Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
SATELLITE CD RADIO, INC.	)	File Nos. 49/50-DSS-P/LA-90
Application for Digital Audio	)	58/59-DSS-AMEND-90
Radio Service Satellite System	)	44/45-DSS-AMEND-92

RESPONSE OF THE
HOME RECORDING RIGHTS COALITION

The Home Recording Rights Coalition ("HRRC") submits these comments in response to the comments filed in these proceedings by the Recording Industry Association of America ("RIAA") on November 13, 1992 (the "RIAA Comments").[1/]

SUMMARY

HRRC takes no position generally on the issue advocated by the RIAA as to whether broadcasters should be required to pay a royalty to sound recording producers for the right to broadcast copyrighted sound recordings, i.e., performance rights for sound recordings. HRRC disagrees, however, with RIAA's suggestion that the Commission should provide these new legislative rights through an administrative proceeding. Congress should make this decision. Moreover, the implicit rationale for the RIAA's argument -- the possible displacement of album sales by home

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[1/] HRRC also previously submitted comments and reply comments with respect to the issues raised herein by the RIAA in the matter of Establishment and Regulation of New Digital Audio Services, GEN Docket 90-357, FCC 90-281, annexed hereto as Exhibits A and B, respectively.

taping from broadcasting -- already has been addressed by Congress in the past few months. With the ink barely dry on the Audio Home Recording Act of 1992, the FCC should not be asked to supplement the remuneration that Congress, just recently, deemed equitable.

I. ADOPTION BY THE COMMISSION OF A PERFORMANCE RIGHT FOR SOUND RECORDINGS WOULD USURP CONGRESS'S CONSTITUTIONAL ROLE IN ESTABLISHING COPYRIGHT LAW AND POLICY.

The Constitution vests Congress with the authority to promote the progress of the useful arts and sciences by securing to authors for limited times certain exclusive rights to their works. One of the rights that Congress granted under this constitutional authority, but only for certain types of works, is an exclusive right of public performance of the works.

Decisions on fundamental copyright policy changes, such as the change advocated by RIAA, should be considered by Congress. Indeed, Congress is best positioned to evaluate and balance the competing interests and policies implicated by the RIAA's Comments:

- Congress is best positioned to take into consideration consumer interests. Satellite broadcasters may pass new performance right royalty fees directly on to consumers through higher monthly service costs or they may be required to seek advertising revenue in order to pay these additional fees which, ultimately, are a cost borne indirectly by consumers in the form of higher product costs. Moreover, the character of digital satellite radio service as a commercial-free or commercial-laden

medium will affect consumers' acceptance of this new medium, and their willingness to pay monthly subscription costs. Especially during the initial phase of operations, satellite broadcasters are unlikely to be able to bear these costs, creating pressure to pass them on to consumers.[2/]

- Congress is also best positioned to consider how the performance rights issue will affect international copyright and trade policy. Some countries currently require payment of performance royalties for broadcast of sound recordings, yet deny royalty revenues to U.S. interests. Some countries limit the rights of sound recording producers to "neighboring rights" and, unlike the United States, grant no copyright protection to sound recording producers. Discussions addressing these policy issues currently are underway in the Uruguay Round of the General Agreement on Tariff and Trade talks regarding Trade-Related Intellectual Property Rights and in the World Intellectual Property Organization. Decisions as to whether, when, or how sound recording producers may be granted performance rights must be considered in light of their impact on these multilateral negotiations and international relationships. In these respects as well, such decisions should be, and ultimately will have to be, addressed by Congress.

[2/] Because RIAA proposes imposing these new rights only on digital satellite broadcasters, any new royalty fees could create economic distortions that disadvantage those who pay over those who are exempted. Thus, the rights of analog and future digital terrestrial broadcasters, digital cable broadcasters, analog satellite and cable broadcasters must be considered.

Congress previously considered the pros and cons of sound recording performance rights within the total context of copyright and public policy. The judgment of Congress, thus far, has been to grant performance rights to some works, but not to sound recordings.[3/] Although RIAA terms this decision an "historical anomaly," the fact remains that these policies reflect the deliberation and legislative judgment of Congress.

If, as RIAA contends, new technologies merit additional rights, then their arguments again should be presented to Congress, not "appealed" to the Commission.

II. ADOPTION BY THE COMMISSION OF A PERFORMANCE RIGHT FOR SOUND RECORDINGS WOULD SET A POOR PRECEDENT FOR FUTURE COPYRIGHT POLICY.

This is an exciting time for the broadcasting industry and, more important, the public. New digital audio and video technologies that will enhance the quality of home broadcast and cable reception rapidly are becoming available. Digital radio receivers for terrestrial, satellite and cable transmissions will soon be a reality for consumers. Digital television broadcast and cable reception await us in the near future. Consumers now can purchase digital audio recorders for the home. One easily can foresee, in the not-too-distant future, that consumers will use digital camcorders and watch television and film programming

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[3/] Under the 1976 Copyright Act, the copyright owner of a musical work is entitled to royalties for a public performance of the work; however, this right does not extend to copyright owners of sound recordings. Compare 17 U.S.C. § 106(4) with 17 U.S.C. § 114(a).

on digital video recorders. At the same time, technology is expanding the number of programs and delivery services available to consumers.

Each new technological advance over the last twenty years has spawned legal challenges by the copyright community in Congress or in the courts, or in both fora.[4/] The introduction of the videocassette recorder and the digital audio tape recorder were followed by litigation over claims of contributory copyright infringement and impending financial doom. A ten-year legislative debate over the legal rights and relationships among consumers, equipment manufacturers and copyright interests, only ended recently with the enactment of the Audio Home Recording Act of 1992 (see Section III, below).

The Commission thus should be extremely wary of any invitation to resolve disputes at the crossroads of technology and copyright. Just as RIAA now claims that new digital satellite radio technology threatens its industry, other copyright industries will raise similar claims as to other new technologies. The Commission must recognize that if it endeavors to resolve the issues that RIAA presents today, it most assuredly

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[4/] Of course, in every case, new technology has proved to be the best friend of copyright interests, and has brought them extraordinary new business opportunities, revenues and profits. It seems unthinkable today that the film industry ever could have opposed the VCR; yet, the copyright dispute over consumer VCR use ultimately had to be resolved by the Supreme Court. While HRRC believes that new technology only enhances the economic vitality of copyright interests, HRRC also must acknowledge that copyright interests consistently have disagreed, and that each new technology reopens old legal controversies over the rights of copyright holders and consumers.

must be prepared to be faced, repeatedly, with new and increasingly complex issues of copyright policy that will arise throughout this decade and into the next century.

RIAA incorrectly suggests that a performance right for its industry is no different than the rights protected by the Commission's syndicated program exclusivity or "syndex" rules promulgated in the early 1970s. The analogy simply does not hold, for two reasons. First, in promulgating the syndex rules, the Commission acted under its authority to protect and regulate the rights of broadcasters, who spent billions of dollars to create and purchase television programming, in light of cable operators' ability to legally retransmit programs at operating cost. See Malrite TV v. FCC, 652 F.2d 1140, 1145-46 (2d Cir. 1981). No comparable broadcaster interest is imputed by RIAA's requests here for additional control over broadcaster programming content or for new royalties. Second, at the time of the Commission's action in the early 1970s, copyright holders in the programming already were granted, under the Copyright Act, rights to remuneration for the initial broadcast transmission. In this case, sound recording producers have no equivalent rights. Whereas the Commission in the syndex rules was extending existing rights into a new broadcast context, RIAA herein invites the Commission to create new rights.

Thus, on this basis as well, HRRC respectfully believes that any legal copyright disputes should be resolved not by the Commission, but by Congress.

III. THE IMPLIED BASIS FOR RIAA'S REQUEST ALREADY HAS BEEN ADDRESSED BY CONGRESS IN THE AUDIO HOME RECORDING ACT.

The decades-long legal controversy over home taping, and any alleged economic harm from such taping, was settled, once and for all, earlier this year. On October 28, 1992, President Bush signed into law the Audio Home Recording Act, S. 1623, 102d Cong., 2d Sess. (1992) (Pub. L. No. 102-563) ("AHRA" or the "Act"). A copy of the Act is attached for the Commission's convenience as Exhibit C hereto.

The Act, enacted by Congress as a new chapter in the Copyright Act, provides a broad exemption for manufacturers, distributors and consumers from any copyright infringement action based on the manufacture, sale or use of consumer analog or digital audio recorders and blank media. AHRA § 1008. In return, those manufacturers and distributors will make royalty payments for the benefit of authors, record producers and performers upon the sale of digital audio recorders and blank digital audio media, AHRA § 1004; and digital audio recorders will include a copy limitation system that prevents the making of copies from copies of commercially distributed copyrighted recordings or broadcasts. AHRA § 1002. Therefore, in the Audio Home Recording Act, Congress already determined an appropriate level of equitable compensation for the benefit of copyright interests with respect to home audio recording.

Indeed, Congress was so clear on the level of equitable compensation to be paid to these copyright interests that it explicitly provided that the royalty payment rates could not be

increased at all. AHRA §§ 1004(a)(1) and (b). The Act also provides for a payment maximum or royalty "cap" with respect to payments on digital audio recorders, that cannot be increased at all for a period of five years; and thereafter may be increased if, and only if, more than twenty percent of the royalty payments were being made at the cap. AHRA § 1004(a)(3). Even then, the cap could be increased only so as to assure that ten percent or less of the royalty payments would be made at the cap, but in no event to exceed the rise in the Consumer Price Index during that period. Id.[5/]

Although this issue was resolved only weeks ago, unfortunately RIAA's comments again raise the specter of "home taping losses," albeit indirectly. RIAA complains that if radio sounds as good as a compact disk, "it does not take a great deal of imagination to foresee what choices consumers will make"; and, that if a digital radio service is permitted to broadcast an entire popular album,[6/] it could "virtually wipe out the economic incentive now afforded to record creators." RIAA Comments at 3, 9. Since HRRC assumes that RIAA is not afraid of consumers listening to recordings, it does not take a great deal

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[5/] Importantly, Congress also deemed that no royalty should be paid with respect to home recording on analog equipment and media, even though covered by the exemption from suit in section 1008 of the Act.

[6/] In its prior submissions to the Commission, HRRC has expressed its opposition to RIAA's proposed rule against broadcasting more than a single cut by a particular artist in a limited time period as detrimental to broadcaster creativity and consumer enjoyment, and potentially as an unconstitutional regulation under the first amendment.

of imagination to recognize that RIAA is trying to use the Commission's power to supplement -- and, if successful, potentially to subvert -- congressional determinations.

The Commission should not countenance such arguments. If some equitable remuneration is due to the recording industry from consumer home copying on digital recorders, that appropriate rate already has been set by Congress. The Commission should not be called upon to second-guess that legislative judgment. If it is appropriate to collect royalties for commercial use of sound recordings, then that issue should be presented squarely to Congress, and separately considered and weighed on its own merits.

CONCLUSION

Digital audio radio broadcasting already presents the Commission with complex issues of technology, spectrum allocation and broadcast policy. We do not believe the Commission also should be saddled with decisions affecting domestic and international copyright policy.

HRRC respectfully submits that decisions as to substantive copyright issues such as performance rights, or economic issues of equitable compensation for existing rights, should continue to be left to Congress.[7/]

[7/] The Home Recording Rights Coalition includes companies that are involved in the manufacture, sale and distribution of audio and video recorders and tape, and related equipment. They include 3M Co., Alpine Electronics Corporation of America; BASF Systems Corporation; Fuji Photo Film USA, Inc.; General Electric
(continued...)

Respectfully submitted,

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Dated: December 15, 1992

7/ (...continued)
Company; Hitachi Home Electronics (America) Inc.; International Jensen Inc.; JBL Incorporated; JVC Company of America; Maxell Corporation of America; N.A.P. Consumer Electronics Corporation; Sansui Electronics Corporation; Sanyo Manufacturing Corporation; Sears, Roebuck & Co.; Sony Corporation; TEAC Corporation of America; Thomson Consumer Electronics USA; Toshiba America, Inc.; Yamaha Electronics Corporation.

Membership also includes many prominent trade associations and consumer groups, such as the American Council of the Blind; the Consumer Recording Rights Committee; the Electronic Industries Association; the International Mass Retail Association; the International Society of Certified Electronic Technicians; the National Association of Retail Dealers of America; the National Retail Federation; the National Association of Television and Electronics Servicers of America; the National Electronic Sales and Services Dealers Association.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 15, 1992, a true and correct copy of the foregoing Response of the Home Recording Rights Coalition served by hand upon:

Donna R. Searcy
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554
(original plus nine copies);

and was served by first class mail, postage prepaid upon:

Robert Briskman
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Gary J. Shapiro

EXHIBIT A

RECEIVED
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

Establishment and Regulation of New Digital Audio Radio Services	)))	GEN Docket No. 90-357 FCC 90-281

COMMENTS OF THE
HOME RECORDING RIGHTS COALITION

Pursuant to the Notice of Inquiry of Proposed Rulemaking in GEN Docket No. 90-357, FCC 90-281, released August 21, 1990, and published in 55 Fed. Reg. 34940 (Aug. 27, 1990), and the procedures set forth in 47 C.F.R. §§ 1.415 and 1.419, the Home Recording Rights Coalition (hereinafter "HRRC")[1] respectfully submits these comments on the Commission's initial inquiry into the Establishment and Regulation of New Digital Audio Radio Services.

In particular, HRRC responds to the suggestion by the Recording Industry Association of America (hereinafter "RIAA")[2]

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[1] The HRRC is a coalition of consumers, manufacturers and retailers of audio and video recording products dedicated to promoting the public's right to use recording equipment for their personal edification and entertainment. Member manufacturers include 3M Co., Ampex Corp., BASF Systems Corp., International Jensen, Inc., JBL Inc., Matsushita Electric Corp. of America, North American Philips Corp., Sears, Roebuck & Co., Sony Corporation of America, Tandy Corp. and Thomson Consumer Electronics, Inc. Trade association members include the American Counsel for the Blind, Electronic Industries Association, and National Association of Retail Dealers of America.

[2] The "Comments of the Recording Industry Association of America" were submitted in connection with the Request for Amendment of the Rules to Establish a Satellite and Terrestrial CD Quality Broadcasting Service, RM-7400, in response to the Petition of Satellite CD Radio, Inc. Because the present proceeding encompasses the petition of Satellite CD Radio, plus the petitions of Radio Satellite Corporation and Strother Communications, Inc., HRRC submits this response to RIAA's Comments in this combined and expanded inquiry.

that the benefits of digital radio should be delayed or denied the public because certain aspects of digital radio, although entirely lawful, may not serve the private commercial interests of the RIAA's members. For the reasons summarized below, RIAA's complaints are wrong-headed and short-sighted.

First, RIAA's complaint that the copyright laws inadequately protect its interests should be made to Congress, which has exclusive jurisdiction over such issues, not the Commission. Indeed, RIAA's arguments favoring performance rights and opposing home taping previously have been made to and rejected by Congress.

Second, RIAA's proposal to mandate the broadcast of unnecessary subcode information similarly attempts an end run around the obligation of Congress and the courts to set copyright policy. Requiring transmission of the subcode information requested by RIAA could allow RIAA members unilaterally to eliminate legitimate home taping and effectively implement a royalty tax system, without any statutory justification for doing so. To the extent that certain other subcode information may be useful to the public, although not necessary for broadcast reception, broadcasters can decide whether to adopt it voluntarily.

Finally, RIAA's complaint that digital radio will become "the electronic record stores of the future" disingenuously ignores the immense profit potential of digital radio for the record industry. RIAA can take ample commercial advantage of digital radio, without asking the Commission to stack the deck in RIAA's favor.

HRRC therefore urges the Commission to reject RIAA's suggestions, and to consider digital radio solely on its own merits, for the public good.

I. The RIAA's Complaints Belong Before Congress, Not the Commission.

RIAA's principal objection to digital radio is that the copyright laws allegedly are inadequate to protect RIAA's interests. Unless broadcasters acquire licenses to broadcast copyrighted sound recordings, argues RIAA, "record companies and their performing artists and musicians will receive no compensation for the commercial public performances of their works . . . ." RIAA Comments at 5-6.

However, this situation is not unique to digital radio. Under United States copyright law, songwriters and composers receive performance royalties from AM and FM radio broadcasts, but holders of copyrights to sound recordings do not. While RIAA views this as "an historical anomaly," id. at 5, Congress intentionally chose not to enact this "performance right" for sound recordings when enacting the Sound Recording Act of 1971, and when subsequently revising the Copyright Act with respect to sound recordings in 1976 and thereafter. There is no evidence that current broadcast technology has injured the record industry, and there is no reason to believe that the better quality and reception offered by digital radio will radically alter consumer taping habits to the record industry's detriment. In any event, whether performance rights or royalty taxes should be enacted in light of new or future

technologies, such as digital radio, remains exclusively with Congress.[3]

RIAA's objection to home taping from digital broadcasts similarly is based on copyright law and is irrelevant to whether and how digital radio should be established in the United States. Recording off-the-air broadcasts has been a legitimate, commonplace practice since the invention of the tape recorder. In granting copyright protection to sound recordings, Congress deliberately placed home taping outside the exclusive rights of copyright holders. The legislative history of the Sound Recording Act of 1971 makes this Congressional intent unmistakably clear:

> 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.

H.R. Rep. No. 92-487 at 7 (1971). This plain statement of Congressional purpose has never been revoked by Congress either explicitly by statute or implicitly through legislative history.[4]

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[3] U.S. Constitution Art. I, Sect. 8, Cl. 8 provides, in pertinent part, that "The Congress shall have Power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." (Emphasis added.)

[4] The admonition of the Supreme Court against unilaterally extending the scope of copyrights, written in the context of the movie industry's attempt to outlaw the videocassette recorder, applies with even greater force here:

> From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed,

Similarly, no court ever has found that home taping for personal use violates the copyright laws. To the contrary, the Supreme Court affirmed in the directly analogous context of off-the-air videotape recording for personal use that home taping is a legitimate activity -- "a paradigmatic noninfringing use" -- that cannot and should not be prevented by copyright holders. Sony Corp. v. Universal City Studios, 464 U.S. 417, 446 n.28 (1984).

Moreover, empirical evidence disproves RIAA's unsupported claim that revenue losses from home taping will multiply with the introduction of digital radio. The Office of Technology Assessment of the U.S. Congress ("OTA") concluded in its October 1989 study, Copyright & Home Copying: Technology Challenges the Law, that at least 78 percent of home taping of prerecorded music displaces no sales, and the actual figure probably is much higher. Id. at 157-159.[5] Home tapers are the largest purchasers of prerecorded music,

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> it was the invention of a new form of copying equipment -- the printing press -- that gave rise to the original need for copyright protection. Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. *** But it is not our job to apply laws that have not yet been written.

Sony Corp. v. Universal City Studios, 464 U.S. 417, 430-31, 456 (1984) (**emphasis** added).

[5] The OTA found that of those persons surveyed, only 27 percent had made such tapes in the past year, Table 5-6 at 263; and that only 45 percent had ever made tapes from broadcasts, Table 5-5 at 262. Of those who had ever taped from broadcasts, 56 percent involved taping of single selections, and only eight percent involved taping of albums. OTA Study at 155. Moreover, approximately one-third of all broadcast taping was done by persons between 10-14 years of age, whose interest in music far outpaces their spending power. Table 5-9 at 264.

and taping actually stimulates record sales. Id. at 145-146, 159. On balance, OTA found, the negative economic impact to society from outlawing home taping far outweighs the potential losses from home taping to the recording industry. Id. at 191-207.[6]

In short, the changes in copyright law suggested by RIAA are not germane to the inquiry now before the Commission, and should not affect the implementation of new digital audio radio services.

II. The Commission Should Not Mandate Inclusion of Unnecessary Subcode Information.

RIAA misleadingly suggests that the technical subcode information it asks the Commission to make mandatory is "essential" for reception or recording[7] of the digital broadcast signal. RIAA Comments at 7-8. In fact, as RIAA knows, all essential subcodes for reception and recording already will be supplied by the signal or by default by the digital receiver.[8]

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[6] RIAA also offers no evidence to suggest that the improved sonic quality of digital radio automatically would translate into increased home taping from broadcasts. In fact, OTA found that even basic technological distinctions such as grades of blank tape, or developments such as dual-cassette and high-speed dubbing decks, have not affected consumer taping habits. Id. at 146.

[7] Curiously, the RIAA in one section of its Comments decries home taping while insisting in another section that subcode information to enable home taping is "essential."

[8] For example, the International Electrotechnical Commission standards for implementing the Serial Copy Management System require that digital broadcast receivers that issue subcode information in an IEC 958 interface signal must indicate in the output signal that the broadcast material is protected by copyright (unless intentionally overridden by the broadcaster) and that the material is of an original generation status. These same standards would have been mandated under United States law by the Digital Audio Tape Recorder Act of 1990, and the Technical Reference Document incorporated therein by reference and published in 136 Cong. Rec. E376 (Feb. 26, 1990).

RIAA's brazen attempt to slip through subcode information for "accounting" and "collection and/or distribution of royalties related thereto" is completely unjustifiable and presumptuous. Copyright law does not impose royalty taxes on either broadcasting or home recording of broadcast music. Prior RIAA attempts to impose performance royalties or royalty taxes on blank tape and/or recorders have been rejected soundly by Congress. Thus, RIAA's request for mandatory royalty and collection subcodes is, at best, highly premature and, at worst, an insidious attempt to impose administratively what it has been unable to achieve legislatively. It would be inappropriate to mandate broadcaster expenditures simply to satisfy RIAA's wishful thinking.

In fact, RIAA has recognized that such matters must be addressed by Congress rather than the Commission. Provisions addressing the limited circumstances in which inclusion of subcode information relating to the operation of the Serial Copy Management System[9] would have been addressed in the Digital Audio Tape Recorder Act of 1990, which was considered in the 101st Congress by both the House and Senate as H.R. 4096 and S. 2358, respectively. These bills, which were not enacted into law, were drafted in consultation with RIAA and HRRC, and submitted to Congress with their mutual support.

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[9] The Serial Copy Management System (SCMS) is designed not to prevent the making of first-generation digital tape copies from copyrighted digital sources (such as broadcasts, CDs or digital audio tapes), but to preclude the making of further generations of digital copies from those first-generation copies. SCMS is implemented in digital audio tape recorders currently offered for sale in the U.S. consumer market.

However, these bills included an essential safeguard for consumers, noticeably absent from RIAA's proposal to this Commission, that would require the recording industry to encode phonorecords to work accurately in conjunction with the Serial Copy Management System.[10] If recording companies, instead, encode products furnished to broadcasters so as to "fool" DAT recorders, the RIAA's suggested mandatory broadcast of these subcodes could prevent all home taping from broadcasts. By asking the Commission to require administratively the broadcast of these codes, without the complementary safeguard, RIAA is asking the Commission to make an end run around Congress and the courts, so as to allow record companies unilaterally to frustrate home tapers.

The remaining subcodes described by RIAA similarly serve the private commercial interests of the recording industry rather than the interests of the public. If a broadcaster believes that supplying information regarding artists, songwriters, tracking times, liner notes, etc., may be of benefit to the public, it voluntarily may do so or, if necessary, may contract with record companies to make such information available. There is no need to mandate the inclusion of such optional information, and thereby

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[10] Section 3(d) of the Digital Audio Tape Recorder Act of 1990 provides in relevant part:

> ENCODING OF INFORMATION ON PHONORECORDS.--(1) No person shall encode a phonorecord of a sound recording with inaccurate information relating to the category code, copyright status, or generation status of the source material so as to improperly affect the operation of the serial copy management system.

force broadcasters to incur additional burden and expense that may not be justified by commercial or policy considerations.[11]

HRRC submits that the Commission should resist RIAA's invitation to usurp Congressional legislative authority. The Commission should reject RIAA's suggestion of mandatory inclusion of digital subcodes in digital radio signals.

III. Digital Radio Carries Tremendous Commercial Potential for the Recording Industry.

The value of the free broadcast system has been proven over and over. At bottom, RIAA's proposal is to convert the United States system of free commercial broadcasting to one of possibly universal pay-per-performance. There is no evidence that free broadcasting and private pay systems cannot coexist. More importantly, there is no evidence that the presently successful free system needs to be converted to a pay system at this time.

This is not the first time that technical enhancements have been viewed, instead, as threats. Only ten years ago the movie industry's cries of mortal injury from home taping very nearly killed the videocassette recorder and, in its wake, the booming home video market. RIAA apparently is poised for a repeat performance with respect to digital radio.

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[11] Specifically to avoid such burdens, Section 3(e) of the Digital Audio Tape Recorder Act of 1990 intentionally was drafted to give broadcasters the option to transmit no subcode information whatsoever; but if the broadcaster chose to transmit any subcode information, only the subcode asserting (or not asserting) copyright protection for the work was required to be accurately transmitted.

Little imagination is necessary to see how digital radio will profit the recording industry. Just as traditional radio broadcasting has done for decades, digital radio will be the primary marketing tool for the recording industry to expose consumers to new music at home, in their cars, or through portable units. Digital radio's capacity to serve a widespread satellite audience will make new radio formats commercially viable and, thereby, will create new avenues for record companies to market music that otherwise might not be heard on commercial airwaves.

In short, the RIAA is dead wrong in suggesting that the digital radio "celestial jukebox" means the sky is falling when, in truth, the sky's the limit. The recording industry, musicians, songwriters, broadcasters and American business in general all stand to benefit handsomely from this new technology. But instead of focusing on innovative marketing strategies, RIAA asks the Commission to stack the deck in its favor. To accord such special treatment to a thriving industry like the record industry surely will thwart the development of digital radio. At this critical incipient stage, HRRC submits that this is too high a price for society to pay.

IV. CONCLUSION

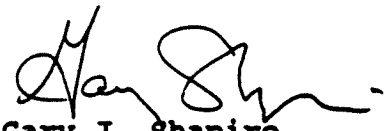
Digital radio promises tremendous opportunities for business and the public. It portends exciting new possibilities for radio to educate, inform and entertain the public. In the near future, digital radio subscribers may program their own news shows from a

list of available stories; or type in questions for interview programs or political candidate debates.

Such promising new digital radio applications cannot reach the public until the technological, distribution and programming systems achieve an initial level of maturity. Japan, Canada and Europe already have begun experimenting with digital radio. The United States, traditionally a leader in broadcast technology and programming innovations, should not delay development and implementation of this clearly beneficial and exciting technology.

HRRC therefore respectfully submits that the Commission should not delay its inquiry into new digital audio radio services in order to ponder legislative, indeed constitutional, consideration of issues such as those raised by RIAA. Insofar as RIAA's Comments all implicate United States copyright law and policy, they are better left to the legislative judgment of Congress.

Respectfully submitted,



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November 13, 1990

EXHIBIT 6

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

Establishment and Regulation of New Digital Audio Radio Services	)))	GEN Docket No. 90-357 FCC 90-281

REPLY COMMENTS OF THE
HOME RECORDING RIGHTS COALITION

On November 13, 1990, the Home Recording Rights Coalition ("HRRC") submitted Comments on the Commission's initial Inquiry into digital audio radio broadcasting. HRRC directed its Comments primarily to suggestions by the RIAA, made in connection with prior rulemaking proceedings,[1] that the Commission use digital radio as a means to achieve administratively copyright royalty tax and technological restrictions against home taping.

HRRC argued that neither the ends nor the means implied by RIAA's proposals are justifiable or warranted. Congress and the Supreme Court consistently have refused in any way to ban, tax or restrict private, noncommercial home taping from broadcasts. If RIAA succeeds in its strategy to achieve administratively what Congress has explicitly rejected, its success would undermine the authority of Congress and the credibility of the Commission.

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[1] The "Comments of the Recording Industry Association of America" were submitted in connection with the Request for Amendment of the Rules to Establish a Satellite and Terrestrial CD Quality Broadcasting Service, RM-7400, in response to the Petition of Satellite CD Radio, Inc. HRRC's Reply here addresses the comments filed by the RIAA in the present proceeding.

Administrative repeal of longstanding copyright law and policy is simply not justified. Fears that digital audio will destroy the market for prerecorded software are frankly no different than the past complaints against earlier technologies, such as analog cassette recorders, dual-deck cassette recorders and videocassette recorders -- all of which products have brought the copyright holders record-setting revenues. Had the government heeded all these past warnings, from the "perils" of AM radio live concert broadcasts through the "menace" of digital technology, the music industry today would still be heard only in halls and theaters, rather than in halls, theaters, living rooms and cars, and at the beach.

The fact is that technology creates new markets for the music industry. The recording industry again, through innovations by third parties, is offered enhanced profit opportunities from digital audio radio broadcasting and cable services.[2] For the government to restrict this technology, as RIAA suggests, would, at best, stifle creativity and innovation in this new medium and, at worst, stifle digital broadcasting itself.

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[2] Moreover, as the U.S. Congress Office of Technology Assessment found, home taping from broadcasts, or any medium, on balance does not displace record sales. To the contrary, OTA verified that home taping stimulates record purchasing and that home tapers are the music industry's biggest customers. HRRC will address its comments on home taping in the context of digital audio broadcasting in connection with the Copyright Office Inquiry in Digital Audio Broadcast and Cable Services, Docket No. RM 90-6.

HRRC's observations in its initial Comments apply to RIAA's filing in this proceeding, as well. RIAA's filing raised certain additional issues, however, that HRRC addresses below.

1. The Commission Need Not Require Digital Audio Services To Acquire Copyright Licenses. RIAA first asks the Commission to require digital audio services to acquire licenses to transmit or broadcast sound recordings. If unlicensed transmissions or broadcasts would violate the Copyright Act, then copyright holders already have the legal means to negotiate necessary licenses or to prosecute infringers. If unlicensed transmissions or broadcasts nonetheless are lawful under the Copyright Act, then there is no justification for requiring broadcasters (and, ultimately, consumers) to shoulder additional expense and burden. In either case, Commission action is unnecessary.

As HRRC noted in its initial Comments, the purported "historical anomaly" denying performance rights to holders of copyrights in sound recordings was, in fact, a deliberate decision that Congress made when it originally granted rights to sound recordings in 1971, and made again when it revamped the Copyright Act in 1976, and made again in 1978 when it specifically considered this issue. If RIAA has new or more persuasive reasons why it now should be entitled to such royalties, it should address a request to Congress, not an "appeal" to the Commission.

2. The Commission Should Let Individual Broadcasters Decide Whether to Broadcast Extraneous Subcode Information. As HRRC noted in its original filing, no additional subcode information is

necessary for accurate reception of digital signals or for operation of the Serial Copy Management System for digital audio tape recorders. HRRC Comments at 6-9. The subcodes that RIAA seeks to make mandatory relate solely to its own commercial interests and its home taping agenda.[3]

Broadcasters Want Subcode Bandwidth For Other Purposes. Comments submitted by broadcasters to the Commission in this Inquiry almost uniformly emphasize the need to limit the number of bits to be transmitted or broadcast per second so as to minimize bandwidth and expense, and to maximize use of the available spectrum. While the RIAA naturally would like to reserve to itself these subcode bands, broadcasters have in mind other plans to serve their audiences; e.g., to display on-screen information such as station identification, weather forecasts, traffic updates, sports scores or stock market reports, whenever the listener wants it and without interrupting the program flow.

HRRC submits that the Commission should not mandate broadcast of optional subcodes to serve the commercial interests of the music industry, or any particular industry. Each broadcaster should instead be free to determine whether to broadcast any industry-specific subcode data, whether related to music, news, business,

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[3] RIAA in its Reply Comments refers to a voluntary standard being proposed to the International Electrotechnical Commission, IEC 958, that would reserve 162 bits of subcode data in a compatible consumer interface signal for identification of musical compositions. While RIAA describes this proposal as if it were already a fait accompli, the proposal is in fact only in embryonic stages of consideration and, even if adopted, will be voluntary and not mandatory.

sports or any entertainment form, in the exercise of its own judgment as to how it may best serve the public.

Broadcasters Can Voluntarily Agree To Include Music-Related Subcode Information. Although in its infancy, the digital audio cable industry already has no shortage of takers for music-related information. One digital broadcaster, International Cablecasting, has announced a service benefitting both its customers and the recording industry -- a remote control unit that displays details about what is being played, and gives a toll-free telephone number to call and order the compact disc.[4] Capitol Records created its own digital audio service to promote its artists on the Digital Planet system.[5] It makes little sense to foist unnecessary subcode data upon broadcasters when those who desire to offer the RIAA's proposed services clearly have the means to do so.[6]

The Commission Should Not Mandate Broadcast of Subcode Information Simply To Support RIAA's Wishful Thinking About Royalties. RIAA now admits that the real reason it wants the mandatory broadcast of subcode information has much more to do with its own self-interest than the public interest. RIAA contends that

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[4] Lublin, "Cable TV To See If Cable Radio Means Sweet Music For Revenue," Wall Street Journal, B-10 (November 6, 1990).

[5] Nunziata, "Capitol Takes to the Airwaves Via Own Digital Cable Radio Channel," Billboard at 93 (June 30, 1990).

[6] RIAA's position, moreover, is self-contradictory. In one breath they decry the threat of digital radio displacing record sales. But in the other, they ask the Commission to mandate the broadcast of information, such as track identification, playing time and liner notes, currently exclusively provided by the industry as an inducement to purchase.

the Commission should mandate the technical system of collecting royalty taxes so that if, perchance, Congress one day enacts a right to collect such taxes, the RIAA will have its preferred means in place to do so.

This puts the cart before the horse. As HRRC noted in its Comments, Congress and the Supreme Court have consistently upheld home taping for private, noncommercial purposes as a legitimate activity that should neither be prohibited nor taxed under the copyright laws. The decision as to whether the twenty year-old legal status of home taping should now be changed rests with Congress and not the Commission. Notably, even in its comments to the Copyright Office, RIAA has not suggested collecting royalty taxes from consumers but has focused instead on collecting performance royalties from broadcasters.

Moreover, Congress has not had any chance to determine whether the particular technical assessment and collection system advocated by RIAA is fair, nondiscriminatory and nonintrusive, or even feasible. Indeed, the RIAA has failed to define just what information they want the Commission to mandate or how their system of royalty tax assessment and collection will work. The Commission should reject RIAA's attempt to administratively and technologically implement a system of taxation they have no legal right to impose.

3. The "Single Cut/Limited Period" Rule Proposed by RIAA Is An Unnecessary, Perhaps Unconstitutional, Form of Censorship. RIAA says that to avoid "devastating" the recording industry, the

Commission should administratively legislate a prohibition on digital audio radio broadcasters playing more than a single track from an album during a limited period of time. HRRC has no problem with RIAA discussing broadcast practices with broadcasters. But as a purely administrative precedent, a single cut rule would be the unkindest cut of all.

The Single Cut Rule Hampers Broadcaster Creativity and Audience Enjoyment. Making virtue a necessity tends to make necessity a virtue. As Eastern Europe has learned, over-regulation suffocates the good with the bad. Requiring additional license fees for broadcast of complete works would in effect be a tax on serious music stations. Unless broadcasters paid this additional license fee, opera lovers would hear the Overture one day, Act One Scene One the next, and so on; symphonies would be broadcast one movement at a time; jazz suites by Duke Ellington or Charles Mingus could not be heard in their intended form. Extra fees would be required for a station to honor the passing of musical giants, such as Leonard Bernstein or Aaron Copland, with broadcasts of a body of works, or to commemorate Beethoven's birthday with a broadcast of all nine symphonies. Rock stations could not play continuous works, such as the Beatles' "Sergeant Pepper's Lonely Hearts Club Band," the Who's rock opera "Tommy" or Pink Floyd's "The Wall," without again paying the piper. Broadcasters should not have to choose between excess economic burdens and public edification.

Current Practices Suggest No Need For Prior Regulation. No prior restraint has ever attached to FM stereo broadcasts, nor has

such a restriction ever seemed necessary.[7] The independent OTA study, Copyright and Home Copying: Technology Challenges the Law,[8] found that only 27 percent of those surveyed taped music from radio or television broadcasts at all during the prior year. OTA Report at 152-153. A larger percentage of those surveyed, 32 percent, had made voice recordings (i.e., other than from broadcasts or prerecorded media) in the prior year. See OTA Survey at 277, Table 9-1. Significantly, more than half of those surveyed, 54 percent, said they never had recorded music from radio or television broadcasts. OTA Survey at 262, Table 5-5. With respect to the particular prior restraint advocated by RIAA, the OTA survey suggests that only a scant eight percent (8%) of tapes made from broadcasts involved taping of entire albums. OTA Study at 155.[9]

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[7] What is perhaps most ironic about RIAA's argument is that radio always has been the industry's primary marketing tool for selling prerecorded music. Record companies give stations promotional copies of albums and other inducements, hoping to receive enough airplay to make or break a record. Consumers hearing an entire album may decide they like enough of the songs to buy it. They might not have reached that conclusion, under RIAA's proposal, by hearing the "hit single" over and over again.

[8] U.S. Congress, Office of Technology Assessment, Copyright and Home Copying: Technology Challenges the Law, OTA-CIT-422 (Washington, DC: US Government Printing Office, October 1989) (hereinafter "OTA Report"; tables of survey results in Appendix C to the OTA Report are cited as "OTA Survey, Table ___").

[9] Data about listening habits further confirms that homemade tapes of broadcasts do not displace record sales. Only about 12% of the recordings to which respondents last listened were home recorded tapes. OTA Survey at 150. Of these, less than three-and-one-half (3-1/2) percent were tapes made from radio broadcasts. OTA Survey, Table 3-14. If consumers really considered home tapes as fungible with prerecorded albums, consumers would be just as content to listen to them, and would spend much more time listening to tapes made from broadcasts than OTA found that they did. OTA Report at 156. Moreover, if home

Digital Radio Does Not Mean Increased Taping. RIAA's theory that better technology means increased taping also was disproved by OTA. Many consumers are satisfied with present levels of analog sound quality;[10] others prefer it.[11] OTA found that only one-third of consumer tapers were aware of the most basic technological distinctions affecting the sound quality of recordings, such as the grade of blank tape used for recording. OTA Report at 146, 160. Developments in recording technology such as dual-cassette and fast-speed dubbing decks also were found by OTA not to influence consumer taping habits. Id. at 161.

The Proposed Restraint May Be Unconstitutional. Even assuming that the RIAA-proposed restraint would be content-neutral, RIAA Comments at 8, it still appears to be unconstitutional. Content-neutral restrictions upon free expression violate the First Amendment if they do not further an important or substantial

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taping of broadcasts truly displaced record sales, the cassette single would never have been viable or, for that matter, would not have so quickly displaced the 45 rpm vinyl single.

[10] As Consumer Reports recently observed in reviewing digital audio tape recorders:

> Electronic measurements are precise, but they don't necessarily tell you whether human ears can hear or appreciate the difference between two sounds. Good as the instruments say the sound of DAT is, chances are that many people would find the sound of a good conventional tape deck good enough.

"Digital Audio Tape Decks," Consumer Reports 660, 661 (October 1990).

[11] A monthly magazine, The Absolute Sound, promotes the view that analog recordings and equipment sound better than digital technology.

governmental interest. United States v. O'Brien, 391 U.S. 367, 377 (1968). RIAA's one-cut rule does not promote any important or substantial governmental interest, and there is no evidence to demonstrate that RIAA's concerns are anything more than speculation and innuendo. Cf. Home Box Office v. FCC, 567 F.2d 9, 50 (D.C. Cir. 1977). The only impartial governmental evidence concerning home taping, from the OTA report, demonstrates decidedly that the rule is not needed. Moreover, the broadcast of entire works is legal, as is home taping of those works, and should not be subject to double-taxation.[12]

4. Encryption Should Not Be Required. HRRC in its initial Comments emphasized the importance of implementing digital radio within the free broadcasting system, and of rebuffing all efforts to make digital radio a pay system. Comparing RIAA's approach before the Commission with the Copyright Office Notice of Inquiry, one is left with the clear impression that copyright holders will firmly object to encryption -- unless the encryption is being used as a method to collect royalty taxes for the recording industry.

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[12] RIAA's analogy to the Commission's syndicated program exclusivity rules in the early 1970s misses an essential point. The Commission there acted out of its authority to protect broadcasters, who spent billions of dollars to create and purchase cable programming, in light of cable operators' ability to legally retransmit such programs at operating cost. See Malrite TV v. FCC, 652 F.2d 1140, 1145-46 (2d Cir. 1981). No comparable broadcaster interest is imputed by RIAA's request here for additional control over broadcast programming content or for new and unwarranted royalty taxes.

On this issue, HRRC is in solid agreement with the Comments submitted to the Commission by the National Association of Broadcasters:

> [A]lthough RIAA has not raised this proposal in the instant FCC inquiry, we strongly oppose the notion that digital audio broadcasting should operate only on an 'encryption' or 'scrambled' basis. To adopt such restrictions, the Commission would move in a direction completely opposite to that which the Communications Act directs it to proceed. This country's over-the-air broadcast service is based upon an advertising-supported and 'free' system. To require the American public to pay directly for enhanced quality audio would appear strongly at odds with these basic statutory requirements. Moreover, any such limitations, be they of a quasi-copyright nature or otherwise, would pose serious implications not only for American broadcasting, but for the Commission's overall communications policy. That is, the matters raised by RIAA are not simply 'copyright issues.' They go to the very heart of the domestic system of over-the-air broadcasting. Any adopting of the RIAA's principles here would have a direct adverse impact not only on broadcasters, but also on the listening public and on the Commission's statutory responsibilities.

Comments of the National Association of Broadcasters, FCC Gen. Docket No. 90-357 at 29 (emphasis added).

Encryption Will Cripple Digital Audio Radio Broadcasting. Encryption would only defer or deny broadcasters and the public the true benefits of digital radio. Compact disc quality sound is nice; but the vast majority of Americans want digital radio to listen to it, not to tape from it. Improved reception for rural and city dwellers and nationwide programming is far more significant to the public interest. Low power consumption and the ability to serve greater minority and cultural interests is far more important to broadcasters.

Scrambling would mandate that every digital receiver, including car radios and personal stereos, be equipped with de-encryption devices adding needless size, weight and complexity. If each channel uses the same encryption method, the purpose of encryption is defeated; but if each channel uses a different system, digital receivers would become expensive and encumbered with descrambling technology. Consumers would reject the inconvenience, and digital broadcasting itself would be defeated.

Encryption Would Set A Damaging Precedent. HRRC is particularly concerned with the precedent that would be set by encryption of digital audio broadcasts, and conditional access for recording. If this is appropriate for digital audio, why not for digital video, which surely is coming as well. In a world in which it costs extra to receive television broadcasts, and extra again to activate a VCR, the enormous benefits, for everyone, of the VCR revolution would be practically and unnecessarily forfeited. Yet this is precisely where the notion of encrypting radio broadcasts, because they are digital and because encryption is possible, leads.

Encryption serves no purpose for digital radio within the sphere of the Commission's concerns, and is bad public policy whether viewed as a matter of communications or copyright concerns.

CONCLUSION

From reading the RIAA's Comments, one would think that the music industry has been in a nose-dive because of home taping. In fact, the opposite is true. Headlines in industry publications trumpet their successes:

-- RIAA shipments, in the first half of 1990, rose nearly 11 percent compared with the first half of 1989, representing a half billion dollar increase in revenue ($3.5 billion versus $3 billion). See Inside RIAA, Fall 1990 at 7; Nunziata, "RIAA: Trade Soared in First Half," Billboard, October 13, 1990, at 1.

-- The National Music Publishers Association ("NMPA") reported that its total revenues moved last year for the first time over the $3 billion mark, more than $1.05 billion of which was from the United States market alone. Lichtman, "Worldwide Pub Revenues Hit $3 Bil in 1989," Billboard, October 6, 1990 at 1, 85. According to NMPA President Ed Murphy, these increasing revenues were attributable to the beneficial effect of new technologies, such as cable television and satellite delivery services, which stimulated greater usage of copyrighted music. Id. at 85.

The benefits of digital radio are clear, as are the new profit opportunities awaiting the music and recording industries. RIAA needs no special favors, no stacked decks, and no new royalty taxes. HRRC strongly urges the Commission to reject RIAA's

proposals and to consider the implementation of digital audio broadcasting for the good of everyone.

Respectfully submitted,

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202-457-4919

January 7, 1991

EXHIBIT C

S. 1623

PUBLIC LAW 102-563

One Hundred Second Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Friday, the third day of January, one thousand nine hundred and ninety-two

An Act

To amend title 17, United States Code, to implement a royalty payment system and a serial copy management system for digital audio recording, to prohibit certain copyright infringement actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Audio Home Recording Act of 1992".

SEC. 2. IMPORTATION, MANUFACTURE, AND DISTRIBUTION OF DIGITAL AUDIO RECORDING DEVICES AND MEDIA.

Title 17, United States Code, is amended by adding at the end the following:

"CHAPTER 10—DIGITAL AUDIO RECORDING DEVICES AND MEDIA

"SUBCHAPTER A—DEFINITIONS

"SUBCHAPTER A—DEFINITIONS

"§ 1001. Definitions

"As used in this chapter, the following terms have the following meanings:

"(1) A 'digital audio copied recording' is 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.

"(2) A 'digital audio interface device' is any machine or device that is designed specifically to communicate digital audio information and related interface data to a digital audio recording device through a nonprofessional interface.

"(3) A 'digital audio recording device' is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use, except for—

"(A) professional model products, and

"(B) dictation machines, answering machines, and other audio recording equipment that is designed and marketed primarily for the creation of sound recordings resulting from the fixation of nonmusical sounds.

"(4)(A) A 'digital audio recording medium' is any material object in a form commonly distributed for use by individuals, that is primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device.

"(B) Such term does not include any material object—

"(i) that embodies a sound recording at the time it is first distributed by the importer or manufacturer; or

"(ii) that is primarily marketed and most commonly used by consumers either for the purpose of making copies of motion pictures or other audiovisual works or for the purpose of making copies of nonmusical literary works, including computer programs or data bases.

"(5)(A) A 'digital musical recording' is a material object—

"(i) in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and

"(ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

"(B) A 'digital musical recording' does not include a material object—

"(i) in which the fixed sounds consist entirely of spoken word recordings, or

"(ii) in which one or more computer programs are fixed, except that a digital musical recording may contain statements or instructions constituting the fixed sounds and incidental material, and statements or instructions to be used directly or indirectly in order to bring about the perception, reproduction, or communication of the fixed sounds and incidental material.

"(C) For purposes of this paragraph—

"(i) a 'spoken word recording' is a sound recording in which are fixed only a series of spoken words, except that the spoken words may be accompanied by incidental musical or other sounds, and

"(ii) the term 'incidental' means related to and relatively minor by comparison.

"(6) 'Distribute' means to sell, lease, or assign a product to consumers in the United States, or to sell, lease, or assign a product in the United States for ultimate transfer to consumers in the United States.

"(7) An 'interested copyright party' is—

"(A) the owner of the exclusive right under section 106(1) of this title to reproduce a sound recording of a

musical work that has been embodied in a digital musical recording or analog musical recording lawfully made under this title that has been distributed;

"(B) the legal or beneficial owner of, or the person that controls, the right to reproduce in a digital musical recording or analog musical recording a musical work that has been embodied in a digital musical recording or analog musical recording lawfully made under this title that has been distributed;

"(C) a featured recording artist who performs on a sound recording that has been distributed; or

"(D) any association or other organization—

"(i) representing persons specified in subparagraph (A), (B), or (C), or

"(ii) engaged in licensing rights in musical works to music users on behalf of writers and publishers.

"(8) To 'manufacture' means to produce or assemble a product in the United States. A 'manufacturer' is a person who manufactures.

"(9) A 'music publisher' is a person that is authorized to license the reproduction of a particular musical work in a sound recording.

"(10) A 'professional model product' is an audio recording device that is designed, manufactured, marketed, and intended for use by recording professionals in the ordinary course of a lawful business, in accordance with such requirements as the Secretary of Commerce shall establish by regulation.

"(11) The term 'serial copying' means the duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording. The term 'digital reproduction of a digital musical recording' does not include a digital musical recording as distributed, by authority of the copyright owner, for ultimate sale to consumers.

"(12) The 'transfer price' of a digital audio recording device or a digital audio recording medium—

"(A) is, subject to subparagraph (B)—

"(i) in the case of an imported product, the actual entered value at United States Customs (exclusive of any freight, insurance, and applicable duty), and

"(ii) in the case of a domestic product, the manufacturer's transfer price (FOB the manufacturer, and exclusive of any direct sales taxes or excise taxes incurred in connection with the sale); and

"(B) shall, in a case in which the transferor and transferee are related entities or within a single entity, not be less than a reasonable arms-length price under the principles of the regulations adopted pursuant to section 482 of the Internal Revenue Code of 1986, or any successor provision to such section.

"(13) A 'writer' is the composer or lyricist of a particular musical work.

"SUBCHAPTER B—COPYING CONTROLS

"§ 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).

"(c) PROHIBITION ON CIRCUMVENTION OF THE SYSTEM.—No person shall import, manufacture, or distribute any device, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent any program or circuit which implements, in whole or in part, a system described in subsection (a).

"(d) ENCODING OF INFORMATION ON DIGITAL MUSICAL RECORDINGS.—

"(1) PROHIBITION ON ENCODING INACCURATE INFORMATION.—No person shall encode a digital musical recording of a sound recording with inaccurate information relating to the category code, copyright status, or generation status of the source material for the recording.

"(2) ENCODING OF COPYRIGHT STATUS NOT REQUIRED.—Nothing in this chapter requires any person engaged in the importation or manufacture of digital musical recordings to encode any such digital musical recording with respect to its copyright status.

"(e) INFORMATION ACCOMPANYING TRANSMISSIONS IN DIGITAL FORMAT.—Any person who transmits or otherwise communicates to the public any sound recording in digital format is not required under this chapter to transmit or otherwise communicate the information relating to the copyright status of the sound recording. Any such person who does transmit or otherwise communicate such copyright status information shall transmit or communicate such information accurately.

"SUBCHAPTER C—ROYALTY PAYMENTS

"§ 1003. Obligation to make royalty payments

"(a) PROHIBITION ON IMPORTATION AND MANUFACTURE.—No person shall import into and distribute, or manufacture and distribute, any digital audio recording device or digital audio recording medium unless such person records the notice specified by this section and subsequently deposits the statements of account and applicable royalty payments for such device or medium specified in section 1004.

"(b) FILING OF NOTICE.—The importer or manufacturer of any digital audio recording device or digital audio recording medium, within a product category or utilizing a technology with respect to which such manufacturer or importer has not previously filed a notice under this subsection, shall file with the Register of Copyrights a notice with respect to such device or medium, in such form and content as the Register shall prescribe by regulation.

"(c) FILING OF QUARTERLY AND ANNUAL STATEMENTS OF ACCOUNT.—

"(1) GENERALLY.—Any importer or manufacturer that distributes any digital audio recording device or digital audio recording medium that it manufactured or imported shall file with the Register of Copyrights, in such form and content as the Register shall prescribe by regulation, such quarterly and annual statements of account with respect to such distribution as the Register shall prescribe by regulation.

"(2) CERTIFICATION, VERIFICATION, AND CONFIDENTIALITY.—Each such statement shall be certified as accurate by an authorized officer or principal of the importer or manufacturer. The Register shall issue regulations to provide for the verification and audit of such statements and to protect the confidentiality of the information contained in such statements. Such regulations shall provide for the disclosure, in confidence, of such statements to interested copyright parties.

"(3) ROYALTY PAYMENTS.—Each such statement shall be accompanied by the royalty payments specified in section 1004.

"§ 1004. Royalty payments

"(a) DIGITAL AUDIO RECORDING DEVICES.—

"(1) AMOUNT OF PAYMENT.—The royalty payment due under section 1003 for each digital audio recording device imported into and distributed in the United States, or manufactured and distributed in the United States, shall be 2 percent of the transfer price. Only the first person to manufacture and distribute or import and distribute such device shall be required to pay the royalty with respect to such device.

"(2) CALCULATION FOR DEVICES DISTRIBUTED WITH OTHER DEVICES.—With respect to a digital audio recording device first distributed in combination with one or more devices, either as a physically integrated unit or as separate components, the royalty payment shall be calculated as follows:

"(A) If the digital audio recording device and such other devices are part of a physically integrated unit, the royalty payment shall be based on the transfer price of the unit, but shall be reduced by any royalty payment made on any digital audio recording device included within the unit that was not first distributed in combination with the unit.

"(B) If the digital audio recording device is not part of a physically integrated unit and substantially similar devices have been distributed separately at any time during the preceding 4 calendar quarters, the royalty payment shall be based on the average transfer price of such devices during those 4 quarters.

"(C) If the digital audio recording device is not part of a physically integrated unit and substantially similar devices have not been distributed separately at any time

during the preceding 4 calendar quarters, the royalty payment shall be based on a constructed price reflecting the proportional value of such device to the combination as a whole.

"(3) LIMITS ON ROYALTIES.—Notwithstanding paragraph (1) or (2), the amount of the royalty payment for each digital audio recording device shall not be less than $1 nor more than the royalty maximum. The royalty maximum shall be $8 per device, except that in the case of a physically integrated unit containing more than 1 digital audio recording device, the royalty maximum for such unit shall be $12. During the 6th year after the effective date of this chapter, and not more than once each year thereafter, any interested copyright party may petition the Copyright Royalty Tribunal to increase the royalty maximum and, if more than 20 percent of the royalty payments are at the relevant royalty maximum, the Tribunal shall prospectively increase such royalty maximum with the goal of having no more than 10 percent of such payments at the new royalty maximum; however the amount of any such increase as a percentage of the royalty maximum shall in no event exceed the percentage increase in the Consumer Price Index during the period under review.

"(b) DIGITAL AUDIO RECORDING MEDIA.—The royalty payment due under section 1003 for each digital audio recording medium imported into and distributed in the United States, or manufactured and distributed in the United States, shall be 3 percent of the transfer price. Only the first person to manufacture and distribute or import and distribute such medium shall be required to pay the royalty with respect to such medium.

"§ 1005. Deposit of royalty payments and deduction of expenses

"The Register of Copyrights shall receive all royalty payments deposited under this chapter and, after deducting the reasonable costs incurred by the Copyright Office under this chapter, shall deposit the balance in the Treasury of the United States as offsetting receipts, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest under section 1007. The Register may, in the Register's discretion, 4 years after the close of any calendar year, close out the royalty payments account for that calendar year, and may treat any funds remaining in such account and any subsequent deposits that would otherwise be attributable to that calendar year as attributable to the succeeding calendar year. The Register shall submit to the Copyright Royalty Tribunal, on a monthly basis, a financial statement reporting the amount of royalties under this chapter that are available for distribution.

"§ 1006. Entitlement to royalty payments

"(a) INTERESTED COPYRIGHT PARTIES.—The royalty payments deposited pursuant to section 1005 shall, in accordance with the procedures specified in section 1007, be distributed to any interested copyright party—

"(1) whose musical work or sound recording has been—

"(A) embodied in a digital musical recording or an analog musical recording lawfully made under this title that has been distributed, and

"(B) distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions, during the period to which such payments pertain; and

"(2) who has filed a claim under section 1007.

"(b) ALLOCATION OF ROYALTY PAYMENTS TO GROUPS.—The royalty payments shall be divided into 2 funds as follows:

"(1) THE SOUND RECORDINGS FUND.—66⅔ percent of the royalty payments shall be allocated to the Sound Recordings Fund. 2½ percent of the royalty payments allocated to the Sound Recordings Fund shall be placed in an escrow account managed by an independent administrator jointly appointed by the interested copyright parties described in section 1001(7)(A) and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians or any successor entity) who have performed on sound recordings distributed in the United States. 1⅔ percent of the royalty payments allocated to the Sound Recordings Fund shall be placed in an escrow account managed by an independent administrator jointly appointed by the interested copyright parties described in section 1001(7)(A) and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation Television and Radio Artists or any successor entity) who have performed on sound recordings distributed in the United States. 40 percent of the remaining royalty payments in the Sound Recordings Fund shall be distributed to the interested copyright parties described in section 1001(7)(C), and 60 percent of such remaining royalty payments shall be distributed to the interested copyright parties described in section 1001(7)(A).

"(2) THE MUSICAL WORKS FUND.—

"(A) 33⅓ percent of the royalty payments shall be allocated to the Musical Works Fund for distribution to interested copyright parties described in section 1001(7)(B).

"(B)(i) Music publishers shall be entitled to 50 percent of the royalty payments allocated to the Musical Works Fund.

"(ii) Writers shall be entitled to the other 50 percent of the royalty payments allocated to the Musical Works Fund.

"(c) ALLOCATION OF ROYALTY PAYMENTS WITHIN GROUPS.—If all interested copyright parties within a group specified in subsection (b) do not agree on a voluntary proposal for the distribution of the royalty payments within each group, the Copyright Royalty Tribunal shall, pursuant to the procedures specified under section 1007(c), allocate royalty payments under this section based on the extent to which, during the relevant period—

"(1) for the Sound Recordings Fund, each sound recording was distributed in the form of digital musical recordings or analog musical recordings; and

"(2) for the Musical Works Fund, each musical work was distributed in the form of digital musical recordings or analog

musical recordings or disseminated to the public in transmissions.

"§ 1007. Procedures for distributing royalty payments

"(a) FILING OF CLAIMS AND NEGOTIATIONS.—

"(1) FILING OF CLAIMS.—During the first 2 months of each calendar year after the calendar year in which this chapter takes effect, every interested copyright party seeking to receive royalty payments to which such party is entitled under section 1006 shall file with the Copyright Royalty Tribunal a claim for payments collected during the preceding year in such form and manner as the Tribunal shall prescribe by regulation.

"(2) NEGOTIATIONS.—Notwithstanding any provision of the antitrust laws, for purposes of this section interested copyright parties within each group specified in section 1006(b) may agree among themselves to the proportionate division of royalty payments, may lump their claims together and file them jointly or as a single claim, or may designate a common agent, including any organization described in section 1001(7)(D), to negotiate or receive payment on their behalf; except that no agreement under this subsection may modify the allocation of royalties specified in section 1006(b).

"(b) DISTRIBUTION OF PAYMENTS IN THE ABSENCE OF A DISPUTE.—Within 30 days after the period established for the filing of claims under subsection (a), in each year after the year in which this section takes effect, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1006(c). If the Tribunal determines that no such controversy exists, the Tribunal shall, within 30 days after such determination, authorize the distribution of the royalty payments as set forth in the agreements regarding the distribution of royalty payments entered into pursuant to subsection (a), after deducting its reasonable administrative costs under this section.

"(c) RESOLUTION OF DISPUTES.—If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty payments. During the pendency of such a proceeding, the Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall, to the extent feasible, authorize the distribution of any amounts that are not in controversy. The Tribunal shall, before authorizing the distribution of such royalty payments, deduct its reasonable administrative costs under this section.

"SUBCHAPTER D—PROHIBITION ON CERTAIN INFRINGEMENT ACTIONS, REMEDIES, AND ARBITRATION

"§ 1008. 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, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

"§ 1009. Civil remedies

"(a) CIVIL ACTIONS.—Any interested copyright party injured by a violation of section 1002 or 1003 may bring a civil action in an appropriate United States district court against any person for such violation.

"(b) OTHER CIVIL ACTIONS.—Any person injured by a violation of this chapter may bring a civil action in an appropriate United States district court for actual damages incurred as a result of such violation.

"(c) POWERS OF THE COURT.—In an action brought under subsection (a), the court—

"(1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain such violation;

"(2) in the case of a violation of section 1002, or in the case of an injury resulting from a failure to make royalty payments required by section 1003, shall award damages under subsection (d);

"(3) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof; and

"(4) in its discretion may award a reasonable attorney's fee to the prevailing party.

"(d) AWARD OF DAMAGES.—

"(1) DAMAGES FOR SECTION 1002 OR 1003 VIOLATIONS.—

"(A) ACTUAL DAMAGES.—(i) In an action brought under subsection (a), if the court finds that a violation of section 1002 or 1003 has occurred, the court shall award to the complaining party its actual damages if the complaining party elects such damages at any time before final judgment is entered.

"(ii) In the case of section 1003, actual damages shall constitute the royalty payments that should have been paid under section 1004 and deposited under section 1005. In such a case, the court, in its discretion, may award an additional amount of not to exceed 50 percent of the actual damages.

"(B) STATUTORY DAMAGES FOR SECTION 1002 VIOLATIONS.—

"(i) DEVICE.—A complaining party may recover an award of statutory damages for each violation of section 1002 (a) or (c) in the sum of not more than $2,500 per device involved in such violation or per device on which a service prohibited by section 1002(c) has been performed, as the court considers just.

"(ii) DIGITAL MUSICAL RECORDING.—A complaining party may recover an award of statutory damages for each violation of section 1002(d) in the sum of not more than $25 per digital musical recording involved in such violation, as the court considers just.

"(iii) TRANSMISSION.—A complaining party may recover an award of damages for each transmission or communication that violates section 1002(e) in the sum of not more than $10,000, as the court considers just.

"(2) REPEATED VIOLATIONS.—In any case in which the court finds that a person has violated section 1002 or 1003 within

3 years after a final judgment against that person for another such violation was entered, the court may increase the award of damages to not more than double the amounts that would otherwise be awarded under paragraph (1), as the court considers just.

"(3) INNOCENT VIOLATIONS OF SECTION 1002.—The court in its discretion may reduce the total award of damages against a person violating section 1002 to a sum of not less than $250 in any case in which the court finds that the violator was not aware and had no reason to believe that its acts constituted a violation of section 1002.

"(e) PAYMENT OF DAMAGES.—Any award of damages under subsection (d) shall be deposited with the Register pursuant to section 1005 for distribution to interested copyright parties as though such funds were royalty payments made pursuant to section 1003.

"(f) IMPOUNDING OF ARTICLES.—At any time while an action under subsection (a) is pending, the court may order the impounding, on such terms as it deems reasonable, of any digital audio recording device, digital musical recording, or device specified in section 1002(c) that is in the custody or control of the alleged violator and that the court has reasonable cause to believe does not comply with, or was involved in a violation of, section 1002.

"(g) REMEDIAL MODIFICATION AND DESTRUCTION OF ARTICLES.—In an action brought under subsection (a), the court may, as part of a final judgment or decree finding a violation of section 1002, order the remedial modification or the destruction of any digital audio recording device, digital musical recording, or device specified in section 1002(c) that—

"(1) does not comply with, or was involved in a violation of, section 1002, and

"(2) is in the custody or control of the violator or has been impounded under subsection (f).

"§ 1010. Arbitration of certain disputes

"(a) SCOPE OF ARBITRATION.—Before the date of first distribution in the United States of a digital audio recording device or a digital audio interface device, any party manufacturing, importing, or distributing such device, and any interested copyright party may mutually agree to binding arbitration for the purpose of determining whether such device is subject to section 1002, or the basis on which royalty payments for such device are to be made under section 1003.

"(b) INITIATION OF ARBITRATION PROCEEDINGS.—Parties agreeing to such arbitration shall file a petition with the Copyright Royalty Tribunal requesting the commencement of an arbitration proceeding. The petition may include the names and qualifications of potential arbitrators. Within 2 weeks after receiving such a petition, the Tribunal shall cause notice to be published in the Federal Register of the initiation of an arbitration proceeding. Such notice shall include the names and qualifications of 3 arbitrators chosen by the Tribunal from a list of available arbitrators obtained from the American Arbitration Association or such similar organization as the Tribunal shall select, and from potential arbitrators listed in the parties' petition. The arbitrators selected under this subsection shall constitute an Arbitration Panel.

"(c) STAY OF JUDICIAL PROCEEDINGS.—Any civil action brought under section 1009 against a party to arbitration under this section

shall, on application of one of the parties to the arbitration, be stayed until completion of the arbitration proceeding.

"(d) ARBITRATION PROCEEDING.—The Arbitration Panel shall conduct an arbitration proceeding with respect to the matter concerned, in accordance with such procedures as it may adopt. The Panel shall act on the basis of a fully documented written record. Any party to the arbitration may submit relevant information and proposals to the Panel. The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the Panel shall direct.

"(e) REPORT TO COPYRIGHT ROYALTY TRIBUNAL.—Not later than 60 days after publication of the notice under subsection (b) of the initiation of an arbitration proceeding, the Arbitration Panel shall report to the Copyright Royalty Tribunal its determination concerning whether the device concerned is subject to section 1002, or the basis on which royalty payments for the device are to be made under section 1003. Such report shall be accompanied by the written record, and shall set forth the facts that the Panel found relevant to its determination.

"(f) ACTION BY THE COPYRIGHT ROYALTY TRIBUNAL.—Within 60 days after receiving the report of the Arbitration Panel under subsection (e), the Copyright Royalty Tribunal shall adopt or reject the determination of the Panel. The Tribunal shall adopt the determination of the Panel unless the Tribunal finds that the determination is clearly erroneous. If the Tribunal rejects the determination of the Panel, the Tribunal shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting forth its decision and the reasons therefor. The Tribunal shall cause to be published in the Federal Register the determination of the Panel and the decision of the Tribunal under this subsection with respect to the determination (including any order issued under the preceding sentence).

"(g) JUDICIAL REVIEW.—Any decision of the Copyright Royalty Tribunal under subsection (f) with respect to a determination of the Arbitration Panel may be appealed, by a party to the arbitration, to the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the publication of the decision in the Federal Register. The pendency of an appeal under this subsection shall not stay the Tribunal's decision. The court shall have jurisdiction to modify or vacate a decision of the Tribunal only if it finds, on the basis of the record before the Tribunal, that the Arbitration Panel or the Tribunal acted in an arbitrary manner. If the court modifies the decision of the Tribunal, the court shall have jurisdiction to enter its own decision in accordance with its final judgment. The court may further vacate the decision of the Tribunal and remand the case for arbitration proceedings as provided in this section.".

SEC. 3. TECHNICAL AMENDMENTS.

(a) FUNCTIONS OF REGISTER.—Chapter 8 of title 17, United States Code is amended—

(1) in section 801(b)—

(A) by striking "and" at the end of paragraph (2);

(B) by striking the period at the end of paragraph (3) and inserting "; and"; and

(C) by adding the following new paragraph at the end:

"(4) to distribute royalty payments deposited with the Register of Copyrights under section 1003, to determine the distribution of such payments, and to carry out its other responsibilities under chapter 10"; and

(2) in section 804(d)—

(A) by inserting "or (4)" after "801(b)(3)"; and

(B) by striking "or 119" and inserting "119, or 1007".

(b) DEFINITIONS.—Section 101 of title 17, United States Code, is amended by striking "As used" and inserting "Except as otherwise provided in this title, as used".

(c) MASK WORKS.—Section 912 of title 17, United States Code, is amended—

(1) in subsection (a) by inserting "or 10" after "8"; and

(2) in subsection (b) by inserting "or 10" after "8".

(d) CONFORMING AMENDMENT TO SECTION 337 OF THE TARIFF ACT OF 1930.—The second sentence of section 337(b)(3) of the Tariff Act of 1930 (19 U.S.C. 1337(b)(3)) is amended to read as follows: "If the Commission has reason to believe that the matter before it (A) is based solely on alleged acts and effects which are within the purview of section 303, 671, or 673, or (B) relates to an alleged copyright infringement with respect to which action is prohibited by section 1008 of title 17, United States Code, the Commission shall terminate, or not institute, any investigation into the matter.".

SEC. 4. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.