

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

ATLANTIC RECORDING CORPORATION; )  
BMG MUSIC; CAPITOL RECORDS, INC.; )  
ELEKTRA ENTERTAINMENT GROUP INC.; )  
INTERSCOPE RECORDS; MOTOWN ) Docket No. 06 CV 3733 (DAB)(GWG)  
RECORD COMPANY, L.P.; SONY BMG )  
MUSIC ENTERTAINMENT; )  
UMG RECORDINGS, INC.; )  
VIRGIN RECORDS AMERICA, INC.; and )  
WARNER BROS. RECORDS INC., )  
)  
Plaintiffs, )  
)  
)  
v. )  
)  
XM SATELLITE RADIO INC. )  
)  
Defendant. )  
)  

---

**AMICUS CURIAE BRIEF OF  
THE CONSUMER ELECTRONICS ASSOCIATION AND  
THE HOME RECORDING RIGHTS COALITION  
IN SUPPORT OF  
DEFENDANT'S MOTION TO DISMISS**

July 17, 2006

## STATEMENT OF INTEREST OF AMICI

This brief of the Consumer Electronics Association (“CEA”) and the Home Recording Rights Coalition (“HRRC”), in support of defendant XM Satellite Radio Inc.’s (“XM”) motion to dismiss, is filed with leave of court and consent of the parties.

CEA is the preeminent trade association of the U.S. consumer electronics industry. CEA members lead the consumer electronics industry in the development, manufacturing and distribution of audio, video, mobile electronics, communications, information technology, multimedia and accessory products, as well as related services, that are sold through consumer channels. Its more than 2,100 corporate members contribute more than \$125 billion to the U.S. economy. CEA’s members include XM, as well as Pioneer Electronics (USA) Inc. and Samsung Electronics, which manufacture and distribute the devices at the heart of this lawsuit.<sup>1</sup>

The Home Recording Rights Coalition, an (unincorporated) association, is a leading advocacy group for consumers’ rights to use home electronics products for private, non-commercial purposes. The members of HRRC include consumers, retailers, manufacturers (including Pioneer and Samsung) and professional servicers of consumer electronics products. The HRRC was founded in 1981, in response to the Ninth Circuit’s ruling, in the *Betamax* litigation, later overturned by the Supreme Court,<sup>2</sup> that distribution of consumer video recorders constituted contributory copyright infringement.

---

<sup>1</sup> Pursuant to F. R. Civ. P. 7.1, CEA affirms that it has no parent corporation and no stockholder owning 10% or more of any stock.

<sup>2</sup> *Sony Corp. v. Universal City Studios, Inc.*, 484 U.S. 417 (1984). The Supreme Court held that distribution of the *Betamax* consumer VCR did not incur liability for contributory copyright infringement because the product had substantial noninfringing uses, such as recording television programs for later viewing.

This brief, in support of defendant XM's Motion To Dismiss, is addressed to the origin, significance, and interpretation of Section 1008 the Audio Home Recording Act of 1992 (the "AHRA"). Section 1008, like the rest of the AHRA, was designed, drafted, and interpreted by all private and public sector interests specifically not just to immunize certain parties from suit, but to *prohibit* suits such as this one. As is reflected in the AHRA's legislative history, CEA and HRRC, along with the recording and music publishing industries, were the main progenitors and active private sector negotiators and advocates of this legislation.

Our main interest in assuming this role was to establish marketplace assurance and legal protection granted under Section 1008 to technology innovators, manufacturers, product distributors and retailers, and, above all, consumers. Our participation in the legislative process represented a long-term commitment to, and a compromise on behalf of, our members, many of whom continue to pay royalties for devices covered by the AHRA and must comply with its technical restrictions on products. Our amicus participation in this litigation represents a continuation of that commitment. We note, as well, that counsel for the Recording Industry Association of America (the "RIAA"), with which we cooperated in negotiating, drafting, advocating, and discussing with Members of Congress the scope and significance of this legislation, have signed the Complaint that is the subject of Defendant's Motion To Dismiss.

## TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICI.....	i
I. THE COPYRIGHT INFRINGEMENT ALLEGATIONS MADE IN THIS CASE ARE ONES THAT SECTION 1008 OF THE AUDIO HOME RECORDING ACT (AHRA) WAS SPECIFICALLY CONCEIVED, DRAFTED, AND ENACTED TO PROHIBIT. ....	1
A. Section 1008 Was Specifically Addressed To Prohibit Suit Based On Anticipated, As Well As Known, Technologies.....	2
B. The Scope And Forward-Looking Nature Of Section 1008 Are Balanced And Reflected In The AHRA’s Provisions For Royalties On Devices And Media, And Technical Measures.....	6
II. THE FACTUAL CIRCUMSTANCES UNDERLYING THE ALLEGATIONS MADE IN THIS CASE WERE SPECIFICALLY ANTICIPATED, ADDRESSED, AND RESOLVED BY THE AHRA.....	8
III. THE AHRA GUARANTEES CONSUMERS A RIGHT TO USE ROYALTY-PAID DIGITAL AUDIO RECORDING DEVICES TO MAKE “FIRST GENERATION” COPIES. ....	12
IV. FAILURE TO GRANT THE MOTION TO DISMISS THIS SUIT WOULD CHILL THE PRIVATE SECTOR NEGOTIATION AND COMPROMISE OF TECHNICAL ISSUES BEARING ON COPYRIGHT, BY INTIMIDATING PRIVATE PARTIES IN WAYS THE AHRA SOUGHT EXPLICITLY TO AVOID.....	16
V. CONCLUSION.....	19

**TABLE OF AUTHORITIES**

**Federal Cases**

Sony Corp. v. Universal City Studios, Inc.,  
484 U.S. 417.....i

**Federal Statutes**

17 U.S.C. § 1001.....1  
17 U.S.C. § 1001(1).....10, 11  
17 U.S.C. § 1001(3).....1  
17 U.S.C. § 1001(5).....1  
17 U.S.C. § 1001(11).....13  
17 U.S.C. § 1001(e).....14  
17 U.S.C. § 1002.....7,13  
17 U.S.C. § 1002(a)(3).....15  
17 U.S.C. § 1002(b).....15  
17 U.S.C. § 1002(e).....11,14  
17 U.S.C. § 1003.....6,7  
17 U.S.C. § 1004.....6,7  
17 U.S.C. § 1005.....6  
17 U.S.C. § 1006.....6,7  
17 U.S.C. §1006(a)(1)(B).....11  
17 U.S.C. §1006(c)(2).....11  
17 U.S.C. § 1007.....6,7  
17 U.S.C. § 1008.....passim  
17 U.S.C. § 1009.....17  
17 U.S.C. § 1010.....17  
17 U.S.C. § 1201(k).....17

**Federal Regulations**

47 C.F.R. §§ 76.1901 et. seq. ....17

**Legislative History**

136 Cong. Rec. S3106 (Mar. 29, 1990) ..... 13  
138 Cong. Rec. H9035 (Sept. 22, 1992)..... 5,13  
138 Cong. Rec. H9043 (Sept. 22, 1992).....13  
138 Cong. Rec. S8723 (June 23, 1992) ..... 13

Audio Home Recording Act of 1991: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary, 102nd. Congress (1992) .....	3,5,6
Audio Home Recording Act of 1991: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary, 102nd. Congress (1992) Appendix 4.--Technical Reference Document for the Audio Home Recording Act of 1991) .....	13,14,15
Digital Audio Recording: Hearing Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the H. Comm. on Energy and Commerce, 102nd Cong. (1992) .....	4,6,7,8
H.R. Rep. No. 102-873, Part 1 (1992).....	2,12
H.R. Rep. No. 102-780 Part 1 (1992) .....	2,6
S. Rep. No. 102-294 (1992).....	passim
The Audio Home Recording Act of 1991: Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary 102nd Cong. (1991).....	6
<b>Other Authorities</b>	
DTCP Content Participation Agreement .....	17
F. R. Civ. P. 7.1.....	i
Report of the Register of Copyrights, “Copyright Implications of Digital Audio Transmission Services” (October 1991) .....	9,10

**I. THE COPYRIGHT INFRINGEMENT ALLEGATIONS MADE IN THIS CASE ARE ONES THAT SECTION 1008 OF THE AUDIO HOME RECORDING ACT (AHRA) WAS SPECIFICALLY CONCEIVED, DRAFTED, AND ENACTED TO PROHIBIT.**

This case is filed literally in the teeth of, but without any reference to, the Audio Home Recording Act of 1992 (“AHRA”), 17 U.S.C. § 1001, *et seq.* Section 1008 of the AHRA states, in plain and unambiguous terms, that any copyright infringement lawsuit *based on* the distribution *or* on the use of a digital audio recorder such as XM’s “inno” cannot be brought:

**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 ... or based on the noncommercial use by a consumer of such a device ... for making digital musical recordings ... .

Counts I through VII of the Complaint are clearly, obviously and unavoidably *based on* both the manufacture and distribution of a “digital audio recording device” *and* on its noncommercial use by consumers, for making “digital musical recordings,” all as clearly and unambiguously defined by the AHRA at 17 U.S.C § 1001(3) and (5). The plaintiffs attempt in their Complaint to avoid the unavoidable via a combination of relabeling, mislabeling, and selective and misleading references<sup>3</sup> to clearly established facts. While the Complaint does not mention the AHRA itself, virtually every word of it is written with the AHRA in mind -- in an effort to misdirect this Honorable Court away from the legislation that clearly controls their allegations in this case.

---

<sup>3</sup> Essentially, the Complaint, in an attempt to circumvent the AHRA, labels device functions as “services,” in the hope that this unilateral mischaracterization will forestall this Court, at least for a period of time, from recognizing these devices for what they plainly and unambiguously are -- digital audio recording devices as defined by the AHRA. If allowed to succeed, this tactic would vitiate the significance, and undermine the value, of Section 1008's prohibition on infringement suits.

This disingenuous effort is all the more remarkable because, as CEA and HRRC discuss below, plaintiff record companies and the RIAA, whose in-house counsel have signed the Complaint, worked for several years in close cooperation with CEA and HRRC and members of Congress to draft and advocate the enactment of this law.<sup>4</sup> In this *amicus* brief, CEA and HRRC demonstrate that this suit is brought in an effort to circumvent the application of the AHRA in the very circumstances, and with respect to the very products and broadcasts, that the plaintiffs and the Congress clearly foresaw at the time of its adoption. These efforts fail to mask the essential, admitted, and unavoidable fact: Counts I through VII are brought under Title 17 of the United States Code, *based on* the distribution and sale, *and* on the noncommercial use by consumers, of devices and transmissions as defined and covered by the AHRA. They are thus facially prohibited by Section 1008 and should not have been included in any complaint brought to this court. Hence, the Complaint must be dismissed.

**A. Section 1008 Was Specifically Addressed To Prohibit Suit Based On Anticipated, As Well As Known, Technologies.**

After a decade of debate and threats of adverse legislation and litigation, and at the urging of Congress, CEA and HRRC joined hands with the music and recording industries to *jointly* propose the AHRA. The main benefit to CEA and HRRC members, and consumers, was the prohibition on suit contained in § 1008, granting marketplace assurances to commercial entities and comfort to consumers. In reporting out the legislation, the Senate Judiciary Committee characterized the main purpose of the entire AHRA as follows: “The purpose of S. 1623 is to ensure the right of consumers to make

---

<sup>4</sup> See, H.R. Rep. No. 102-873, Part 1 (hereinafter “House Judiciary Report”) (Exh. 1) at 9-12 (1992); H.R. Rep. No. 102-780 Part 1 (hereinafter House “Energy & Commerce Report”) (Exh. 2) at 17-20 (1992).

analog or digital audio recordings of copyrighted music for their private, noncommercial use.”<sup>5</sup>

After being asked by leaders of congressional committees to propose a legislative solution, CEA, HRRC, and their members joined the RIAA, the National Music Publishers Association (“NMPA”), and their members, in drafting and jointly supporting the bills that achieved enactment as the AHRA. In February, 1992, Tandy Corp. (now RadioShack) CEO John Roach explained this joint effort, and its importance to industry and consumers, to a subcommittee of the House Judiciary Committee:

[L]ast year, when music and consumer electronics industry representatives were before the Senate Commerce Committee, your colleagues in the other chamber asked us to work out a compromise. Today, I can report that we have. ... [T]his historic compromise is embodied in the legislation before you today.

\*\*\* This legislation enables consumers to make recordings for their own private, noncommercial use; eliminates manufacturer or retailer liability for alleged copyright infringement; and fosters music industry support for the new generation of digital recording formats.

Of special importance to Tandy is the protection the bill would afford manufacturers and retailers from copyright infringement actions based on consumer audio taping practices. *This would create a more stable environment for the introduction of new products and formats, allowing us to focus on marketing strategies instead of litigation strategies.*<sup>6</sup>

---

<sup>5</sup> S. Rep. No. 102-294 (Exh. 3) (1992), at 30 (hereinafter “the Senate Report”).

<sup>6</sup> Audio Home Recording Act of 1991: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary, 102nd. Congress (1992) (hereinafter, “House Judiciary Hearing”) (Exh. 4) at 152-153 (prepared statement of Mr. Roach, Chairman of the Board, Tandy Corporation) (emphasis supplied). CEA was at that time known as the Consumer Electronics Group of the Electronic Industries Association.

The private sector “bargain” was succinctly summarized by Edward P. Murphy, President of the NMPA, representing the Copyright Coalition, in an appearance before a subcommittee of the House Energy and Commerce Committee:

Previously I’ve characterized this as a win-win-win situation, and I think, Madam Chairwoman, if enacted this bill would be an all-around victory. First, the music copyright owners will receive some compensation for digital home copying of their works and will be safeguarded against multi-generational copying which will be provided through the incorporation in each digital recording device of the SCMS technology. *Second, the legal cloud that has hung over digital recording technology is removed.*<sup>7</sup>

The centrality of the prohibition of infringement suits was well understood by the committees of jurisdiction. “As stated earlier, a key purpose of S. 1623 is to insure the right of consumers to make analog or digital audio recordings of copyrighted music for private, noncommercial use. . . . Thus, for purposes of illustration, the making of . . . [a digital audio copied recording] by a consumer for use in his or her home, car, or portable tape player, or for a family member, is protected by the prohibition against copyright infringement actions contained in this legislation.”<sup>8</sup>

Referring to the uncertainty, legislative debate, and litigation<sup>9</sup> that had dogged the previous decade, the Senate Report continued:

---

<sup>7</sup> Digital Audio Recording: Hearing Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the H. Comm. on Energy and Commerce, 102nd Cong. (1992) (hereinafter, “House Commerce Hearing”) (Exh. 5) at 91-96, Statement of Edward P. Murphy. (emphasis supplied).

<sup>8</sup> Senate Report (Exh. 3) at 51.

<sup>9</sup> “The copyright law implications of private audio recording for noncommercial use have been the subject of longstanding debate. . . . In the absence of legislative resolution, the distribution of consumer digital audio recording technologies has been subject to challenge in the courts based on claims of contributory copyright infringement.” *Id.* (citation omitted). Music publishers filed suit based on contributory copyright infringement against the manufacture and sale of the digital audio tape (DAT) recorder – which suit was dismissed following the announcement of the inter-industry compromise

A central purpose of the Audio Home Recording Act of 1991 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. *To address the uncertainty that has plagued this issue, section [1008] prohibits certain copyright infringement actions.*<sup>10</sup>

It was equally well understood that section 1008 was intended “conclusively to resolve” any uncertainty as to *future*, as well as known, technologies. Any bill that resolved only a particular pending dispute would not achieve Congress’s goal of stimulating and supporting innovation in digital technology. Thus, in answering questions posed by the House Judiciary Committee, Mr. Roach confirmed:

[The AHRA] is a very general piece of legislation that encompasses really all of the digital domain which is likely to be introduced into the technology for the foreseeable future. ... This bill will encompass DAT, digital compact cassette, recordable CD, minidisk, even firmware type of distribution of digital music which could conceivably come about in the future. *So it is not really limited as to the media, but really to the specific intent and purpose of the recording for music purposes.*<sup>11</sup>

The clear intent to cover and hence immunize from suit *new*, as well as known, technologies, was emphasized and strongly endorsed by the then-President of the Recording Industry Association of America, when testifying in support of the AHRA:

---

that paved the way for the introduction of the AHRA. *Cahn v. Sony Corp.*, No. 90 Civ. 4537 (S.D.N.Y., filed July 9, 1990, dismissed without prejudice, July 10, 1991).

<sup>10</sup> Senate Report (Exh. 3) at 51 (emphasis supplied). *See also* 138 Cong. Rec. H9035 (Sept. 22, 1992) (remarks of Rep. Collins) (Exh. 9); Senate Report (Exh. 3) at 30, 33.

<sup>11</sup> House Judiciary Hearing at 176 (response of John Roach, Chairman, Radio Shack, to question from Subcomm. Chairman Hughes) (emphasis supplied) (Exh. 4). The “firmware” type of recording referred to by Mr. Roach aptly describes the “inno,” which stores recordings in computer chip memory.

It is not often, Mr. Chairman, that we have the opportunity to amend the copyright law *in anticipation of the strains that come with the benefits of new technology*. More often, as you know, the law lags behind technology. This legislation presents a unique opportunity to harmonize the law simultaneously with an important advance in recording technology. S. 1623 is unique in another way as well. *It is a generic solution that applies across the board to all forms of digital audio recording technology. Congress will not be in the position after enactment of this bill to provide protection for new forms of digital audio recording technologies.*<sup>12</sup>

The House Energy & Commerce Report reflected this consensus among the interested parties:

[T]he reported legislation would cover all digital recording technology that exists now or is developed in the future.<sup>13</sup>

**B. The Scope And Forward-Looking Nature Of Section 1008 Are Balanced And Reflected In The AHRA's Provisions For Royalties On Devices And Media, And Technical Measures.**

The other two elements of the public and private sector bargain embodied in the AHRA are:

(1) royalty payments to fix a rate to be regarded as providing compensation to all participants in the music and recording industry, for the digital home recordings of copyrighted music, based on the use of the defined devices and media (§§1003-1007);

(2) technological protection -- a “Serial Copy Management System” (SCMS), which mandated the use of technology to guarantee to consumers a right to make first generation copies directly from broadcasts or from prerecorded media, *but* -- consistent

---

<sup>12</sup> The Audio Home Recording Act of 1991: Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary (hereinafter, “Senate Judiciary Hearing”) (Exh. 6), 102nd Cong. 110-11 (1991) ( oral statement of Jason S. Berman, President, RIAA) (emphasis supplied). *See also*, House Commerce Hearing at 89 (prepared statement of Jason S. Berman, President, RIAA) (“The bill that you are considering today addresses *all* digital audio recording technology – present and future ones alike”) (Exh. 5) (emphasis supplied).

<sup>13</sup> House Energy & Commerce Report (Exh. 2) at 19.

with the recording industry's top objective at the time -- to prohibit "serial" digital copying, *i.e.*, the making of copies from copies (§1002).<sup>14</sup>

Manufacturers, or importers and distributors, of devices covered by the AHRA are obliged to pay into a "royalty" fund, out of which proceeds are distributed to music industry members and workers on a widespread, detailed, and very closely negotiated basis. *See* 17 U.S.C. §§ 1003 (obligation), 1004 (payments), 1006 (entitlement to receive share of payments), and 1007 (procedures for distributing royalty payments). It is crystal clear from the legislative history cited above that the payment obligations set forth in Section 1003 were advocated for by CEA, HRRC, and corporate representatives *not* as an acknowledgment of any pre-existing legal obligation, but as a balanced result, *in exchange* for the prohibition on suit contained in Section 1008.<sup>15</sup>

Similarly, CEA and HRRC were willing to support the imposition of technological restrictions on their own members' and constituents' products, to prevent serial copying, but only in exchange for (1) assurances that the ability to make "first generation" home recordings would *not* be impaired, and (2) the prohibition on suit.<sup>16</sup> Device manufacturers and consumers did not recognize any pre-existing legal duty to impose any such technical constraints on the operation of their own devices. Therefore, the guarantee that the regime would not impair first generation recording was not enough, in and of itself, to cause them to negotiate, engage in drafting, or support the AHRA.

---

<sup>14</sup> *See infra* Section III.

<sup>15</sup> House Commerce Hearing 84-86 (prepared statement of Gary Shapiro, Vice President, Electronic Industries Association, and Chairman, HRRC) (Exh. 5).

<sup>16</sup> *Id.*

What brought them to the table was Section 1008's suit prohibition. HRRC's Chairman told Rep. Cardiss Collins, Chair of the House Energy & Commerce Subcommittee on Consumer Protection, in one of HRRC's joint appearances with the music industry:

Madam Chairwoman, the broad support for the Audio Home Recording Act in the HRRC constituency is based largely on [section 1008] of the Act. \*\*\* [I]t means that consumers can rest assured that new formats will be supported and will remain available, so long as the marketplace demands them. These are assurances that, in the world of audio home recording, no one has had for several years.<sup>17</sup>

**II. THE FACTUAL CIRCUMSTANCES UNDERLYING THE ALLEGATIONS MADE IN THIS CASE WERE SPECIFICALLY ANTICIPATED, ADDRESSED, AND RESOLVED BY THE AHRA.**

The circumstance in which this case was filed -- *including* the licensing, distribution, and use of digital audio recorders by a satellite music service -- was clearly and specifically among those anticipated by the private and public sector advocates of the AHRA -- *especially* the RIAA and its member record labels. As the Senate Report observed, one of the primary concerns motivating enactment of the AHRA was the recording industry's fears of potential sales displacement from digital home recording of new digital broadcast technologies. In fact, Congress concurrently considered the implications for the recording industry both of home copying from digital broadcasts, and of digital broadcasting itself:

Senator DeConcini, on July 25, 1990, requested that the Copyright Office conduct a study on the copyright implications of digital audio broadcasts. The Copyright Office's Report contained an analysis of the home taping issue. The report concluded that '... copying of prerecorded works does and will displace sales of authorized copies, both in analog and digital formats, although the magnitude and economic impact of the displacement is difficult to assess at this time.' The report of the Copyright Office endorsed [the AHRA].<sup>18</sup>

---

<sup>17</sup> *Id.* at 86.

<sup>18</sup> Senate Report at 35 (footnotes omitted) (Exh. 3). The letter from Senator Dennis DeConcini to Register of Copyrights Ralph Oman referenced the possibility of a

That Copyright Office Report, entitled “Copyright Implications of Digital Audio Transmission Services” and dated October 1991, included in an appendix comments submitted by numerous parties, including the Recording Industry Association of America. In those comments, *RIAA predicted scenarios they anticipated would come to fruition during the 1990s*, including precisely the one presented by this case:

- Digital Cable And Satellite Radio, several of which services already had launched, offering as many as 91 channels of commercial-free music;<sup>19</sup> and
- Digital Terrestrial Radio, which could play entire albums in perfect audio quality, and publish program guides that enable consumers to record at home;<sup>20</sup>

As those RIAA Comments make clear, RIAA was deeply concerned that personal recording from digital audio broadcast services could displace recorded music sales:

- “We are naturally concerned that the new services will provide overwhelming inducements to home taping.” (RC Appendix at 6)
- “One service brags that it has a ‘[f]riendly tape recorder interface’ and provides subscribers with a diagram showing how to hook up their tape recorders to the cable box.” (RC Appendix at 10)
- “The quality will be the same as recording off their own CD player.”  
*Id.*
- “[H]arm [to the recording industry] flows ... from the home taping that will occur.” (RC Appendix at 12)

---

“worldwide satellite digital audio broadcasting system,” and that “the sound quality potentially available through digital audio systems could equal that available on prerecorded compact disks.” *See*, Report of the Register of Copyrights, “Copyright Implications of Digital Audio Transmission Services,” Appendix Comment Letters (October 1991) (hereinafter, “RC Appendix”) (Exh. 7) at iii.

<sup>19</sup> RC Appendix (Exh. 7) at 65, (Comments of the Recording Industry Association of America, *In re: Digital Audio Broadcast and Cable Services; Copyright Office Study*, Docket No. RM 90-6 (December 14, 1990)).

<sup>20</sup> *Id.* at 2.

- RIAA’s Comments cited to an estimate, in a 1989 report by the congressional Office of Technology Assessment, that “approximately 439 million unauthorized tapings of prerecorded works were made in this country from broadcast services in the one-year period preceding the survey – before the advent of digital broadcast services.” (RC Appendix at 12, n.5, emphasis in original).

That 1991 RIAA submission to the Copyright Office also attached separate Comments that RIAA had submitted to the Federal Communications Commission in a proceeding on digital audio broadcast radio. In those Comments to the FCC, too, the RIAA voiced concerns about consumer digital recording from digital broadcasts:

The ‘cloning’ characteristics inherent in digital technology make *digital audio services* a most serious threat to the recording industry. Since digital audio services will transmit sound recordings with quality equal to that of prerecorded compact discs, they will enable individuals to connect their digital radio receivers to digital recorders such as DAT, to make ‘perfect clone’ copies of prerecorded works. In fact, even recording digital radio transmissions on an analog cassette recorder will provide extremely high quality, nearly perfect, copies.<sup>21</sup>

Thus, when Congress addressed the impact of home recording on the recording industry via the AHRA, it intentionally and very specifically addressed the recording of broadcast transmissions, including those from the anticipated digital satellite and terrestrial radio services that now make transmissions to licensed devices. Consequently, Section 1001(1) of the AHRA defines a “digital audio copied recording” -- that is, a copy made by the consumer using a digital audio recording device -- as “a reproduction in a digital format of a digital

---

<sup>21</sup> RC Appendix (Exh. 7) at 34 (attachment -- Before the Federal Communications Commission, Comments of the Recording Industry Association of America, *In the Matter of Amendment of the Commission's Rules with regard to the Establishment and Regulation of New Digital Audio Radio Services*, GEN. Docket No. 90-357 at 5 (Oct. 12, 1990)) (emphasis supplied, citation omitted).

musical recording, whether that reproduction is made directly from another digital musical recording *or indirectly from a transmission.*” 17 U.S.C. § 1001(1) (emphasis supplied). Moreover, the AHRA makes provision for the distribution of royalty payments to copyright owners whose recordings were “disseminated to the public in transmissions.” 17 U.S.C. § 1006(a)(1)(B) and (c)(2).<sup>22</sup>

In sum, the recording industry, like everyone else involved, intended and thoroughly understood that the AHRA, and its prohibition of suit, apply to any “digital audio recording device” that can receive and record from any type of digital broadcast transmission -- and RIAA so informed Congress. Congress accepted that recommendation, and therefore specifically included the ability to record “indirectly from a transmission” within the scope of the AHRA. “Thus, a digital audio recording made from a commercially released compact disc or audio cassette, or from a radio broadcast of a commercially released compact disc or audio cassette, would be a ‘digital audio copied recording.’”<sup>23</sup>

Both the language of the AHRA itself and the context in which it arose make clear that the AHRA compromise was intended to provide the recording industry with a solution for home recording from analog and digital broadcasts, via devices exactly like the “inno” -- whose recording function is clearly and

---

<sup>22</sup> Further addressing broadcast transmissions, the AHRA attempted to minimize the obligations of broadcasters themselves to help protect against serial copying, by providing that those who make digital transmissions of digital sound recordings do not need to encode in the transmission the “copyright status” of the sound recording (which helps trigger serial copy protections using the “SCMS” technology). 17 U.S.C. § 1002(e).

<sup>23</sup> Senate Report (Exh. 3) at 47. As discussed *infra* in Section III, the legislative history reinforces that the AHRA covers recording from digital broadcasts.

primarily directed to such purpose -- and that Section 1008 is addressed precisely to prohibiting a copyright infringement suit *based on* the circumstance unambiguously presented by this case. Congress specifically, with full information and foresight, decided and ensured that no person should be sued for copyright infringement *based on* the manufacture, sale, *or* use by consumers of devices such as those whose use by consumers is explicitly admitted in the Complaint as forming the basis of this suit.

### **III. THE AHRA GUARANTEES CONSUMERS A RIGHT TO USE ROYALTY-PAID DIGITAL AUDIO RECORDING DEVICES TO MAKE “FIRST GENERATION” COPIES.**

Allowing this litigation to proceed, even to discovery, would chill the availability of products whose utility is specifically addressed and protected by the AHRA, and thus would deprive the consuming public of expectations that the Congress explicitly protected in the AHRA. As the House Judiciary Report states:

[C]onsumers will be able to make an *unlimited* number of copies from a digital musical recording. However, due to encoding that takes place on a digitally-formatted copy made from a digital musical recording, no further copies may be made from that copy. To paraphrase a Supreme Court opinion in a different context, consumers ‘are free to copy from the original, but they may not copy from the copy.’<sup>24</sup>

By technologically addressing only *serial* copying, Congress made the consumer’s right to make a first generation of copies a major objective of the legislation. Allowing this litigation to proceed would eviscerate not only the benefits of prohibiting suit, but *also* the benefits to consumers of a recording right that was a specific element of the “tradeoffs” involved in the AHRA.

---

<sup>24</sup> House Judiciary Report (Exh. 1) at 19, (emphasis supplied, citation omitted).

The requirement to comply with serial copy management obligations, and the ability to update SCMS with respect to future technologies, is set forth in Section 1002 of the AHRA. “Serial copying” is defined at Section 1001(11). The bills as introduced in both the House and Senate incorporated a “Technical Reference Document” (“TRD”) that describes the functional characteristics of a serial copy management system.<sup>25</sup> That document, as part of the legislative history, establishes the functional characteristics of a serial copy management system and explains its operation.<sup>26</sup> The TRD confirmed, explicitly and specifically, the intention of the AHRA to apply to all types of recording (including, particularly, recording from digital broadcast transmissions) and all types of recording technology. It demonstrates the specific expectation that serial copy protection would and should not be limited to specific technologies and should not hinder development of new ways to prevent serial copying. Rather, future technologies should maintain the functional characteristics of the system described in that document.

Notably, the Technical Reference Document also demonstrates that the AHRA was intended to secure consumers’ rights to record from digital broadcast transmissions on devices like the XM “inno.” The parties recognized the need to prevent unauthorized serial copying from broadcast transmissions. However, broadcasters themselves did not want to be saddled with responsibility for transmitting information that would permit or restrict serial copying (or, conversely, with liability for transmission errors that might

---

<sup>25</sup> See, House Judiciary Hearing at 359 *et seq.*, (Appendix 4.--Technical Reference Document for the Audio Home Recording Act of 1991) (hereinafter "the TRD") (Exh. 8) (Feb. 19, 1992). The TRD was also printed in Senate Judiciary Report (Exh. 3) at 17; 138 Cong. Rec. H9043 (Sept. 22, 1992); 138 Cong. Rec. S8723 (June 23, 1992); 136 Cong. Rec. S3106 (Mar. 29, 1990). Hereinafter for page references, "TRD" will be used to refer to the "Appendix 4" printing, Exh. 8, *id.*

<sup>26</sup> See Remarks of Rep. Collins, *supra*, n.10 (Exh. 9).

permit unauthorized copying or restrict permitted copying). Therefore, the AHRA provided that the broadcasters would not be required to transmit information with respect to serial copying controls. Section 1002(e) relieves broadcasters of the requirement to transmit “copyright status” information, which information indicates whether serial copy protection is to be applied.<sup>27</sup> If, however, the broadcaster chooses to transmit such information, section 1001(e) requires that it be transmitted accurately.

Instead, the devices that received digital broadcast transmissions are to be constructed so as to permit the making of first generation copies from broadcasts, but not serial copies. Although the workings of this provision are technical and detailed, the intention and ultimate effect are clear:

- The TRD provides the general rule for devices that receive digital audio broadcast transmissions without copyright status information (as is contemplated by § 1002(e)). Specifically, devices that receive such digital audio broadcast transmissions “shall indicate that copyright is asserted over the transmitted audio material and that the generation status is original.” (TRD at 365) As a result, broadcasts will be protected against serial copying, but the “original” broadcast transmission always can be copied by the consumer.
- The TRD refers throughout to a category of products that receive digital broadcast transmissions, called “Digital Receivers.” The TRD describes how recording devices implement the above-referenced general rule that copies should be made from digital broadcast transmissions, using the example of a specific technology called “Serial Copy Management System” or “SCMS.” Specifically, Digital Receivers are automatically to “set” the copyright status

---

<sup>27</sup> As explained in the TRD, serial copy protection relies primarily on two bits of information. The first, “copyright status,” indicates whether serial copy protection should be applied to prevent copying from copies. The second, “generation status,” indicates whether the signal is coming from an “original” that can be copied, or from a copy. If the “copyright status” indicates that the audio material must be protected against serial copying, then recording devices look to a second piece of information, known as “generation status” information. If the “generation status” indicates that the material already is a copy, then serial copying from that copy is to be prohibited by the recording device. If the “generation status” indicates that the audio material is “original,” then a copy is permitted to be made, but serial copies cannot be made from that copy. TRD (Exh. 8) at 359-360, 380-383.

information to indicate copyright protection (TRD at 369, 375, 395), and should set the generation status information to indicate that the transmission is “original” material that can be copied (TRD at 373, 378, 395).

Therefore, the AHRA expressly protected the rights of consumers to make copies of digital broadcasts, by ensuring that the Digital Receivers themselves (like the “inno” or new “HD” radios) emitted information that would enable such copying to occur.<sup>28</sup>

Further, the Technical Reference Document anticipates different types of source and recording media that could be used to copy the sound recordings, *including* “solid state” devices – the type of semiconductor chips employed in the “inno” devices upon whose use by consumers this suit is based.<sup>29</sup>

Moreover, the AHRA itself is neither static nor blind to the expected emergence of new formats, technologies, and methods. Section 1002(a)(3) establishes a procedure for the Secretary of Commerce to “certify” new “systems” as “prohibiting unauthorized serial copying.” Section 1002(b) grants a right for any “interested party” (which includes record labels) to *petition* the Secretary for verification that a “system” meets SCMS standards. CEA and HRRC are not aware that the RIAA, the plaintiff labels, or anyone else has ever asked the Secretary to interpret or adapt SCMS in light of the new formats

---

<sup>28</sup> The TRD contemplated one limited exception to this general rule. Unlike broadcast services, where the content to be transmitted is programmed by the broadcaster, the TRD anticipated services “whereby the consumer interactively determines what specific work(s) and/or event(s) are received.” (TRD at 365, 373) For this category of “pay per listen” or “on-demand” audio services, the TRD permits the generation status information to be set so as to prevent any copying. *Id.* The TRD makes clear, however, that this specialized category of “Electronic Audio Software Delivery” was to be “distinguished from regular broadcast or comparable cable radio programming services” and, thus, would not interfere with consumers' right to record from non-interactive digital transmissions, like XM, which are programmed by the broadcaster. *Id.*

<sup>29</sup> *Id.* at 377.

and technologies involved in the use of the devices on which this suit is based. Instead of addressing concerns to the forum established by statute, plaintiffs dub new devices as “services” and ask this Honorable Court to do violence to a clear and unambiguous provision of the statute -- all in a plainly transparent attempt to circumvent *both* the law’s prohibition of suit, *and* its provisions that safeguard consumer practices.

**IV. FAILURE TO GRANT THE MOTION TO DISMISS THIS SUIT WOULD CHILL THE PRIVATE SECTOR NEGOTIATION AND COMPROMISE OF TECHNICAL ISSUES BEARING ON COPYRIGHT, BY INTIMIDATING PRIVATE PARTIES IN WAYS THE AHRA SOUGHT EXPLICITLY TO AVOID.**

The AHRA was an historic compromise in another sense. It was the first in a series of statutory, licensing, and regulatory initiatives whereby technology companies accepted technical and financial obligations, in exchange for technical and legal assurances that consumer products would be supported, and operate reliably, in the future. The validity and vitality of this approach, favoring solutions arising in the private sector, depends on the courts and the parties adhering to the plain meaning of what was proposed in the private sector and adopted in the Congress.

As the legislation and its history demonstrate, the AHRA balanced technical and royalty obligations against the prohibition on suit, *and* the limitation that the technology could be used to prevent only *serial* copies. Failure to grant this Motion to Dismiss -- thus subjecting those who would market or license compliant devices, nevertheless, to the rigors of suit and the risk of the Copyright law’s potentially ruinous statutory damages provisions -- could effectively deny the consuming public the benefit of the right to make first generation copies.

Not only does the AHRA prohibit copyright infringement suits, it *also* contains its own remedies for violations. It is no accident that these remedies, set forth in Sections

1009 and 1010, are *not* the intimidating Copyright Act remedies. Nor is it an accident that Section 1008's prohibition on suit applies to devices that are *covered* by the AHRA, even if they are not compliant. The clear intention, as demonstrated by these provisions, is to *avoid* the potential of chilling the prospect of new devices coming to market, via intimidation posed by Copyright Act damages. It is precisely this intimidation that this Complaint, and this suit, seek to restore, by simply ignoring the existence of the AHRA. This Honorable Court should not lend its authority to any such undertaking.

The consequences of such intimidation are potentially far-reaching. The AHRA was the first, but not the only, private and public sector undertaking that seeks to balance a mandate to employ copy protection technology in devices against an "encoding rule." Such provisions are now recognized in legislation,<sup>30</sup> regulation,<sup>31</sup> and private sector license agreements.<sup>32</sup> The balancing of technological measures, and limitations on their use, is a core concept in the private sector Copy Protection Technical Working Group, which is now in its eleventh year of exploring new ways to protect digital entertainment

---

<sup>30</sup> Section 1201(k) (17 U.S.C. § 1201(k)) of the Digital Millennium Copyright Act of 1998 ("DMCA"), imposes technical obligations on defined video recording products, in exchange for "Encoding Rules" that guarantee consumers the right to make first generation copies from terrestrial, cable and satellite television broadcasts.

<sup>31</sup> Federal Communications Commission regulations 47 C.F.R. §§ 76.1901 *et seq.* require, with respect to devices licensed to employ technologies referenced in FCC regulations, that the technologies not be triggered in certain defined ways, so as to protect the rights of consumers to record television programming.

<sup>32</sup> *See, e.g.*, DTCP Content Participant Agreement at 23 - 29, available online at [http://www.dtcp.com/data/DTCP\\_Content\\_Participant010730.pdf](http://www.dtcp.com/data/DTCP_Content_Participant010730.pdf).

content without impinging on reasonable and customary consumer home and personal recording.<sup>33</sup>

It is the prohibition on suit, *and* the ability of products to come to market and function in a predictable manner in the hands of consumers, that provide an incentive to work on solutions in negotiations that begin in the private sector. Allowing this suit to go forward, even to discovery, would vitiate both benefits and incentives. Not only would it deprive manufacturers and consumers of reliance on a very clearly stated prohibition and expectation, it would *also* deny to consumers the functionality of a product that is clearly protected by a statute that was jointly recommended to the Congress by the private sector. This would violate not only the AHRA, but the public policy behind it.

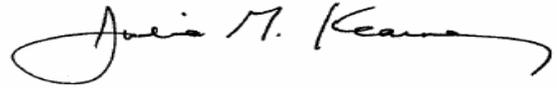
---

<sup>33</sup> See [www.CPTWG.org](http://www.CPTWG.org).

**V. CONCLUSION.**

The Audio Home Recording Act clearly and unambiguously specifies that a suit for copyright infringement under Title 17 of the U.S. Code, directed at conduct based on the distribution or use by a consumer of a digital audio recording device such as the one on which this Complaint is based, is prohibited. Hence, Counts I - VII of this Complaint must be dismissed.

Respectfully submitted,



---

Julie M. Kearney (JK1966)  
Senior Director and Reg. Counsel,  
Consumer Electronics Association  
Reg. Counsel and Assoc. Leg.  
Counsel, Home Recording Rights  
Coalition  
CONSUMER ELECTRONICS  
ASSOCIATION  
2500 Wilson Boulevard  
Arlington, VA 22201  
Tel: (703) 907-7644  
Fax: (703) 907-8114

Dated: July 17, 2006