STATEMENT
of
RUTH ZIEGLER

Deputy General Counsel
Sirius Satellite Radio Inc.

On

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

Hearing Before the Subcommittee on Telecommunications and the Internet
United States House of Representatives
June 27, 2006

EXECUTIVE SUMMARY of the STATEMENT of RUTH 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.

STATEMENT
of
RUTH ZIEGLER

Deputy General Counsel
Sirius Satellite Radio Inc.

On

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

Hearing Before the Subcommittee on Telecommunications and the Internet
United States House of Representatives
June 27, 2006

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]

---

[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

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

---

deleterious to that process than allowing the recording industry to renege on the legislative deal that it made.

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.

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]

---

[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.

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:

> 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]

---

[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).

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

---

[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.

> records but this legislation will end 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

---

[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.

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 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]

---

[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."

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

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 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.