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

COMMENTS OF THE
RECORDING INDUSTRY ASSOCIATION OF AMERICA

I. INTRODUCTION

The Recording Industry Association of America ("RIAA") submits these comments in response to: (1) the application by Satellite CD Radio, Inc. to construct, launch and operate a digital audio radio service satellite system; and (2) the Federal Communication Commission's general proposal to allocate 50 mhz in the S-band for satellite digital audio broadcasting (DAB). As explained below, of paramount concern to the RIAA is that the Commission, in establishing the ground rules for the development of new digital audio services, such as the one proposed by Satellite CD Radio, Inc., take into account the critical interests of the copyright owners of the sound recordings that will comprise the very programming of these new DAB services.

The Recording Industry Association of America is a not-for-profit incorporated trade association whose members account for more than ninety-five percent of all the prerecorded music that is produced, manufactured, and distributed in the United States. Recording companies, those they employ, and the artists and musicians who perform the music, depend for their livelihoods upon the integrity of the copyrights our members hold in sound recordings. The recording industry necessarily is deeply interested in new technologies for disseminating or delivering its music to the public; particularly, as is the case here, where those technologies severely threaten the integrity of those copyrights. Digital audio broadcasting services, such as the service proposed by Satellite CD Radio, Inc., intend to commercially exploit our members' product, in direct competition with their customary means of exploitation without either securing authorization from, or providing renumeration to, record companies, musicians or artists. If the U.S. recording industry is to continue to be one of the shining stars of our nation's economy and cultural heritage, as well as being the primary source of audio programming, this fundamental unfairness must be rectified.

Digital audio broadcasting services, whether terrestrial or satellite, could dramatically change the manner in which Americans receive and enjoy prerecorded

music. These services will make available in the home or car, via the airwaves, music of unprecedented and unparalled digital quality comparable to what only is currently available to consumers who purchase a compact disc or such new prerecorded formats as the Digital Compact Cassette (DCC) and the Mini-Disc (MD). With digital broadcasters able to offer CD-quality music for "free" or for a marginal cost to the consumer, as a result of the current legal environment which ignores the legitimate interests of record companies and their performing artists, it does not take a great deal of imagination to foresee what choices consumers will make.

The ability to transmit "CD quality" digital audio signals challenges our assumptions about the means of delivering musical entertainment as we approach the 21st Century. Traditionally, the recording industry has looked upon the sale of prerecorded music on disc and tape as the primary form of distribution of sound recordings to the public. The copyright law bears the imprimatur of this technology driven, and perhaps soon to be outdated, approach.

Digital audio broadcast services, including the service proposed by Satellite CD Radio, Inc., however, have the potential to eviscerate the sales market for existing sound recordings, as well as the economic incentive necessary to produce new sound recordings. The Commission need only look to the words of Satellite CD Radio, Inc.

President Robert Briskman who, in an attempt to allay the fears of the local broadcasters, stated that those who should worry are the makers of CDs and cassettes. 1/ Needless to say, the recording industry has heeded Mr. Briskman's message -- we are worried!

The RIAA does not intend, through these comments, to recommend that the Commission deny all authorizations for digital audio broadcasting services. However, it is imperative that the Commission take into account the larger policy concerns surrounding the introduction of this new digital audio technology before granting spectrum for any such service. Specifically, we respectfully request that the Commission's approval of any new digital audio broadcasting service, including the application by Satellite CD Radio, Inc., be conditioned upon the applicant's securing of licenses from the copyright owners of the sound recordings to be transmitted by the service. While conditioning these approvals in this manner is appropriate for all digital transmissions of sound recordings, such a requirement is most critical with respect to the transmission of anything more than an individual selection from a particular album during a limited time period.

The Commission's authority to establish a copyright surrogate system, as proposed in these comments, in the

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1/ Broadcasting, October 12, 1992, p. 12.

absence of specific obligations under federal copyright law is clear. The Commission took such a step previously in its promulgation of rules governing cable retransmission of syndicated television programming in an effort to assure the continued vitality of television program suppliers. Here, audio program suppliers need comparable protection.

II. DIGITAL AUDIO SERVICES HAVE SIGNIFICANT COPYRIGHT AND BUSINESS IMPLICATIONS FOR THE U.S. RECORDING INDUSTRY

New digital audio broadcasting services, such as contemplated by Satellite CD Radio, Inc., have far-reaching implications for copyrights in sound recordings.

A U.S. copyright is, in actuality, a "bundle of rights", generally providing copyright owners with the exclusive rights of reproduction, adaptation, public distribution, public display and, importantly for the purposes of these comments, the right of public performance. 2/ Unlike the owners of all other works protected under U.S. copyright law, however, U.S. copyright owners of sound recordings are not currently afforded a public performance right. 3/ Because of this historical anomaly, 4/ record companies and their performing artists

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2/ 17 U.S.C. Section 106.

3/ 17 U.S.C. Section 114(a).

4/ See, generally, the Report of the U.S. Register of Copyrights, Performance Rights in Sound Recordings, 95th Cong., 2d Sess. (June 1978) (House Jud. Comm. Print No. 15). Therein, in 1978, the Register concluded that a

and musicians receive no compensation for the commercial public performance of their works. Recently, focusing specifically on the copyright implications of digital audio transmission services, the U.S. Copyright Office reiterated its longstanding recommendation to Congress to establish a performance right for sound recordings. 5/

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performance right should be granted to copyright owners of sound recordings in light of "considerations of national uniformity, equal treatment, and practical effectiveness":

> "Broadcasters and other commercial users of recordings have performed them without permission or payment for generations. Users today look upon any requirement that they pay royalties as an unfair imposition in the nature of a "tax". However, any economic burden on the users of recordings for public performance is heavily outweighed . . . by the commercial benefits accruing directly from the use of copyrighted sound recordings . . . Sound recordings are creative works, and their unauthorized performance results in both damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified."

Id. at 1063. The above quoted passage was written before the development of the new digital transmission and recording technologies now at issue.

5/ See, generally, Report of the U.S. Register of Copyrights, Report on Copyright Implications of Digital Audio Transmission Services, October 1991 [hereinafter cited as Report]. Therein, the Register of Copyrights stated that "there is no valid copyright policy reason to deny authors and owners of sound recordings of the right to compensation for the public performance of their works. The United States, as a world leader in the creation of sound recordings, should delay no longer in giving its creators of sound recordings the minimum rights that more than sixty countries give their creators."

Id. at 155.

Several activities contemplated by digital audio services may go well beyond that of traditional terrestrial analog radio broadcasting. For example, digital audio broadcasting services may provide their listeners with detailed program guides, deliver entire albums without commercial interruption, create new "greatest hits" compilations of popular artists, offer subscription or "pay-per-listen" services, may utilize "smart cards" to decode encrypted digital audio signals, and with an interactive system, allow for delivery of "audio on demand." The U.S. Copyright Office commented recently on how digital technologies will "make possible the celestial jukebox, music on demand, and pay-per-listen services" 6/ and how these non-conventional services will change the way consumers receive music in the future. 7/

6/ Id. at 154.

7/ Id. at 12. In detailing the variety of new digital audio transmission services, the Copyright Office Report states:

> "Introduction of a pay-per-listen service in the future is possible, which will allow subscribers to call in their musical requests for transmission over their system. Adjustments may also be made to digital tuners to allow subscribers to program in their selections . . . It is possible that such services . . . may become the principal means of delivery of music to the public, replacing record stores and merchandisers. Should this occur, the market for copyrighted works will change, creating the need for reconsideration of the means by which copyright holders are compensated."

Satellite CD Radio, Inc., itself has announced its intent to charge subscribers directly for listening to our members' product and offer program guides, album hours, etc. 8/ As a result, its subscribers will be paying Satellite CD Radio, Inc. the monies it previously would have spent in record stores to buy prerecorded music. The only difference is that, unlike the record store, Satellite CD Radio, Inc. will have no clear obligation to compensate its audio program suppliers (i.e., record companies) for their exploitation of our product.

As recommended earlier, the Commission should, at minimum, prohibit digital audio broadcasting services from transmitting anything more than an individual selection from a particular album during a limited time period unless they have secured the express consent of the owner of the copyrighted sound recording. The Commission's authority to establish such content-neutral regulations governing digital transmissions is clear. In fact, the Commission adopted a similar regulatory scheme in 1972 when, through its "syndicated program exclusivity rules", 9/ it restricted the right of cable television systems from

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8/ Broadcasting, October 19, 1992, pg. 28. Satellite CD Radio, Inc. has announced plans to charge subscribers $5-10 per month to receive its service -- commercial-free subscription and "pay-per-listen" music formats.

9/ Former 47 C.F.R. Sections 76.151 through 76.155 (1972).

retransmitting certain syndicated programming broadcast by distant television stations. 10/

Without adequate protection, these digital audio broadcasting services could have a devastating impact on the recording industry, and ultimately on the listening public as well. For example, unless subject to certain controls, a digital radio service could transmit with CD quality an entire album of a popular artist, such as R.E.M.'s new hit album "Automatic for the People", on the day of its release, thereby making it available to millions of R.E.M. fans throughout the country. One can readily see how this capability could virtually wipe out the economic incentive now afforded to record creators to produce new recordings by eliminating the market for the sale of prerecorded music -- the only existing means for providing compensation to the record producers and the artists whose performances are fixed on the recording.

III. CONCLUSION

Central to any audio transmission service, whether analog or digital, are the sound recordings that are delivered to the public for its listening pleasure. Without adequate and effective protection for the copyright

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10/ This matter is discussed in greater detail in previous filings submitted by the RIAA to the Commission, General Docket No. 90-357, and appended, in relevant part, to this submission.

owners of these sound recordings, the livelihoods of recording artists, musicians, recording engineers, and the numerous others involved in the creation of sound recordings are placed in jeopardy. The advent of digital audio broadcasting services represents an entirely new threat to the recording industry. We must abandon the antiquated, self-serving and largely inaccurate view of the relationship between broadcast and sale of prerecorded music 11/ with a view toward a future in which transmissions could be a principal form of commercial exploitation. Under these circumstances, due consideration must be given to the interests of the copyright owners of prerecorded music as the Commission sets the ground rules for new digital audio broadcasting services.

11/ Report, supra note 5, at 155. The U.S. Copyright Office, in reiterating its support for the creation of a public performance right for sound recordings, rejected the "promotion" arguments used by broadcasters to oppose a performance right:

> "Broadcasters counter with the argument that free airplay promotes the sale of records. The Copyright Office does not find this argument persuasive. Broadcasters choose to play pre-recorded music: it is a relatively cheap form of programming. Broadcasters could program live music, or they could prepare their own original recordings. They generally do neither because playing pre-recorded music is economically cost-efficient and popular with the public. There is no valid copyright policy reason to deny authors and owners of sound recordings of the right to compensation for the public performance of their works."

It is in the long-term interests of the United States to assure that the supply of sound recordings continues to be abundant in the future. 12/ Unfortunately, but not surprisingly, commercial digital audio transmission ventures, driven by the prospects for short-term profits, will dismiss these important public policy interests. The Commission must assure that our nation's long-term interests are not lost in the process.

Accordingly, the RIAA recommends that the Commission proceed cautiously in establishing digital audio broadcasting services, including that proposed by Satellite CD Radio, Inc., and assure that any approvals granted to such services are conditioned upon their protection of the rights and interests of the owners of the recorded works that will make up the service's programming. Specifically, any approvals granted to a digital audio broadcasting service by the Commission should require the service to fully protect the copyright interests of record producers and their recording artists through the acquisition of licenses from the copyright owners of the distributed sound recordings, particularly with respect to its transmission

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12/ A vital U.S. sound recording industry also has significant trade implications. In 1990, RIAA member companies produced nearly 50 percent of all sound recordings sold worldwide, generating $24 billion in worldwide sales. These international sales of U.S. recordings result in a significant positive balance of trade, making sound recordings truly one of America's "trade jewels."

of anything more than an individual selection from a particular album during a limited time period. Anything less will most certainly cause irreparable harm to the U.S. recording industry, the tens of thousands of people it employs, and ultimately, the listening public.

Respectfully submitted,

RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.
1020 19th Street, N.W.
Washington, DC 20036
(202) 775-0101

David E. Leibowitz
Executive Vice President
and General Counsel

Jennifer L. Bendall, Esquire
Director of Congressional
Relations

November 13, 1992

CERTIFICATE OF SERVICE

I, Rick Barnes, do hereby certify that a true and correct copy of the foregoing "Comments of the Recording Industry Association of America" was delivered by hand, on this 13th day of November 1992, to the following:

Donna R. Searcy
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Rick Barnes

CERTIFICATE OF SERVICE

I, Rick Barnes, do hereby certify that a true and correct copy of the foregoing "Comments of the Recording Industry Association of America" was delivered by hand, on this 13th day of November 1992, to the following:

Robert Briskman
President
Satellite CD Radio, Inc.
1001 22nd Street, N.W., Sixth Floor
Washington, D.C. 20036-1817

Rick Barnes

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Amendment of the Commission's Rules with regard to the Establishment and Regulation of New Digital Audio Radio Services	)	GEN. Docket No. 90-357

REPLY COMMENTS OF THE
RECORDING INDUSTRY ASSOCIATION OF AMERICA

II. RIAA's Proposed Prohibition on Multiple Cut Album Airplay is Justified on the Same Basis as the Commission's Syndex Rules

NAB criticized our proposal to prohibit multiple album cut airplay and attempted to distinguish the "syndex" rules on two grounds. First, it asserted that, in contrast to RIAA's proposal, the syndex rules were justified because they were necessary to remedy an unfairness: "'the broadcasting industry spent billions of dollars to create and purchase programming, [while] cable operators could retransmit those programs at their operating cost without making any payments to their program suppliers'." NAB Comments at 27 (quoting Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir.

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[4] We also urged the Commission to recommend that Congress grant a performance right in sound recordings. Please refer to our attached comments in the Copyright Office proceeding for an elaboration of our views on this issue.

1981), cert. denied sub nom. National Football League v. FCC, 454 U.S. 1143 (1982)). This attempted distinction is both unavailing and amusing. With minimal editing, the quoted sentence would aptly describe the situation in which the recording industry finds itself vis-a-vis the broadcasters. The real point is that NAB apparently favors "fairness" only when it is on the receiving end.[5] Moreover, the syndex rules applied to protect copyright owners even in those circumstances where a local station had not "spent billions . . . to purchase programming."[6] In such circumstances, the effect of the rule was to protect the copyright owner's ability to market its work through its normal channels despite the absence of copyright liability governing the cable retransmissions at issue there. That is all RIAA seeks here. The absence of a performance right in a sound recording does not prevent the Commission from taking similar action here. At issue in both instances is the effort to

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[5] It is ironic that broadcasters, while seeking to perpetuate their free use of our sound recordings, are simultaneously urging Congress to require cable systems to compensate them for cable's retransmission of local broadcast signals (the so-called "if carry, must pay" proposal).

[6] See 47 C.F.R. §§ 76.151(a), 76.153(a) (1972).

protect the source of programming that drives these broadcast services.[7]

Second, NAB asserts that our proposed rule is beyond the FCC's jurisdiction over communications policy. To the contrary, it is difficult to conceive of what could be more squarely within the Commission's jurisdiction than a rule establishing reasonable conditions of broadcast for a new service and for the very works that will comprise the programming for this service. The protection of affected copyright interests and the resultant prevention of damage to the creative incentive purpose of copyright protection provide no grounds for concluding that adoption of our proposed rule is beyond the jurisdiction of the Commission. Communications policy should not be made in a vacuum and often does take into account the copyright or economic interests of persons affected by communications policy issues. The Commission's history is full of such examples.[8]

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[7] The recording industry's investment in each and every recording that reaches the public is substantial. Most releases are not profitable, however. Only about one of every six recordings breaks even; yet a smaller fraction achieves the status of "hits." It is the profits from these successes that sustain the industry and make possible continued investments in new recording projects, new talent and less profitable genres such as jazz.

[8] The Commission's syndex rules are one example of

[Footnote continued on next page]

NAB also argues that our proposal raises "serious First Amendment questions," apparently referring to the impediment it would create to the broadcast industry's commercial exploitation of the recording industry's product. This is no surprise. Copyright users frequently attempt to wrap themselves in the first amendment when they want to use copyrighted material without permission from or compensation to the owner.[9]

[Footnote continued from previous page]
Commission action authorized by its jurisdiction over communications policy issues that has copyright protection implications. See United Video, Inc. v. FCC, 890 F.2d 1173, 1184 (D.C. Cir. 1989) ("[T]he 1976 Congress did not imagine copyright law and communications law to be two islands, separated by an impassable sea.") Other examples include the Commission's exclusivity rule on sports broadcasts, 47 C.F.R. § 76.67, and the Commission's withholding, at the behest of the Executive Branch, of § 214 authorizations to satellite resale carriers to deliver superstations for retransmission by Canadian cable systems until adequate copyright safeguards for program suppliers are in place. See Letter from Chairman Mark Fowler to Ambassador Diana Lady Dougan (August 6, 1984).

Further, the Communications Act itself legislates in areas in which communications policy affects copyright interests. See, e.g., 47 U.S.C. § 605(a) (prohibiting unauthorized interception of certain broadcast, satellite and other signals) and 47 U.S.C. § 325(a) (prohibiting the unauthorized broadcast of broadcast signals).

[9] See P. Goldstein, Copyright § 10.3 (1989) (citing, inter alia, Roy Export Co. v. Columbia Broadcasting Sys., Inc., 672 F.2d 1095 (2d Cir.), cert. denied, 459 U.S. 826 (1982); Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184 (5th Cir. 1979); Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979); Wainwright Secs., Inc. v. Wall Street Transcript Corp.,
[Footnote continued on next page]

It is, however, a specious argument. There is no first amendment right "to make commercial use of the copyrighted work of others." United Video, Inc. v. FCC, 890 F.2d 1173, 1191 (D.C. Cir. 1989) (upholding syndex rules against, inter alia, first amendment challenges). And, curiously, the broadcast industry discerned no such infirmities in the syndex rules that it sought and secured.

[Footnote continued from previous page]
558 F.2d 91 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978); United States v. Bodin, 375 F. Supp. 1265 (W.D. Okla. 1974)).

As part of an overall protection scheme, the Commission should prohibit digital audio services from transmitting anything more than an individual selection from a particular album during a limited time period unless they have secured the express consent of the owner of the copyrighted sound recording.[12] The Commission's authority to establish such content-neutral regulations governing digital transmissions is clear. In fact, the Commission adopted a similar regulatory system in 1972 when,

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[12] The Commission may wish to also consider imposing similar restrictions on: (1) the transmission of concert performances made from unauthorized "bootleg" sound recordings; and (2) digital cable audio ventures including the "Digital Music Express", "Digital Cable Radio", and the "Digital Planet".

It should be noted that even the unauthorized digital transmission of individual selections can itself have a significant financial impact on the growing "cassette singles" market within the recording industry. For example, during the first six months of 1990 over 45 million prerecorded cassette singles were marketed in the United States with a suggested retail list dollar value of over $133 million.

through its "syndicated program exclusivity rules"[13], it restricted the right of cable television systems from retransmitting certain syndicated programming broadcast by distant television stations. Significantly, the Commission established these rules notwithstanding the "legality" of such retransmissions under the then applicable copyright law.[14] Section 76.151(a) of these rules provided the "copyright holders of syndicated programs" with the right to object to the distant importation of their programs even where no local television station had acquired local broadcast rights.[15] Part of the rationale for this rule was to afford to the copyright owner the opportunity to more fully exploit its rights in the program despite the absence of copyright liability governing cable's retransmission activity. Indeed, these rules have been referred to "as proxies for the copyright liability the courts had refused to impose".[16]

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13 Former 47 CFR Section 76.151 through 76.155 (1972).

14 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). As with its current NOI concerning digital audio systems, the Commission in 1972 was dealing with an industry that had yet to mature. The full development of proper legal norms governing cable's activities needed time to evolve, and the FCC's cable rules served as the foundation for this development. The Commission can and should serve the same purpose here.

15 The standing of these copyright holders to secure exclusivity protection was set forth under former 47 CFR Section 76.153(a).

16 Malrite T.V. of N.Y., et al. v. F.C.C. & U.S., 49 R.R.2d 1127, 1131 (1981). See also H.R. Rep. No. 1476, 94th Cong., 2d Sess. 177, reprinted in U.S. Code Cong. & Ad. News

By providing exclusivity protection for sound recordings, the Commission would be serving several important public interests. First, it would affirm the incentive necessary for record companies to produce new recordings by preserving their opportunity to sell prerecorded material to the public and to profit from new forms of commercial exploitation.[17] Second, it could allow for the development of "legitimate" electronic distributors of sound recordings in the future. Finally, it could enhance both competition and diversity in the digital audio industry.

5792, wherein the House Judiciary Committee during the 1976 Copyright Law Revision stated that "the syndicated [and sports] program exclusivity rules of the FCC have the effect of protecting copyright owners by restricting the cable carriage of certain distant television programming".

[17] The unintended elimination of this incentive through unrestricted digital transmissions could deprive both analog and digital broadcasters of new musical works for the listening public's pleasure.

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and Regulation of New Digital Audio	)	
Radio Services	)	

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