



The Committee on Energy and Commerce

Memorandum

June 4, 2012

To: Members and Staff, Subcommittee on Communications and Technology

From: Majority Committee Staff

Re: Hearing on “The Future of Audio”

The Subcommittee on Communications and Technology will hold a hearing Wednesday, June 6, 2012, at 10:15 a.m. in 2123 Rayburn House Office Building on “The Future of Audio.” One panel of witnesses will testify.

I. Witnesses

Mr. Ben Allison
Bassist/Composer and Governor
New York Chapter, National Academy of Recording Arts and Sciences

Mr. David M. Israelite
President and CEO
National Music Publishers’ Association

Mr. Cary Sherman
Chairman and CEO
Recording Industry Association of America

Mr. Jeff Smulyan
Chairman, President, and CEO
Emmis Communications

Mr. Steven W. Newberry
President and CEO
Commonwealth Broadcasting Corp.

Mr. Tim Westergren
Chief Strategy Officer and Founder
Pandora

Mr. Christopher Guttman-McCabe
Vice President, Regulatory Affairs
CTIA

Mr. Gary Shapiro
President and CEO
Consumer Electronics Association

This is not our parents' audio market. In the last 20 years, broadcast radio has gone HD, bringing HD radio owners the advantages of digital transmission and as many as four channels each from more than 2,000 participating local stations. Satellite radio now offers subscribers more than 150 digital channels from anywhere in the nation. Portable MP3 players allow audiophiles to carry their entire music collections to the gym. And the Internet gives listeners access to a virtually infinite amount of legal (and pirated) content.

The number of outlets has increased exponentially. The Internet, in particular, has all but obliterated technological and economic barriers to entry into the marketplace. Anyone with access to an Internet connection who can speak, sing, or play an instrument—no matter how well—can reach the world's listeners for a song. But if a chord rings in the digital woods and no one hears it, does it make a sound? Paying the rent while launching your career may be a little easier now, but the growth in available channels has fractured audiences. In the past, getting on the radio brought a certain likelihood you would obtain at least a modicum of success (and remuneration). Today, everyone can be "on the radio." Getting from the garage to the Grammys may ironically be harder, requiring not only more talent, but also more marketing to rise above the din for anyone except those with the most viral of Internet videos.

These developments are stirring tensions among the participants in the distribution chain. Some fear they will garner a smaller share of the pie. Others fear they will be disintermediated altogether. The changes are also placing strains on existing legal frameworks. And somewhere amidst it all sits the artist. This hearing will examine how advances in communications services and consumer electronics equipment are affecting the distribution and consumption of audio content. What follows is background on some of the regulatory issues that may arise.

II. **Background**

Broadcast Radio Ownership Caps

In light of the robust competition in the audio market, some broadcasters argue that certain Federal Communications Commission (FCC) restrictions on broadcast radio ownership no longer make sense. If the agency found enough competition to allow XM and Sirius—the only two domestic satellite radio companies—to merge in 2008, then there must be enough competition to liberalize the radio ownership limits, they say.

The newspaper-broadcast cross-ownership ban, put in place in 1975, prohibits an entity from owning in the same market both a newspaper and a broadcast radio or broadcast television station. Pursuant to the agency's obligation to review its broadcast ownership restrictions in 2006 as part of the statutorily mandated *Quadrennial Review*, the FCC sought to relax the ban in December 2007 in favor of a case-by-case review. Cross-ownership would be presumed permissible in the 20 largest markets and presumed impermissible in smaller markets. The U.S.

Court of Appeals for the Third Circuit overturned the decision in its July 2011 *Prometheus Radio Project v. FCC* ruling, however, on the grounds that the editorial then-Chairman Martin used to propose the revision did not constitute sufficient notice under the Administrative Procedure Act. Opponents of the ban are once again urging the Commission to eliminate it in light of increased competition and because newspapers are struggling in the current marketplace.

The radio-television cross-ownership rule, put in place in 1999, allows an entity to own up to two television stations and four radio stations in a market, so long as at least 10 independent media voices would remain in the market after a combination. It allows an entity to own up to two television stations and six radio stations, or one television station and seven radio stations, in a market so long as at least 20 independent media voices would remain in the market after a combination. For purposes of the rule, independent voices are full-power broadcast TV stations, primary broadcast radio stations, daily newspapers, and cable systems. The FCC retained the radio-television cross-ownership rule in its 2007 *Quadrennial Review* order, a decision the Third Circuit upheld in its 2011 *Prometheus* decision. Opponents of the rule are again arguing that increased competition makes the rule unreasonable. They also criticize as irrational the omission of satellite and Internet services from the “independent voices” analysis.

The local broadcast radio caps, put in place in 1996, prohibit an entity from owning:

- more than eight commercial radio stations in markets with 45 or more stations, and no more than five can be in the same service (AM or FM);
- more than seven commercial radio stations in markets with 30-44 stations, and no more than four can be in the same service;
- more than six commercial radio stations in markets with 15-29 stations, and no more than four can be in the same service; and,
- more than five or more than 50 percent of the commercial radio stations, whichever is less, in markets with 14 or fewer radio stations, and no more than three can be in the same service, except that an entity may always own a single AM and single FM station combination.

The FCC retained the local radio ownership caps in its 2007 *Quadrennial Review* order. The Third Circuit upheld the decision in its 2011 *Prometheus* ruling, concluding that the agency’s decision was not so arbitrary and capricious as to violate the Administrative Procedure Act. Opponents of the caps argue that doesn’t mean they are good policy. They say that ownership of multiple radio stations in a market promotes diversity because station owners do not want to duplicate formats and compete with themselves. They also point out that the market has evolved even more since 2007. Between 1996 and now, the number of full-power radio stations has increased by 23.7 percent, satellite radio has gained more than 20 million subscribers, Internet radio garners more than 89 million listeners each month, and a majority of Americans over the age of 12 possess a portable music player.

As part of the 2010 *Quadrennial Review*, the FCC proposed in December 2011 to reinstate Chairman Martin’s relaxation of the newspaper-broadcast cross-ownership ban and

eliminate the radio-television cross-ownership rule, but to retain the local broadcast radio ownership caps.

Low-Power FM

In January 2011, Congress passed the Local Community Radio Act, introduced by Reps. Doyle and Terry, to allow authorization of additional low-power FM stations. In particular, the legislation removes the third-adjacent channel minimum distance separation requirements and allows waiver of the second-adjacent channel minimum distance separation requirements in certain circumstances. The legislation also makes clear that “FM translator stations, FM booster stations, and low-power FM stations remain equal in status” and imposes certain interference protections. The FCC issued an order and notice of proposed rulemaking in March 2012 to implement the law and seek further input.

FM Chip

A number of broadcasters seek a mandate requiring consumer electronics manufacturers and wireless providers to include an FM receiver in cell phones. They argue that requiring an FM chip in cell phones is necessary to preserve free, over-the-air radio. They also argue that the mandate is justified because over-the-air radio provides critical information in times of emergencies. Manufacturers and wireless providers oppose the mandate on the grounds that it will increase costs and that requiring an FM chip in wireless devices would duplicate the emergency alert program the wireless industry is deploying as a result of the WARN Act. They also argue that features of phones should be determined by consumer demand and say that more than 40 wireless device models already have an FM chip.

Royalties

Under copyright law, satellite and Internet radio stations must pay performers and recording owners for music they transmit. Broadcast radio stations do not, however. They argue this is necessary to preserve free, over-the-air radio, and that broadcast radio airtime promotes record sales. Performers and record labels, however, argue that they should be the ones to decide how much to value the promotional benefits of broadcast and should be compensated for use of their music. Satellite and Internet radio operators also say that it is unfair for their broadcast competitors to pay less than they do.

If you need more information, please call Neil Fried at (202) 225-2927.