

June 6, 2006

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property
and the Internet
U.S. House of Representatives
2184 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Howard Berman
Ranking Member
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property
and the Internet
U.S. House of Representatives
2221 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith and Ranking Member Berman:

The undersigned companies and associations, representing the interests of American consumers, information technology and telecommunications companies, consumer electronics companies, broadcasters (including terrestrial radio, satellite radio and webcast services), libraries and educational institutions, write to express our very serious concerns regarding the proposed Section 115 Reform Act of 2006 ("SIRA"). While the reform of section 115 is a worthy goal, provisions of SIRA would constitute an extraordinary expansion of copyright rights that would harm technology, innovation, and consumers. It would threaten the development of new, innovative technologies and services that deliver all forms of content. It would reject considered and well-founded recommendations of the Copyright Office. And, it would encroach in unprecedented ways upon long-held consumer rights to make private, personal uses of copyrighted works – rights that become even more vital and necessary for the public good in the digital age.

We support instead broad consensus approaches to the resolution of copyright issues. This bill apparently reflects a privately negotiated outcome between two interest groups, and does not reflect such a consensus. Any change as major as SIRA merits careful consideration and input from all users of copyrighted works, and from the general public.

We are troubled that the bill will reverse broad, long-standing principles of copyright law, and will be misconstrued by courts to the detriment of technology innovation and consumer welfare. Among our chief concerns are the following:

The bill appears to establish, for the first time, that every incidental, server, cache, network and buffer copy made in digital transmission systems, digital

networks, and computers and other personal consumer equipment is subject to the control of copyright owners and must be licensed. The bill erroneously suggests that interactive public performances of sound recordings are “digital phonorecord deliveries” (*i.e.*, a transfer of ownership) subject to license for reproductions of copies. The bill goes so far as to provide that even noninteractive public performances require licenses for such copies. There is no justification to so penalize streaming, or, indeed, any other type of licensed transmission made via internet or any digital communications network, based on such a technicality. Virtually every digital transmission and display technology requires some degree of caching or buffering. Such caching or buffering is integral to the nature of digital technology in order for the consumer to hear or display data. These caches and buffers must be made by the transmitting entity, the transmission conduit (an ISP or online service provider) and/or consumer software or hardware, or else digital transmissions simply are not feasible. Where a transmission is lawfully made, there is no basis for giving copyright owners added control because of incidental copies that have no independent economic value apart from the performance itself.

The bill also appears to establish, for the first time, that every digital performance or display also is a distribution, for which the transmitter must take additional licenses, and potentially pay duplicative fees, for consumer conduct that long has been considered private, noncommercial “fair use.” The bill eradicates the sharp lines previously drawn in the Copyright Act between performances and displays on the one hand, and distributions and reproductions on the other. If every performance or display that *can* be reproduced by any consumer is equated with a distribution or reproduction, then

- ❖ every consumer timeshift recording on a VCR or TiVo is a “distribution”;
- ❖ every text web page is a “distribution”;
- ❖ any audio or video clip on any web site is a “distribution”;
- ❖ every television that does “freeze frame” or “instant replay” is a “distribution”;
- ❖ every analog cassette or CD recorded from FM or HD Radio is a “distribution”;
- ❖ and on, and on, and on, and on.

The apparent requirement that fair uses be licensed – even at a zero rate – sets a dangerous precedent for all fair uses of information, news and entertainment, regardless of whether in print, audio or video. The Copyright Office has stated to Congress, in the August 2001 [DMCA Section 104 Report](#) and in hearings before your Subcommittee, its view that any reproductions made in the course of a lawful performance have no independent economic significance apart from the performance and are fair use. It is and must remain a fundamental principle for the benefit of the public that ***fair uses require no licenses whatsoever.*** SIRA inexplicably rejects the Copyright Office Report, and creates an unnecessary license for such fair use copies. Unless amended, SIRA would undermine fair use as a foundation of the public good.

The bill would effectively declare all home recording – even time-shifting – to be unlawful without a reproduction license. Even the “zero rate” license for noninteractive streaming imposes conditions that restrict fair use by consumers. The bill denies this otherwise unnecessary license to anyone 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, unless a valid license has otherwise

been obtained by such service for such activity.” We cannot recall any time since before the *Betamax* case when Congress was willing even to consider restricting “future listening” – time-shifting – by consumers. Such a restriction, if applied to video, would outlaw the ability of devices such as TiVo and even the VCR to set recording times based on an electronic program guide. It is equally unacceptable with respect to audio.

The bill is a back-handed technology mandate that will stifle innovation. By requiring – and then effectively denying – additional licenses for entities that make transmissions to consumer receivers and personal recording devices, the bill would stifle technological innovation. If Congress gives content owners a veto over the devices that consumers can use to receive transmissions, they effectively have given the content owners *carte blanche* control over what innovation should or should not be brought to market. This would eviscerate the protections for innovation that technology industries and consumer interests fought for and obtained in the Audio Home Recording Act, as well as consumers’ reasonable and customary rights to record from radio transmissions.

By diminishing long held rights of fair use, this bill will inflict significant harm on sound copyright policy, technological development, and the public interest. On behalf of our organizations and the constituencies we represent, we strongly urge the Subcommittee to reject this ill-advised incursion on the fair use rights of consumers. Instead, the Subcommittee should seek testimony on this proposed legislation from a broad group of parties that may be affected by the provisions and the implications of this bill, apart from the few online music companies, music publishers, and recording labels that see themselves as SIRA’s primary beneficiaries.

Respectfully submitted,

American Association of Law Libraries
BellSouth Corporation
Bonneville International Corp.
Computer & Communications Industry Association
Consumer Electronics Association
Consumer Project on Technology
Cox Radio, Inc.
Electronic Frontier Foundation
Entercom Communications Corp
Greater Media, Inc.
Home Recording Rights Coalition
Local Radio Internet Coalition
National Religious Broadcasters Music License Committee
Public Knowledge
RadioShack Corporation
Salem Communications Corp.
Sirius Satellite Radio Inc.
U.S. Public Policy Committee of the Association for Computing Machinery (USACM)
XM Satellite Radio Inc.