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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Digital Broadcast Copy Protection) MB Docket No. 02-230
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COMMENTS OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION

October 30, 2002

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COMMENTS OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION

The National Music Publishers' Association ("NMPA") hereby submits these comments in connection with the Commission's Notice of Proposed Rulemaking ("NPRM"), FCC 02-231 (Aug. 9, 2002) in the above-captioned proceeding.

I. Summary

NMPA works to protect and advance the interests of the music publishing industry. With more than 800 members, NMPA represents the leading companies in the industry, from those affiliated with large media companies to the industry's largest and most influential independent music publishers. The Harry Fox Agency ("HFA"), NMPA's licensing affiliate, provides an information source, clearinghouse, and monitoring service for licensing music copyrights and acts as licensing agent for more than 27,000 music publisher-principals, who in turn represent more than 160,000 songwriters. Together, NMPA and HFA represent music publishers affiliated with major record labels, major "independent" publishers, and thousands of publishers that are small businesses. The instant proceeding is of interest to all aspects of the NMPA membership primarily because of its potential impact on the reproduction and distribution of digital copies of music, including the use of the Internet to further re-distribute such copies.¹ Music piracy by means of illicit digital re-distribution is an issue of major concern to every NMPA member.

The NPRM seeks comment on "whether a regulatory copy protection regime is needed within the limited sphere of digital broadcast television", whether the broadcast flag technology that has been developed would be the appropriate technology to be used in such a regime, and whether the Commission has ancillary jurisdiction to adopt such a regime. NPRM at ¶ 3.

¹ The exclusive rights of music copyright owners to reproduce and distribute their works are found at 17 U.S.C. 106(1) and 106(3). These rights should be distinguished from the right of such owners to publicly perform these works, which is found at 17 U.S.C. 106(4) and which is typically administered by "performing rights organizations" such as ASCAP and BMI.

Although framed narrowly, the issue by its nature cannot be confined to digital broadcast television (DTV). Any standard that the Commission adopts for DTV will inevitably have a significant impact on the development and deployment of anti-piracy technology in other forms of digital media, especially digital recordings of music. For this reason, NMPA urges the Commission to consider carefully the repercussions of any decision that it makes to adopt a copy protection regime for DTV, including the scope and capabilities of such a regime on the music publishing industry as a whole. At this time NMPA does not address the question of the Commission's jurisdiction, but requests that the Commission allow it to defer comment on that issue until a proposal that fully considers the possible ramifications of adoption of an anti-piracy regime is made. If the Commission proceeds, however, then any such rulemaking must include the Copyright Office -- which has expertise and clear statutory jurisdiction over copyright protection for digital media -- as an equal partner in its decision-making process. In light of the Commission's prior rulemaking requiring a broad range of television related consumer appliances to be capable of receiving and decoding DTV broadcast content', it is clear that adequate copyright protection technology (whether industry generated or government-induced) must be present in any devices designed to directly or indirectly receive the DTV broadcast signal as well as the broadcast signal itself in order to avoid a new source of illicitly re-distributed copyrighted material.

With respect to the proposed "broadcast flag" technology, we believe that its propriety is dependent on what downstream capabilities and control are included in the copyright protection scheme. The broader the inter-operability between: (1) devices that receive and decode DTV broadcasts, and (2) downstream devices that record, store and further distribute the broadcast, the more "robust" the protection technology must be. In addition, if a broader class of devices are required to comply with the specification, the effort necessary to enforce

² In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, MM Docket No. 00-39, Second Report And Order And Second Memorandum Opinion And Order. (Adopted August 8, 2002, Released August 9, 2002,

compliance increases substantially. Because the scope of downstream authorized uses has not been determined, it is difficult to comment on the effectiveness of the broadcast flag.

II. Discussion

A. Any Mandated Copyright Protection Standard for DTV Will Inevitably Impact Adoption of Copyright Protection in Other Modes of Digital Media Delivery.

The NMPA believes it is crucial that the FCC recognize that an FCC-mandated requirement for copyright protection in DTV devices will have a substantial impact across a wide range of consumer electronic devices and media industries well beyond the field of DTV broadcasting. The NMPA believes that this rulemaking will likely establish the baseline standard copyright technology for all digitally distributed copyrighted works, whether distributed as a DTV broadcast or not. There are several reasons why we believe an FCC-mandated copyright protection scheme will have such a wide-ranging effect. First, the cost and effort incurred by all of the industry participants in order to participate in creating a workable copyright protection standard has been and will be considerable. It will be difficult to re-engage this process a second or third time once it is completed the first time for DTV receiving devices.³ This is especially so because the FCC has already issued a ruling requiring that DTV Tuners be included in all television receivers and related appliances by 2007, with a phase in beginning in 2004. This requirement forces engineering and policy decisions to be made in short order.⁴

³ The efforts and unresolved issues described in the BPDG Report demonstrate this point. In addition, the experience of the music industry with the Secure Digital Music Initiative (SDMI), which other than an interim solution not widely adopted, unsuccessfully attempted to develop a long-term consensus audio control technology, also shows the broad range of issues posed by this matter.

⁴ In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, MM Docket No. 00-39, *Second Report And Order And Second Memorandum Opinion And Order*. (Adopted August 8, 2002, Released August 9, 2002, para. 40. Hereinafter referred to as the "DTV Tuner Report and Order.")

Second, the devices in which the FCC requires DTV Tuners to be embedded⁵ will include the new class of devices generally viewed as becoming the digital media “nerve center” for the family living room. These devices – including DVD recorders (DVD-R) and Personal Video Recorders (PVR) -- are multi-function appliances that will do much more than tune, display, record and play back DTV broadcasts.⁶ Already, one PVR manufacturer, Replay-TV, has built into its product the capability to share digitally recorded files over the Internet — without an intervening PC.’ In addition, there are a number of announced DVD-R products with **IEEE-1394** (FireWire) connections built into them. The existing range of low-cost DVD players already includes those with the ability to play music CDs and CD-Rs containing **MP3** files.’ Because these multi-function devices will have DTV Tuners in them, they will presumably contain any FCC mandated copyright protection technology.

Third, and most importantly, the consumer electronics industry is likely to contend that it is too price sensitive to adopt any additional copyright protection technology other than the bare minimum necessary in order to comply with any regulations or law.⁹ A mere three years after the introduction of the DVD, at least one of the originators of the technology has

⁵ The list of devices subject to the DTV Tuner requirement includes “TV Interface Devices (videocassette recorders (VCRs), digital versatile disk (DVD) players/ recorders, etc.) that receive broadcast television signals.” DTV Tuner Report and Order, para. 40.

⁶ “The [ReplayTV] 4000 series has a more polished, metal exterior than previous ReplayTV incarnations, making it the sexiest line of DVRs on the block. Set up as a central component in your home theater, it comes well apportioned with inputs and outputs and a serviceable universal remote.” Review: Sonicblue ReplayTV 4040, <http://electronics.cnet.com/electronics/0-6342371-1305-8361726-1.html>. “Freestyle [a Samsung product using a specialized version of Microsoft Windows XP] includes applications for DVD and digital-music playback and for processing and recording live television, allowing the PC to become an entertainment command center and a potential rival to digital video recorders from companies such as TiVo and Sonicblue ... part of a growing trend ... to centralize digital content at home.” Samsune Chief Talks Home Imurovement, Richard Shim, CNet, January 8, 2002, <http://news.com.com/2100-1040-803716.html?tag=rn>

⁷ See *Paramount v. ReplayTV*, CV: 01-9358 FMC, (U.S. Dist. Ct., CD Cal.), where the film industry alleges that SonicBlue is a contributory infringer..

⁸ “...[T]hey've gone one step further by accommodating MP3-encoded CDs as well as playing DVD-Video, DVD-R, CD, Video CD, and Audio CD-R.” Review:Toshiba SD2715 5-Disc DVD DVD-R MP3 Player., http://www.pc4d.com/tv_video/68/sd2715_5_disc_dvd_player.shtml. Note *that* this device also has “coaxial digital audio output.”

⁹ The consumer electronics industry has already communicated its cost sensitivity to the FCC during the rulemaking process leading up to the DTV Tuner Ruling.

abandoned manufacturing DVD players in favor of licensing.” In such an economic environment, it is unlikely that the consumer electronics industry will be agreeable to including more than one copyright protection scheme within the digital media “nerve-center” appliances described above. This is because each scheme would result in its own engineering, manufacturing and licensing costs for the added components and related intellectual property. In other words, once a multi-function DVD-R product line is designed to provide copyright protection for DTV broadcasts, the manufacturer will likely resist any later proposal to include additional copyright protection technology for different types of content unless it is a minor modification of the DTV copyright protection regime already embedded in the original device architecture. Therefore, any new proposed requirement for copyright protection outside of the “DTV sphere” will either have to be a close adaptation of the DTV copyright protection technology standard, or it will be met with stiff resistance from the consumer electronics industry. This result would place the music publishing industry, among other copyright holders, at a severe disadvantage in its pursuit of broader industry standards for copyright protection technology if the regulated DTV standard is too narrow in scope and capability.

B. The Commission Should Include the Copyright Office When Considering Standards

Federal copyright law accords the U.S. Copyright Office the primary role in setting standards for the use of copyrighted material and in mandating measures to avoid circumvention of copyright protection technology. Depending on the scope of any specific rule that it ultimately proposes, the Commission may also have jurisdiction in this area. NMPA believes that, in light of the Copyright Office’s statutory duties, the Commission must include it as an equal partner in any rulemaking proceeding on this subject.

¹⁰ “In our DVD business, we are shifting the emphasis from price-competitive DVD players and DVD-ROM drives to higher value-added DVD recorders and DVD-R/RW drives for personal computers.” Pioneer Corporation Annual Report, June 2002. http://www.pioneer.co.jp/corp/ir/management/index_e.html

Title 17 of the U.S. Code, which includes the Copyright Law of the United States, contains a number of provisions that give the Copyright Office responsibilities with respect to copyrights generally. Section 701(b)(2) states that among the functions of the Register of Copyrights is to “provide information and assistance to Federal departments and agencies and the Judiciary on national and international issues relating to copyright, other matters arising under this title, and related matters.” 17 U.S.C. § 701(b)(2) (2002).

Congress has also given the Copyright Office jurisdiction over matters specific to digital copyright protection technology. The Digital Millennium Copyright Act (“DMCA”), enacted in 1998, was intended to implement the United States’ obligations under the World Intellectual Property Organization’s (“WIPO”) treaties. The U.S. was required under the WIPO treaties to pass laws prohibiting circumvention of technological protection measures employed by copyright owners to protect their works against unauthorized copying **or** transmission, and prohibiting the removal or alteration of copyright use management information from an authorized digital copy of a work. *See* DMCA Section 104 Report of the U.S. Copyright Office at p. vi (August 2001). Under the DMCA, there are specific duties for the Copyright Office laid out by the Copyright Act that are directly relevant to the regulatory process being proposed by the FCC, examples of which are enumerated below:

1. Section 1201 of Title 17 of the U.S. Code, enacted in the DMCA, makes it illegal to circumvent a technological measure that effectively controls access to a copyrighted work. The Librarian of Congress, upon recommendation of the Register **of** Copyrights, is to promulgate rules to implement portions **of** this section. 17 U.S.C. § 1201(a)(1)(C) and (D) (2002). (The **rules** under this section appear at 37 C.F.R. § 201.40 (2001).) In addition, under Section 1201(g)(5) the Register **of** Copyrights was assigned joint responsibility with the Department of Commerce **for** studying and reporting to Congress on the effect **of** the encryption research exemption provisions **of** Section 1201. Included in this assignment was the task of considering the effect **of** those provisions on “the adequacy and effectiveness of technological measures designed to protect copyrighted works” and “protection of copyright

owners against the unauthorized access to their encrypted copyrighted works”. 17 U.S.C. § 1201(g)(5)(B) and (C) (2002).¹¹

2. Under Section 104 of the DMCA, which did not amend Title 17, the Register of Copyrights was instructed by Congress to evaluate the effects of the DMCA and “the development of electronic commerce and associated technology” on, and “the relationship between existing and emergent technology” and, the operation of Section 109 and 117 of the Title 17. Act of Oct. 8, 1998, P.L. 15-304, Title I, § 104, 112 Stat. 2876. These sections of Title 17 contain the first sale doctrine and certain limitations on exclusive rights to computer programs.

These statutory provisions clearly demonstrate that the Copyright Office has statutory jurisdiction over matters that the FCC is considering regulating in this NPRM. Accordingly, the Commission should treat the Copyright Office as an equal partner in any rulemaking proceedings on the subject that effectively decide the application of copyright statutory law or doctrine or determine policy with regard to copyright.

C. Current Proposal on DTV Technical Standards is Incomplete

The BPDG Report clearly envisions DTV receiving devices that are capable of making digital reproductions of the DTV broadcasts and further distributing these copies.¹² As noted in the NPRM, the DTV copy protection proposal set forth in the BPDG Report does not resolve the key issues of compliance, robustness, and enforcement with regard to establishing the extent of any permissible copying and re-distribution. NPRM, ¶ 4. The re-broadcast of television broadcasts per se is only one facet of the potential piracy problem that DTV

¹¹ (A copy of the report can be found at http://www.copyright.gov/reports/studies/dmca_report.html.)

¹² “The requirements to protect digital recordings should not interfere with the ability of consumers to make secure copies of DTV content marked with the Broadcast Flag, either on personal video recorders (e.g., a hard-disk based device such as TiVo or ReplayTV) or on removable media (e.g., on D-VHS tapes or DVD recordable discs). Similarly, the requirements to protect digital outputs should not interfere with the ability of consumers to send DTV content across secure [home and personal digital networks] , such as a home digital network connecting digital set top boxes, digital recorders, digital servers and digital display devices.” BPDG Report, Section 4.7, pg. 12.

broadcast poses.¹³ The extraction of copyrighted works from the broadcast in order to create new sources of illicitly distributed digital copies is an additional feature of this technology. The risk to copyrights in areas beyond the narrow field of DTV broadcast can be demonstrated by considering the various licensing functions of NMPA's licensing subsidiary, HFA. First, HFA, on behalf of its affiliated music publishers and songwriters, licenses the distribution of copyrighted works that comprise sound track albums derived from movie soundtracks. Second, HFA licenses the distribution of copyrighted works that comprise the sound recording component of music videos. Third, HFA licenses the use of works in sound recordings that many cable television operators publicly perform in the form of music-only channels. DTV broadcasts of movies, music videos and music channels can quite possibly result in a new source of illicit digital copies of such sound recordings that are subject to widespread reproduction and re-distribution on the scale currently exemplified by popular Internet file sharing services. The scope and "robustness" of any technical copy protection standard are therefore critical issues for all copyright owners.

The NMPA believes that any effort to produce a DTV copyright protection technology standard should be flexible enough to prevent multi-function "nerve center" digital media devices from becoming a source of new content illicitly distributed over computer networks like the Internet or otherwise manufactured on a wide scale. As a principal matter, the copy protection regime should meet the reasonable requirements of copyright owners whose works are used in DTV broadcasts. While the legitimate expectations of consumers should be taken into consideration, the integrity of the copyright protection scheme must be maintained. NMPA does not view legitimate consumer expectations as including the ability to reproduce and widely re-distribute copies of sound recordings derived from the DTV broadcast that travel from the DVD-R (or other media center device) out to the Internet or any other kind of public

¹³ The CE industry construction of the BPDG purpose is rather narrow: "[The] CE industry supports the concept of a narrowly focused process to protect copyright asserted digital television broadcasts from distribution on the Internet." BPDG Report, Section 2.12, pg. 7.

computer network, whether directly or through a computer, or the ability to manufacture (or “burn”) CDs or DVDs on a significant scale. The complexity of this issue, and the large body of copyright case law that defines legitimate consumer expectations in this area, demonstrates the necessity of Copyright Office involvement in any regulatory proceeding on this matter.

NMPA is concerned that an FCC-mandated copyright protection scheme that polices only a small perimeter will fail to address these concerns and be ineffectual. Although the consumer electronics industry is concerned that a broad discussion of this topic will make it difficult to reach a consensus on a technology,¹⁴ NMPA believes that it is inconsistent to limit the scope of such a regulation to prevent “digital television broadcasts ... from distribution on the Internet” while at the same time requiring that any system “not interfere with the ability of consumers to send DTV content across secure [home and personal digital networks]”¹⁵ While addressing downstream uses entails a broader range of topics, considering these issues now should ultimately save considerable time and money for all digital media industry participants.

D. Answers to Certain Questions in the NPRM.

The NPRM asked a number of specific questions. NMPA provides the following answers to those questions applicable to its interests:

1. “ . . . *whether a regulatory copy protection regime is needed within the limited sphere of digital broadcast television.*”

We do not take a position on this question at this time. NMPA believes that, if the FCC decides, (or is required by legislation) to proceed with such a regime, then it should include the Copyright Office in the process and should make decisions with the knowledge that

¹⁴ This is important to note because the BPDG Report notes that “[s]ome CE companies are concerned that this work product contains accommodations and structures that are designed to allow for future protection systems such as watermarking. Because no watermarking proposals for DTV have been discussed, nor the surrounding issues, these companies are uncomfortable in accepting any framework for such systems until all the issues are known.” Section 2.12.6, pg. 7. NMPA is proposing that the issues be aired, not ignored.

¹⁵ *Infra*, notes 8, 10 and 11. The required capability of the ATSC flag and the open question of the “analog hole” (see para. 2.5, pg. 5 of the BPDG Report) also weigh on this issue.

adoption of a DTV copyright protection standard will result in the above-described effects on the digital media industry beyond the narrow scope of DTV broadcasting.

2. “ . . . whether the Commission should adopt rules or create some other mechanism to resolve outstanding compliance, robustness and enforcement issues.”

If the Commission proceeds to regulate a standard, it must also resolve the outstanding compliance, robustness and enforcement issues taking into account a broader range of effect than the re-broadcast over the Internet of DTV. A robust technology with poor compliance or enforcement is no protection at all. The FCC should undertake this in a joint effort with the Copyright Office in a manner that, while recognizing the legitimate expectations of consumers, maintains the integrity of the copy protection function.

3. “ . . . whether the Commission should mandate that consumer electronics devices recognize and give effect to the ATSC flag or another type of content control mark. If so, we seek comment on whether this mandate should include devices other than DTV broadcast receivers and what the resulting impact would be on consumers.”

We do not take a position at this time with regard to the capability of the ATSC flag. As discussed in section C of our comments, whether the flag is sufficient or not depends on the scope of authorized downstream uses that the flag is intended to control. A simple “protect/no protect” flag would imply very tightly controlled copying and no exportation of the copy outside the device. More downstream flexibility in order to permit exportation between devices in the home would require more sophistication with regard to the flag, watermark or other indicia embedded in the DTV broadcast data.” The NMPA believes that it is clear from product announcements and advertising from consumer electronic and computer industry companies that each industry views DVD Recorders, Personal Video Recorders and Personal

¹⁶ Note that the more complex the system, the higher the costs to adopt and manufacture, thus increasing the level of resistance to any follow-on copy protection technology proposal as discussed in Section A.

Computers, as the central recording, storage, conversion and control devices for digital media in the home, including digital television. In addition, the FCC Rulemaking on DTV Tuners applies to both receivers and other recording devices, which should, by definition, include Personal Computers equipped to receive DTV. At a minimum, whatever device the FCC requires to have a DTV Tuner under its sister rulemaking or any device designed to receive and decode protected DTV broadcasts should be subject to the requirement to incorporate the regulated copy protection standard. In addition, to the extent the computer or consumer electronics industry offers additional products that provide similar functionality, they should be required to include the copy protection technology as well.

4. We also seek comment on whether and how downstream devices would be required to protect the content.

NMPA believes that whether and how downstream devices should be required to protect the content depends on the level of robustness that is set by the copy protection standard and the effectiveness of the compliance requirements and their enforcement. For example, to the extent the rules permit copying from a DVD-R across a “home network” to a Personal Computer, then the Personal Computer should be subject to the regulation in some manner. Otherwise, the Personal Computer can be the device that freely reproduces and re-distributes the copies without restriction even though the DVD-R was incapable of doing so. If the rules did not permit the DVD-R from exporting protected files, then the Personal Computer might be exempt, depending on the circumstances. As stated above in Section C., we believe that it would be contradictory to mandate a technology narrowly focused on re-distribution of the DTV broadcast while requiring that other downstream use and re-distribution be permitted. In addition, enforcement is critical: enforcement of compliance by DVD-R manufacturers while allowing PC software developers to build DTV storage and retransmission programs without consequence is no protection at all.

5. *We also seek comment on the appropriate scope of protection to be accorded DTV broadcast content. In addition, some parties have raised concerns about the potential impact of a broadcast flag requirement on consumers' existing and future electronic equipment.*

This question is answered in section C of our comments.

6. *Finally, we seek comment on the impact of the ATSC flag or other digital broadcast copy protection mechanism on consumers. The BPDG Final Report asserts that a broadcast flag system would not interfere with consumers' ability to make secure copies of DTV content for their personal use, either on personal video recorders or removable media.*

This is a complicated question of copyright law that is fact and case specific. We do not object to the making of copies of DTV content for personal use, within the current bounds of the law, as long as such copies are not further reproduced or re-distributed to a broader group of recipients. The question proves again the need for Copyright Office involvement in any proceeding on this topic.

7. *Similarly, the BPDG Final Report states that the requirements to protect digital outputs should not interfere with consumers' ability to send DTV content across secure digital networks, such as "home digital network connecting digital set top boxes, digital recorders, digital servers and digital display devices." We seek comment on these assertions.*

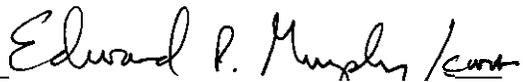
See our answer to the question above.

III. Conclusion

NMPA intends to participate in any Commission rulemaking that proposes to adopt a digital copy protection scheme that might affect the digital distribution of music or the ability

to combat music piracy. As described above, this proceeding fits this description. If the Commission proceeds, it should consider the effects of a DTV copy protection standard on other digital media, include the Copyright Office in its formulation of any regulatory standard, and resolve the outstanding robustness and related issues in a coherent, logical manner that respects the rights of copyright owners

Respectfully submitted,


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