STATEMENT OF MITCH BAINWOL
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RECORDING INDUSTRY ASSOCIATION OF AMERICA
BEFORE THE
SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
ON
CONTENT PROTECTION IN THE DIGITAL AGE: THE BROADCAST FLAG, HIGH-DEFINITION RADIO, AND THE ANALOG HOLE

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Chairman Smith, Ranking Democratic Member Berman, and Members of the Subcommittee, I appreciate this opportunity to appear before the Subcommittee today to address emerging issues in the area of digital radio. I testify today not only as CEO of the RIAA, but also for the many people involved in the music business who share our views about both the promise and the risk of certain business models that will take advantage of new technology enabling the convergence of radio and download-like services.

At the outset, we are excited about the new opportunities digital radio will provide to expose new artists and offer consumers new choices in the way they get our music, and about the convergence of different platforms and distribution systems.

Issues concerning the video broadcast flag are very similar to those concerning digital radio. At the heart, it is about assuring that content licensed for broadcast does not become content permanently distributed instead, whether it is a movie or a song.

We need to make sure that our copyright law – which was written to accommodate radio business models – properly addresses technology which will allow

radio to become much more than a passive listening experience. Digital radio can be delivered over lots of different platforms, including over-the-air, satellite, cable, and Internet; but it is the same service to the consumer. New and proposed functionality in all these platforms will allow each of these types of radio services to become a download or distribution service. And with their ability to enable automatic, organized copying and permanent storage of individual songs, these services will replace the sale of downloads or subscriptions by competitive distribution services such as Napster, Rhapsody, and iTunes.

What we are talking about here is not casual recording by listeners. We are talking about technologies that allow broadcast programs to be automatically captured and then disaggregated, song-by-song, into a massive library of music, neatly filed in a digital jukebox and organized by artist, song title, genre and any other classification imaginable. Listeners will be able to build entire collections of content without the need to ever purchase any of it; indeed, they won't even have to listen to it. This is not fair use. It is not time-shifting. The resulting harm from loss of sales threatens to rival or even surpass that of peer-to-peer ("P2P") file-sharing, which has already devastated the music and other content industries. Unlike P2P, digital radio downloads will offer pristine copies of songs without the threat of viruses and spyware. The ubiquity and ease of use of radios outstrips that of computers, and the one-way method of communication allows individuals to boldly engage in piracy with little fear of detection.

The recent Supreme Court ruling in the *Grokster* case recognized the liability of companies that encourage and induce online piracy, and offers the promise of a brighter future for creators of music and fans. We can't allow that future to be dampened by new

business models that cannibalize the creative content they depend on. We are absolutely fine with any and all new radio features that give consumers more flexibility – but like their competitors in the download and subscription space, they need to be licensed in the marketplace. The record companies have shown a great willingness over the past few years to license new and creative services to bring more choices to consumers. We look forward to evaluating new business models that expand the capabilities of radio broadcasts. But it needs to be done in the marketplace at fair rates.

The law as it now stands was written for a traditional radio service – that is, a service that broadcasts music for passive listening, not as a download service. Payment under the law is very different for a broadcast as opposed to a download. Radio services are entitled to a statutory license, if a license is even required. Download services, however, must be licensed in the marketplace. When a radio service adds features to effectively become a download service, it should not be allowed to merely use the radio license without paying the same marketplace price that download services pay. It is unfair to the legitimate distribution services and retailers, and it is unfair to the copyright owners who deserve fair compensation.

The convergence of radio and downloading capability, while providing great opportunities, requires changes in the law that protect against a company transforming its radio service into a distribution service without the appropriate license. There are two components to implementing these changes: readdressing the license this Committee passed into law for satellite, cable, and Internet radio services; and enabling the FCC to appropriately address over-the-air digital radio services which are not covered by this license.

License granted to satellite, cable, and Internet services

Recognizing the unprecedented threats of piracy imposed by new methods of digital distribution, Congress used the Digital Performance Rights Act (DPRA) and Digital Millennium Copyright Act (DMCA) to grant owners of sound recording copyrights a limited digital performance right. While artists and record labels were finally compensated for the broadcast *performances* of their work, the same law granted a limited license for satellite, cable, and Internet services to use these works after paying a compulsory licensing fee. In an effort to allow satellite services to establish themselves, the law provided them this compulsory license without the full range of requirements imposed upon other digital broadcast platforms. It is now clear that satellite radio, especially with proposed features allowing permanent copying and disaggregation, presents the same issues as these other digital platforms and should be brought into conformity.

Other services operating under the same statutory license are prohibited from enabling listeners to make copies of the songs broadcast in their programs. The lack of similar prohibitive language for satellite broadcasters has provided them an unfair competitive advantage. Congress must address this discrepancy so that all statutory licensees have the same obligation to safeguard content and its providers.

Satellite radio should also not be able to rely on the Audio Home Recording Act (AHRA) as an excuse to create an unlicensed download service. The AHRA was passed by Congress in 1992 to address "serial copying" by digital audio tape recorders, not to address downloading functionality that facilitates the making of personal collections that substitute for sales. The small royalties provided by the AHRA were never intended to

substitute for the marketplace licenses afforded download services. Congress's attention to one small category of digital recorders dictates against application of the AHRA to an unintended medium. At the same time, it underscores the need for Congress to continue to protect creative content in a fast-evolving digital marketplace.

Over-the-air digital broadcasts

Importantly, the digital performance right granted to artists and labels does not extend to over-the-air digital broadcasts. This lack of a performance right means we only derive revenue from the sale of music listeners ultimately buy. Yet, unfettered copying and storing features on this platform will displace those sales. If listeners are able to instantly make a free copy of the song they are listening to, they will see little reason to purchase it. We know this from the P2P experience.

The consequences go beyond a record company's bottom line. The parties affected by this uncompensated copying include artists, songwriters, music publishers, studio musicians, engineers, and the many others who help bring music to the public. In addition, broadcasters and retailers themselves will lose an important new source of revenue by failing to provide a "buy" button enabling consumers to purchase the music they want to own. And they also risk losing a significant portion of their listeners who build up personal libraries of music and choose to listen to that instead of radio broadcasts. The loss of listeners means the loss of advertisers who will see diminishing returns on this platform. The availability of free music further threatens the growth of licensed on-demand download services struggling to provide the same content at a reasonable price. And, of course, the loss of sales ultimately affects consumers, as companies are no longer able to invest in the production of new content.

In this instance, it is not possible to rely on market forces to level the playing field. Artists and labels have no leverage to withhold content since they don't have a performance right for over-the-air radio and are subject to a compulsory license for performances over the other platforms. This lack of a market solution, and because over-the-air broadcasters are not covered by the copyright license, requires that the FCC, the regulatory agency that controls the signal for over-the-air radio, be granted the jurisdiction to address these issues. We want to ensure parity and require over-the-air digital broadcasters to follow the same rules as those set by you for their competitors in section 114 of the Copyright Act. We would urge that any grant of jurisdiction impose the same rules on over-the-air broadcasters as are imposed on competitor services based on any changes to the copyright license that you choose to make.

In requesting these changes we note that the lack of a performance right for over-the-air radio is unfair in its own right. But to allow this absence of a performance right to give radio services the unbridled ability to add download features – for which competitor services must pay market prices – is to add insult to injury.

We also want to be clear that nothing we are seeking would change consumer expectations about how they use radio. Listeners can still hit a record button when they hear a song they like, and can engage in time-shifting, and in Tivo-like recording by time, program or channel. We merely ask that the line be drawn at automatic searching, copying, and disaggregation features that exceed the experience they, and Congress, expect from radio.

Finally, we are not seeking a delay in the rollout of new technology. Like everyone, we see the promise in exciting new platforms, and we want to see them in the

marketplace soon. But we need to ensure that any rollout occurs in a responsible way that respects the rights of content providers and the legitimate business concerns of other competing platforms. We continue to encourage those in the digital radio business to work with us. These services have built multi-billion dollar companies through grants of extremely low royalty rates (or even, for over-the-air radio, no royalty rates) and rely on our continued ability to provide desirable content. That ability will only come with appropriate protection and market compensation.

Simply, services that operate as broadcast stations should not offer features that enable song-by-song disaggregation and permanent storage in digital libraries without paying the same market prices that licensed download services pay. Satellite and over-the-air radio broadcasters need to prevent the unrestricted redistribution of recordings and the ability to perform search-facilitated or automated copying so that individual recordings cannot be separated from surrounding content. To ensure the appropriate and responsible rollout of these new technologies, Congress should grant jurisdiction to the FCC to require parity with all of the conditions prescribed in section 114 and in equal measure for all platforms.

Thank you.