

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of: )  
 )  
Digital Audio Broadcasting Systems )  
And Their Impact on the Terrestrial ) MM Docket No. 99-325  
Radio Broadcast Service )

**Reply Comments of the Home Recording Rights Coalition  
On Notice of Inquiry Re Digital Audio Content Control**

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In its Comments filed on June 16,<sup>1</sup> HRRC argued that action by the Commission at this time would be neither lawful nor justified:

- The Commission has no jurisdictional basis to address the concerns cited by the Recording Industry Association of America (RIAA) because the Congress did not provide for one, either directly in the Communications Act or indirectly via the Copyright Act.
- It is the Copyright Act that denies to phonorecord producers any licensing authority over the free terrestrial broadcast, analog or digital, of the sound recordings stored on phonorecords.
- Hence, the law denies any public or private sector basis or home for the new license administration powers that the RIAA is urging the Commission to create.
- To the extent RIAA has spelled out the action it seeks from the Commission, such action would seem to interfere with the technical and legal schema set out by the Congress in the Audio Home Recording Act of 1992 (AHRA) for the same devices.
- To the extent the AHRA is to be updated, modified, reinterpreted or repealed, this is a job for the Congress rather than one the Commission could possibly begin to tackle.

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<sup>1</sup> *In the Matter of Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service*, MM Docket No. 99-325, Further Notice of Proposed Rulemaking And Notice of Inquiry (“NOI”) (Rel. Apr. 20, 2004); Comments of the Home Recording Rights Coalition On Notice of Inquiry Re Digital Audio Content Control (June 16, 2004) (“HRRC NOI Comments”).

The comments by other entities, including the RIAA,<sup>2</sup> do not provide any basis for revisiting or questioning these conclusions. Rather, the RIAA has endeavored to weave a blanket of support out of *gaps in*, rather than provisions of, existing law. By curious logic, RIAA argues that Congress's *failure* to provide RIAA's members with any protection for free over-air broadcasts in either the telecommunications law or the copyright law must mean that Congress *intended* – without giving the slightest such indication – for the FCC to do so. This thesis can withstand neither precedent nor analysis.

**I. THE RIAA IS ASKING THE COMMISSION TO REWRITE RATHER THAN IMPLEMENT THREE LAWS ENACTED IN THE LAST TWELVE YEARS.**

The RIAA Comments seem a remarkable example of turning night into day by citing three Congressional enactments, in the last dozen years, that *specifically excluded* conferring the rights that the RIAA now asks the FCC to manufacture. Somehow, this is supposed to be translated into a congressional mandate, authorization, or grant of jurisdiction. To so interpret these omissions gives new meaning to the term “Congressional oversight.”

**A. The Audio Home Recording Act Covered Much More Than RIAA Now Avers, And Remains An Intractable Obstacle To The Quasi-Legislative Agenda Now Urged On The FCC.**

RIAA's novel cloaking of the Audio Home Recording Act (AHRA) as essentially irrelevant to the products and conduct that it now asks the Commission to regulate fits poorly on the frame of the group that (with HRRC and others) negotiated, drafted, presented, and explained this legislation to the Congress. The history of this legislation, and its provisions, belie each of the remarkable claims and twists that the RIAA now makes.

The AHRA evolved from a multi-year negotiation that began with consumer electronics manufacturers and the RIAA, and ultimately included the entire music industry, the consumer

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<sup>2</sup> Recording Industry Association of America, Inc. (“RIAA”) NOI Comments.

electronics industry, the HRRC, and others. In the 1992 hearings on H.R. 3204, composer George David Weiss, on behalf of the © Copyright Coalition – an umbrella group of music industry proprietor interests – explained to a subcommittee of the House Judiciary Committee the history, evolution, scope, and meaning of this legislation.<sup>3</sup> He said:

“I am here today to describe why I and the organizations that I represent so enthusiastically support H.R. 3204. In so doing, I hope it will become clear ... that a delicate balance has been achieved in this legislation between the desire to provide the newest technologies for the American public, on the one hand, and the need to protect the vital interests of music creators and copyright owners on the other. The balancing of these interests in H.R. 3204 represents an historic achievement, which – if enacted into law – will end more than a decade of controversy that has consumed the energies of many people in both government and industry and has delayed the availability to the public of exciting new means for the enjoyment of music. \*\*\*

[I]t is important to emphasize that H.R. 3204 does address the issue that in the past has been most crucial for the creative music community – the substantial threat that we believe is posed by unlimited, uncompensated digital home taping. By providing for a modest royalty and a copy limiting system, the bill implicitly recognizes the need to protect intellectual property rights and the economic well being of the American music industry. \*\*\*

To break the impasse and address the various issues posed by audio home recording, H.R. 3204 combines three key elements from previous proposals.

The first addresses a central concern of consumers. The bill makes clear that consumers copying for private, non-commercial use, whether in digital or analog format, cannot be the subject of a copyright infringement suit.

The second element is a system of modest royalty payments, designed to partially compensate music creators and copyright owners for digital audio copies made by consumers. \*\*\*

The third element involves a technological limitation – the Serial Copy Management System – on the recording capability of nonprofessional digital audio recording equipment. \*\*\*

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<sup>3</sup> *Audio Home Recording Act of 1991: Hearing on H.R. 3204, Audio Home Recording Act of 1991 Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102<sup>nd</sup> Cong. 159-166 (1992) (Statement of George D. Weiss, on behalf of the Copyright Coalition.)* A copy of Mr. Weiss’s testimony, as published by the Committee, is attached as an Appendix.

This carefully balanced package therefore provides substantial benefits to each of the affected parties. First, for creators and music copyright owners, it will provide compensation for digital copying of our music and will thereby stimulate creativity. Second, by removing the legal cloud that has surrounded digital recording technologies, manufacturers and importers will finally be free to bring their new products into the American market without concern about copyright infringement lawsuits.”

This accurate explanation of the origins and scope of the AHRA is a far cry from the tortuous arguments and explanations now put forward to the Commission. While RIAA’s uncertainty, today, about the ultimate scope of the AHRA can be justified, the interpretations and assertions made in its Comments cannot be.

1. The AHRA Covered More Than “DAT” Recorders.

First, it is directly contrary to the language of the Act, and to a history and evolution that the RIAA knows as well as anyone else, to claim that the AHRA was inspired by and targeted at “only” digital audio tape (“DAT”) recorders, and not at other existing and future digital recording products. Mr. Weiss explained to the House Judiciary subcommittee that his music industry coalition opposed the “DAT Bill” in the previous Congress precisely *because* it was addressed only to a single, tape-based format, and not to other future digital audio recording techniques:

“When the © Copyright Coalition was originally founded ... our initial concern was focused on legislation introduced in 1989 that would have relied solely on a technical fix – the Serial Copy Management System – to address the copyright issues raised by the advent of digital audio tape (DAT) technology. \*\*\* We opposed the bill principally because it did not represent a comprehensive solution: first, it did not provide for compensatory royalties to creators and copyright owners; and second, *it applied only to DAT technology, not to all recording systems.*

In part due to the objections expressed by the © Copyright Coalition, Members of Congress urged the various interests to go back to the negotiating table, and to return when we had reached an agreement. With these negotiations successfully concluded, the Coalition can now express its unqualified support for H.R. 3204 because this bill does represent a comprehensive solution. \*\*\*

Because H.R. 3204 extends to *all analog and digital audio recording devices, whether now known or later developed*, you will be spared from having to consider separate legislation each time a new audio recording format is developed.”<sup>4</sup>

Jay Berman, President of the RIAA (now head of IFPI), explained to the Senate Judiciary Committee why the RIAA subsequently *backed out* of supporting the 1989 “DAT Bill,” and reopened private sector negotiations to achieve the AHRA – a much more comprehensive bill to cover Mini-discs, recordable Compact Discs, and “other formats that, quite possibly, haven’t even been conceived of yet.”<sup>5</sup> He recounted specifically why RIAA had come to insist, successfully, that the AHRA must cover all formats, not just the DAT format:

“Mr. Chairman, not everyone concurred that our agreement jointly to advance Serial Copy Management System (“SCMS”) legislation, last year’s S. 2358, represented substantial progress, but it was the right first step. Some, including our partners in the songwriting and music publishing community and a number of our friends in Congress, felt that the agreement did not go far enough, for two reasons: First, it addressed only DATs, *rather than digital audio recording technology generically*. Second, it did not provide for royalties.

It became clear, particularly as the new DCC technology was revealed during consideration of that legislation, that *a step-by-step approach to legislation was not practical* for the marketplace or for Congress. So we joined hands with our colleagues in the music industry and sat down once again with our new friends in the consumer electronics industry. As you can see today, that exercise was successful. \*\*\* *S. 1623 is a “generic” solution in that it applies across the board to all digital audio recording technologies. Congress will not be in the position after enacting this bill, as it might have been with prior bills, of having to enact subsequent bills for new forms of digital audio technologies.*<sup>6</sup>

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<sup>4</sup> *Id.* at 160-168. Underlined emphasis is in original; bolded emphasis supplied.

<sup>5</sup> *The Audio Home Recording Act of 1991: Hearing before the Subcomm. On Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, S. Hrg. 102-98 at 115 (1991) (Statement of Jason S. Berman.) (“*Senate Judiciary AHRA hearing*”).

<sup>6</sup> *Id.* at 117 - 118, 120. Underlined emphasis in original; bolded emphasis supplied. As passed by the Senate, S. 1623 contained the Technical Reference Document (“TRD,” referred to now in RIAA’s Comments as specifically referencing only “DAT”) with the same text in which it was cited in the House legislative history. In other words – the TRD did not change between Mr. Berman’s testimony, touting its comprehensive coverage, and the final enactment of the AHRA.

2. RIAA's Present Uncertainty About the Scope of "SCMS" Is A Reason That The FCC Must *Refrain* From Usurping The Jurisdiction Of Another Agency And Of The Courts.

An RIAA observation more firmly grounded in reality is that the AHRA, as enacted, has left the precise scope and definition of the "Serial Copy Management System" ("SCMS") in some doubt, both legally and technologically. However, this uncertainty is a reason the Commission *cannot* and *should not* intervene – not a reason that it should.

While it is true that uncertainties persist, RIAA presents a less than accurate picture. RIAA suggests that the Act and the "Technical Reference Document" ("TRD")<sup>7</sup> provide for only two possible "flavors" of SCMS – (1) the example fleshed out in the TRD, and (2) some additional implementation if approved by the Secretary of Commerce. Actually, the Act offers *four* alternatives, of which three are evident from the text:

**"§ 1002 Incorporation of copying controls**

**(a) Prohibition on Importation, Manufacture, and Distribution.**—No person shall import, manufacture, or distribute any digital audio recording device or digital audio interface device that does not conform to—

(1) the Serial Copy Management System;

(2) a system that has the same functional characteristics as the Serial Copy Management System and requires that copyright and generation status information be accurately sent, received, and acted upon between devices using the system's method of serial copying regulation and devices using the Serial Copy Management System; or

(3) any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying.

**(b) Development of Verification Procedure.**—The Secretary of Commerce shall establish a procedure to verify, upon the petition of an interested party, that a system meets the standards set forth in subsection (a)(2)."

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<sup>7</sup> H.R. Rep. No. 102-780 pt. 1, at 32-50 (1992).

The Act does not define the Serial Copy Management System. As RIAA notes, the TRD (included in the version of the AHRA passed by the Senate<sup>8</sup> and which the Energy & Commerce Committee references in a committee report<sup>9</sup>) gives only one detailed example (IEC958 / 60A) of SCMS operation. However, the TRD *also* lays a broader, functional requirements description that appears intended to apply to additional means of marking content and reading the marks.<sup>10</sup> Therefore, there are several possible flavors of “SCMS”:

- (1) As described in 1002(a)(1) via reference to the functional requirements set forth in Part II.(A)<sup>11</sup> of the TRD;
- (2) As described in 1002(a)(1) via the specific example set forth in Parts II.(B) and (C) of the TRD;
- (3) Via a *de facto* implementation in the marketplace that may or may not be *verified* by the Secretary of Commerce under 1002(a)(2); or
- (4) Via a *de jure* implementation proposed to the Secretary and *certified* as compliant.

This statutory scheme is plainly at variance with RIAA’s present attempt to describe the law as one inspired by and addressed only to “tape” recorders, and limited by the Congress to a single technical mode of implementation. This much is clear beyond dispute:

- The interpretation of the AHRA has been, and is, up to the courts, not the FCC.
- Two of the four means of implementing technical measures, with respect to digital audio recording, are up to the Secretary of Commerce, not the FCC.
- Any future clarification, re-direction, or repeal of the AHRA is up to the Congress, not the FCC.

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<sup>8</sup> S. Rep. No. 102-294, at 17-30 (1992); 138 Cong. Rec. S8723-S8730 (1992).

<sup>9</sup> H.R. Rep. No. 102-780 pt. 1, at 32-50 (1992).

<sup>10</sup> *Id.* at 41-47.

<sup>11</sup> “A. General Principles for SCMS Implementation in DAR Devices—To implement the functional characteristics of SCMS in DAR devices, *whether presently known or developed in the future*, the following conditions must be observed ....” *Id.* at 42 (emphasis supplied).

### 3. RIAA Cites The *Rio* Case With Respect To The Wrong Devices.

Acknowledging that courts do have the power to interpret and apply the AHRA, the RIAA engages in what can be described as only a *sleight of hand* reading of the *Rio* case to make an argument that virtually none of the devices it is asking the FCC to regulate would be covered by the AHRA. In so doing, RIAA obscures:

- the court’s actual holding, which applied to portable devices that make copies *from* a general purpose computer hard-drive recorder. The *Rio* holding was *not* addressed to the sort of PVR-type recorder that the RIAA is asking the FCC to regulate technologically; and
- the relevance of spoken-word recordings (not covered by the AHRA), by suggesting that, *e.g.*, a car-based recorder will not be covered by the AHRA because it would record spoken words more often than it would songs.

The Ninth Circuit held in the *Rio* case that the *Rio* MP3 player was not covered as a “DAR” because its source – a computer hard drive – was not a “digital musical recording.” While the MP3 player passed the test that its *primary purpose* was to record music, it did not pass the additional requirement that the *source* of such music must be a transmission or a substrate that contains “only sounds.” The court observed that a computer hard drive’s contents are not limited to “only sounds,” so that computer hard drives were not the “digital musical recordings” to whose copying the AHRA was addressed.<sup>12</sup>

The court did *not* hold that *all* potential hard drives – such as a car-based “personal audio recorder,” or “PAR” – were not covered by the AHRA. Indeed, the status of the *computer hard drive* as a DAR was not before the court at all. Therefore, the *Rio* court held *nothing* on the subject of whether a dedicated musical recording device, as in a car, whose primary purpose is to

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<sup>12</sup> *RIAA v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1076 (9<sup>th</sup> Cir. 1999).

