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Home Recording Rights Coalition

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 7, 2000

VIA HAND DELIVERY

Ms. Magalie R. Salas
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: Written *Ex Parte* Presentation; *In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment*; PP Docket No. 00-67; *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*; CS Docket No: 97-80

Dear Ms. Salas:

The Home Recording Rights Coalition respectfully requests that the enclosed written *ex parte* presentation be entered into the record in the above-mentioned proceedings. This *ex parte* presentation responds to the August 25, 2000 *ex parte* letter filed by the Motion Picture Association of America.

In accordance with Section 1.1206 of the Commission's rules, two copies of the written *ex parte* package are being provided to your office for each docket. Copies of this notice and the attached written *ex parte* presentation have also been delivered to the parties listed below.

Respectfully submitted,

Ruth Rogers

Ruth Rogers
Executive Director

cc: Chairman Kennard
Commissioner Furchtgott-Roth
Commission Ness
Commissioner Powell
Commissioner Tristani
William J. Friedman IV
David Goodfriend

A coalition of consumers, retailers, manufacturers and servicers of video and audio recording products.
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RESPONSE TO MPAA ASSERTIONS

RE: ABILITY TO PRESERVE "EXCLUSIVE RIGHTS" THROUGH DESIGN MANDATE

In an ex parte letter dated August 25, 2000, the Motion Picture Association of America essentially argues that manufacturers are under a legal mandate to design their devices to give content owners the ability to block home taping whenever they wish to invoke their "exclusive rights." The MPAA suggests that the Commission should "[a]llow the DFAST license to require devices to have the technical capability to permit content owners, at their discretion, to exercise their exclusive rights . . . ." (This assertion seems inconsistent with MPAA's position, as set forth in the same filing, that MPAA members are not parties to the DFAST license and thus cannot be bound by any limitations on the exercise of their "exclusive rights.") In a subsequent September 6, 2000, ex parte filing, MPAA now appears to assert that member companies will withhold content from consumers without limitation or "middle ground" if devices are not designed to respond to all technological protection measures used by copyright owners. As MPAA put it, if the devices are not designed as specified, "they cannot receive high value, copy protected content."

Such flat and complete limitations on device design have never been accepted by Congress or the courts, and should not be accepted by the FCC as an onerous, ancillary condition to its declaration of a "right to attach." As Senator John Ashcroft put it during the debate over the DMCA, "One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible." Cong. Rec. S4890 (daily ed. May 14, 1998).

As the Commission no doubt appreciates, in recent years Congress has sought to encourage competition in the design and distribution of new technology. Under Section 304 of the Telecommunications Act of 1996, for example, Congress sought to bring competition to the market for navigation devices for the benefit of consumers. Two years later, in writing the Digital Millennium Copyright Act (DMCA), Congress went out of its way to ensure that manufacturers of new consumer electronics, information technology, and telecommunications products would not be subject to a design mandate requiring them to build devices that would respond to all the technological protection measures that copyright owners might use to block access to or the copying of copyrighted works.

Nonetheless, the MPAA--notwithstanding its self-proclaimed new role as a representative of consumers--would have the Commission use this proceeding to limit competition and to deny consumers access to new technology and services. Moreover, the MPAA would have the Commission effectively impose a design mandate on manufacturers of competitive navigation devices.

With MPAA essentially asking the Commission to impose a design mandate on new technology, we think it useful to include in the record excerpts from the debate over the "no

mandate" provision of the DMCA. The depth, breadth, and consistency of the views expressed by Congress leave little doubt about how important it considered the need to preserve design flexibility for device manufacturers.

Text and Legislative History of "No Mandate" Provision

Section 1201(c)(3) of the DMCA provides:

> (3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

Below we set forth here verbatim excerpts from the legislative history. The entire legislative history of the DMCA is available on our web site at http://www.hrrc.org/html/DMCA-leg-hist.html.

Representative Rick Boucher in the House of Representatives (Cong. Rec. E2166) (daily ed. Oct. 14, 1998):

[W]ith respect to consumer electronics devices and other equipment, the conferees included a "no mandate" provision which should reassure manufacturers of future digital telecommunications, consumer electronics and computing products that they have the design freedom to choose parts and components in designing and building new equipment. Read together with other provisions of the measure and other parts of the relevant legislative history, the "no mandate" provision confirms that Congress does not intend to require equipment manufacturers to design new digital telecommunications equipment, consumer electronics and computing products to respond to any particular copy protection technology. . . .

[T]he legislation is not intended to diminish core fair use and other rights that have always been recognized in our copyright law. These provisions confirm that the measure does not limit the development and use of consumer electronics, telecommunications, and computer products used by libraries, universities, schools and consumers everyday for perfectly legitimate purposes.

Representative Tom Bliley in the House of Representatives (Cong. Rec. E2136) (daily ed. Oct. 13, 1998):

[The Commerce] Committee endeavored to specify, with as much clarity as possible, how the anti-circumvention right, established in title 17 but outside of the Copyright Act, would be qualified to maintain balance between the interests of content creators and information users. The Committee considered it particularly important to ensure that the concept of fair use remain firmly established in the law and that consumer electronics, telecommunications, computer, and other legitimate device manufacturers have the freedom to design new products without being subjected to the threat of litigation for making design decisions. The manner in which this balance has been achieved is spelled out in greater detail below. . . .

Section 1201(c)(3) provides that nothing in section 1201 requires that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computer product provide for a response to any particular technological measure, so long as the device does not otherwise violate section 1201. With the strong recommendation of my Committee, the House had deleted the "so long as" clause as unnecessary and potentially circular in meaning. However, with the addition by the conferees of new subsection (k), which mandates a response by certain devices to certain analog protection measures, the "so long as" clause of the original Senate bill finally had a single, simple, and clear antecedent, and thus was acceptable to me and my fellow House conferees.

If history is a guide, someone may yet try to use this bill as a basis for filing a lawsuit to stop legitimate new products from coming to market. It was the Committee's strong belief--a view generally shared by the conferees--that product manufacturers should remain free to design and produce consumer electronics, telecommunications, and computing products without the threat of incurring liability for their design decisions. Imposing design requirements on product and component manufacturers would have a dampening effect on innovation, on the research and development of new products, and hence on the growth of electronic commerce.

The Committee on Commerce recognized that it is important to balance the interest in protecting copyrighted works through the use of technological measures with the interest in allowing manufacturers to design their products to respond to consumer needs and desires. Had the bill been read to require that products respond to any technological protection measure that any copyright owner chose to deploy, manufacturers would have been confronted with difficult, perhaps even impossible, design choices, with the result that the availability of new products with new product features could have been restricted. They might have been forced to choose, for example, between implementing two mutually incompatible technological measures. In striking a balance between the interests of product manufacturers and content owners, the Committee believed that it was inappropriate and technologically infeasible to require products to respond to all technological protection measures. For that reason, it included the "no mandate" provision in the form of section 1201(c)(3). As a result of this change, it was the Committee's strongly held view that the bill should not serve as a basis for attacking the manufacture, importation, or sale of staple articles of commerce with commercially significant non-infringing uses, but it would provide content owners with a powerful new tool to attack black boxes. Except for the one recognition in the conference report of the balanced requirements of section 1201(k) as "otherwise" imposing certain obligations, this provision remains unchanged from the House bill.

Representative W.J. ("Billy") Tauzin in the House of Representatives (Cong. Rec. E2144) (daily ed. Oct 13, 1998):

We also sought to ensure that consumers could apply their centuries-old fair use rights in the digital age. Sections 1201(a)(2) and (b)(1) make it illegal to manufacture, import, offer to the public, provide, or to otherwise traffic in "black boxes." These provisions are not aimed at staple articles of commerce, such as video cassette recorders, telecommunications switches, and personal computers widely used today by businesses and consumers for legitimate purposes. As a result of the efforts of the Commerce Committee, legitimate concerns about how these provisions might be interpreted by a court to negatively affect consumers have been addressed to the satisfaction of consumer electronics and other product managers.

Section 1201(c)(3), the "no mandate" provision, makes clear that neither of these sections requires that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computer product provide for a response to any particular technological measure, so long as the device does not otherwise violate section 1201. Members of my Subcommittee included an unambiguous no mandate provision out of concern that someone might try to use this bill as a basis for filing a lawsuit to stop legitimate new products from coming to market. It was our strong belief that product manufacturers should remain free to design and produce digital consumer electronics, telecommunications, and computing products without the threat of incurring liability for their design decisions. Had the bill been read to require that new digital products respond to any technological protection measure that any copyright owners chose to deploy, manufacturers would have been confronted with difficult, perhaps even impossible, design choices. They could have been forced to choose, for example, between implementing one of two incompatible digital technological measures. It was the wrong thing to do for consumers and thus, we fixed the problem.

Representative Scott Klug in the House of Representatives (Cong. Rec. H10621) (daily ed. Oct. 12, 1998):

The second change the conferees insisted upon was a "no mandate" provision. This language ensures that manufacturers of future digital telecommunications, computer, and consumer electronics products will have the freedom to choose parts and components in designing new equipment. Specifically, Section 1201(c)(3) provides that nothing in the subsection requires that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computer product provide for a response to any particular technological measure, so long as the device does not otherwise violate the section. With my colleague from Virginia, Representative Boucher, I originally persuaded the members of the Commerce Committee to delete the "so long as" phrase of the original Senate version. Our thinking, confirmed by committee counsel, was that this language was not just circular, but created serious ambiguity and uncertainty for product manufacturers because it was not clear whether a court, judging the circumstances after the fact, would find that specific products fell within the scope of this provision and thus had to be designed to respond to protection measures. And, it is entirely possible that these protective measures may require conflicting responses by the products.

The conferees added back the language we struck, but in a context in which the "so long as" clause had some clear, understandable meaning. The language agreed to by the conferees mandates a response by specified analog devices to two known analog protection measures, thereby limiting the applicability of the "so long as" clause. In my opinion, spelling out this single, specific limitation will provide manufacturers, particularly those working on innovative digital products, the certainty they need to design their products to respond to market conditions, not the threat of lawsuits.

Both of these changes share one other important characteristic. Given the language contained in the Judiciary Committee's original bill, specifically sections 1201(a)(1), (a)(2), and (b)(1), there was great reason to believe that one of the fundamental laws of copyright was about to be overruled. That law, known as Sony Corporation of America v. Universal Studios, 464 U.S. 417 (198), reinforced the centuries-old concept of fair use. It also validated the legitimacy of products if capable of substantial non-infringing uses. The original version of the legislation threatened this standard, imposing liability on device manufacturers if the product is of limited commercial value.

Now, I'm not a lawyer, but it seems irrational to me to change the standard without at least some modest showing that such a change is necessary. And, changing the standard, in a very real sense, threatens the very innovation and ingenuity that have been the hallmark of American products, both hardware and content-related. I'm very pleased that the conferees have meaningfully clarified that the Sony decision remains valid law. They have also successfully limited the interpretation of Sections 1201(a)(2) and (b)(1), the "device" provisions, to outlaw only those products having no legitimate purpose. As the conference report makes clear, these two sections now must be read to support, not stifle, staple articles of commerce, such as consumer electronics, telecommunications, and computer products used by businesses and consumers everyday, for perfectly legitimate purposes.

Senator John Ashcroft in the U.S. Senate (Cong. Rec. S11887-88) (daily ed. Oct. 8, 1998):

Second, the conferees made an important contribution by clarifying the "no mandate" provision of the bill. Because the conference report is silent, I thought that I should explain this provision in some detail. As my colleagues may recall, I had been very concerned that S. 2037 could be interpreted as a mandate on product manufacturers to design products so as to affirmatively respond to or accommodate technological protection measures that copyright owners might use to deny access to or the copying of their works. To address this potential problem, I authored an amendment providing that nothing in the bill required that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological protection measure. The amendment reflected my belief that product manufacturers should remain free to design and produce the best, most advanced consumer electronics, telecommunications, and computing products without the threat of incurring liability for their design decisions. Creative engineers--not risk-averse lawyers--should be principally responsible for product design. As important, the amendment reflected the working assumption of all of my colleagues that this bill is aimed fundamentally at so-called "black boxes" and not at legitimate products that have substantial noninfringing uses.

As my colleagues know, there had been some concern expressed that the "so long as" clause of section 1201(c)(3) made the provision appear to be circular in its logic. In other words, there was concern that the entire provision could be read to provide in essence that manufacturers were not under any design mandate to respond to technological measures, as long as they "otherwise" designed their devices to respond to existing technological measures. I never shared that perspective. To eliminate any uncertainty, the House Commerce Committee simply deleted the "so long as" clause. As I explained on the floor in September, that change merely confirmed my original conception of the amendment. Now that the conferees have adopted a provision requiring certain analog videocassette recorders to respond to certain existing analog protection measures, the "so long as" clause has a meaning that all should agree is logical: Manufacturers of consumer electronics, telecommunications, and computer products are not under a design mandate generally, but they are otherwise subject to a single, very limited, and carefully defined mandate to design certain analog videocassette recorders to respond to existing analog protection measures. Quite importantly from my perspective, this provision is limited so as not to impair the reasonable and accustomed home taping practices of consumers recognized in the Supreme Court's Betamax decision.

It thus should be about as clear as can be to a judge or jury that, unless otherwise specified, nothing in this legislation should be interpreted to limit manufacturers of legitimate products with substantial noninfringing uses--such as VCRs and personal computers--in making fundamental design decision or revisions, whether in selecting certain components over others or in choosing particular combinations of parts.

Representative Tom Bliley in the House of Representatives (Cong. Rec. H7094) (daily ed. Aug. 4, 1998):

In our report, the Committee stressed that section 1201(a)(2) is aimed fundamentally at outlawing so-called "black boxes" that are expressly intended to facilitate circumvention of protection measures for purposes of gaining access to a work. This provision is not aimed at products that are capable of commercially significant noninfringing uses, such as the consumer

electronics, telecommunications, and computer products--including videocassette recorders, telecommunications switches, personal computers, and servers--used by businesses and consumers everyday for perfectly legitimate purposes. Moreover, as section 1201(c)(3) makes clear, such a device does not need to be designed or assembled, or parts or components for inclusion in a device be designed, selected, or assembled, so as affirmatively to accommodate or respond to any particular technological measure. . . .

As the hearing record demonstrates, there is a fundamental difference between a device that does not respond to a protection measure and one that affirmatively removes such a measure. Section 1202(c)(3) is intended to make clear that nothing in section 1201 requires that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure that might be used to control access to or the copying of a work protected under title 17, United States Code. Of course, this provision is not intended to create a loophole to remove from the proscriptions of section 1201 devices, or components or parts thereof, that circumvent by, for example, affirmatively decrypting an encrypted work or descrambling a scrambled work.

House Report No. 105-551(Part 2) (Committee on Commerce) (page 41):

(c) Other rights, etc., not affected

Subsection (c) sets forth several provisions clarifying the scope of Section 102. Section 102(c)(1) provides that Section 102 shall not have any effect on rights, remedies, limitations, or defenses to copyright infringement, including fair use, under Title 17. Section 102(c)(2) provides that Section 102 shall not alter the existing doctrines of contributory or vicarious liability for copyright infringement in connection with any technology, product, service, device, component or part thereof. Section 102(c)(3) clarifies that nothing in Section 102 creates an affirmative mandate requiring manufacturers of consumer electronics, telecommunications, and computing products to design their products or their parts and components to affirmatively respond to any particular technological protection measure employed to protect a copyrighted work. . . .

Senator John Ashcroft in the U.S. Senate (Cong. Rec. S4890) (daily ed. May 14, 1998):

One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.

As Missouri's Attorney General, I had the privilege to file a brief in the Supreme Court in support of the right of consumers to buy that first generation of VCRs. I want to make it clear that I did not come to Washington to vote for a bill that could be used to ban the next generation of recording equipment. I want to reassure consumers that nothing in the bill should be read to make it unlawful to produce and use the next generation of computers or VCRs or whatever future device will render one or the other of these familiar devices obsolete.

Another important amendment was added that makes clear that this law does not mandate any particular selection of components for the design of any technology. I was concerned that this

legislation could be interpreted as a mandate on product manufacturers to design products so as to respond affirmatively to effective technical protection measures available in the marketplace. In response to this concern I was pleased to offer an amendment, with the support of both the Chairman and the Ranking Member of the Committee, to avoid the unintended effect of having design requirements imposed on product and component manufacturers, which would have a dampening effect on innovation, and on the research and development of new products. Accordingly, my amendment clarified that product designers need not design consumer electronics, telecommunications, or computing products, nor design and select parts or components for such products, in order to respond to particular technological protection measures.

This amendment reflects my belief that product manufacturers should remain free to design and produce consumer electronics, telecommunications and computing products without the threat of incurring liability for their design decisions under this legislation. Nothing could cause greater disaster and a swifter downfall of our vibrant technology sector than to have the federal government dictating the design of computer chips or mother boards. By way of example, during the course of our deliberations, we were made aware of certain video boards used in personal computers in order to allow consumers to receive television signals on their computer monitors which, in order to transform the television signal from a TV signal to one capable of display on a computer monitor, remove attributes of the original signal that may be associated with certain copy control technologies. I am acutely aware of this particular example because I have one of these video boards on my own computer back in my office. It is quite useful as it allows me to monitor the Senate floor, and occasionally ESPN on those rare occasions when the Senate is not in session. My amendment makes it clear that this legislation does not require that such transformations, which are part of the normal conversion process rather than affirmative attempts to remove or circumvent copy control technologies, fall within the proscriptions of chapter 12 of the copyright law as added by this bill.

Further, concerns were voiced during the Committee's deliberations that because 1201 applies not only to devices but to parts and components of devices, it could be interpreted broadly to sweep in legitimate products such as personal computers and accessories and video and audio recording devices. While the manufacturers of these products were understandably concerned, it was quite apparent to me that it was not the Committee's intention that such useful multipurpose articles of commerce be prohibited by 1201 on the basis that they may have particular parts or components that might, if evaluated separately from such products, fall within the proscriptions of 1201(a)(2) or (b). My amendment adding sections 1201(d)(2) and (3) was intended to address these concerns.