

Audio flags could conflict with fair use

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New radio technologies have music industry and radio officials at odds over fair use of audio and video digital transmissions.

The implementation of audio and video flags to block unauthorized distribution and replication could be one solution, experts testified Tuesday before the House Subcommittee on Telecommunications and the Internet. However, opponents of the flags say they would still block even legal use of music by consumers.

The Audio Broadcast Flag Licensing Act, currently pending before the committee, would authorize the Federal Communications Commission to implement technologies to prohibit unlawful transmission and copying from satellite and HD radio.

"Specifically, it provides that technical licensing agreements currently taking place between satellite/HD radio and developers of digital audio broadcast systems include a broadcast flag or similar technology that limits the unauthorized dissemination, duplication and redistribution of the content," said Rep. Mike Ferguson, R-N.J., sponsor of the proposed bill.

"If the products in question allow downloading that was not legally authorized, the parties will need to come to the table with content creators and work out fair royalties," Ferguson said. "My bill makes sure that the marketplace, not Congress, is where these negotiations happen."

Proponents of the bill point to the successes of legal downloading

services such as iTunes as re-energizing the music industry after years of struggle in the age of Napster and Grokster. However, with the advent of satellite radio and emerging digital radio, industry executives now say their business is in danger again from consumers who "cherrypick" individual songs that have been broadcast, then record save them on their satellite device. Subsequently, artists would not receive proper royalties from these transmissions.

Some songwriters and performers argue that their livelihood is in danger if consumers can save songs they hear on XM or digital radio, and not pay royalties for those selections.

Satellite radio providers such as Sirius and XM pay a performance fee to broadcast the music but not a distribution fee that entitles subscribers to services such as iTunes to a different ownership of the music.

According to Ruth Ziegler, deputy general counsel for Sirius Satellite Radio, the company's most popular \$50 device is not capable of saving individual songs for transfer or download to other devices, in compliance with the 1992 Audio Home Recording Act (AHRA). Any future use of the broadcast music would fall under fair use protection, she said.

"The whole purpose of a broadcast audio flag regime is to provide for encryption of content transmitted in the clear," Ziegler said. "Satellite radio content is fully encrypted at the source, providing the same level of protection against redistribution as the protection provided by the video flag adopted by the FCC. Particularly as applied to the satellite radio industry, the audio flag makes no sense."

XM Radio spokesman David Butler said his company's devices also prohibit illegal music transfers and are designed specifically to comply with the AHRA. Their main function, he said, is timeshifting to enhance convenience for the listener.

"The law allows consumers to make a personal copy for private use. We believe that these devices are in full compliance with the law and new regulations," Butler said.

The flag's opponents caution that curbing illegal transfer of files could also prohibit legal use of music by consumers as well as stifle further technological advances in digital music technology.

Setting restrictions before the technology has had time to be fully realized could have adverse effects. Instead, the National Association of Broadcasters suggests that the marketplace should be allowed to operate free of these regulations and a consensus could be reached normally.

"NAB does not believe that legislation mandating any particular system of digital radio copy protection is necessary or appropriate at this time. Rather, we encourage the committee to permit the parties' adequate time to work through these complicated issues," Andrew Levin, executive vice president and chief legal officer for Clear Channel Communications testified.

Kenneth Crews, director of the Copyright Management Center at Indiana University-Purdue University Indianapolis, told United Press International that Ferguson's bill, if enacted, could greatly infringe upon fair use rights.

Crews said the bill is a "broad grant of power to the FCC, subsequently bringing about "a conflict between the public's right of fair use and the copyright's owners with respect to original material."

"The problem is the law of copyright also includes a number of provisions that are specifically intended to protect the interests of the consumer," he said.

Instead of placing restrictions on current technologies to limit use, Crews suggested that the music industry should adapt to a new business model where they could be more profitable without breaching fair use, such as a monthly fee for downloads on satellite devices. Use in the privacy one one's home is likely covered by fair use, Crews said.

"You cannot defeat technology," he said. "We can create law that makes certain activities legal but someone will still do it."

"The goal in my mind should be how do we construct a law and a business model that allows consumers to make some reasonable uses including copying to different devices of that work once it's lawfully in their possession while at same time minimizing further transmission to friends and strangers," Crews said.

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