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Is Home Recording Dead? A Discussion of the Atlantic v. XM Satellite Radio Litigation and Audio Home Recording Rights

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NOTES

IS HOME RECORDING DEAD? A DISCUSSION OF THE ATLANTIC V. XM SATELLITE RADIO LITIGATION AND AUDIO HOME RECORDING RIGHTS

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In April of 2006, XM Satellite Radio, Inc. (XM) launched a new device entitled the “Inno.” The Inno allows XM subscribers to listen to live satellite radio broadcasts, record individual songs that are played during those live broadcasts, and transfer digital music files to the device for listening. The Inno has caught the ire of the recording industry because it allows the user to record permanent digital copies of individual songs, and to create permanent libraries of those sound recordings.

On May 16, 2006, the Recording Industry Association of America (RIAA) filed suit on behalf of the major record labels against XM over the marketing and promotion of the Inno and the “XM + MP3” service. The plaintiffs allege that use of the device with the XM + MP3 service infringes on the plaintiffs’ copyrights, the Inno induces users to engage in copyright infringement, XM is contributorily liable for the infringement by Inno users, and that XM is in violation of numerous other copyright laws. The plaintiffs seek a declaratory judgment that the device infringes on the plaintiffs’ copyrights, an injunction barring the production and distribution of the Inno, and damages from XM for the infringement by Inno users. On the other hand, XM and its supporters argue that XM is immune from any copyright infringement actions related to use of the Inno because federal copyright law prohibits suits against those who manufacture,
XM contends that the Inno meets the statutory requirements of a digital audio recording device. The current litigation between the RIAA and XM encompasses numerous legal and policy issues. Nonetheless, all of these issues hinge on one central issue: Whether use of the Inno’s recording function actually infringes on the plaintiffs’ copyrights. Accordingly, the purpose of this Note is to discuss and explore that question.

Part II of this Note provides basic background information on the Inno’s functions and disputed features, describes how the Inno has been marketed to the public, and explains the applicable copyright statutes and primary case law interpreting those statutes. Part II concludes by discussing the contentions put forward by both sides of the XM litigation regarding whether the statutory immunities of the Audio Home Recording Act of 1992 (AHRA) apply to XM, and whether XM has created a service that illegally distributes the plaintiffs’ copyrighted works. Part III of the Note analyzes, in light of the text and legislative history of the AHRA and Digital Performance Rights Act of 1995 (DPRA), whether the Inno used with XM’s services is in fact a digital audio recording device or a cleverly disguised digital music distribution service. Part III also articulates some of the problems within the AHRA, and suggests potentially beneficial amendments that should be made to the AHRA.

In conclusion, this Note finds that the Inno fails to meet the definition of a digital audio recording device under the AHRA. Therefore, XM cannot claim the protections of federal law provided to distributors of digital audio recording devices. Nonetheless, this Note will also find that XM is not in violation of its statutory license to perform the plaintiffs’ works because the Inno used with the XM broadcast does not constitute an unauthorized digital music distribution service run by XM. In light of the probable outcome of this litigation, as well as the outcome of prior litigation, this Note ultimately concludes that Congress should amend the AHRA to provide clear guidance to manufacturers of digital audio recording devices as well as to ensure that copyright owners are properly compensated and protected against illegal copying of their works.

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7 Memorandum of Law in Support of Defendant’s Motion to Dismiss at 1–2, 13–14, Atlantic Recording Corp. v. XM Satellite Radio, No. 06 CV 3733 (DAB) (S.D.N.Y. July 17, 2006) [hereinafter Memorandum]; Amicus Curiae Brief of the Consumer Electronics Assoc. & Home Rerecording Rights Coalition in Support of Defendant’s Motion to Dismiss at 1–18, Atlantic Recording Corp. v. XM Satellite Radio, No. 06 CV 3733 (DAB) (July 17, 2006) [hereinafter Amicus Brief].

8 Memorandum, supra note 7, at 1–2, 14–17.
II. BACKGROUND

This Part will begin by providing a brief overview of the history of XM Satellite Radio and satellite radio technology in general. Next, the basic functions and key features of the Inno, as well as XM’s marketing strategies of the device, will be discussed. Finally, this section will conclude by introducing the copyright laws pertinent to the XM litigation, laying out judicial interpretations of certain key portions of these laws, and reviewing the legal arguments put forth by both sides of the XM case.

A. XM SATELLITE RADIO

XM was incorporated in 1992 in response to the creation of a new medium for broadcasting radio. Unlike traditional radio stations that broadcast an analog AM or FM signal, XM broadcasts an all digital signal through the use of satellites. XM offers a variety of programming options, including several genres of music, premium sports, comedy, talk radio, and traffic and weather reporting on over 170 channels. In order to receive the XM signal and listen to the broadcast, an individual must own an XM Radio and pay a monthly subscription fee. Currently, XM has approximately seven million subscribers across the United States.

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11 XM is one of only two companies that currently hold a license to broadcast satellite radio. XM Corporate Information, supra note 9.

12 Id.

13 Memorandum, supra note 7, at 4. XM broadcasts an encrypted (protected) digital signal that can only be decrypted and heard through an XM radio that has been activated. Id. Currently, the monthly subscription rate is $12.95/month for one radio, and $6.99/month for additional radios under the family plan. XM Radio – Fast Facts, http://www.xmradio.com/about/fast-facts/index.xmc (last visited Apr. 15, 2007).

14 Id.
B. THE INNO

The Inno is a portable handheld device that allows users to enjoy XM satellite radio broadcasts virtually anywhere within the United States and surrounding territories. With the Inno, users can listen to a live broadcast on any of XM’s channels, as well as receive sports scores, stock quotes, and various other information. In addition, the “TuneSelect” feature allows listeners to be notified whenever their favorite artist or song is currently being played on any XM channel.

The Inno’s most innovative, and most controversial, feature is its ability to record individual songs and other programming from a live XM broadcast. With the touch of a button, Inno users can record individual songs directly from an XM broadcast. Even if a song has already begun playing, a listener can record the entire song because the device automatically stores the last ten minutes of the broadcast on the Inno’s internal memory. Similar to a VCR or Personal Video Recorder (PVR), the Inno allows the user to schedule a recording session on a particular channel at a predetermined time. Songs and other content recorded on the Inno cannot be transferred from the device, and Inno users can only listen to recorded songs and content if they have an active XM subscription. The Inno also allows users to transfer their own digital music files to the device for subsequent listening. Users can even bookmark songs that they have listened to during an XM broadcast for purchase on the “XM + Napster” service.

16 PIONEER, supra note 2, at 26–28, 31–32.
17 Id. at 29–30.
18 Id. at 33–34.
19 Id. at 33. The device must be tuned to the channel where the song was playing once the song began playing. Id.
20 Id. at 35–36.
21 Memorandum, supra note 7, at 6; PIONEER, supra note 2, at 37.
23 PIONEER, supra note 2, at 45.
C. MARKETING OF THE INNO

XM touts the Inno as a portable satellite radio that allows for easy recording, playback, and management of the user’s favorite music. XM purports that the Inno’s features make it superior to the iPod, which is currently the most popular digital music player. XM currently markets the Inno as part of its “XM2go” product line, emphasizing that Inno users can enjoy XM broadcasts and content anywhere and at anytime. Since its initial unveiling at the 2006 Consumer Electronics Show (CES) held in Las Vegas, Nevada, the Inno has received numerous awards and accolades within the consumer electronics industry.

D. APPLICABLE COPYRIGHT LAW

To determine whether the Inno used with the XM broadcast is permissible, the XM court will have to consider and interpret two pieces of legislation. First, the AHRA statutory language and legislative history provide guidance on digital audio recording devices and the liability issues surrounding such devices. Additionally, both the District Court and Ninth Circuit decisions in the RIAA v. Diamond Multimedia litigation provide in-depth discussions and interpretations of the AHRA. Finally, the DPRA defines the digital performance right in sound recordings, as well as dictates the rights and requirements for satellite radio companies to broadcast copyrighted sound recordings.


a. Historical Background. Prior to 1972, federal copyright law did not protect copyright owners from the unauthorized duplication of their sound recordings. In order to protect themselves, sound recording copyright owners

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24 Examples of some marketing phrases used include: “Hear It, Click It, Save It... Your playlist will never be the same”; “Record with the touch of a button”; “Schedule recordings in advance. Never miss your favorite programs”; “Store up to 50 hours of XM”; “Listen to the songs you want to hear when you want to hear them”; “Create playlists using both your own music files and recorded XM songs”; “Bookmark songs for easy online purchase.” Pioneer Inno, http://www.xmradio.com/innodemo/index.xmc (last visited Apr. 15, 2007).

25 See Complaint, supra note 3, at 2 (“It’s not an iPod, it’s the Mothership.”).


had to resort to state civil and criminal laws to obtain relief. Congress finally responded by enacting the Sound Recording Amendment of 1971, which prohibited the unauthorized duplication of a recorded performance or rendition of a copyrighted musical composition.

Notwithstanding the passage of the Sound Recording Amendment, it still remained unclear whether home recording of sound recordings constituted copyright infringement. "Private copying' or 'home recording' is the practice of individuals making tapes at home of their own or friends records or taping broadcasts of recorded music off the radio." Traditionally, most home recording took place on analog recording technology, such as audio cassette tapes. This did not worry the recording industry because the inherent characteristics of analog technology limited the effects of copyright infringement resulting from home recording.

However, in 1990, Sony Corporation and its subsidiaries were sued by songwriters and publishers in a class action to prohibit digital audio recording technology from entering the United States. The Digital Audio Tape (DAT) and DAT recorder, introduced by Sony and Philips Electronics in the mid-1980s, made it possible for consumers to digitally record and copy music. DAT

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29 Id. at 499.
30 Id. This legislation protects sound recordings fixed after February 1972 under federal copyright law, while those fixed prior to February 1972 are only protected by state and criminal law against unauthorized duplication and distribution. Id.
31 Id. at 499–500. Compare H.R. REP. NO. 92-487, at 6 (1971), reprinted in 1971 U.S.C.C.A.N. 1566, 1572 (stating that the granting of a limited copyright in sound recordings was not designed to prohibit home recording of sound recordings from broadcasts, tapes, or records for private use), and Elektra Records Co. v. Gem Elec. Dist., Inc., 360 F. Supp. 821, 824 (E.D.N.Y. 1973) (stating that Congress did not intend to prohibit individuals from making home recordings of copyrighted materials), with Melville B. Nimmer, Copyright Liability for Audio Home Recording: Distilling the Betamax Myth, 68 VA. L. REV. 1505 (1982) (contending that under copyright law there was no exemption from copyright liability for audio home recording).
32 Kurlantzick & Pennino, supra note 28, at 497. There is an important distinction between music piracy and home taping. Music piracy is illegal because of its "for-profit" aspect, and the practice has been illegal since copyright protection was extended to sound recordings in 1971. However, the legality of the home taping of a legitimately purchased audio recording was a long-standing debate.
35 Id.
36 See Melville, supra note 32, at 378 ("DAT recorders permit users to make successive copies of tapes with virtually none of the degradation in sound quality that occurs with analog copies.").
RECORDING SATELLITE RADIO

technology troubled the recording industry because, for the cost of a blank digital audio tape, consumers could use a DAT recorder to make a perfect replica of the original CD.\(^\text{37}\) The industry believed that DAT technology would serve as a widespread mechanism for copyright infringement,\(^\text{38}\) and as a result, severely diminish the revenues of recording companies and artists.\(^\text{39}\)

The Sony case, which could have directly resolved the legality of home recording, was eventually settled in 1991.\(^\text{40}\) Part of the settlement agreement required that Sony and the other defendants agree to cooperate with the plaintiffs to establish legislation that would address the issue of home copying and create a royalty payment system for those who wish to manufacture and distribute digital audio recording equipment and recording media.\(^\text{41}\) These efforts eventually led to the passage of the AHRA.\(^\text{42}\)

b. AHRA Provisions. The AHRA was enacted as a compromise between consumers, the consumer electronics industry, and the recording industry.\(^\text{43}\) According to the Senate, “[t]he purpose of [the AHRA] is to guarantee the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use.”\(^\text{44}\) The AHRA, which amended chapter ten of the Copyright Act,\(^\text{45}\) has three primary purposes.\(^\text{46}\) First, it allows for the sale and distribution of digital audio recording devices for home use within the United States, with certain limitations.\(^\text{47}\) Second, the AHRA provides compensation to recording artists and copyright owners for potential lost revenues due to the use of this technology.\(^\text{48}\) Third, the AHRA provides immunity from copyright infringement suits for those who produce, import, or distribute digital audio

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\(^{37}\) Melville, \textit{supra} note 32, at 378–79.


\(^{39}\) \textit{Id.}

\(^{40}\) Kurlantzick \& Pennino, \textit{supra} note 28, at 500–01; Lutzker, \textit{supra} note 33, at 164–65.

\(^{41}\) Kurlantzick \& Pennino, \textit{supra} note 28, at 501; Lutzker, \textit{supra} note 33, at 170 n.134.

\(^{42}\) Kurlantzick \& Pennino, \textit{supra} note 28, at 501; \textit{see also} Lutzker, \textit{supra} note 33, at 184–89 (discussing the passage of the AHRA).

\(^{43}\) Melville, \textit{supra} note 32, at 379. In fact, the AHRA was not drafted by Congress. Lutzker, \textit{supra} note 33, at 180. The provisions and language of the AHRA are the result of extended negotiations between those who have a large financial interest in the legislation, including “the record industry (producers), the songwriters and music publishers (creators and their agents), and the consumer electronics industry (manufacturers, distributors, and retailers)." \textit{Id.}

\(^{44}\) Melville, \textit{supra} note 32, at 379 n.61 (quoting S. REP. NO. 102-294, at 30 (1992)).


\(^{47}\) \textit{Id.}

\(^{48}\) \textit{Id.}
recording devices and media, as well as for consumers who employ the technology for noncommercial purposes.\textsuperscript{49}

Under the AHRA, a "digital audio recording device" is a device distributed to individuals that has a digital recording function designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use.\textsuperscript{50} 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.\textsuperscript{51} A "digital musical recording" is a material object (i) containing only sounds and material, statements, or instructions incidental to those sounds, fixed in a digital recording format, 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.\textsuperscript{52}

Manufacturers of digital audio recording devices are required to implement certain copy controls within the devices that are to be distributed within the United States.\textsuperscript{53} Specifically, all digital audio recording devices must comply with the Serial Copy Management System (SCMS).\textsuperscript{54} SCMS is a technology that prevents users of digital audio recording devices from making second-generation copies of an audio recording.\textsuperscript{55} To ensure that each device meets SCMS standards, each manufacturer or importer of a digital audio recording device must gain permission from the Secretary of Commerce in order to lawfully sell their devices within the United States.\textsuperscript{56} Moreover, it is unlawful for anyone to import, manufacturer, or distribute any device, or offer any service within the United States, whose primary purpose is to circumvent any SCMS program.\textsuperscript{57}

To offset the potential economic losses that the recording industry would face due to widespread home recording, Congress devised a royalty system to

\textsuperscript{49} Id. § 8B.07[C].
\textsuperscript{50} 17 U.S.C. § 1001(3) (2000).
\textsuperscript{51} 17 U.S.C. § 1001(1).
\textsuperscript{52} 17 U.S.C. § 1001(5).
\textsuperscript{54} Id.
\textsuperscript{55} Melville, \textit{supra} note 32, at 380–81. SCMS technology permits the recorder to make unlimited first generation copies of original prerecorded material but prohibits the re-copying of those first generation copies. The SCMS functions by encoding every copied tape [or other digital recording] with an inaudible signal that, when detected by a SCMS-enabled device, prevents a copy of that copy from being made.
\textsuperscript{56} Id.
\textsuperscript{57} 17 U.S.C. § 1002(b).
\textsuperscript{58} 17 U.S.C. § 1002(c).
compensate those affected by home recording technology. The AHRA requires that producers and distributors of audio recording devices pay a certain percentage of the price of each recording device or medium sold within the United States to the Register of Copyrights, and that the proceeds be periodically distributed to recording artists, music publishers, music writers, and copyright owners. The manufacturer and or distributor of digital audio recording devices must notify the Register of Copyrights that they intend to distribute such devices as well as provide quarterly and annual accounting statements relating to the distribution of the devices and media that they actually sell.

The AHRA also provides limited immunity for producers, importers, distributors, and users of digital or analog audio recording devices and media. Section 1008 states that one cannot be sued for copyright infringement simply because they are a manufacturer, importer, or distributor of digital audio recording devices, even if those who use the devices engage in copyright infringement. Similarly, consumers who use such devices for noncommercial purposes, such as making personal copies of digital recordings, cannot be sued for copyright infringement. Thus, while § 1008 permits individuals to tape sound recordings from the radio for purely private purposes, using audio recording technology for the purpose of reproducing and selling copies of sound recordings is prohibited.

c. AHRA Legislative History. Both the House and Senate reports on the AHRA provide some understanding as to what recording devices and media Congress intended the AHRA to cover. The Senate report states that the definition of digital musical recording (referred to as “audiogram” in the report) is meant to include “objects commonly understood to embody sound recordings and their underlying works.” The Senate report gives examples of digital

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59 17 U.S.C. §§ 1004-1005 (2000); Melville, supra note 32, at 380 n.68. Currently, the statutory rate is 2% for digital recording devices and 3% for digital audio recording media. 17 U.S.C. § 1004(a)(1), (b). The statute also provides for royalty rate calculations for digital audio recording devices that are integrated with or distributed with other devices. 17 U.S.C. § 1004(a)(2). Only the first person to manufacture and distribute or import and distribute a recording device is required to pay the royalty. 17 U.S.C. § 1004(a)(1).
61 2 NIMMER & NIMMER, supra note 46, § 8B.07[C].
62 17 U.S.C. § 1008 (2000); see also Lutzker, supra note 33, at 160 (“Under the AHRA, [contributory infringement] is a cause of action that henceforth will be foreclosed to copyright owners of musical compositions and sound recordings.”).
64 2 NIMMER & NIMMER, supra note 46, § 8B.07[C][2].
musical recordings, specifically naming "recorded compact discs (CDs), digital audio tapes (DATs), audio cassettes and long-playing albums (LPs), and in the near future, digital compact cassettes (DCCs) and mini-discs (MDs)." The primary House report simply states that the AHRA was meant to encompass all digital recording technologies, and it explicitly lists DATs, DCCs, and Mini-Discs as examples. The Senate report goes on to state that the incidental material that can accompany the sound recordings includes text or graphics, such as title, artist information, biographies, still photos of the performers, lyrics of the musical works that are commonly embodied on album covers, CD boxes, and audio cassette packages. "Statements or instructions" includes the data used for the playback of recordings, such as track and timing information so that the audio player can locate a particular track, as well as subcode information used in the Serial Copy Management System.

The statutory definition of digital musical recording explicitly excludes material objects that contain one or more computer programs. The Senate report states that material objects that contain computer programs or databases that are not incidental to the fixed sounds do not meet the definition of a digital musical recording. Similarly, the House report notes that the AHRA expressly excludes computer programs from the definition of digital musical recording.

To determine whether devices with both recording and playback functions constitute digital audio recording devices, the Senate report explains that the primary purpose test is applied only to the recording function of the device and not to all of the features of the device as a whole. The drafters meant for "primary purpose" to mean "a purpose that exceeds 50 percent of all purposes." The Senate report further states that "if the 'primary purpose' of the recording function is to make objects other than digital audio copied recordings, then the machine or device is not a 'digital audio recording device,' even if the machine or device is technically capable of making such recordings." That report also
explains that a computer does not constitute a digital audio recording device; however, a computer peripheral device that has a recording function marketed specifically for making digital audio copied recordings would fall under the AHRA.  

d. Judicial Interpretation of the AHRA: RIAA v. Diamond. Considering all the interests at stake and the billions of dollars reaped from the sale of audio recording technology and sound recordings, there has been surprisingly little litigation concerning the AHRA. *RIAA v. Diamond Multimedia Systems* was one of the first cases to provide a comprehensive interpretation of the AHRA.  

The *Diamond* litigation involved the “Rio,” a portable digital music player manufactured by Diamond Multimedia Systems. The Rio allowed users to transfer digital audio files from their computer to the device for playback. The Rio played “MP3” files, the most popular digital audio format at the time. To download songs to the Rio, users had to connect the device to their computer with a cable and use the “Rio Manager” computer software to transfer files to the device. The Rio could store approximately one hour of music, and with an additional flash memory card, the device could store us to an extra hour of music. The device’s only output was through an analog signal sent to headphones connected to the device. The Rio was not capable of duplicating any of the files stored within its internal memory, nor could it transfer or upload the files to a computer, another device, or to the internet. A flash memory card with MP3 audio files, however, could be removed and inserted for playback into another Rio.

...
i. District Court Decision. The RIAA filed suit against Diamond in 1998, seeking to enjoin further manufacture and distribution of the Rio and also to recover the unpaid royalties for the manufacture and distribution of the Rio as required by the AHRA.

Diamond claimed that the Rio was not a digital audio recording device as defined by the AHRA. According to Diamond, because a computer hard drive is not a digital musical recording, a device that copies digital audio files from a computer hard drive (such as the Rio) cannot be a digital audio recording device because it does not make reproductions from digital musical recordings. Diamond also argued that the Rio was not a digital audio recording device because it lacked a digital recording function. The company's rationale was that since the Rio was entirely dependent on a computer to transfer the files to the device, the device could not independently make recordings, and therefore the Rio lacked a recording function for AHRA purposes.

The plaintiffs, on the other hand, claimed that by manufacturing and distributing the Rio, Diamond was violating the AHRA. They argued that the Rio was a digital audio recording device because the exclusion of "material objects...in which one or more computer programs are fixed" from the definition of digital audio recording applied only to objects containing computer programs, such as CD-ROMs. According to the plaintiffs, this provision was designed to exclude the copying of CD-ROMs containing incidental audio tracks from AHRA protection. They also alleged that the Rio violated the AHRA because it was a digital audio recording device lacking a SCMS system.

The district court ultimately denied the RIAA's injunction request, holding that (i) the plaintiffs had not established a probability of success on the merits, and (ii) refusing the injunction would not subject the plaintiffs to irreparable
According to the court, although the plaintiffs had shown that the Rio probably was a digital audio recording device, they failed to establish a probability of success because they had not proven that the Rio did not comply with the AHRA’s SCMS requirements.  

In evaluating whether the Rio was a digital audio recording device, the court extensively reviewed the statutory language and legislative history of the AHRA. The court concluded that Diamond’s construction of both the definition of digital audio recording device and the computer hard drive exception was contrary to the spirit and purpose of the AHRA. The court stated that the AHRA’s legislative history supports the view that the exclusion of material objects containing computer programs from the definition of digital musical recording was intended to “avoid immunizing the illegitimate copying of computer programs from liability for copyright infringement.” In addition, the court reasoned that under Diamond’s interpretation of the definition of digital musical recording, any recording device transferring digital music files that resided temporarily on a computer hard drive would not be subject to AHRA regulation, an interpretation that would “effectively eviscerate the AHRA.” Furthermore, the court believed that nothing within the definition of digital audio recording device indicated that such devices must be able to record independently from a computer. Finally, the court felt that Diamond’s interpretation of the term “recording function” meant that any device that did not independently make recordings would not be subject to AHRA regulation, even though the device was capable of making digital audio reproductions.

ii. Ninth Circuit Decision. After being rejected by the district court, the RIAA appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit, after conducting its own extensive analysis of the text and legislative history of the AHRA, concluded that the Rio did not qualify as a digital audio recording device, because it was not able to directly reproduce digital musical recordings or reproduce them indirectly from a transmission.
According to the Ninth Circuit, the AHRA contained a "computer hard-drive exemption" for certain digital audio recording devices, and this exemption precluded the Rio from being considered a digital audio recording device. The court reasoned that because the AHRA's definition of digital musical recording excluded material objects "in which one or more computer programs are fixed," a computer hard drive must fall outside the definition of a digital music recording. The court further stated that this exemption applies not only to the copying of computer programs from hard drives, but to "any copying from a computer hard drive." Since the Rio could only copy files from a computer hard drive, the court determined that the Rio was not be a digital audio recording device because it did not reproduce files from an actual digital musical recording.

Instead of simply rejecting the RIAA's request for an injunction based on the facts of the case, the Ninth Circuit went further and acknowledged the existence of a significant loophole in the AHRA. The court held that any recording device that first passes files through a computer hard drive would not be subject to regulation under the AHRA. According to the court, "[u]nder the plain meaning of [the AHRA's] definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices because their 'primary purpose' is not to make digital audio copied recordings." The primary purpose of the computer the court stated, is "to run various programs and to record the data necessary to run those programs and perform various tasks."

In support of its argument, the Ninth Circuit cited the legislative history of the AHRA. The court noted that the Senate drafting report states that the personal computer does not fall within the definition of a digital audio recording device because the recording function of the computer "is designed and marketed primarily for the recording of data and computer programs," and not for recording digital audio copied recordings. The court also pointed out that the Senate Report states that "[i]f the 'primary purpose' of the recording function is to make objects other than digital audio copied recordings, then the machine or device is not a 'digital audio recording device,' even if the machine or device is technically capable of making such recordings."
The Ninth Circuit also held that the Rio was not a digital audio recording device because it could not reproduce a digital musical recording "from a transmission."\textsuperscript{116} A performance is transmitted when, through a device or process, it is communicated beyond the place from which it is sent.\textsuperscript{117} The Senate report states that a radio broadcast is an example of a transmission,\textsuperscript{118} and a digital audio recording made from a radio broadcast constitutes a digital audio copied recording.\textsuperscript{119} From these readings of the statute and legislative history, the court concluded that a device falls under the AHRA "if it can indirectly copy a digital music recording by making a copy from a transmission of that recording."\textsuperscript{120} Since the Rio could only make copies of sound recordings from a computer hard drive, the court held that it was incapable of making digital musical recordings indirectly from a transmission.\textsuperscript{121}

In summary, the Ninth Circuit set forth a two-part test to determine whether a device constitutes a digital audio recording device under the AHRA. Under their test, for a device to be considered a digital audio recording device, "[it] must be able to produce, either 'directly' or 'from a transmission,' a 'digital music recording.'"\textsuperscript{122} In addition, the device must have a recording function whose primary purpose is to make digital audio copied recordings.\textsuperscript{123} Under this test, a device that is capable of copying digital audio files only from a computer hard drive does not constitute a digital audio recording device under the AHRA, and therefore is not subject to regulation under the AHRA.\textsuperscript{124}

2. Digital Performance Right in Sound Recordings Act of 1995. The 1976 Copyright Act provided copyright owners with five exclusive rights in their copyrighted works: the rights to reproduce, adapt, distribute, publicly perform, and publicly display their works.\textsuperscript{125} Congress specifically excluded an exclusive performance

\textsuperscript{116} Id. at 1079.
\textsuperscript{117} Id. Since the term "transmission" was not defined within the AHRA, the court looked to other portions of the copyright act, as well as the legislative history of the AHRA, to find a suitable definition for transmission. Id. The court believed that the way the term is used within the AHRA implies that a transmission is a communication to the public. Id.
\textsuperscript{118} Id. at 1080 (citing S. REP. NO. 102-294, at 119).
\textsuperscript{119} Id. at 1080–81 (citing S. REP. NO. 102-294, at 119).
\textsuperscript{120} Id. at 1081.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 1076.
\textsuperscript{123} Id. at 1078.
\textsuperscript{124} See id. at 1075–81 (discussing why the Rio is not a digital audio recording device).

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture
right for sound recordings. Congress finally addressed the lack of protection for the public performance of sound recordings by passing the Digital Performance Right in Sound Recordings Act of 1995 (DPRA). The DPRA created two rights for copyright owners: (i) a public performance right in sound recordings for certain digital transmissions, and (ii) a compulsory license for the digital distribution of sound recordings, also known as "digital phonorecord delivery." 

17 U.S.C. § 106(6): Performance Right in Sound Recordings. The DPRA amended § 106 of the Copyright Act by providing copyright owners with the exclusive right to publicly perform sound recordings by means of a digital audio transmission. The performance right within § 106(6) is rather limited in scope, as it only applies to sound recordings that are transmitted digitally. This means that live performances of copyrighted works, transmissions of audiovisual works (movies, television programs, etc.), and transmissions that occur in analog formats or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible . . . . To perform or display a work "publicly" means—(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.


126 2 NIMMER & NIMMER, supra note 46, § 8.21[B]; see also 17 U.S.C. § 106 (2000) (giving copyright owners an exclusive performance for public performances through a digital audio transmission instead of a comprehensive exclusive performance right as found under § 106(4)); id. § 2.10 (discussing sound recordings and the rights surrounding them). The reason for the omission is that Congress intended to address this issue at a later date. 2 NIMMER & NIMMER, supra note 46, § 8.21[B].


128 2 NIMMER & NIMMER, supra note 46, § 8.22.


130 17 U.S.C. § 106(6). The Copyright Office, Patent and Trademark Office, and the White House all recommended that the performance right cover all public performances of sound recordings, but Congress chose instead to limit the right to digital transmissions. 2 NIMMER & NIMMER, supra note 46, § 8.21[B] n.44. Congress made this decision in an effort to recognize the carefully created performance right agreed to by the affected parties. H.R. REP. 104-274, at 19 (1995); 2 NIMMER & NIMMER, supra note 46, § 8.21[B].
(including those made by AM, FM, and TV stations) are all exempted from DPRA regulation.\textsuperscript{131}

b. 17 U.S.C. § 114: Scope of Exclusive Performance Right in Sound Recordings. While the DPRA finally gave copyright owners an exclusive right in the performance of sound recordings, albeit a rather limited right, several notable limitations have been imposed on this right through amendments to § 114 of the Copyright Act.\textsuperscript{132} In particular, § 114(d)(1) exempts nonsubscription transmissions,\textsuperscript{133} most retransmissions of these transmissions, and other transmissions that Congress deems should not be subject to the performance right, as long as the transmission of the sound recordings is not part of an interactive service.\textsuperscript{134} An “interactive service” is a service “that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.”\textsuperscript{135}

Section 114(d)(2) subjects subscription digital audio transmissions,\textsuperscript{136} certain nonsubscription transmissions, and satellite radio transmissions\textsuperscript{137} to a statutory license if the transmission meets certain requirements.\textsuperscript{138} A statutory license

\textsuperscript{131} 2 NIMMER & NIMMER, supra note 46, § 8.21[B].


\textsuperscript{133} “The classic example of such a transmission is a transmission to the general public by a free over-the-air broadcast station, such as a traditional radio or television station . . . .” S. REP. NO. 104-128, at 24.


\textsuperscript{135} 17 U.S.C. § 114(d)(7). The term interactive service includes on-line or other services that offer “pay-per-listen,” “audio-on-demand,” or “celestial jukebox” features, regardless of whether there is a charge to receive the service. S. REP. NO. 104-128, at 35 (1995).

\textsuperscript{136} A subscription digital audio transmission is a transmission limited to particular recipients for which subscribers are charged a fee to receive the transmission. 17 U.S.C. § 114(j)(14); 2 NIMMER & NIMMER, supra note 46, § 8.22[C][1][a].

\textsuperscript{137} The statute states that this section only applies to “preexisting satellite digital audio radio service.” 17 U.S.C. § 114(d)(2). At the time this statute was enacted, CD Radio (now Sirius Satellite Radio) and American Mobile Radio Corporation (now XM Satellite Radio) had purchased licenses from the FCC and had begun developing their satellite radio systems. 2 NIMMER & NIMMER, supra note 46, § 8.22[D][1][6].

\textsuperscript{138} See generally 2 NIMMER & NIMMER, supra note 46, § 8.22 (discussing digital transmission rights in sound recordings).
guarantees that broadcasters of sound recordings, such as satellite radio companies, will receive a license to perform sound recordings through a digital transmission, as long as the broadcaster pays the royalties required under the statute. In order for a performance of sound recordings by a satellite radio company to qualify for a statutory license, certain requirements must be met: (i) the transmission cannot be part of an interactive service; (ii) the broadcaster cannot intentionally cause the recipient’s equipment to automatically switch from one channel to another; (iii) the transmission must contain specific information about the copyrighted work; (iv) the transmission cannot exceed the sound recording performance complement; and (v) the broadcaster may not publish an advance program schedule or make announcements of specific sound recordings or phonorecords to be transmitted. Section 114(d)(3) provides terms for the licensing of transmissions of sound recordings by interactive services. Finally, § 114(d)(4) states that (i) nothing within § 114 limits the exclusive right to perform a sound recording publicly via digital audio transmission, (ii) § 114 does not limit the exclusive right to publicly perform a musical work under § 106(4), and (iii) the limitation on performance rights of sound recordings described within § 106(6) does not prevent copyright owners from exercising their other exclusive rights contained in § 106.

c. 17 U.S.C. § 115: Digital Phonorecord Delivery. The DPRA also expanded the reproduction and distribution rights held by copyright owners under § 115 of the Copyright Act. Among other things, the DPRA amended the mechanical compulsory license under § 115 to give a compulsory licensee the right to reproduce and distribute or authorize the distribution of a sound recording by means of digital transmission. The DPRA also set forth how royalties are to be

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140 The sound recording performance complement restricts the number of times broadcasters can perform a particular sound recording, several selections from the same album of an artist, several sound recordings from the same artist, or different recordings from a compilation album within a certain time period. See 17 U.S.C. § 114(j)(13).
141 Id. § 114(d)(2)(A)–(B).
142 Id. § 114(d)(3).
143 Id. § 114(d)(4)(A).
144 Id. § 114(d)(4)(B).
145 Id. § 114(d)(4)(C).
146 2 NIMMER & NIMMER, supra note 46, § 8.23[A].
147 H.R. REP. 104-274, at 37–38 (1995); see also 2 NIMMER & NIMMER, supra note 46, § 8.23[A][1] (stating that the compulsory license essentially allows any party to reproduce their own version of a musical work, such as a song, once the work has been released to the public, without obtaining the explicit permission of the copyright owner). A “mechanical license” is “a grant of the right to produce and release a copyrighted work in exchange for a royalty based on the number of units
be paid when a musical work is reproduced and distributed through a digital transmission. 148

Under § 115, the digital distribution of a sound recording created under a compulsory license constitutes a “digital phonorecord delivery.” 149 A “phonorecord” is a material object where sounds are fixed and from which the sounds can be perceived, reproduced, or communicated through a machine or device (such as a cassette tape, CD, etc.). 150 A digital phonorecord delivery is “each individual delivery of a phonorecord by digital transmission of a sound recording that results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording . . . .” 151 The DPRA Senate Report explains that a “specifically identifiable reproduction” is one that the transmitting service, and not simply the recipient, can identify. 152 This implies that the mere private copying of a sound recording from a digital transmission does not result in a digital phonorecord delivery. 153 A transmission of a sound recording or the underlying musical work can be characterized as a digital phonorecord delivery even if the transmission is part of a public performance of the sound recording or musical work. 154 However, any transmission of a sound recording made from a real-time, noninteractive subscription transmission where no copy of the transmission is made throughout the entire performance of the sound recording is not a digital phonorecord delivery. 155 Moreover, the fact that a recipient of a transmission, through actions on their own, records all or part of the programming from the service does not necessarily render the transmission a digital phonorecord delivery. 156

Digital phonorecord delivery of sound recordings is permissible only if (i) the copyright owner of the sound recording has authorized the delivery and (ii) the copyright owner of the sound recording, or the entity making the delivery, has obtained a compulsory license or has been authorized by the copyright owner of the underlying musical work to distribute or authorize distribution of each musical work embodied in the sound recording via digital delivery. 157 Basically, this means manufactured and sold.” BLACK’S LAW DICTIONARY 939 (8th ed. 2004).

148 H.R. REP. 104-274, at 37–41.
149 2 NIMMER & NIMMER, supra note 46, § 8.23[A][2].
154 17 U.S.C. § 115(d); 2 NIMMER & NIMMER, supra note 46, § 8.23[A][2].
155 17 U.S.C. § 115(d); 2 NIMMER & NIMMER, supra note 46, § 8.23[A][2].
156 S. REP. NO. 104-128, at 45; 2 NIMMER & NIMMER, supra note 46, § 8.23[A][2].
that those who wish to digitally deliver phonorecords legally must receive permission to deliver each phonorecord, either through negotiations with the copyright owner or through the compulsory license.\(^{158}\)

The DPRA makes it clear that nothing contained within \(\S\) 115 annuls or limits the exclusive right to perform a sound recording or musical work embodied within the recording, including by means of digital transmission.\(^{159}\) Additionally, because the liability exemption of \(\S\) 1008 of the AHRA could be interpreted as immunizing some digital phonorecord delivery activities, the DPRA expressly limits \(\S\) 1008 to prevent it from covering digital phonorecord delivery.\(^{160}\) However, to keep those protected by the AHRA from being liable for unauthorized digital phonorecord delivery under \(\S\) 115, the DPRA explicitly immunizes producers, distributors, importers, and users of audio recording technology.\(^{161}\) This means that copyright owners will not be able to bring infringement actions under \(\S\) 115 against those who manufacture, import, or distribute digital audio recording equipment, or against consumers for their personal use of that technology; however, copyright owners can still take action against other parties involved in unauthorized digital phonorecord delivery.\(^{162}\)

E. ATLANTIC V. XM: CONTENTIONS ON BOTH SIDES

1. The Plaintiffs' Position. The plaintiffs allege that XM, through the Inno, has created a service that permits the company to engage in the unauthorized reproduction and distribution of the plaintiffs’ sound recordings.\(^{163}\) They contend

\(^{158}\) 2 NIMMER & NIMMER, supra note 46, \(\S\) 8.23[B][1].

To give a concrete example, imagine that Composer in 1980 authorizes Star to perform and sell copies to the public of her newly written Song. Thereafter in 1990, Upstart may invoke the compulsory license to assemble musicians to record his own version of Song; Upstart must pay compulsory license fees to Composer, with no obligation to Star. Now imagine that Techie in 1997 wishes to avail itself of the newly added compulsory license to offer digital phonorecord delivery. Techie must remit the statutory fee to Composer for use of the music. Techie may use Star's or Upstart's sound recording only if it concludes a license agreement with either; absent successful licensing arrangements, Techie may wish to assemble its own musicians and singers (or cyberian facsimiles thereof) to record a new rendition of Song, which will then be the subject of digital phonorecord delivery. In that last instantiation, Techie will owe statutory license fees to Composer, and nothing to Star or Upstart.

\(^{159}\) Id.

\(^{160}\) 17 U.S.C. \(\S\) 115(c)(3)(I); 2 NIMMER & NIMMER, supra note 46, \(\S\) 8.23[B][4].

\(^{161}\) 17 U.S.C. \(\S\) 115(c)(3)(I); 2 NIMMER & NIMMER, supra note 46, \(\S\) 8.23[B][4].

\(^{162}\) 2 NIMMER & NIMMER, supra note 46, \(\S\) 8.23[B][4].

\(^{163}\) Complaint, supra note 3, at 1–2, 15–17.
that this service violates XM's statutory license under § 114. In their response to XM's motion to dismiss the complaint, the plaintiffs also argue that the AHRA does not immunize XM from suit for this alleged activity because (i) the AHRA liability exemptions do not apply to XM's alleged distribution service and (ii) even if the AHRA liability exemptions were applicable, the Inno is not a device covered by the AHRA.

a. XM's Use of the Inno Infringes on Plaintiffs' Exclusive Rights to Distribute Their Copyrighted Works. The plaintiffs argue that the Inno and its ability to record individual digital music tracks broadcast via an XM signal constitute an unauthorized digital music distribution service. According to the plaintiffs, XM is using the Inno to make available and distribute digital copies of the plaintiffs' copyrighted sound recordings through this system without their permission. They argue that this new service is a violation of XM's statutory license because § 114 only grants XM permission to publicly perform—meaning permission only to broadcast—the plaintiff's copyrighted works.

b. The AHRA Does Not Immunize XM's Conduct. In their opposition to XM's Motion to Dismiss, the plaintiffs contend that while § 1008 of the AHRA does provide for a limited immunity for companies that produce, distribute, and import digital audio recording devices, this limited exception does not immunize XM's conduct. The plaintiffs maintain that the unlawful conduct is not XM's distribution of the Inno or consumers' use of the device—claims that would be barred under § 1008, but rather that XM has created a system that distributes copies of sound recordings. Furthermore, according to the plaintiffs, § 1008 cannot immunize XM's conduct because this would conflict with the requirements of XM's statutory license because § 114 explicitly prohibits satellite radio companies from reproducing or distributing sound recordings as part of their service.

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164 Id. at 1–2.
165 Plaintiffs' Opposition to Motion to Dismiss at 8–14, Atlantic Recording Corp. v. XM Satellite Radio, No. 06 CV 3733 (DAB) (GWG) (Aug. 31, 2006) [hereinafter Plaintiffs’ Opposition].
166 Id. at 17–21.
168 Id. at 18–32.
169 Id. at 18–32.
171 Plaintiffs’ Opposition, supra note 165, at 8–14.
172 Id. at 14–17.
c. The Inno Does Not Fall Under the AHRA. The plaintiffs also contend that the Inno is not a digital audio recording device under the AHRA because the Inno is incapable of making true digital audio copied recordings. Under their theory, for a device to be able to make a digital audio copied recording as defined within the AHRA, both the source recording and reproduction of the source made by the device must be a digital musical recording. The plaintiffs claim that the Inno’s recording capabilities fail to meet either of these requirements.\(^{173}\)

First, the plaintiffs point out that the statutory language of the AHRA, its legislative history, and the Ninth Circuit’s interpretation of the AHRA in Diamond all imply that digital musical recordings can only be contained on some sort of physical media, such as CDs or digital audio tapes.\(^ {174}\) They note that the definition of digital musical recording excludes material objects that contain computer programs, including computer hard drives and computer-like memory.\(^ {175}\) Accordingly, under the Ninth Circuit’s interpretation of the definition of digital musical recordings, plaintiffs contend that the Inno is not a digital audio recording device because it does in fact make recordings on computer-like memory.\(^ {176}\) The plaintiffs also suggest that the actual recordings transmitted via the XM broadcast may not qualify as digital musical recordings under the AHRA, and therefore the Inno cannot make digital audio copied recordings.\(^ {177}\) According to the plaintiffs, if the sound recordings broadcast by XM are stored on a centralized computer or object containing computer programs, then the transmitted recordings are not actual digital musical recordings.\(^ {178}\) Therefore, under the plaintiffs’ rationale, the Inno is not a digital audio recording device since it cannot make copies of true digital music recordings.\(^ {179}\)

2. The Defendant’s Position. XM disputes the plaintiffs’ claim that the Inno and its functionality constitute an interactive service that allows Inno users to illegally download songs.\(^ {180}\) XM and amici argue that the AHRA permits XM and other manufacturers of digital audio recording devices to produce and distribute devices such as the Inno,\(^ {181}\) and that the legislative intent behind the statute supports this assertion.\(^ {182}\)

\(^{173}\) Id. at 17–22.
\(^{174}\) Id.
\(^{175}\) Id.
\(^{176}\) Id. at 22.
\(^{177}\) Id.
\(^{178}\) Id.
\(^{179}\) Id.
\(^{180}\) Id. at 8–11, 16–17.
\(^{181}\) Memorandum, supra note 7, at 13–15; Amicus Brief, supra note 7, at 12–16.
\(^{182}\) Memorandum, supra note 7, at 17–21; Amicus Brief, supra note 7, at 2–8.
a. XM Has Not Created a Digital Music Distribution Service in Violation of Its § 114 Statutory License. XM contends that the Inno used with the XM broadcast is not a digital music distribution service, and thus XM is not in breach of its statutory license to broadcast the plaintiffs' copyrighted works. Both XM and amici allege that the plaintiffs' claim that the Inno's functionality constitutes an interactive service is a blatant attempt to circumvent the AHRA.

XM maintains that the Inno is not an interactive service because users do not have the ability to select which sound recordings are broadcast to their device. In addition, unlike traditional digital music distribution services, XM contends that the Inno does not actually download, and XM does not distribute, sound recordings. According to XM, using the Inno's recording function is analogous to recording from an analog radio broadcast with a cassette tape recorder, or recording a television broadcast with a VCR for private use—both of which are permissible under existing copyright law.

b. The AHRA Covers the Inno. In its motion to dismiss, XM maintains that it is immunized from liability under the AHRA because the plain language of § 1008 prohibits any infringement actions based on the manufacture, distribution, importation, or consumer use of a digital audio recording device. Therefore, according to XM, even if the conduct alleged by the plaintiffs constitutes copyright infringement, XM is not liable for the infringement because the device meets the requirements of a digital audio recording device under the AHRA.

XM claims that the Inno meets the definition of a digital audio recording device as defined within § 1001(3) for a number of reasons. First, because XM sells the Inno directly to consumers, the device is commonly distributed to individuals. Secondly, the Inno is used by individual XM subscribers, thus meeting the requirement that it be a device used by individuals. Thirdly, the primary purpose of the Inno's recording function is to allow users to make copies

183 Memorandum, supra note 7, at 8–9.
184 Id. at 1–2; Amicus Brief, supra note 7, at 1 n.3, 2.
185 Memorandum, supra note 7, at 9.
186 Id. at 10–11.
188 Memorandum, supra note 7, at 2, 13.
189 Id.
190 Id. at 14–16.
191 Id. at 14.
192 Id. at 15.
of digital musical recordings for their private use. Finally, XM claims that the recordings made by the Inno are in fact digital audio copied recordings because they are fixed in a digital recording format, and because they are made indirectly from a transmission.

XM and amici also contend that § 1008 of the AHRA was designed to prohibit copyright infringement claims based on then-existing, as well as future, types of digital audio recording technology, including devices such as the Inno. In addition, amici argue that the AHRA provides sufficient compensation to the plaintiffs based on the use of digital audio recording technology, given the royalty payments that manufacturers are required to pay.

III. ANALYSIS

A. ATLANTIC V. XM LITIGATION

The Atlantic v. XM litigation revolves around two key issues: (i) whether the AHRA and its statutory immunity applies to XM given the Inno’s recording features; and if not, (ii) whether the Inno and its functions constitute an unauthorized digital music distribution service. If the court finds that the Inno is simply a legitimate digital audio recording device, then XM, as a distributor of the Inno, is immune from suit for the non-commercial use of the device by consumers. However, if the court rules that the Inno’s functionality used in conjunction with the XM broadcast signal amounts to a digital music distribution service, then XM is actually distributing copies of the plaintiffs’ copyrighted sound recordings, and therefore XM is in violation of its statutory license to perform the plaintiffs’ copyright works under § 114(d)(2) of the Copyright Act.

1. The Inno Does Not Satisfy the AHRA Requirements for a Digital Audio Recording Device. Given the design aspects and features of the Inno, XM has a strong argument that the Inno is in compliance with the Ninth Circuit’s interpretation of an AHRA digital audio recording device, as stated in Diamond. However, a close evaluation of the Inno and its features reveals that the Inno, a device similar to the Rio in many respects, falls outside the purview of the AHRA for a number of reasons. First, the Inno is incapable of making copies directly from digital musical recordings. Secondly, the Inno cannot make digital copies of recordings

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193 Id.
194 Id. at 15–16.
195 Id. at 19–20; Amicus Brief, supra note 7, at 2–6, 8–12.
196 Amicus Brief, supra note 7, at 6–7.
198 See generally 17 U.S.C. § 114(d)(2) (explaining the requirements for a statutory license under § 114 for certain transmissions, including satellite radio transmissions).
from a transmission. Finally, the primary purpose of the Inno’s recording function is not to reproduce musical copies of digital musical recordings.

a. The Inno Cannot Make Digital Audio Copied Recordings Directly from Digital Musical Recordings. The Inno does not make copies directly from digital audio recordings. Similar to the Rio discussed in Diamond, the Inno cannot copy audio recordings directly from physical media, such as CDs, tapes, mini discs, or digital audio tapes. Furthermore, just like users of the Rio, Inno users can transfer digital audio files from their computer hard drive to the Inno with the use of a computer program. In addition, the Inno stores its copied recordings on its internal, computer-like memory.

The text and legislative history of the AHRA support the Ninth Circuit’s, and the plaintiffs’, interpretation of the AHRA with respect to digital audio recording devices. The AHRA was designed to protect those who manufacture and distribute devices that permit consumers to make personal copies of sound recordings contained on physical media, where the resulting copies are fixed only on physical media. The House and Senate reports on the AHRA substantiate the fact that the drafters made a conscious effort to exclude sound recordings contained on computers, computer hard drives, or computer-like memory from the definition of digital musical recording. This means that digital musical recordings, whether encoded directly onto a computer hard drive (such as an MP3 file) or transferred from physical media (such as a CD or digital audio tape) onto a computer hard drive, are no longer digital musical recordings under the AHRA definition.

Given the current AHRA language and Congress’s statements clearly defining the context and meaning of this language, the sound recordings made by the Inno cannot be considered digital musical recordings for AHRA purposes for two reasons. First, the internal storage of the Inno is a form of computer-like memory. Similar to the Rio’s storage medium, the Inno’s memory stores data similar to that of computer hard drives or computer memory. Both the Senate

199 Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072, 1076 (9th Cir. 1999) (“[T]he Rio does not record ‘directly’ from ‘digital music recordings’ . . . .”); see also id. at 1075 (“The Rio . . . is incapable of receiving audio files from anything other than a personal computer equipped with Rio Manager.”). See generally PIONEER, supra note 2, at 26–78 (no reference to recording directly from physical media).

200 See PIONEER, supra note 2, at 51, 54, 59.

201 Although the Diamond decision is not binding precedent in this litigation, given that Diamond is the leading interpretation and discussion of the AHRA, that case should serve as strong persuasive precedent for the district court to consider. See supra note 77 and accompanying text; Needham, supra note 88, at 1150 (noting that there was no case law interpreting the AHRA prior to the Diamond litigation).

202 See PIONEER, supra note 2, at 77, 83.

203 Id. The user guide specifically states that the storage capacity of the built-in memory is 1
and the Ninth Circuit have stated that recordings fixed on computer memory do not constitute digital musical recordings. 204 Second, the Inno User Guide indicates that the device’s memory contains at least one computer program. 205 The internal memory of the Inno contains “firmware,” which is a series of computer files and programs that help a device to function properly. 206 Since the material object where the Inno stores sound recordings contains one or more computer programs, and because this memory is the only place where the Inno stores sound recordings, none of the recordings fixed to the Inno’s internal memory can be digital musical recordings.

b. The Inno Is Incapable of Making Digital Musical Recordings “Indirectly from a Transmission.” Since the actual copies made by the device are not digital musical recordings, the Inno cannot make digital audio copied recordings indirectly from a transmission. The plaintiffs also contend that the Inno cannot make digital musical recordings from a transmission because the source recording itself may not be a digital musical recording, 207 an argument based on a strict application of the statutory language of the AHRA. If XM does in fact store its broadcasted recordings on a computer hard drive, then under the current AHRA language, the plaintiffs are correct.

The Inno cannot make digital audio copied recordings if XM does not in fact transmit true digital musical recordings. Both the text and the legislative history of the AHRA support the proposition that digital musical recordings are only those recordings fixed on physical media. Thus, for a device to reproduce a digital musical recording from a transmission, the transmitted recording itself must originate from some sort of physical media, such as CDs or digital audio tapes. For example, if XM were to broadcast a sound recording directly from a CD and the Inno were to make a physical copy of this recording from the broadcast, this recording activity would be covered by the AHRA (the Senate report directly states this as a permissible activity). 208 However, if the sound recordings that are broadcast by XM are fixed on a computer hard drive or

Gigabyte. Id. at 83. This storage system is identical to what computer hard drives and memory use to store data. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 170, 578 (11th ed. 2003) (Explaining that a “byte” is “a unit of computer information or data storage capacity,” and that a “gigabyte is equivalent to one billion bytes”).

204 S. REP. NO. 102-294, at 46 (1992); Diamond, 180 F.3d at 1078.
205 PIONEER, supra note 2, at 64, 83.
207 Plaintiff’s Opposition, supra note 165, at 21 n.3.
208 See S. REP. NO. 102-294, at 47 (“Thus, a digital audio recording made from a commercially released compact disc or audio cassette, or from a radio broadcast of a commercially released compact disc or audio cassette, would be a ‘digital audio copied recording.’ ”).
computer-like memory, this means that the transmitted recordings are not actual
digital musical recordings. Therefore, if the Inno makes copies of broadcasted
recordings stored on a central computer, than it is not actually making copies of
true digital music recordings. Ultimately, additional discovery will reveal exactly
how XM stores the digital musical recordings used during its broadcasts, and
whether that mode of storage provides another reason why the Inno is not
covered by the AHRA.

c. The "Primary Purpose" of the Inno's Recording Function Is Not Marketed and
Used for Making Digital Audio Copied Recordings. The recording function of the Inno
also fails the primary purpose test for a number of reasons. First, since the Inno
stores recordings on a computer-like memory, the recordings made by the Inno
do not constitute digital audio copied recordings. Therefore, the primary purpose
of the Inno's recording function is to make objects other than digital audio copied
recordings. As the Senate report clearly states, this type of device cannot
constitute a digital audio recording device. Second, the Inno is heavily
marketed as an MP3 player, and XM touts the fact that users can copy MP3 and
other digital audio files from their computer to the device. In fact, the internal
memory of the Inno can be divided in such a way that the majority of the internal
memory is designated for storing digital audio files copied from the user's
computer. Moreover, the Ninth Circuit's interpretation of the AHRA in
Diamond states that making copies of digital audio files that originate on a
computer hard drive does not amount to making digital musical recordings. All
of these factors illustrate that the recording function of the Inno is neither capable
of, nor marketed for, the primary purpose of making digital audio copied
recordings for personal use.

2. The Inno Used in Conjunction with the XM Broadcast Does Not Breach XM's § 114
Statutory License. XM has been granted a statutory license under § 114 to broadcast
sound recordings owned by the plaintiffs and others. An interactive service,
however, is not eligible for a § 114 statutory license, and operators of these

209 Id.
210 See supra note 24 and accompanying text.
211 PIONEER, supra note 2, at 77.
212 Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072, 1098 (9th Cir.
1999).
213 Since the recording function fails the primary purpose test, determining whether the function
is used to make copies for noncommercial private use is irrelevant. With that said, the device easily
passes this test, since the Inno is incapable of making second generation copies. Furthermore, copies
of sound recordings made from an XM broadcast cannot be transferred from the Inno. This means
that only the user of the device can listen to the recordings and there is no way for the user to make
multiple copies to sell. See PIONEER, supra note 2 (explaining the recording capabilities and
limitations of the Inno).
services must instead obtain a license from the copyright owner to perform each individual sound recording.\textsuperscript{215} A thorough review of the Inno's features and how the XM broadcast signal is integrated with the Inno reveals that the XM signal in conjunction with the Inno does not constitute an interactive or digital music distribution service. Therefore, XM is not in violation of its statutory license and should not be held liable for copyright infringement for the performances of the plaintiffs' copyrighted sound recordings that are received by Inno users.

\textit{a. The Inno Used with the XM Broadcast Is Not an "Interactive Service."} It is clear that the Inno used with the XM services is not an interactive service. The plaintiffs allege that the XM broadcast used with the Inno provides the same service as legitimate distribution services—perfect digital copies of the plaintiffs' sound recordings—and that using the Inno to copy recordings is no different than downloading songs from these services.\textsuperscript{216} However, unlike the individual song request features of traditional audio-on-demand services, such as Napster, Rhapsody, and Urge, the Inno does not permit users to request that specific songs be played by XM.\textsuperscript{217} Only XM has control over the sound recordings that are performed during its broadcasts. The Inno simply allows the user to make copies of these recordings and other broadcasted material. Moreover, the other legitimate digital music distribution services allow users to copy any song within their catalog, on demand. Inno users, however, cannot select specific songs within XM's catalog to copy.

Additionally, while the XM + Napster service is a true interactive service and the Inno can play songs purchased from Napster, this alone is not enough to call the Inno used in conjunction with XM services an interactive service. Section 114 states that if an entity offers both interactive and noninteractive services, "the noninteractive component shall not be treated as part of an interactive service."\textsuperscript{218} Here, the Inno can be used entirely separate from the XM + Napster service. The Inno's documentation and marketing materials suggest that the Inno is a passive, non-interactive device that simply receives and decrypts the XM signal.

\begin{footnotesize}
\textsuperscript{215} 17 U.S.C. § 114.

\textsuperscript{216} Plaintiffs' Opposition, supra note 165, at 6.

\textsuperscript{217} Even if XM users could call in to request specific songs to be broadcast, this does not make the XM broadcast an interactive service. See 17 U.S.C. § 114(f) ("The ability of individuals to request that a particular sound recording be performed by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making the request."); S. REP. NO. 104-128, at 33–34 (1995), \textit{reprinted in} 1995 U.S.C.C.A.N. 356, 380–81 (explaining that the term "interactive service" does not cover traditional radio station practices, such as allowing listeners to call in and request that certain songs be played over the air).

\textsuperscript{218} 17 U.S.C. § 114(f).
\end{footnotesize}
and provides recording capabilities.\textsuperscript{219} Nothing in the documentation suggests that the Inno itself sends any requests or communicates with any of XM's systems.\textsuperscript{220} Since the Inno meets none of the requirements of an interactive service, the fact that XM markets, distributes, and broadcasts its signal to the Inno is not a violation of its § 114 statutory license. Furthermore, given that Napster is an interactive service, the company is required under § 114 and § 115 of the Copyright Act to negotiate a license with the copyright owners of the sound recordings that are transmitted through its service. Accordingly, the fact that the Inno can play recordings transmitted from the Napster service does not amount to a violation of XM’s § 114 statutory license.

\textit{b. XM Does Not Engage in Digital Phonorecord Delivery Through Use of the Inno.}

In addition to not being an interactive service, the Inno used together with XM services does not comprise a digital phonorecord delivery service. While the Inno does allow for the user to make digital copies of sound recordings transmitted by XM, nothing in the device’s documentation suggests that the copied recordings are “specifically identifiable” by XM.\textsuperscript{221} The Inno simply allows users to make copies of sound recordings and other material transmitted via an XM broadcast. The Senate report specifically points out that just because a subscriber to a non-interactive subscription transmission makes copies of transmitted material on their own accord, this in itself does not make the transmission a digital phonorecord delivery.\textsuperscript{222} The fact that the Inno permits users to schedule recordings does not mean that XM itself is engaging in digital phonorecord delivery. Accordingly, since the recording function of the Inno is designed only for the specific purpose of allowing consumers to copy transmitted content and does not allow users to select individual songs to download, the XM broadcast used with the Inno clearly is not a digital phonorecord delivery service.

\textsuperscript{219} \textit{See generally} PIONEER, supra note 2 (providing a thorough description of the Inno's features, making no mention of any way that the Inno sends data or other communication to XM).

\textsuperscript{220} \textit{Id.}

\textsuperscript{221} Ultimately more discovery will reveal whether XM can track which recordings are actually copied by the Inno. One possible argument that the recordings are specifically identifiable by XM is that the XM + Napster service sends certain usage statistics to XM for informational purposes and part of this information includes songs copied by users. For example, if an audio-on-demand service allows users to download individual songs and keeps a record of which songs a user downloads and when the songs were downloaded, the service would be able to specifically identify any recordings transmitted by the service. Furthermore, since the Inno can be used separately from the XM + Napster service, the device is capable of making recordings that would not be reported to XM.

\textsuperscript{222} S. REP. NO. 104-128, at 45.
B. A NEED FOR CHANGE WITHIN THE AHRA

The probable outcome of the XM litigation, as well as the differing opinions in the Diamond case, illustrate that the AHRA is in desperate need of reformation. Although Congress may have intended for the AHRA to provide consumers with “access to the latest digital audio recording technology” and to “cover future as well as then-existing technologies,” the statutory language is too vague to accomplish that aim. The AHRA also fails to provide copyright owners adequate compensation and protection against the unauthorized copying of their copyrighted works. Finally, in its current form, the overly confusing language of the AHRA provides little guidance to producers of digital audio recording technology or the courts. These issues can be rectified by making simple changes to the AHRA.

1. The AHRA is Too Narrow to Be Effective. In drafting the language of the AHRA, Congress limited the definition of digital musical recording to material objects in which only sounds are fixed. This limited definition encompasses only those sound recordings fixed in a digital format on physical media (CDs, DATs, DCC, etc.). However, the majority of digital sound recordings and copies of sound recordings are no longer fixed on physical media; instead, they are fixed in compressed digital audio format files stored on computer memory, such as MP3, WMA, and AAC, and stored as digital audio files on computer hard drives and other computer-like memory.

The statutory language and legislative history of the AHRA reveal that when the drafters enacted the AHRA, they did not envision the potential for musical recordings to be reproduced and stored onto computer hard drives and computer-like memory. Since MP3s and other digital musical files are often fixed on objects that contain one or more computer programs, such as computer hard drives or computer-like memory, and not solely on physical media, these digital audio files do not fall within the AHRA’s definition of digital musical recording. As a result, the majority of portable music players and other devices that make copies of musical recordings are not covered by the AHRA.

2. The AHRA Provides Copyright Owners with Inadequate Compensation and Protection. While the AHRA was enacted in part to provide consumers access to digital audio recording technology, it was also intended to provide compensation to copyright owners for the reduction in music sales that home recording would

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223 Memorandum, supra note 7, at 19.
224 Adrian, supra note 22.
225 See Needham, supra note 88, at 1143 (“Understandably, the explosion of digital musical transmission was not foreseen in 1992 when the [AHRA] was passed.”)
cause. Additionally, the AHRA-imposed copy controls were designed to provide protection against the mass distribution of copyrighted digital musical recordings. The computer hard drive exception loophole that the Ninth Circuit read into the AHRA in Diamond, however, effectively denies copyright owners both adequate compensation for and protection from copyright infringement caused widespread home recording. Since the vast majority of musical recording devices create digital audio recordings on computer hard drives and computer memory, under the Ninth Circuit's interpretation of the AHRA, most digital audio recording devices are not covered by the AHRA. This means that producers of MP3 and other digital audio players are not required to make any royalty payments for the devices they produce, even though these devices are used to make numerous unauthorized copies of sound recordings. In addition, producers are free to create and distribute digital audio recording devices with no serial copy protection as long as the device does not fix the digital recordings onto physical media.

3. The AHRA Creates Confusion. In the Diamond litigation, the district court and the Ninth Circuit evaluated the same device under the AHRA and came to completely opposite conclusions as to what constitutes a digital audio recording device. Despite the exhaustive Congressional record discussing the AHRA and its provisions, the district court found that the Rio was a digital audio recording device, while the Ninth Circuit held that the Rio was not a digital audio recording device. Although the district court in the XM litigation should find that the Inno is not a digital audio recording device, given the AHRA's vague statutory language, both that court and a subsequent appellate court could potentially disagree with the Ninth Circuit's AHRA interpretation, thus causing a division among the circuits on what technology is covered by the AHRA.

4. Proposed Solution. There is no doubt that the AHRA has created much confusion and is arguably not achieving its purpose, as evidenced by the Diamond case and now the XM litigation. Therefore, it is imperative that Congress take action to amend the AHRA. In doing so, Congress must be careful not to create legislation that substantially impairs consumers' rights to use digital audio recording technology.

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228 Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072, 1077-79 (9th Cir. 1999).

229 See 180 F.3d 1073-81 (discussing why the Rio was not digital audio recording device under the AHRA); Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 29 F. Supp. 624, 627-32 (C.D. Cal. 1998) (explaining why the Rio satisfied the requirements of an AHRA digital audio recording device).
One potential change would be to remove the terms "digital musical recording," "digital audio copied recordings," "digital audio recording medium," and "digital audio recording device" from the AHRA and replace them with less complicated terminology. For instance, the Canadian Private Copyright Collective (CPCC)\(^{230}\) has recently proposed legislation similar to the AHRA, which places a tariff on digital audio recording technology and media.\(^{231}\) Under the CPCC’s proposed law,

> “blank audio recording medium” means
> (a) a recording medium, regardless of its material form, onto which a sound recording may be reproduced, that is of a kind ordinarily used by individual consumers for that purpose and on which no sounds have ever been fixed, including
> (i) audio cassettes (1/8 inch tape) of 40 minutes or more in length;
> (ii) recordable compact discs (CD-R, CD-RW, CD-R Audio, CD-RW Audio);
> (iii) MiniDiscs;
> (iv) Removable electronic memory cards in the Secure Digital, MultiMedia, and Memory Stick formats with more than 256 MBs of memory;
> (v) digital audio recorders; and
> (vi) any medium prescribed by regulations pursuant to sections 79 and 87 of the [Copyright] Act

This bill places a sliding-scale tariff on removable media and digital audio recorders based on the storage size of the media/recorder, capping the tariff amount after a certain point.\(^{233}\)

\(^{230}\) The CPCC is a Canadian nonprofit organization representing songwriters, music publishers, and record companies that handles the collection and distribution of private copying royalties. Canadian Private Copying Collective, About CPCC, http://cpcc.ca/english/about.htm (last visited Apr. 15, 2007).


\(^{232}\) Id. at 4 (emphasis added).

\(^{233}\) Id. at 4–5.
The CPCC’s proposed bill has a number of advantages over the AHRA. First, unlike the vague and confusing terms used within the AHRA, the statutory language of the CPCC proposal explicitly states what types of media and devices are covered by the legislation. This language gives clear guidance to producers and distributors of digital audio recording technology concerning the types of recorders and media that are covered by the statute. Secondly, the CPCC’s proposed statute can easily be amended to address new developments in the digital audio technology landscape through minor modifications. Finally, the CPCC’s proposed bill strikes a proper balance between the interests of copyright owners and the consumer electronics industry. Copyright owners would receive more compensation than under the AHRA because a royalty is assessed on MP3 players and other devices that play digital audio files. Computer hard drives, however, are not covered by the statutory language, which would appease computer hardware manufacturers.

Unless the AHRA is amended, consumers may eventually lose the audio home recording rights that they now enjoy. Radio broadcasts are shifting to a digital format, as evidenced by the introduction of both satellite and High-Definition radio broadcasting formats. Moreover, most digital audio recording technology fixes recordings on computer hard drives and computer-like memory. Therefore, under the current statutory language of the AHRA, future consumers may be denied the opportunity to use digital audio recording technology to make home recordings from radio broadcasts. This loss of home recording rights does not seem fair, especially given the fact that it is permissible for consumers to use digital video recorders (DVRs), such as the TiVo, to record audio/video content from a digital video broadcast. For these reasons, it is essential that Congress amend the AHRA to cover all devices that are able to make digital audio recordings, and thus provide consumers and copyright owners with an appropriate degree of protection and compensation.

IV. CONCLUSION

The Inno uses innovative digital technology to permit users to record individual sound recordings and programs that are broadcast over the XM signal. As long as the Inno user keeps their XM Radio subscription active, any songs that they record can be stored for subsequent playback.

The AHRA was enacted to encourage the introduction of digital audio recording technology. This legislation permits consumers to make digital copies of sound recordings, and it immunizes manufacturers and distributors of digital audio recording technology from liability resulting from the unlawful use of their technology. Under the language of the AHRA, the Inno does not fall within the purview of the AHRA. The AHRA only covers devices that are capable of
making physical copies of digital musical recordings, and the Inno is incapable of doing so.

While the Inno does allow consumers to make digital copies of sound recordings broadcast over the XM signal, this in itself does not make use of the Inno a digital music distribution service. First, the Inno is a passive, noninteractive device. Unlike users of most digital music distribution services, users of the Inno do not have the ability to choose any song to record; they can but only record those songs that happen to be broadcast by XM. In addition, Congress has stated that a legitimate broadcaster of sound recordings does not digitally distribute sound recordings simply because individual users, are able to make copies of recordings broadcast over a digital transmission. Therefore, while the Inno is not a digital audio recording device that is protected by the AHRA, its functions do not amount to a service that engages in the unauthorized distribution of copyrighted works.

Despite Congress's intent, the AHRA has become an arguably meaningless piece of legislation. Its narrow scope fails to fully compensate copyright owners for the inevitable copyright infringement that home recording encourages, and it does not go far enough to prevent unauthorized copying of copyrighted works. Finally, the differing interpretations of the AHRA given by the district court and the Ninth Circuit in Diamond serve as a clear example of why the AHRA needs to be clarified. Accordingly, Congress should amend the AHRA in such a way that it covers the private copying of all sound recordings, including recordings stored on computer hard drives and other computer-like memory.

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