

Testimony of

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Statement of Bruce Reese
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On behalf of the National Association of Broadcasters

Hearing before the Senate Judiciary Committee
Parity, Platforms and Protection:
The Future of the Music Industry in the Digital Radio Revolution

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Good morning, Chairman Specter and Members of the Committee, my name is Bruce Reese. I am the President and CEO of Bonneville International, which owns and operates 38 radio stations throughout the country, including WTOP here in Washington. I am also the Joint Board Chairman of the National Association of Broadcasters (NAB). NAB is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and the Courts.

My message today can be summarized in two simple thoughts. First, Congress should not take any actions that would deter the continued roll-out of terrestrial digital radio service. Second, Congress should improve current copyright law so that it does not inhibit Internet radio streaming.

Any System to Protect Digital Content Must Not Impede the Digital Radio Roll-Out

Turning first to the issue of terrestrial digital radio, I can report that local broadcasters today are engaged in an exciting transition to digital. The industry sees high definition radio as our future--it will enable us to better serve our local communities and to remain competitive in today's ever-changing digital media marketplace. But we face many challenges as we work toward a successful and timely transition to digital radio. Those challenges would be exacerbated - and the roll-out delayed - by a "quick fix" technical system to provide copy protection for digital radio. For this reason, NAB and the Recording Industry Association of America (RIAA) are now coordinating on the development of a consensus on digital radio copy protection. We urge you to allow this industry process to continue without the adoption of premature legislative mandates that could well have disastrous consequences for our industry.

The radio industry in America has begun its massive roll-out of digital broadcast transmissions and all-new digital radio receivers. Currently, 765 digital AM and FM stations are on the air. Broadcasters have individually committed to upgrade more than 2,000 stations to high definition (HD) radio technology this year. Why are radio broadcasters embracing HD radio? In short, because it will allow local broadcasters to better serve their listeners and to remain competitive in today's digital media marketplace. HD radio not only offers crystal-clear audio. It permits the broadcasting of multiple free, over-the-air program streams to bring additional content (including much more local content) to the public within stations' current spectrum. It also permits other services, including wireless data enabling text information, such as song titles and artists or weather and traffic alerts. Even more innovative features are under development, such as program menus giving listeners instant access to a favorite drive time show, news and information, and special music programming. New features of the future could also include real-time traffic reports broadcast by local stations and visually displayed on a vehicle's navigation system. In sum, digital radio will allow broadcasters to remain a vital and vibrant part of the media landscape of the future.

But beyond thousands of radio stations converting to digital, the HD radio revolution also involves the consumer electronics industry and, most importantly, consumers. New digital radio receivers have been launched in the marketplace across a range of product categories. Major radio groups are engaged in a massive marketing campaign to promote digital radio to consumers. And auto makers and after-market manufacturers are beginning to produce digital radio products for car sound systems. 2006 promises to be a pivotal year for the roll-out of digital radio, with

auto makers signing up for factory-installed radios, retail outlets prominently featuring many new digital radio products, and hundreds more broadcasters commencing digital transmissions. Given this investment by broadcasters and equipment manufacturers and the benefits that consumers will receive from a successful deployment of digital radio, it is of paramount importance that any copy protection mechanism not impede the digital radio roll-out. NAB remains concerned that developing and implementing a technical system to provide copy protection for digital radio not have a negative impact on the digital radio transition. Reaching a final consensus on the digital television (DTV) broadcast flag mechanism, for example, entailed many years of intense negotiations by scores of participants from a wide array of industry sectors. The purpose, concept and methodology of the DTV flag were then the subject of voluminous comments and reply comments from affected industry and consumers groups, companies and organizations. The FCC scrutinized these comments, heard in-person presentations from many interested parties and concluded that the purpose of preventing widespread indiscriminate re-distribution of digital video content over the Internet was worthy and that the methodology was sound and workable.

NAB has expressed its willingness to participate in developing and forging a consensus on a digital radio copy protection system so long as it would not interrupt the digital roll-out or create uncertainty that would lead to a slow down of adoption rates by manufacturers, consumers or even broadcasters. To that end, NAB and RIAA are in on-going discussions regarding copy protection. We jointly held an executive level meeting in New York City that served as a starting point for our discussions. During that meeting, we agreed to two working groups - an Audio Flag Task Force and a Technical Implementation Working Group - as well as a schedule for each group.

On April 5, 2006, the Audio Flag group held its first meeting at the NAB offices. Steve Marks, General Counsel at the RIAA, and Dan Halyburton, the Chair of the NAB Audio Flag Task Force, led the group. Each industry had member company representation at the meeting and participation via conference call. The meeting was productive in laying a foundation for the work and discussions that will follow.

During the week of April 17th, two meetings were held. The first meeting of the Technical Implementation Working Group was on Wednesday, April 19 at the RIAA offices. This group consists of engineers and technology executives and will address technical issues relating to the implementation of a potential audio flag. On Thursday, April 20, the second meeting of the Task Force took place at the RIAA offices. We expect these two groups to continue to meet and to move forward with discussions that will ultimately involve and include other vital stakeholders in a successful resolution of the issues.

Given these on-going discussions, NAB does not believe that legislation mandating any particular system of digital radio copy protection is necessary at this time. Terrestrial digital radio is a far different platform from satellite and on-line music services and delivery. The reality or scope of any threat to the recording industry from a scenario in which consumers make good quality recordings from digital broadcasts on their local radio stations is still an evolving concern. Those desiring to obtain and listen to pure, uninterrupted performances of sound recordings, in lieu of the radio, already have an abundant number of means to do so. Satellite and cable digital subscription services, hundreds of thousands of unencrypted compact discs, peer to peer file sharing, and hours of uninterrupted music that can be stored on recordable CDs and hard drives, are but a few such means. These are far different concerns than that of consumers seeking out random digital audio broadcast signals that may contain DJ patter over the recordings in order to create files to make copies of or distribute sound recordings. Moreover, the public's right to make private copies of sound recordings for personal use must be taken into account in developing any technical system of copy protection. Nonetheless, NAB strongly believes that the broadcast industry, the recording industry, and other vital stakeholders can work toward a consensus on digital radio copy protection system as warranted by marketplace conditions and technological developments.

In a similar vein, let me take this opportunity to note the importance of regulatory parity to terrestrial radio's future. One of the FCC's stated goals is to "develop[] a consistent regulatory framework across platforms by regulating like services in a similar functional manner." Report and Order and Notice of Proposed Rulemaking in CC Docket No. 02-33, FCC 05-150 at ¶ 1 (rel. Sept. 23, 2005). NAB supports this goal and urges both Congress and the FCC to achieve greater regulatory parity between terrestrial radio and satellite radio. The regulatory disparities between satellite and terrestrial broadcast radio are well known. For example, broadcasters are subject to public interest obligations that satellite radio providers are not. As you are no doubt aware, terrestrial radio providers are subject to strict indecency regulations that the FCC has not applied to radio programming delivered by satellite. Some have in fact speculated that this disparity in content regulation will give satellite radio operators a competitive advantage in the marketplace, especially among certain demographic groups. Perhaps most worrying, broadcasters fully expect XM and Sirius to pursue local advertising dollars aggressively, even though the FCC believed they would be "national services" when it authorized satellite radio. Small market stations are particularly concerned that if satellite radio - with the ability to put hundreds of programming channels into every market - were to absorb local advertising dollars, terrestrial stations - which are limited by the FCC's ownership rules to a very small number of channels in each market - would not be able to compete, or perhaps even survive.

For all these reasons, NAB remains very concerned about the considerable legal and regulatory disparity between terrestrial radio and satellite radio. Congress and the FCC should not permit any of these regulatory disparities to endanger "the important service that terrestrial radio provides" to local communities throughout the country. Report and Order, Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, 12 FCC Rcd 5754, 5763, 5769 (1997).

Changes To Copyright Law Are Needed To Promote Internet Radio Streaming

In July 2004, NAB testified in detail before the House Subcommittee on Courts, the Internet and Intellectual Property about changes to copyright law that Congress should make so that Internet radio streaming could mature into a workable business model and better serve radio listeners throughout the country. Today, I will briefly summarize the changes we previously proposed, which are needed today more than ever. NAB's very extensive 2004 testimony on these proposals is also attached.

First, Congress should make clear that Internet streaming of a radio broadcast to members of a radio station's local over-the-air audience is not subject to the sound recording performance right, just as the over-the-air performance is not. Internet transmissions to those local audiences are indistinguishable from over-the-air performance, and it makes no sense to treat the same audience differently depending upon whether they listen to the same signal over the air or over the Internet. Transmissions to these local audiences provide the same public service benefits to the community as over-the-air transmission, and provide the same promotional benefits to the record companies as the station's over-the-air broadcasts.

Second, the sound recording performance fee - and the standard by which it is set - must be reformed. In 1998, Congress adopted a new standard by which rates are set: "the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." § 114(f)(2)(B). This standard has been a recipe for abuse and needlessly inflated royalty rates to levels that are suffocating radio streaming services. This is true because there is not a free market in which willing buyers and willing sellers can freely negotiate. In fact, the "willing buyer, willing seller" standard has given rise to a presumption in favor of agreements negotiated by the major recording companies, acting under the antitrust exemption contained in the Copyright Act. The predictable result has been unreasonably high sound recording fees. In lieu of the manipulable "willing buyer, willing seller" standard, Congress should establish a sound recording performance fee comparable to what is paid to BMI, ASCAP and SESAC.

Third, the statutory performance license imposed nine conditions on broadcasters that stream, three of which are wholly incompatible with broadcasters' over-the-air business model. For example, one condition prohibits the playing of any three tracks from the same album within a three hour period. Another condition prohibits DJs from "pre-announcing" songs, and the third requires the transmitting entity to use a player that displays in textual data the name of the sound recording, the featured artist, and the name of the source phonorecords as it is being performed. Congress should eliminate these conditions, which are contrary to long-established broadcast practices and are designed to prevent copying of sound recordings from distribution mechanisms far different than radio. Radio stations should not be forced to choose between either radically altering their over-the-air programming practices or risking uncertain and costly copyright infringement litigation.

Fourth, as the law currently exists, record companies can "double dip," charging royalty fees for "ephemeral" or buffer copies that are simply a technical by-product of the streaming process and which have no independent economic value of their own. These ephemeral recordings exist simply to facilitate a licensed (and thus already fully compensated) performance or an exempt performance. Congress should modify the law to ensure there be no further payment needed to make copies used only to facilitate the permitted performance.

Fifth, Congress should ensure that recordkeeping and reporting requirements do not discourage broadcasters from streaming. Currently, these reporting requirements are established by a Copyright Royalty Board as part of the rule making process, and can be changed at will, so broadcasters may be subject to uncertain and changing rules. Congress should end this uncertainty by making clear that the "reasonable" reporting obligation under these rules contemplates reasonable sample periods, permits the exclusion of information a station lacks, and would be satisfied by the reporting of sound recording title and artist name.

As we stated in 2004, NAB continues to believe that these changes in copyright law are necessary so that Internet radio streaming can reach its full potential both for the benefit of broadcasters and for the listening public.

Conclusion

The deployment of HD radio is essential for terrestrial broadcasters to better serve their listeners and to remain competitive in today's digital media marketplace. A successful digital transition will allow local broadcasters to compete more effectively against satellite radio operators, which will still have a competitive advantage over local stations due to the disparity in regulatory treatment between radio services offered terrestrially and offered via satellite. Because of the importance of a timely roll-out of digital radio, any system to protect digital content must not impede the transition. NAB and RIAA are now coordinating on the development of a consensus on digital radio copy

protection, and this industry process should be allowed to continue without the adoption of premature legislative mandates.

As NAB previously testified, a number of changes to copyright law are needed to promote Internet radio streaming. Congress should consider changes to copyright law in the following areas: (1) the sound recording performance fee for Internet streaming, including the amount of the fee, and the fact that it is imposed on broadcasters for listeners who are within the broadcaster's local service area; (2) the standard by which that fee is determined; (3) the conditions under which the necessary statutory licenses are available; (4) the law governing the making of copies used solely to facilitate lawful performances; and (5) the threat of difficult and unnecessary reporting and record keeping requirements.