies for implementing the Flag, including one that provides for remote access of recorded TV programs. It is important to note that the Broadcast Flag would have no effect on the copying of TV programs or distributing protected digital broadcast content within the personal digital network environment. The Broadcast Flag solution will have no impact on existing consumer equipment. The cost impact on affected equipment going forward will be insignificant.

The D.C. Circuit Court of Appeals, invalidated the FCC's regulations on purely jurisdictional grounds. Significantly, no consumer electronics or computer technology company required to implement the Broadcast Flag challenged the FCC regulation.

It is imperative that Congress act quickly to enact narrowly crafted legislation to reinstate the FCC's Broadcast Flag ruling. The marketplace has already anticipated that the Broadcast Flag will be required and many manufacturers of digital television devices are now producing equipment in compliance with the FCC Broadcast Flag regulations. It is worthy of note that there has been no discernable consumer resistance to these broadcast flag compliant devices and no surge of consumer complaints.

Let me add one cautionary note. While we strongly support legislation that will reinstate the Broadcast Flag, we cannot support legislation that will do that at the expense of the anti-circumvention provisions of the DMCA. It has been suggested that HR 1201

be attached to Broadcast Flag legislation. However, that type of legislation would as a practical matter repeal Section 1201 of the DMCA, would compromise efforts to fight piracy and inflict devastating harm on an important American industry.

I appreciate this opportunity to discuss these matters of concern to our industry.

Chairman Upton, Ranking Member Markey, members of the Subcommittee, thank you for giving me this opportunity to speak to you today about the Broadcast Flag and whether content protection and technological innovation can coexist.

The short answer is that content protection and technological innovation CAN coexist, and ARE coexisting. American consumers, and indeed consumers around the world, have entered a golden age of access to audiovisual content. Never before have consumers had so much choice in terms of the movies available to them and the means by which they are delivered – theaters, VHS, DVD, cable, satellite, broadcast TV, Internet, advertiser supported, subscription, pay-per-view, video-on-demand – the list is long and growing. And television programming is being made available to consumers in even more ways (e.g., via mobile phones).

The engine that is driving us into this golden age of consumer choice is technology. The motion picture industry has enthusiastically embraced innovative technology to create new markets and bring new choices to consumers. Here are a few of the recent announcements:

- Warner Bros. partners with Free Record Shop using P2P distribution
- Universal partners with LoveFilm in UK, offering downloads
- CBS and Verizon FiOS TV partner to carry select programs
- Disney offers feature length film on ITunes
- CBS delivers college basketball "March Madness" online
- ABC offers free streaming of shows at ABC.com
- Disney re-launches MovieBeam as a new digital VOD distribution channel
- NBC Universal launches Aeon Digital set top box
- MTV Networks partners with Microsoft to offer digital music and video downloads via URGE.
- MTV Networks offers thousands of free on-demand videos via its broadband channels, including MTV Overdrive, Nick Turbo, V-Spot and Motherload
- CBS offers select programs on demand
- Warner Bros. launches P2P service In2Movies in Germany
- Fox announces VOD and DVD windows collapsed
- NBC Universal announces Peer Impact deal
- Disney announces download-to-own deal for full-length feature films with CinemaNow
- Google Video beta launched – essentially going with a wholesale reseller model – creating an iTunes-like store.

However, technology brings challenges as well as opportunities. The greatest challenge is to maintain control over the distribution of movies and TV shows in order to recoup the cost of production and spur investment in new projects.

Fortunately, technology itself is a big part of the solution to illegal distribution. Digital rights management (DRM) technology enables secure delivery of movies and TV shows to consumers, exponentially expanding consumer choice. The high-tech industry is our partner in this endeavor. Contrary to the perception of some, the high-tech and movie industries are not enemies. To the contrary, we share a common interest in

providing consumers new viewing opportunities, which will create vast new markets for both consumer technology and content.

The greatest challenge facing the motion picture industry today is the widespread trafficking of movies and television shows on the Internet, mostly through so-called peer-to-peer "file sharing." The term "file sharing" is a popular euphemism for copying, which in the case of copyrighted motion pictures and TV programming is stealing.

DRM technology is being employed by movie distributors to prevent unauthorized reproduction and redistribution of digital works. However when movies and TV shows leak out of a protected environment, whether through hacking of DRM measures, copying through the "analog hole," illegally camcording off theater screens, or other means, they can be made available to literally tens of millions of people over the Internet, instantaneously and with little or no degradation of quality.

Movie studios are actively engaged in finding ways to stem this leakage, such as through use of more sophisticated DRM measures. They are also heavily involved in encouraging awareness of and respect for their rights under copyright laws around the world, not only through infringement actions, but through consumer education and working with colleges and universities to develop codes of conduct for students using digital networks.

One source of leakage that only can be addressed by the Congress is digital broadcast television. Because it is transmitted without encryption or other technological protections (*i.e.*, "in the clear"), there is no technological protection against anyone redistributing digital broadcast television content over the Internet and other digital networks. By contrast, cable and satellite, and even authorized Internet, distribution can include protections against such redistribution. The likelihood of wide-scale redistribution of content distributed over digital broadcast television creates a disincentive for program owners to license high value content through that distribution channel.

The effects of this disparity will become yet more pronounced as more and more consumers access their content from digital broadcasts, in preparation for the mandated switch-over from analog to digital broadcasting in 2009. Program owners may determine that the value of their programming is diminished so significantly by redistribution over the Internet that they choose to distribute their programming only through distribution channels that can offer some protection. Without this high-value programming, local stations would lose viewership and, correspondingly, revenue. Loss of this revenue would threaten their continued existence, jeopardizing the source of local news and public affairs programming for millions of Americans.

In order to provide a level playing field for off-air broadcasters, and protect the millions of consumers who rely on free TV, the Federal Communications Commission initiated a proceeding aimed at adopting narrowly targeted regulations prohibiting the indiscriminate redistribution of digital broadcast television programming. In November 2003, with the purpose of speeding consumer transition to digital television, the FCC issued a regulation requiring implementation of the "Broadcast Flag" as of July 1, 2005.

The basic outline of the Broadcast Flag was developed and approved in principle by a large and diverse group of consumer electronics, computer technology and video content companies participating in the Broadcast Protection Discussion Group, an informal, open forum created for the purpose of finding a solution to the broadcast redistribution problem. The BPDG proposed implementation of a Broadcast Flag as the most appropriate and efficient solution for the protection of digital broadcast television. Use of the Flag allows broadcasters to offer content creators the same protection against Internet redistribution that conditional access systems like cable and satellite can provide. Nothing in the Broadcast Flag regulation requires broadcasters to embed the Flag in content; the Broadcast Flag regime merely allows a content provider to choose whether to include protection against Internet redistribution.

Subsequent to its adoption of its Broadcast Flag regulation, the FCC certified 13 separate technologies for implementing the Flag, including one that provides for remote access of recorded TV programs. It is important to note that the Broadcast Flag would have no effect on the copying of TV programs. The Broadcast Flag solution will not prevent consumers from making an unlimited number of physical recordings of DTV programs, or from distributing protected digital broadcast content within the personal digital network environment. Furthermore, implementation of the Broadcast Flag solution will have no impact on existing consumer equipment. The cost impact on affected equipment going forward will be insignificant.

Despite the broad consensus in favor of the Broadcast Flag, the FCC's authority to adopt Broadcast Flag regulations was challenged before the D.C. Circuit Court of Appeals, which invalidated the FCC's regulations on purely jurisdictional grounds. Significantly, no consumer electronics or computer technology company required to implement the Broadcast Flag challenged the FCC regulation.

It is imperative that Congress act quickly to enact narrowly crafted legislation to reinstate the FCC's Broadcast Flag ruling. The marketplace has already anticipated that the Broadcast Flag will be required and many manufacturers of digital television devices are now producing equipment in compliance with the FCC Broadcast Flag regulations. Moreover, consumer equipment that includes one or more of the same 13 content protection technologies approved for use under the Flag regime is already being deployed, so most manufacturers will be building equipment that will work seamlessly under the Broadcast Flag regime in any event. It is worthy of note that there has been no discernable consumer resistance to these broadcast flag compliant devices and no surge of consumer complaints.

Let me add one cautionary note. While we strongly support legislation that will reinstate the Broadcast Flag, we cannot support legislation that will do that at the expense of the anti-circumvention provisions of the DMCA. It has been suggested that HR 1201 be attached to Broadcast Flag legislation. However, that type of legislation would as a practical matter repeal Section 1201 of the DMCA, would compromise efforts to fight piracy and inflict devastating harm on an important American industry.

Chairman Upton, Ranking Member Markey, members of the Committee, I appreciate this opportunity to discuss these matters of concern to our industry and I look forward to answering any questions you may have regarding what I have just discussed.

MR. FERGUSON. Thank you very much. Mr. Shapiro, 5 minutes, please.

MR. SHAPIRO. Thank you for this invitation to testify on behalf of the technology industry. We represent 2,100 companies and $180 billion, and we believe that we are igniting the greatest explosion of human creativity since the Renaissance and it is driving America's rise to global leadership and innovation and ingenuity. We believe that the rationale actually for the video flag is debatable and for the audio flag it is actually non-existent. The fact is that both of these bills would involve taking rights away from lawful consumers and giving it to the content industry.

That is why if the committee chooses to move forward on either of the flag bills we would hope that it should also protect consumers by putting H.R. 1201 as part of the package. Let us review the facts. We have a symbiotic relationship between the content and technology

industries. We need each other and in the long term we do great things for each other. The problem is in the short term the content industry reacts to every new technology with fear, apprehension and cries for government intervention. The track record is unbroken. They opposed the player piano, FM radio, television, the cassette recorders, the VCR, the MP3 player, the TiVo, and I could go on and on and on. But again and again the content industries come here to Congress asking you to stop or limit technologies. And most of the time you have chosen the free market over regulation, and what has happened? Well, somehow the sky doesn't fall. New revenue streams are created and the economy and consumers have benefited.

The new villains today at this hearing are digital television, digital radio or HD radio, and satellite radio. Right now we are barraged by bills and lawsuits that would impose government mandates on our products and limit private non-commercial activities of consumers. The television broadcast flag and audio flag are two such proposals. They are radically different in terms of technology, implementation and impact on innovation and consumers, and that is why we have two separate panels and that is why I urge you to consider them separately.

The television broadcast flag emerged from a very rigorous multi-year, multi-industry technical process. It was implemented by the FCC and was only addressing redistribution over the Internet. By contrast the audio flag bill, H.R. 4861, is aimed to stop the copying, in other words, non-commercial recording inside your own home. The bill targets unauthorized copying, not illegal copying, but just unauthorized. And, secondly, no audio flag actually exists. Unlike the video flag, the audio flag was not the result of an industry process. The RIAA does not even have a technical proposal. Instead, they come with a theoretical mandate and so they come with a theoretical mandate and ask you to legislate on it.

The audio flag bill also contradicts the Audio Home Recording Act. Congress challenged us to come make a deal with the recording industry. We did. It said digital audio recording products shall not be restricted except by the law that was already in there so you cannot make copies of copies and royalties shall be paid and then they shall be produced. But yet here they are with legislation and lawsuits. Also significant, a flag would bring digital radio transition to a halt. The only way to accomplish the bill's ban on copying is through an encryption scheme which would obsolete all existing digital radios notwithstanding the prohibition in the legislation.

Basically the RIAA is showing up very late to the party. They ignored the CPTWG, they ignored the FCC. They have no evidence of real harm and they are demanding that everyone bring their lawful

businesses to a full stop. The bill's proposal to lock down satellite radio is even more outrageous. Exciting new products are being sold by XM and Sirius that allow consumers to record lawfully acquired material recording off of radio. They comply with the Audio Home Recording Act. They cannot be used for piracy and all digital recordings are locked into the device. There is no demonstrated problem and there is no evidence of harm to music sales.

These proposals are merely the latest step in a long-standing attempt to tip the balance of copyright. We always hear about balance, but we never hear about consumer rights and consumer balance. The lawsuit provides an example that you should focus on how much copyright has spun out of control. The record labels have sued XM radio for these devices. They are suing for statutory damages of $150,000 per song. That translates into $115 million per XM device already sold. That liability against five devices would exceed XM's 2005 revenues. Against 100 devices it would exceed the entire revenue of the recording industry and if the INO just becomes one-quarter as successful as the iPod, claim damages would exceed the gross domestic product of the United States of America.

This is all for a product that merely allows private recording. I can't imagine a stronger disincentive to new innovation, but for the RIAA, that is exactly the point. In the past two decades Congress has passed some 20 bills expanding copyright owners' rights and restricting consumer rights. That is why if Congress chooses to give even more powers to the copyright owners, it must protect the rights of consumers by passing H.R. 1201. It balances the copyright laws and it allows the real pirates to be put in jail. It codifies the Supreme Court Betamax decision and allows consumers to bypass technical protection measures to exercise their fair use rights. It is tough on pirates.

In conclusion, I ask you to be suspicious of claims that government limits on consumers and innovation are necessary to protect the content industry. Perhaps they are finally right. Maybe this time the sky is really falling. But I believe you have earned the right to be skeptical.

[The prepared statement of Gary Shapiro follows:]

PREPARED STATEMENT OF GARY SHAPIRO, PRESIDENT AND CHIEF EXECUTIVE OFFICER, CONSUMER ELECTRONICS ASSOCIATION

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

Before discussing the advisability of any sort of "flag" legislation, I want to emphasize that both CEA and the HRRC share and applaud Chairman Barton's and Mr. Boucher's determination that if the Congress should find it appropriate to proceed, it should do so only while enacting H.R. 1201 at the same time. We believe this legislation, as formulated and introduced in this Congress, would protect consumers without threatening any legitimate service. It would not remove any tools against pirates. It has been unfairly caricatured by some, and deserves consideration on its own merits.

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

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

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

Any "Flag" Provision Should Be Proven Necessary And Accompanied By H.R. 1201

The most vital requirement is that the legislation be *necessary* in the first place. There has been much discussion and review on this subject by the FCC with respect to the Video Broadcast Flag, which addresses only the mass, indiscriminate redistribution of content over the Internet. There has been no such focused discussion about an "audio

flag" because we have not yet seen any actual proposal for such a "flag." It seems evident that addressing "mass, indiscriminate redistribution" is very far from what the recording industry actually has in mind when it asks for a "flag." The Video Broadcast Flag, as promulgated by the FCC, assured consumers' rights to record from broadcast television. The recording industry seems intent on targeting, and preventing or taxing, consumers' rights to record from terrestrial and satellite radio.

Concerns About Technical Mandates In General

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

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

This Hearing Is About Very Different Subjects

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

The "Broadcast Flag Authorization Act"

The proposals for a "broadcast flag" emerged from two forums in which CEA, the HRRC, and various members have been very active – the Advanced Television Systems Committee (ATSC) and the Copy Protection Technical Work Group. In ATSC committees, members of the content community for years pushed for a "descriptor" for the purportedly limited purpose of marking content, for possible control over mass Internet transmission. Members of the consumer electronics industry were greatly concerned that such a "flag" might be abused or used for other purposes, resulting in unwarranted control over consumer devices *inside* the home – something that had never been imposed on free, over-the-air commercial broadcasting. In response to these concerns, the content and broadcasting representatives agreed to clarify that the flag was meant to govern not transmission, but *retransmission*, outside the home.

Our members led in forming a Broadcast Flag work group at the CPTWG, and in drafting a final report. While the concept of a passive "flag" proved simple enough, the digital means of securing content, in response to such a flag, and the potential effect on consumers and their devices, proved highly controversial and contentious. The pros and

cons finally were sorted out in the FCC Report & Order, which specified that the Flag was meant solely to address ***"mass, indiscriminate redistribution"*** of content over the Internet. This is the Order that the Court of Appeals nullified on jurisdictional grounds, and which, we assume, any "flag" legislation would reinstate.

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

- First, we have been disappointed to see the "ATSC Descriptor" show up in a number of standards proceedings, proposed by the content industry for uses that go well beyond those originally described to the ATSC.
- Second, some of the legislative language that at times has been circulated and attributed to the Motion Picture Association of America and its members would go well beyond the FCC's "mass, indiscriminate redistribution" standard, and could be interpreted as constraining distribution on networks *inside* the home.
- Third, the flag regulations were invalidated before they ever took effect. It should be clearly understood that, if legislation is enacted that would put the FCC regulations into force for the first time, manufacturers must be given a commercially reasonable period of time to manufacture and include the necessary circuitry in their devices.
- Fourth, exceptions for consumer fair use, news and public affairs programming, and distance education, as we proposed to the FCC, should be part of any legislation addressing this subject.

The "Audio Flag"

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

(a) refers to some known technology

(b) is aimed only at "mass, indiscriminate redistribution of content over the Internet, and

(c) is not aimed at restricting consumers' in-home use of content that they have lawfully obtained.

Unfortunately, this is not the case.

Most Proposals Are Not For "Flags" At All

Flying generally under "flag" colors in both bodies this year, either legislatively or in the PR wars, have been proposals that would govern the playback of lawfully received satellite radio content,[1] require a license for and then deny it to music services that are deemed to encourage lawful home recording,[2] define a "flag" as pertaining to music "distribution" rather than to the public performance in question,[3] or require a radio

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

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

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

service to stop consumers from "disaggregating" music by playing back the songs they lawfully record at home in the order they choose.[4]

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

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

There is no demonstrated problem, and there is no reason to take control of these services away from broadcasters and satellite radio providers, or to interfere with the customary enjoyment of these services by consumers, and put those controls solely in the hands of the record companies or music publishers. The Congress has consistently declined to do so. As a result, the United States remains a world leader in developing new broadcast and consumer technologies and services.

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

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

> "… will eliminate the legal uncertainty about home audio taping that has clouded the marketplace. The bill will bar copyright infringement lawsuits for both analog and digital audio home recording by consumers, and for the sale of audio recording equipment by manufacturers and importers. It thus will allow consumer electronics manufacturers to introduce new audio technology into the market without fear of infringement lawsuits …."[5]

Yet, on May 16, the major record labels filed suit against the XM satellite radio service, explicitly based on its support of a royalty-paid device, covered by the AHRA, that in addition to allowing consumers to make home recordings (that cannot be output from the device), allows consumers to choose the order in which the recordings are played back. According to the labels, apparently such consumer choice violates the law.

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[4] This was contained in a minority discussion draft of the legislation referenced directly above.

[5] *The Audio Home Recording Act of 1991: Hearing before the Senate Committee on the Judiciary*, S. Hrg. 102-98 at 115, October 29, 1991, written statement of Jason S. Berman.at 119. Mr. Berman, in fact, emphasized that the comprehensive compromise nature of the AHRA was a reason for the Congress to pass it: "Moreover, enactment of this legislation will ratify the whole process of negotiation and compromise that Congress encouraged us to undertake." *Id.* at 120.

Moreover, they apparently see no relevance to the legislative language they agreed to in our joint support of the AHRA in 1992:

> **§ 1008. Prohibition on certain infringement actions**
> No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on making digital musical recordings or analog musical recordings.

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

HRRC And CEA Oppose H.R. 4861

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

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

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

We Have Not Seen An Actual "Flag" Proposal Because No Such Thing Exists

Perhaps one reason we have not seen any legislation addressed strictly and only to mass, indiscriminate redistribution over the Internet is that we have also not seen any technical proposal, from the music industry, that would be so limited. Unlike the video Flag, the "proposal" made by the RIAA to the FCC in 2004 was aimed, instead, at frustrating the long-accepted, reasonable private and noncommercial practices of consumers inside the home. As to distribution outside the home, the RIAA never explained to the FCC how it could accomplish its objectives in a non-intrusive manner, and we are still not aware of any such technical proposal.

The FCC's Digital Audio Broadcast proceeding was begun by the Commission in 1999 and its initial emphasis was almost entirely technical. Nevertheless, neither the

RIAA nor any other music industry interest ever made a single filing in that proceeding until 2004 – and even then it did not disclose or propose what specific technology would be imposed on consumers. But no matter what technology ultimately is chosen, there has simply never been any case made for the need of an "audio flag." A mandate in aid of one would be an unwarranted, unnecessary, and probably unworkable intrusion into consumer use, and into the very viability of the new digital radio format on which so many have worked so long and hard for so many years.

The proposal to suddenly lock down satellite radio comes even more "out of the blue." There is no indication that the new devices being rolled out by these services depart from the requirements of the Audio Home Recording Act, most of which were drafted by the music industry itself. Indeed, the products that form the basis of the record labels' suit against XM *do not have any outputs, other than a headphone jack, via which music from the satellite broadcast content can be obtained.* It is true that, in theory, the output of a headphone jack can be digitized and potentially sent to the Internet. Is it the music industry's "flag agenda" to impose some copy protection scheme on *all* headphone jacks and other analog interfaces of *all* music players and stereo system components? If so, they should say so, and return to the multi-industry Copy Protection Technical Working Group (which they left 6 or 7 years ago) for such an idea to be given appropriate consideration in the private sector.

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

* * *

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

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

MR. FERGUSON. Thank you. For our third panelist on the video flag panel, Ms. Sohn.

MS. SOHN. Thank you for inviting me to testify here today to give a consumer perspective on the broadcast flags. We are living in a digital gold age and consumers, your constituents, are the beneficiaries. Consumers have numerous choices for buying digital content and for buying devices on which to play that content. They have never had so much flexibility and so much opportunity to be creators themselves.

New opportunities in the content industry to profit from these digital technologies arise every day. Sales of DVDs continue to generate enormous revenues. In just months, iTunes sold 12 million video downloads for use on its video iPod. The broadcast networks, ESPN and

Warner Brothers, are making for pay and advertiser-supported content available either through streaming or as downloads over a variety of on-line platforms. As the content industry has ramped up on-line delivery of content, it has been testing a variety of protection measures that provide both security for the industry and flexibility for consumers.

So to answer the question, can content protection technological innovation coexist? It is a resounding yes. Look at the robust market for on-line content distribution facilitated by the technologies and networks consumers love. But apparently success is not enough for the content industry which is asking you to interfere with this market and impose two technology mandates that could bring this technological and artistic renaissance to a grinding halt.

The first to reinstate the FCC's vacated broadcast flag rule, Public Knowledge opposes this rule first and foremost because it would give the FCC unprecedented and broad control over technological design. On this point the D.C. Circuit emphatically agreed. Moreover, the rule would allow the agency to set the limits of consumers' rights and the copyright law. It would prohibit lawful uses of content, including use of broadcast TV excerpts on-line and for distant education.

And let me clarify with all due respect to my colleagues on the first panel while the broadcast flag purports to be about indiscriminate redistribution, it also prohibits discriminate redistribution. So if you, Mr. Chairman, would like to send a clip of you appearing on broadcast news to your home office in New Jersey, you wouldn't be able to do that under the broadcast flag scheme. The flag scheme will also cause great consumer inconvenience, confusion, and cost, which will slow rather than expedite the transition to digital TV.

Again, with all due respect to Mr. Attaway, flag-compliant devices may not work with non-compliant devices, making millions of obsolete legacy machines. Digital media recorded on a flag-compliant device may not play on a non-compliant device meaning that the DVD that you burn in one room of the house may not play in a DVD player in a different room. In addition, TV flag scheme will increase consumer cost because none of the 13 technologies the FCC has certified work with each other. Therefore, if you have a Phillips flag-compliant TV set, a consumer must purchase devices from that same manufacturer. This is profoundly anti-competitive and anti-consumer.

And with your permission, I would like to submit for the record some diagrams that demonstrate how devices become obsolete when you mix flag-compliant and non-compliant devices.

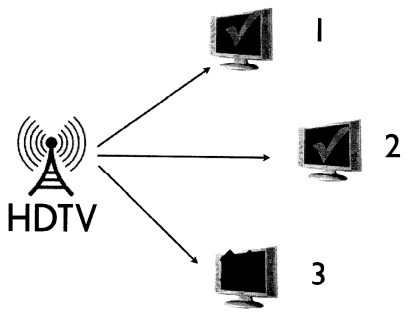
MR. FERGUSON. Without objection, we will include those.

[The information follows:]

the broadcast flag regime is a government mandated robustness requirement, that attempts to prevent the indiscriminate redistribution of high-value digital broadcast television.

there are three basic examples that explain why a broadcast flag regime fails consumers:
1. how non-compliant devices become obsolete;
2. even if all devices are flag compliant, all follow-on consumer devices that are replaced with compliant devices must use the same manufacturer's technology; and
3. how consumers (and more importantly "pirates") can simply evade the broadcast flag scheme all together by maintaining current, non-flag compliant technology.

three scenarios:

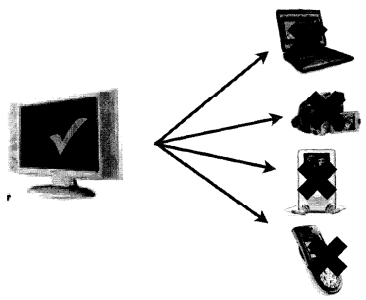


each scenario involves a "flagged" digital broadcast television signal being received into the home.

the first two signals are received by broadcast flag compliant devices, and the last one by a current non-compliant device.

scenario 1:

one flag compliant device

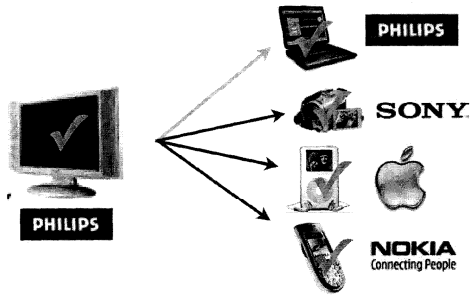


in this scenario, just one receiving device is broadcast flag compliant.

the first digital receiving device, realizes that none of the rest of the digital devices are broadcast flag compliant (even though they may not even have a digital tv receiver in them), and refuses to "talk" with them.

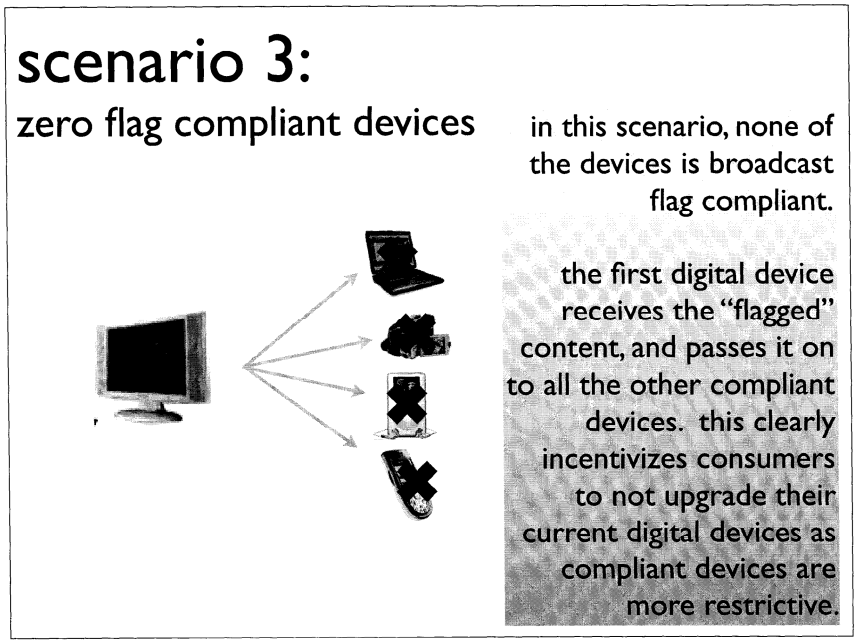
scenario 2:

all flag compliant devices



in this scenario, all the devices are broadcast flag compliant.

even so, because only one pair of them are using the broadcast flag spec of the *same manufacturer* (philips), many of the devices refuse to "talk" to each other and will not receive / copy the digital signal.



MS. SOHN. Nevertheless, if Congress decides to impose a TV flag scheme, it must also ensure that consumers' rights under the copyright act are preserved. Thus, any broadcast flag legislation must be coupled with legislation that would permit circumvention of technological protection measures for lawful uses. We are grateful that Chairman Barton has recommended that any flag legislation also include H.R. 1201. In addition, any TV flag legislation should have meaningful exemptions for news and public affairs programming, distant education, and public domain programming. The former is particularly important as news programming is the public's compensation for permitting broadcasters to use the public airways for free.

We have similar concerns about the audio flag which are discussed in detail in my written statement. Proponents of the audio flag do not even purport to be concerned with so-called indiscriminate redistribution of songs. Instead, they want to extinguish the long-protected consumer right to make personal home recordings of radio transmissions. There are far better alternatives to the heavy-handed technology mandates being discussed today. As Mr. Markey said, they include a multi-prong approach of consumer education, enforcement of copyright laws, and use of technological tools developed in the marketplace which Public Knowledge supports.

The Grokster decision and the Family Entertainment Copyright Act are just two of several new legal tools that the content industry has at its

disposal to protect its content. Members of the subcommittee, the TV and audio flags are controversial and do not reflect consensus. That is another myth. I am confident that you will conclude that the Federal Communications Commission should not become the Federal Computer Commission or the Federal Copyright Commission, and that the marketplace, not the Government is the best arbiter of what technologies succeed or fail. The flag rules place unacceptable limits on innovation, competition and consumer rights. I urge you to reject them. Thank you.

[The prepared statement of Gigi Sohn follows:]

PREPARED STATEMENT OF GIGI SOHN, PRESIDENT, PUBLIC KNOWLEDGE

Chairman Upton, Ranking Member Markey and other members of the subcommittee, my name is Gigi B. Sohn. I am the President of Public Knowledge, a nonprofit public interest organization that addresses the public's stake in the convergence of communications policy and intellectual property law. I want to thank the subcommittee for inviting me to testify on the audio and video broadcast flags. I specifically want to focus on the impact of these technological mandates on consumers.

I served as counsel to the nine public interest and library groups that successfully challenged the Federal Communications Commission's (FCC) broadcast flag rules in the United States Court of Appeals for the District of Columbia Circuit. My organization financed and coordinated the case, which is titled *American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005). I have attached a copy of the court's decision in the case, and I respectfully request that it be placed into the record of this hearing.

Introduction

This is the digital golden age for consumers. They have numerous choices for buying digital content and for buying devices on which to play that content. Far away from the copyright and technology battles in which we engage in Washington, newly forged partnerships between technology companies and content companies are revolutionizing the way we view and listen to digital media. Here are just a few examples:

- New versions of Microsoft's Media Center software enable the playback of a consumer's favorite media, whether on the individual's home office monitor, living room television, or PDA. The company has also developed a new music service in conjunction with MTV, VH1, and CMT music channels.
- Innovators like DigitalDeck, NewSoft, SlingMedia, and Sony each have developed competing technologies that allow consumers to remotely watch the television playing in their living rooms on a laptop, mobile phone, or portable gaming console.
- Yahoo! has developed software and services that enable consumers to view, create, and share content between their mobile phones, computers and living rooms, all using the Internet.
- Google has developed a distribution system to allow anyone to provide videos for free or for sale, and allow others to download that content to a computer, Apple iPod, or Sony Play Station Portable (PSP). Google has announced content distribution agreements with large content providers like CBS and the NBA. This follows the recent success of NBC, ABC, and ESPN, which distribute programming in partnership with Apple's iTunes.
- TiVo's most recent software update makes it simple for consumers to watch their favorite television shows on popular players like the iPod and PSP. And

soon, the next generation TiVo recorder will help consumers record over-the-air high-definition television.

- Together, XM Radio and Pioneer developed an innovative portable satellite radio player that, like a TiVo, allows consumers to automatically record their favorite songs or shows while they are being broadcast. A consumer's preferences are stored on the radio, and when connected to a computer, XM's software helps the consumer to find more information about the artists, purchase music through the new Napster, and discover other songs and shows by similar artists.

These and many other examples demonstrate that the market for delivering content digitally over new technologies is working. Consumers can watch and listen to the content they purchase anytime and anywhere they want. Some of that content will be protected, and consumers can decide whether that protection is flexible enough. All of these great developments happened without government intervention.

The public appetite for buying individual TV shows and songs online is growing by leaps and bounds. There are more ways than ever to watch TV and movies and listen to the radio. Here are some of the newest legal services that offer consumers the opportunity to view, either for free or for a charge, content provided by the TV networks and Hollywood studios:

- Last winter, CBS Sports and the NCAA announced that they would stream the NCAA tournament for free over the Internet. Over the course of the tournament, they served up a record 268,000 simultaneous streams, with a total of 14 million streams served and 4 million unique visitors.[1]
- The iTunes Video store, launched in October 2005, now carries television programs from ABC, NBC, Fox and CBS, along with many cable networks. In its first five months of operation, the movie store sold more than 12 million videos at $1.99 a piece.
- In May, ABC began offering downloads of many of its most popular shows, including Lost, Alias, and Desperate Housewives for free on a trial basis. Last week ABC reported that more than 11 million viewers used the service in the first month of operation.
- Services like CinemaNow and WorldCinemaOnline allow consumers to download Digital Rights Management (DRM) protected movies and TV shows to their computers. Consumers can opt for a limited time rental, or choose to keep the movie for a higher price.
- Akimbo and MovieBeam use a special set-top box that enables the user to download and watch movies on demand, with variable pricing based on the length of viewing.
- Warner Brothers has entered into a partnership with BitTorrent to provide DRM-protected media using BitTorrent technology. This innovative model will use BitTorrent's distributed model to provide high speed downloads, and shared compensation for the content owners.

Yet even as innovators in the motion picture and recording industries promote these alternative distribution models and the technologies that facilitate them, their colleagues in Washington are asking Congress to step in and give them protection from the vague threat of massive copyright infringement the industry says these new technologies could facilitate. Let us be clear. The content industry has not shown that any infringement has resulted from these technologies. And it certainly has not shown that government

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1http://www2.ncaa.org/portal/media_and_events/press_room/2006/march/20060320_mmod_rls.html

technology mandates will work to stop actual copyright pirates rather than prevent ordinary consumers from engaging in lawful activities.

The content industry is asking Congress to impose three technology mandates: the TV broadcast flag, an audio broadcast flag, and an end to the analog hole. Each mandate 1) injects government into technological design; 2) restricts lawful consumer activities; and 3) increases consumer costs by making obsolete millions of digital devices. Once consumers start to purchase devices that are compliant with these technology mandates, the costs will be enormous. For example:

- A consumer would not be able to record over-the-air local news on her broadcast-flag compliant digital video recorder in her living room and play it back on a non-compliant player in her bedroom (broadcast flag).
- A member of Congress could not email a clip of his appearance on the national news to his home office (broadcast flag).
- A student would be prohibited from recording excerpts from a DVD for a college Powerpoint presentation (analog hole).
- A consumer would be unable to record individual songs off digital broadcast and satellite radio (audio flag).
- Current versions of TiVos (and other digital video recorders), and Slingboxes may not work with analog hole closing compliant devices, rendering them virtually obsolete (analog hole and broadcast flag).
- A university could not use digital TV video clips for distance learning classes (broadcast flag).

I urge the Committee to think very long and hard about trying to fix what is not broken. Ask yourselves, in light of recent marketplace developments, is it good policy to turn the Federal Communications Commission into the Federal Computer Commission or the Federal Copyright Commission? Is it good policy to impose limits on a new technology like HD Radio (that unlike digital television, consumers need not adopt) that may well kill it? Is it good policy to impose technological mandates (like the broadcast flag and closing the analog hole) that would result in consumers having to replace most of the new devices that they just purchased?

There are better alternatives for protecting digital content than heavy-handed technology mandates. An effective multi-pronged approach would utilize consumer education, enforcement of copyright laws, new business models for content distribution and the use of technological tools developed in the marketplace, not mandated by government. The recent *Grokster* decision and the passage of the Family Entertainment and Copyright Act are just two of several new tools that the content industry has at its disposal to protect its content.

Technology Mandates Harm Innovation and are Costly and Inconvenient for Consumers

For Public Knowledge, its members and its public interest allies, the impact of the D.C. Circuit's decision vacating the broadcast flag rules goes far beyond citizens' ability to make non-infringing uses of copyrighted material they receive on free over-the-air broadcast television. Equally as important, the decision limited the power of a government agency that, in the court's own words, has never exercised such "sweeping" power over the design of a broad range of consumer electronics and computer devices. This hands-off approach has fostered a robust market place for electronic devices that has in turn made this country the leader in their development and manufacture.

For this reason, any attempt to portray legislative reinstatement of the broadcast flag rules as "narrow" should be viewed with great skepticism. The rules put the FCC in the position of deciding the ultimate fate of every single device that can demodulate a digital television signal. The broadcast flag rules require the FCC to pre-approve television sets, computer software, digital video recorders, cellphones, game consoles, iPods and any

other device that can receive a digital television signal.[2] Thus, the broadcast flag scheme places the FCC in the position of dictating the marketplace for all kinds of electronics.

The agency has neither the resources nor the expertise to engage in this kind of determination. This type of government oversight of technology design will slow the rollout of new technologies and seriously compromise US companies' competitiveness in the electronics marketplace.

Some argue that the initial FCC certification process worked because all thirteen technologies submitted to the agency were approved. That is a very superficial view of that process. First, it is widely known that several manufacturers removed legal and consumer-friendly features of their devices before submitting them to the FCC, largely at the behest of the movie studios. Second, the changing nature of the FCC and its commissioners is likely to make for widely varying results. Given the fervor of then-Commissioner Martin's dissent to the Commission's approval of TiVo-To-Go, it is unlikely that such technology would be certified today under Chairman Martin's FCC.[3]

The certification process also exacerbates equipment incompatibility problems caused by the broadcast flag scheme. Not only will the scheme prevent consumers from making copies of a TV show on one system and play it on another, none of the 13 different technologies approved by the FCC in its interim certification process work with each other. This means that a consumer who buys one Philips brand flag-compliant device must buy *all* Philips brand flag compliant devices. This raises consumer costs, and also raises serious questions about competition among and between digital device manufacturers. [4]

Proposals to mandate content protection for digital broadcast and satellite radio would similarly place the FCC in the position of mandating the design of new technologies. For example, H.R. 4861, the Audio Broadcast Flag Licensing Act of 2006 ("Ferguson bill"), gives the FCC the authority to promulgate regulations governing "all technologies necessary to make transmission and reception devices" for digital broadcast and satellite radio. In the case of so-called High Definition (or HD) Radio,[5] this could destroy this new technology at birth. Digital broadcast radio benefits consumers through improved sound quality (particularly for AM radio) and gives radio broadcasters the capacity to provide additional program streams and metadata. Unlike digital television, however, consumers need not purchase digital broadcast receivers to continue receiving free over the air broadcast radio. Certainly, if digital radio receivers have less functionality than current analog radio receivers, consumers will reject them and the market for HD radio will die.

In the case of digital satellite radio, mandated radio content protection has the potential to cripple this increasingly popular, but still nascent, technology. XM Radio now has more than six and a half million subscribers, and Sirius Radio last year passed the four million subscriber mark. Consumers are buying all types of receivers for those

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2 D.C. Circuit Court Judge Harry Edwards noted this reach at oral argument when he said, "You're beyond transmission…I mean you're out there in the whole world regulating****I mean, I suppose it will be washing machines next." *ALA v. FCC*, Oral Argument Transcript at 31.

3 For a detailed analysis of the flaws of the FCC's certifications process, *see* Center for Democracy and Technology, *Lessons of the FCC Broadcast Flag Process* (2005), found at http://cdt.org/copyright/20050919flaglessons.pdf

4 For a detailed discussion of these issues, *see* http://www.publicknowledge.org/content/presentations/bflagpff.ppt

5 I say "so called," because calling a digital radio broadcast signal "High Definition" is quite misleading. Whereas in the television context, High Definition connotes a far clearer and sharper picture, an HD radio signal simply raises the quality of AM radio to FM standards, and permits the reception of broadcast radio in places where an analog signal would get cut off, such as in a tunnel or at a traffic light. Indeed, an "HD" quality signal is not even a CD quality signal. *See,* Ken Kessler, Digital Radio Sucks, it's Official, found at http://www.stereophile.com/newsletters/.

services, based in part on the new flexibility and features the equipment offers. The type of content protection the recording industry seeks would likely slow this incredible growth.

The Content Industry Has Not Justified the Need for Technology Mandates

Hollywood's core justification for imposition of the TV broadcast flag scheme can be paraphrased thusly: if the threat of indiscriminate redistribution of "high value" high definition television content is not reduced, broadcasters will not make that content available, thus slowing this country's transition to digital TV.[6]

One of the most vocal proponents of this argument was Viacom, which told the FCC in 2002 that "if the broadcast flag is not implemented and enforced by next summer, CBS will cease providing any programming in high definition for the 2003-2004 television season. And without the security afforded by a broadcast flag, Paramount will have less enthusiasm to make digital content available."[7]

Viacom never did carry out its threat to withhold HD programming, and the argument that the broadcast flag is necessary to encourage the broadcast of high value content and the orderly transition to digital TV transmission has been repudiated in the marketplace. [8] First, broadcasters are making "high value" content available for HDTV or, "in HD": 50%[9] of TV shows, including 66 %[10] of prime time programming, is broadcast in high definition. A number of "high value" sports programming broadcasts, including Monday Night Football, the Super Bowl, the NBA Finals, the NCAA Final Four college basketball championship, the FIFA World Cup, Major League Baseball's All-Star Game and World Series games, all NBC NASCAR races, the U.S. Open golf tournament, and the Olympics, are broadcast in HD along with many other select sporting events throughout the year.[11] Second, the country's transition to digital TV is accelerating, not slowing down, as sales of digital TV sets continue to increase. According to the Consumer Electronics Association, sales of digital TV sets grew 60% to $17 billion dollars.[12] According to Forrester Research, 16 million American homes have digital television sets. In 2006, that number is expected to rise to 26 million, or one in four households.[13] Indeed, the case could be made that rather than accelerate the DTV transition, the broadcast flag could slow the transition when consumers discover that expensive new television sets have less functionality than their current sets.

The recording industry has similarly not demonstrated that an audio flag is necessary. The industry does not cite to even one instance of a digital broadcast or satellite radio transmission being copied illegally or retransmitted over the Internet. Indeed, RIAA chief Mitch Bainwol's testimony and comments on the subject make clear that the real rationale for seeking radio content protection is not copyright infringement, but the recording industry's displeasure over the licensing fees it receives from broadcast

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6 *See In the Matter of Digital Broadcast Content Protection,* FCC 03-273, 18 FCC Rcd 23550, 23553 (November 4, 2003).

7 *See* Comments of Viacom *In the Matter of Digital Broadcast Content Protection*, MM Docket No. 02-230 at 12 (December 6, 2002).

8 D.C. Circuit Judge Edwards also rejected this argument. S*ee ALA v. FCC* Oral Argument Transcript at 32 (Judge Edwards: "This in no way -- what you do here or not in no way impairs the ability to . . . stay on the digital deadline. . . . In no way.").

9 http://www.ati.com/products/hdtvwonder/

10 For the week of Jan. 19 to Jan. 25, ABC broadcast 13 of 32 prime-time shows in HD. During the same week, CBS broadcast 31 of 34 prime-time shows in HD; NBC broadcast 32 of 50 prime-time shows in HD during the same period. For all 3 networks combined, 76 of 116 (66%) prime-time shows were broadcast in HD for one week in January 2006.

11 http://www.cnet.com/4520-7874_1-5119938-1.html

12 http://www.ce.org/Press/CurrentNews/press_relesae_detail.asp?id=10913

13 *See,* http://biz.yahoo.com/prnews/051220/nytu017.html?.v=36

and satellite radio broadcasters.[14] The recording industry does not even pretend that audio flag legislation is intended to do anything other than stop personal home recording.

Video and Audio Flag Schemes Will Transform the Federal Communications Commission into the Federal Copyright Commission

Despite the FCC's protestations to the contrary, any video or audio broadcast flag scheme will necessarily involve the agency in shaping the rights of content owners and consumers under copyright law. Making copyright law and policy is not the FCC's job. It is Congress' job.

While it is true that the TV broadcast flag scheme does not completely bar a consumer from recording her favorite TV show, it does prevent consumers from engaging in other lawful activities under copyright law. For example, as the D.C. Circuit noted in *ALA v. FCC*, the broadcast flag would limit the ability of libraries and other educators to use broadcast clips for distance learning via the Internet that is permitted pursuant to the TEACH Act, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §1330, amending 17 U.S.C. §§ 110, 112 & 882 (2002). *See ALA v. FCC*, 406 F.2d at 697.

This and other examples highlight that while proponents of the flag may justify it as prohibiting only "indiscriminate" redistribution of content over the Internet, flag-compliant technologies actually prohibit any and all distribution, no matter how limited or legal. For example, if a member of this Committee wants to email a snippet of his appearance on the national TV news to his home office, the broadcast flag scheme would prohibit him from doing so. Video bloggers and other TV watchdogs would similarly be unable to post broadcast TV clips on their blogs. For example, the Parents Television Council, which rates television programs according to how child friendly they are, would be prevented from posting clips from those programs for parents to see.[15]

The fact that the broadcast flag will limit lawful uses of copyrighted content was detailed in the Congressional Research Service Report entitled *Copy Protection of Digital Television: The Broadcast Flag (May 11, 2005)*. CRS concluded there that

> While the broadcast flag is intended to "prevent the indiscriminate redistribution of [digital broadcast] content over the Internet or through similar means," the goal of the flag was not to impede a consumer's ability to copy or use content lawfully in the home, nor was the policy intended to "foreclose use of the Internet to send digital broadcast content where it can be adequately protected from indiscriminate redistribution." However, current technological limitations have the potential to hinder some activities that might normally be considered "fair use" under existing copyright law. For example, a consumer who wished to record a program to watch at a later time, or at a different location (time-shifting, and space-shifting, respectively), might be prevented when otherwise approved technologies do not allow for such activities, or do not integrate well with one another, or with older, "legacy" devices. In addition, future fair or reasonable uses may be precluded by these limitations. For example, a student would be unable to email herself a copy of a project with digital video content because no current secure system exists for email transmission.[16]

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14 *See* testimony of Mitch Bainwol before House Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property for the hearing on "Content Protection in the Digital Age: The Broadcast Flag, High-Definition Radio, and the Analog Hole," November 3, 2005 at 4, found at http://judiciary.house.gov/media/pdfs/bainwol110305.pdf; and Mitch Bainwol, Out, P2P Paranoia, In: Platform Parity, Billboard Magazine, January 7, 2006 at 4.

15 *See* www.parentstv.org.

16 CRS Report at 5.

Proposals for an audio flag for broadcast and satellite radio similarly, and perhaps even more directly, place the FCC in the position of determining consumers' rights under copyright law. For example, the Ferguson bill gives the FCC authority to issue licenses for satellite and digital broadcast radio transmission and reception devices that must

> include prohibitions against unauthorized copying and redistribution of transmitted content through the use of a broadcast flag or other similar technology, in a manner consistent with the purposes of other applicable law.

Under this proposal, the FCC is placed in charge of determining both 1) the extent to which unauthorized copying (which is legal is some circumstances) of digital broadcast and satellite radio content is permitted; and 2) determining what kind of copying and redistribution of audio content is permissible. In other words, the FCC is given the power to control the extent to which consumers can engage in personal copying.

Not only does this language give the FCC power to set copyright law, it also directly conflicts with current copyright law, specifically the Audio Home Recording Act – which explicitly gives consumers the right to record digital radio transmissions for noncommercial use.[17]

Any Broadcast Flag Legislation Must Be Coupled With DMCA Reform and Include Public Interest Exceptions

As discussed above, Public Knowledge believes that technology mandates like the video and audio broadcast flags are misguided industrial policies that would constitute a radical expansion of the FCC's powers while radically diminishing consumers' rights. If the first rule for policymakers in technology and copyright debates is "first do no harm," then your course of action should be to let an already thriving market continue to grow.

Nevertheless, if Congress decides to impose flag schemes for digital television and/or digital radio, it must attempt to ensure that consumer's rights under the Copyright Act and the public interest under the Communications Act are preserved. The latter is particularly critical given that Hollywood seeks to limit access to free over-the-air broadcasting, which by law exists to serve the American people with, among other things, local news and public affairs programming. Thus, any broadcast flag legislation must be coupled with legislation to permit circumvention of technological protection measures for lawful uses and must include meaningful exceptions for 1) news and public affairs programming; 2) distance education; and 3) programming in the public domain.

DMCA Reform

We urge Chairman Barton to keep his promise to consumers that the full Energy and Commerce Committee will not approve any broadcast flag legislation unless it is coupled with legislation to permit circumvention of technological protection measures for lawful uses. Because of broadcasting's special role in American society, it is imperative that consumers be able to circumvent technological protection measures like the broadcast flag in order to engage in lawful uses of that content. This is particularly important as more and more people use weblogs to comment or criticize our culture.

Public Knowledge is grateful that Chairman Barton has co-sponsored H.R. 1201, the Digital Media Consumers Rights Act. H.R. 1201 would provide an exception to the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA), for lawful uses of copyrighted content. We believe that it is a narrowly tailored law that will preserve fair use rights for the digital age. Critics contend that H.R. 1201 is an invitation to piracy – but determined pirates do not need or use fair use to engage in illegal activity. H.R. 1201 only permits lawful activity. Those who flout copyright law will continue to be subject to all the penalties that the law permits.

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17 17 U.S.C. §§1000-1010.

News and Public Affairs Programming

Under the Communications Act of 1934, broadcasters are tasked with serving as public trustees in exchange for the free use of public spectrum. As part of that duty, broadcasters are tasked with providing news and public affairs programming which serve the needs of the local communities that they serve. This programming, in essence, is payback to local viewers for the right to use a valuable resource: the public airwaves.

Broadcast news and public affairs programming is also a common source of comment, criticism and follow-up news on a variety of digital media. Websites and weblogs abound with fair use clips of such broadcast programming. Such comment and criticism would not be possible under a broadcast flag scheme.

For these reasons, any broadcast flag legislation should exempt news and public affairs programming. To the extent that the studios claim the need for a broadcast flag to protect secondary markets for programming, there is no such market for news and public affairs programming, since it is outdated soon after it airs.[18]

The exceptions language included in the broadcast flag provision which is part of the pending Senate telecommunications reform bill, S. 2686, is wholly inadequate. That provision exempts news and public affairs programming "the primary commercial value of which depends on timeliness." However, it is entirely up to the broadcaster to decide whether that test is met. Undoubtedly, the studios will pressure the broadcaster to decide that the primary commercial value of such programming does not depend on timeliness – ensuring that most, if not all, news and public affairs programming is flagged. This is an exception that swallows the exception.

Distance Education

Any broadcast flag law must also exempt distance learning for non-profit and for-profit libraries and higher educational institutions. As more and more Americans receive their educations online, those institutions must be able to redistribute broadcast programming that is part of a distance education curriculum. For non-profit higher education institutions, the ability to do so is guaranteed by the TEACH Act, Pub. L. 107-273. While for-profit educational institutions are not protected by the TEACH Act, there is no rationale for treating these institutions differently than non-profits. Both are dedicated to distance education and both use broadcast programming to engage in that activity.

The broadcast flag provision in the Senate telecommunications reform bill also is inadequate to protect the rights of libraries and universities to engage in distance learning. Under that provision, libraries and universities must seek FCC permission before they can engage in a task that is critical to their mission, and at least with respect to non-profit libraries, protected by law.

Programming in the Public Domain

The public domain is the reservoir of creative works that are no longer protected by copyright. Thus, they are free for the public to use in whatever way they please. As such they should not be subject to technological protection measures like the broadcast flag. To the extent that content owners consider the public domain to be a dumping ground of works with little commercial value, it is unlikely that this exemption will be used very often. Moreover, if content owners are concerned that a program under copyright that only uses a small bit of a public domain work would be required to be exempted, the

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18 One MPAA executive stated at a recent public forum that the studios opposed such an exemption because they wanted to reserve the right to sell boxed sets of shows like Meet the Press. This strains credulity, since if there was a secondary market for public affairs programming of this type, then the studios would already be selling it.

legislative language or legislative history can be drafted to emphasize that only that programming which primarily consists of public domain materials should be exempted.

A Technology Mandate to Close the Analog Hole is Unnecessary and Would Cause Great Consumer Confusion, Cost and Inconvenience

While this hearing does not specifically address the content industry's efforts to close the so-called analog hole through legislative means, those efforts are closely related to the broadcast flag and radio content protection initiatives, and are therefore worthy of mention.

As many of you know, a bill was introduced in the House of Representatives last year[19] that would mandate that all digital devices read and obey two specific technologies – an encryption technology called CGMS-A and a watermarking technology called VEIL. The content industry claims that both of these technologies are necessary to ensure that analog content cannot be captured and digitized for possible indiscriminate distribution over the Internet.

I will not mince words – a government mandate to close the analog hole would be profoundly anti-consumer and a radical change in the historic copyright balance. Closing the analog hole would immediately restrict lawful uses of technology and make millions of consumer devices obsolete. It would not be far-fetched to predict that closing the analog hole will cause a consumer backlash with ramifications for device manufacturers, retail stores, content producers and Congress.

Moreover, Hollywood has not clearly defined the problem it wants to fix. They have provided no evidence that use of the analog hole has resulted in any significant copyright infringement. The mere fact that a consumer can buy an analog to digital converter device is not evidence that such a device is being used illegally any more than the sale of kitchen knives indicates that they are being used for stabbings. If the concern is that certain individuals are taking analog content, digitizing it and placing it on peer-to-peer networks, then the answer is not to close the analog hole, but to use the many legal, technological and marketplace tools the industry has at its disposal to combat illegal use of those networks.

Specifically, the proposed legislation suffers from a number of important substantive flaws. Here are just a few:

- *The analog hole technology mandate would be more intrusive than the broadcast flag:* The content industry's proposal mandates that each and every device with an analog connection obey not one, but two copy protection schemes. Thus, while the broadcast flag would put the FCC in charge of design control just for technologies that demodulate a broadcast signal, the proposal would put the inexperienced and overworked Patent and Trademark Office in charge of mandating the design of *every* device with an analog connector, including printers, cellphones, camcorders, etc. Like the broadcast flag, it sets in stone a copy protection technology for technologies that are always changing.
- *The analog hole mandate would impose a detailed set of encoding rules that would restrict certain lawful uses of content.* The House bill includes tiered levels of restriction based on the type of programming (*e.g.*, pay-per-view, video on demand) that limit lawful uses in a manner that ignores the four fair use factors of 17 U.S.C. §107. This upsets the balance established in copyright law between the needs of copyright holders and the rights of the public by placing far too much control over lawful uses in the hands of the content producers.

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19 H.R. 4569: The Digital Transition Content Security Act of 2005, 109th Cong. 2005. Found at: <http://www.publicknowledge.org/issues/hr4569>

- *The mandate would eliminate the DMCA's safety valve.* This Committee has been the leader in ensuring that the anti-circumvention provisions of the Digital Millennium Copyright Act do not unintentionally impinge on fair use. A common justifications for limitations on fair use imposed by the DMCA is that individuals who want to use excerpts of digitally protected content like DVDs can copy snippets using the analog outputs on a TV set or by recording the screen with a video camera.[20] An analog hole mandate would eliminate this safety valve.
- *The bill would mandate and unproven and disputed technology.* While the CGMS-A + VEIL technology was discussed at the Analog Hole Reconversion Discussion Group, a standards group with both industry and public interest participation, it was quickly dismissed as not worthy of further consideration. Thus, this technology has not been fully vetted by industry and public interest groups. If Congress feels it must do something about the analog hole, at a minimum it should refer the technology back to industry and public interest groups so CGMS-A + VEIL can be thoroughly analyzed for its impact on consumers and the cost to technology companies. In the complete absence of any such review, the one-sided imposition of such a detailed technology mandated would be unprecedented.

The Proper Balance Between Content Protection and Consumer Rights Should Be Set by Copyright Law and Marketplace Initiatives

I am often asked the following question: if Public Knowledge opposes the broadcast flag, radio content protection and closing the analog hole, what are better alternatives to protect digital television and radio content from infringing uses? The best approach to protecting rights holders' interests is a multi-pronged approach: by better educating the public, using the legal tools that the content industry already has at its disposal, and the technological tools that are being developed and tested in the marketplace every day. In the past eighteen months alone, content industry has used and won several important new tools to protect content, including:

- *The Supreme Court's decision in MGM v. Grokster and its aftermath.* The Supreme Court gave content owners a powerful tool against infringement when it held that manufacturers and distributors of technologies that are used to infringe could be held liable for that infringement if they actively encourage illegal activity. As a result, a number of commercial P2P distributors have gone out of business, moved out of the U.S., or sold their assets to copyright holders.
- *Lawsuits against mass infringers using P2P networks.* Both the RIAA and the MPAA continue to sue individuals who are engaged in massive infringement over peer-to-peer (P2P) networks. By their own admission, these lawsuits have

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20 See Testimony of Dean Marks, Senior Counsel Intellectual Property, Time Warner, Inc., and Steve Metalitz, Representing Content Industry Joint Commenters, before the Copyright Office in Rulemaking Hearing: Exemptions From Prohibitions On Circumvention Of Technological Measures That Control Access To Copyrighted Works, May 13, 2003 at 60-61: "I think the best example I can give is the demonstration that Mr. Attaway [MPAA Executive Vice President for Government Relations and Washington General Counsel] gave for you [Marybeth Peters, Registrar of Copyrights] earlier this month in Washington in which he demonstrated that he used a digital camcorder viewing the screen on which a DVD was playing to make a excerpt from a DVD film and have a digital copy that could then be used for all the fair use purposes…." (Mr. Metaliz at 60.) "I agree with everything Steve has just said about fair use copying or taking clips … with digital camcorders and analog camcorders being widely available …" (Mr. Marks at 61).

had both a deterrent and educative effect. The RIAA now characterizes the P2P problem as "contained."[21]

- *Passage of the Family Entertainment and Copyright Act.* The FECA gave copyright holders a new cause of action to help limit leaks of pre-release works and made explicit the illegality of bringing a camcorder into a movie theatre. It also provided for the appointment of an intellectual property "czar" to better enforce copyright laws.
- *Agreements by ISPs to pass on warning notices.* The war between Internet Service Providers and content companies has begun to cool. Last year, Verizon and Disney entered into an agreement by which Verizon will warn alleged copyright infringers using its networks, but will not give up their personal information to Disney. Verizon officials have told me that they intend to enter into similar agreements with other content providers.
- *Increased use of copy protection and other digital rights management tools in the marketplace.* As discussed above, there are numerous instances of the use of digital rights management tools in the marketplace. iTunes Fairplay DRM is perhaps the most well known, but other services that use DRM include MSN music and video, Napster, Yahoo Music, Wal-mart, Movielink, CinemaNow and MovieBeam. The success of some of these business models are a testament to the fact that if content companies make their catalogues available in an easily accessible, flexible and reasonably priced manner, those models will succeed in the marketplace without government intervention.

These tools are in addition to the strict penalties of current copyright law. To the extent that the content industries are looking for a "speed bump" to keep "honest people honest," I would contend that many such speed bumps already exist, while more are being developed every day without government technology mandates.

Finally, by far the most effective means of preventing massive copyright infringement involves the content industry doing what it took the music industry far too long to do[22] – satisfy market demand by allowing consumers to enjoy fair and flexible access to content at reasonable prices (inevitably produced in a free market). DVDs are the best example of the market working. There, a government mandate –the Digital Video Recording Act--was rejected and an industry-agreed upon fairly weak "keep honest people honest" protection system was adopted. Despite the fact that the protection system was defeated long ago, the DVD market has grown at an astounding rate – from zero in 1997 to $25,000,000,000 in sales and rentals last year. Moreover as I noted above, many other new digital music and video distribution models, developed with content industry support and industry-agreed upon content protection, are emerging in the market. We believe that these efforts make government intervention in the free market unnecessary.

Conclusion

The content and technology industries are moving forward, together, to provide the digital content and the digital machinery that consumers are buying and enjoying. Technology mandates like the broadcast flag and radio content protection are a step

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21 Jefferson Graham, *RIAA Chief Says Illegal Song-Sharing "Contained"*, USATODAY.COM, June 12, 2006, at: http://www.usatoday.com/tech/products/services/2006-06-12-riaa_x.htm.

22 See Keynote Address of Edgar Bronfman, Chairman and CEO of Warner Music at http://www.tvworldwide.com/events/pff/050821/agenda.htm. "The Music Industry, like almost every industry faced with massive and rapid transformation first reacted too slowly and moderately, inhibited by an instinctive and reflexive reaction to protect our current business and business models."

backward from this progress, limiting both innovation and consumer choice while increasing costs to innovators and consumers. I urge the subcommittee to look at recent marketplace developments and consider whether government action here would do far more harm than good. Thank you.

MR. FERGUSON. Thanks very much to all three of you. I will begin the questioning. Mr. Attaway, will video content providers be less willing to invest in digital content absent a broadcast video flag and why or why not?

MR. ATTAWAY. Absolutely. Ms. Sohn just said that she supports the use of technology to prevent content. Well, we are using technology on the vast majority of the services you see on that chart to protect our content against redistribution. Only over the air broadcasters lack the ability to do that because they broadcast free in the clear. They are not encrypted. What we are trying to do is get broadcasters on a level playing field by using the same technology that all these other services are using to protect against redistribution. If broadcasters can't do that, it is axiomatic that the owners of valuable content, if given a choice between licensing the services that protect against redistribution and those that don't, are going to license to the ones that protect the content. They have to. They have to protect their content against--they have to protect their markets.

So absolutely, yes, without reinstituting the broadcast flag, high-value content is going to migrate away from over the air broadcasters to cable and satellite services, where it could be protected.

MR. FERGUSON. Ms. Sohn, the FCC, and I want to make sure I get through my questions here, the FCC adopted broadcast flag rules that by many accounts were fair. They are workable for content owners. They are workable for manufacturers, for consumers. Those rules were struck down but not on substantive grounds. They were struck down on jurisdictional grounds. Why shouldn't Congress just grant the FCC authority to implement the rules that have already been sort of vetted through this whole process?

MS. SOHN. Well, because they are profoundly anti-consumer and they put an agency--

MR. FERGUSON. We sort of went through this long process that everyone says was a great process, it was an important process, sort of common ground was found, it was vetted through all sorts of players, everybody at the table, how many years it took to do it, and then it was struck down again. Not because of the content of the agreement but just because they didn't have the jurisdiction to do it.

MS. SOHN. Well, except that the court said that the FCC had never exercised such sweeping powers. I mean, yeah, it was a jurisdictional--

MR. FERGUSON. But again that has nothing to do with the content.

MS. SOHN. What is that?

MR. FERGUSON. That has nothing to do with the substance. It just says it is a jurisdictional issue.

MS. SOHN. Well, unless you believe that the FCC, a government agency, should have power to dictate technology design for every single device that demodulates a television.

MR. FERGUSON. But this is something that has gone through this incredible vetting process. All the court said was Congress hasn't given FCC the power to do that. Why wouldn't we just do it if it has gone through this process?

MS. SOHN. Because it is anti-consumer and it does obsolete devices. And the notion that there was a consensus is way overblown. So the FCC certified 13 technologies but--

MR. FERGUSON. We had folks who were on your side of this argument on a previous panel saying this was the model, this is Utopia, this was the Nirvana of coming up with a solution.

MS. SOHN. But if there is consensus--

MR. FERGUSON. You are telling me that they were just wrong?

MS. SOHN. Well, if there is consensus then why do we need Government to act? Then let them just do it.

MR. FERGUSON. Because the court said jurisdictionally they kind of found this technical jurisdictional issue. We've got a solution for that. The Congress has a solution for jurisdictional issues. We just grant them the authority to implement something which all the players have already worked out.

MS. SOHN. Well, again, the reason even if you construe this as a narrow jurisdictional decision the broadcast flag scheme would place the FCC as an arbiter of what technologies come to market and what don't. It would be bad for the lawful uses that consumers make of technology, and it would also be bad for cost and the digital television transition purposes.

MR. FERGUSON. Mr. Gonzalez.

MR. GONZALEZ. Thank you very much, Mr. Chairman. I will just go back to some basics so I can try to get an understanding of what this whole thing is all about. And that is you have the content people. They actually have the product. Then we have broadcasters that deliver the product. Then we have manufacturers that obviously manufacture all the equipment to accommodate all that, that whole scheme. But in that mix we have certain legal principles, certain rights that are recognized since time and memorial, the royalty scheme, copyright scheme and such, and I don't ever want to toss that away. Something that is always predominant of course is the consumer, the customer, the citizen, and

what we are getting out there, when we get it, is it fair, it is a level playing field and so on.

And I said this earlier, the big boogey man has always been redistribution because one of the principles that I think we are always going to adhere to is fair use. When I got to this committee it was I love all these concepts but fair use. What is fair in any particular context depending where technology is and so on kind of changes. It is not what it used to be with the Xerox machine and so on which we have gone over. But it is still there and we have to either expand it, narrow it, or whatever we are going to do. Part of the solution appears to be this flagging system.

But it seems to me that as technology moves forward, the business concerns that used to come under the heading of redistribution are now coming under the heading of distribution. And what I mean is Sirius is a good example of that. That is you don't have an individual that is just going to go and record one or two songs and eventually one or two films or whatever it is for personal use or to go to the lake house or back home and one up here in the district when we come up. It is totally different.

And if you listen to Ms. Ziegler and what they are providing it is fairly extraordinary, and that is for a fee and the right equipment you have a whole library that if you think in terms of numbers and you think in terms of royalties and copyrights and all of that, these are conceivably, and I am not saying that the sky is falling with every technological advance, but I think we do have to recognize that at some point you could reach where the distribution system itself equates to or is equal to what we are trying to avoid in the redistribution system.

And I don't know if I am making myself anywhere near clear on this thing but I think if you are a business person out there--and I am not sure, Gary, that I am making myself too clear on this thing, but are we reaching a point where technology in a business model when it comes to the product itself, the content people, what they are putting out there, is going to be so distributed without recognizing, let us say, the royalty payments, the artist, the writer, Sony or whoever it is. Are we reaching that point? Is that possible?

MR. SHAPIRO. It is a good point and I do applaud you for recognizing the difference between redistribution and what is in the home. The broadcast flag for the most part is about redistribution on the Internet and it is a potential problem. There was a lot--it took 10 years of discussion. It is a technical solution which definitely works. There needs to be exceptions. There needs to be other things. And it is very different than when we are talking about the audio broadcast flag.

When you are talking about the audio broadcast flag, first of all, we cut a deal. Congress sent us away 10 years ago or so and said come back

and solve this problem. We came back. We agreed to pay royalties for every digital audio recording product. We are paying those. The products are just being introduced. It is a hefty royalty. I think it is about $10 or $12 a pop. We are also paying--we have also agreed to design the devices in a way we can never make copies of copies. That is the Audio Home Recording Act. And in turn we got the right to produce audio home recording products.

Now what you are saying, as I hear you, is that because technology is advancing, consumers are being able to exercise their fair use rights established by Congress repeatedly. The right to record off radio has been recognized over and over again by Congress. But what you are saying is technology is advancing in such a way that maybe that is not a good idea anymore. I think what the prior panel totally missed was the concept if Congress wants to take away the right that consumers have to record off the radio, they should say they are doing that because that is what Mitch Bainwol is arguing for.

It wasn't about redistribution over the Internet. It was the fact that consumers are exercising their rights and technology is allowing them to do it easier and easier. They paid for the right to their fee. They paid for the royalty manufacturer. The devices are restricted. But the test really should be a cynical one, as I said earlier, by Congress. It should be really an effect on innovation and creation. And I think if you look at what has changed in society dramatically in the last 20 years with the digital revolution is we made every American a creator, and we have to stop measuring our creativity by the financial results of 10 companies that compose the MPPA and the RIAA.

I think we have to measure by the fact that there is all sorts of new creativity out there, and if you listen to the content community we would have shut down the iPod, we would have shut down all these new services, we would have shut down the VCR, and that is why you have to be skeptical. And what I heard in the prior panel to be so dangerous you have the broadcasting industry, radio broadcasters only, not the satellite people, negotiating with the RIAA over how satellite radio will be regulated and how devices will be regulated. And that is considered negotiation.

Hillary Rosen, the President of the RIAA, Jack Valenti, the President of Motion Pictures Association, and I created the CPTWG, the Copyright Protection Trade Working Group, and the RIAA was part of that. We created a DVD standard together. We created the broadcast flag. The RIAA walked away. They said we have nothing to do--digital radio went through the FCC. The RIAA had nothing to do with it until 3 years ago, Mitch comes in and said, my God, we have this huge problem with

digital radio, and now they are killing the product that radio broadcasters need and are threatening satellite radio.

And what is the result? It will be a doubling or tripling of price for satellite radio subscribers. Ten million subscribers are going to have to pay a lot more.

MR. GONZALEZ. And I know I am over my time but would you indulge me, Mr. Chairman, to allow the other two witnesses to respond on this particular point or anything else that they feel they need to address?

MR. FERGUSON. I would just ask that they do it very briefly. Mrs. Blackburn is here and it is her turn.

MR. ATTAWAY. Thank you. I just want to respond to the point that Mr. Shapiro was making. He accused us of being Chicken Little but yet he is the one that is saying that if you protect content it is going to stifle innovation and bar technology. Well, the facts show that that simply isn't true. Movies are available today in more venues, on more different types of devices than ever before in history, and it is the movies, it is the content that is driving this new technology. The studios are at the forefront of using new technology to offer consumers greater choice. We are not Chicken Little.

MR. FERGUSON. Ms. Sohn, very briefly.

MS. SOHN. Yeah. Mr. Attaway just undercut the answer to your question, Mr. Ferguson, to the extent he said movies are everywhere. Okay. So they are making high quality content available. Sixty-six percent of prime time programming is in HD, high definition, so the notion that they are not going to make their content available if they don't have this flag is belied by the facts. In 2002, Viacom threatened to not do any HD programming unless they got a broadcast flag. Well, guess what? CBS is doing tons of high definition broadcasting.

MR. FERGUSON. Mrs. Blackburn is recognized for questions.

MRS. BLACKBURN. Thank you all. Thanks for staying here for the afternoon. Not any of you probably thought that you were going to be spending the afternoon with us but this is always a good debate and being certain that we protect all of our content creators is a discussion that I am enjoying having on an ongoing basis with Mr. Shapiro.

He has great innovators that are members of his organization. So, Mr. Shapiro, let us continue our dialogue, how about that? And go back to Mr. Ferguson's bill, and you are critical of the bill and there are some--and I appreciate being invited to speak to your groups and sometimes there are some that will say we are trying to confuse the issue or that you guys are trying to confuse the issue by saying that new devices from XM will comply with the Audio Home Recording Act, and we have great discussions about it.

Some people think this is a red herring because the fee paid is minimal and it is not sufficient for the download service that they are providing, and we have our entertainers that, basically as we heard Mr. Harris say that some of these devices, his revenue is going to be gone, and he is not going to be making revenue. So, don't you think there ought to be some kind of new services compensation for the songwriters so that they are being compensated? Don't you think there should be a way with these new devices that they are going to be compensated?

MR. SHAPIRO. Well, thank you, and thank you for coming back and I was looking forward to the moment you had your voice back. The last time I was up here, I was terrified when you didn't have a voice.

MRS. BLACKBURN. Oh, I made sure that I was ready for today.

MR. SHAPIRO. What you are asking as I hear it, is because technology is changing there must be new ways to compensate creators, and what I would ask you to recognize is we did cut a deal with the music industry as Congress asked us to. We came back, and that deal is kicking in now because every one of these devices that they are so concerned about, as a result there would be an enormous royalty paid. That is why when they say it is only $2 million, yeah, because they haven't been sold yet.

Now if they will be sold, well, depending on what happens with the lawsuit obviously, there will be significant amounts of money.

MRS. BLACKBURN. Let us qualify that because it is fractions of a penny.

MR. SHAPIRO. No, let me--can I just explain?

MRS. BLACKBURN. Okay. Go ahead.

MR. SHAPIRO. I need some help here. I think it is $8 to $10 per device sold goes directly to the music industry, and the reason it is very--this is just per device.

MRS. BLACKBURN. Yes. Yes.

MR. SHAPIRO. In addition, there is the monthly fee which they get a very large cut of. I understand Sirius and XM are the largest payers of royalties to the music industry. And then there is also the fact that we are by law, the deal we cut with the music industry at the request of Congress, we have agreed to restrict every device so that it may not make copies of copies. So essentially the sky is not falling.

MRS. BLACKBURN. We are here for the flag.

MR. SHAPIRO. Yes, we all are.

MRS. BLACKBURN. And we all support a flag.

MR. SHAPIRO. And I think it is good to talk about--we want this great creativity, but I think the fact is that we believe the devices encourage great creativity by everyone. I think what I would like to do is define the difference that we have because I think we do have a

difference. And I think what I have heard you say earlier today is that you do not think that consumers in all cases should have the right to record from radio and aggregate it, and that is what Mr. Bainwol is asking to change and that is why there is this proposal out there.

And that is where the difference is right now, and the question is do consumers have the right to record off of radio or at least off of satellite and HD radio, and that is the question. And if it is a TiVo in the broadcast world they do with TiVo because the video broadcast flag is just about sending stuff over the Internet, and if we want to talk about sending stuff over the Internet, we want to negotiate about a flag, let us do that. We have been asking the RIAA to talk about that for years. But talking about what consumers do in their home is what we are focused on here.

If Congress wants to take away the right that consumers have to record off the radio that is what Congress has the right and privilege to do, but that is what this is about.

MRS. BLACKBURN. Well, I think that what we have to look at there too is--and all of that sounds good but, Mr. Shapiro, if you can sort a file and you can store that file and then you can redistribute that file you are playing with something that is a horse of a different color, and that is where we have such a difference of opinion. And it works out, when you look at what is paid by radio there is very little that ends up going to that songwriter on that royalty, very little on per song but, we have--

MR. SHAPIRO. Excuse me, could I just correct one thing? The redistribution is not permitted with these devices so what you are talking about is recording in the home. Every device--

MRS. BLACKBURN. In a perfect world.

MR. SHAPIRO. No, that is what we are talking about today.

MRS. BLACKBURN. Mr. Chairman, my time is over, and I will yield back.

MR. FERGUSON. Thank you, Mrs. Blackburn. I have one follow-up question with Ms. Sohn. When we are talking about this video flag provision, I believe your organization and perhaps others have argued for a news exception, and I just want to explore that a little bit. Now obviously broadcasters and others have talked about without this content protection they have less of an incentive or less of an ability to protect their intellectual property, their investment and their product, et cetera.

Obviously news organizations do the same thing when they produce a product, when they produce a newscast. They have invested resources to produce that news content. If the FCC's flag rules still allow personal copying and limited Internet sharing, why is there a need for a news exception, and how do we define what is news?

MS. SOHN. Well it doesn't allow limited Internet sharing. That was the point I made in the testimony is that broadcast flag not only prohibits indiscriminate redistribution over the Internet, it prohibits all distribution over the Internet so that is number one. Number two, news and public affairs programming, the thing about news and public affairs is that the day after it plays it doesn't have any value, all right, and I have heard some people say, well, we might want to sell DVD sets of Meet the Press. Well, if that was the case why don't we see it on the shelves already?

So one of the rationales for the broadcast flag is that, well, if our movies are pirated then we are not going to be able to put them on DVD. We won't be able to have secondary markets for them. Well, that is clearly not the case. Nobody really wants to buy the 7:00 news on DVD. That is number one. The second point is to the extent that broadcasters get free use of the public air waves, they do so because they are supposed to provide news and public affairs programming, and that is the type of programming that people blog on, they comment on, they criticize on-line.

So to take that away from the American public is basically saying, okay, you can spend your taxpayer dollars and give them all to the broadcasters for nothing and get absolutely nothing in return.

MR. SHAPIRO. Can I just add to that?

MR. FERGUSON. Forgive me. How do we define news content?

MS. SOHN. It is actually defined in the Communications Act. The exceptions to Section 315, the equal time rules, is defined there and there is a whole--

MR. FERGUSON. Not all of us have read 315.

MS. SOHN. Those are the exceptions to the equal time rule. There are certain occurrences for news and documentary programming where you basically don't have to follow the equal time rules. The FCC has a huge body of law defining what is, and I will say as somebody who lost many of these cases when I was at Media Access Project, the definition actually is not too broad but somewhat broad. It would cover enough to make us comfortable.

MR. FERGUSON. It just seems that that is a sticky area particularly with the way coverage today and broadcasts today are changing. I mean you could flip through the channels at any point during the day and find news coverage when it just sort of seems to me that those lines are blurring a little bit and that might be a difficult exception to both define and enforce.

MS. SOHN. Well, again, like I said, the FCC has a very large body of law in that area so it not like they are going blind. And I also think that the broadcasters are pretty smart. They know what news and public

affairs programming is. Now I do have a problem with the Senate provision and the telecom bill because it basically allows the broadcasters to have the exception swallow the exception. They obviously have to have some discretion but the FCC has to be able to also enforce any concerns that the public has with them defining news and public affairs programming too broadly.

But under the FCC's case law, I don't think it is a problem actually.

MR. FERGUSON. Does 60 Minutes fit under that?

MS. SOHN. I would think so, yeah.

MR. FERGUSON. So that would be considered a news--

MS. SOHN. News and public affairs programming, probably. I would have to see what the FCC has decided as far as equal time rules are concerned but is anybody selling 60 Minutes reruns on DVD?

MR. FERGUSON. Yeah.

MR. SHAPIRO. Mr. Ferguson, can I give you a real life example?

MR. FERGUSON. Sure.

MR. SHAPIRO. I assume you are running for re-election in New Jersey and you have an opponent, I don't know. But the opponent runs an attack ad on your local television station against you which is totally unfair and your staff is incensed about it. And they call you up in Washington--

MR. FERGUSON. Any attack ads somebody would run against me would be terribly unfair.

MR. SHAPIRO. Then you want to see it. Here you are in Washington. Under today they could basically copy it and send it to you over the Internet. No broadcast flag. In fact, as was said earlier, there is no exceptions. If this all passed as proposed, I don't know what would happen. They would probably have to Federal Express it, a hard copy, so you lose 12 or 24 or 36 hours waiting for that Fed Ex to actually see how bad it really was.

There are a lot of exceptions like that which come in, and which is why the exceptions are important. And I don't know if that would qualify as news and public affairs. I don't know if attack ads are actually news. But it would affect--and there are a lot of real life situations like that.

MR. FERGUSON. Can you comment on that?

MR. ATTAWAY. That is simply not true. The FCC rule does provide--

MR. FERGUSON. You have a disagreement?

MR. ATTAWAY. --for discriminate redistribution and in fact one of the 13 technologies that was certified by the FCC would permit you to get your attack ad sent from your district to your office here in Washington. I just don't understand why I keep hearing this that the rule

would prevent all redistribution when it is just simply not true, and the technologies certified by the FCC would permit it.

MS. SOHN. But what the rule says and what the technology allows you to do, Fritz, are two separate things, okay, so the FCC kept saying, well, we are not changing copyright law and this is only about indiscriminate redistribution. They can say that all they want but the technology does not permit what Gary just talked about.

MR. FERGUSON. When we are talking about Dateline or, what do you call it, 60 Minutes or Newsmakers or some of these other programs which seem to kind of blur the lines a little bit that is where I was going. I appreciate your varied viewpoints on this. One thing we have heard today is a lot of varied viewpoints. I know there was some comment from some of you on my bill which we discussed at the first panel. I know, Mr. Shapiro, you were cautioning against sweeping generalizations and Chicken Little and the sky is falling, and I would just respectfully ask that you not practice that either.

MR. SHAPIRO. I would never do that.

MR. FERGUSON. In your description of my bill or whatever Mr. Bainwol or someone else was saying, my sense is that there is certainly a reasonable common ground solution that folks if they just get to the negotiating table can come up with. It has happened before. It can happen again. I don't happen to believe that government and the Congress getting involved in every problem is necessarily the solution, but when it seems like folks aren't necessarily perhaps negotiating effectively and one party is severely disadvantaged by the lack of a negotiation that seems to me to be a market failure as someone said earlier today, and that is frankly the goal of my bill.

Thank you all, all three of you, very much for being here today. We appreciate it very much.

MR. SHAPIRO. Thank you for listening.

MR. FERGUSON. You are welcome. And we will adjourn this hearing.

[Whereupon, at 5:53 p.m., the subcommittee was adjourned.]

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