

December 6, 2002

**Joint Proposal from MPAA and 5C Companies
for Table A Criteria**

This proposal is being made to the Commission to suggest criteria for adoption by the Commission to authorize digital output and recording technologies for Table A.

Notes:

- Authorization of a given technology will generally require the inclusion of “Associated Obligations” (as defined below) in Table A, which will pertain to the use of that technology by a Covered Product to protect Unscreened Content or Marked Content against unauthorized redistribution (including unauthorized Internet redistribution).
- This proposal contemplates that the criteria set forth below will be used in connection with processes to be determined by the Commission for adding technologies to Table A after adoption of the regulation promulgating the compliance and robustness requirements. Notwithstanding, the proponents recommend that the Commission authorize technologies for protecting digital output and recording of protected DTV content, in such manner that the Compliance and Robustness Requirements do not take effect prior to the authorization of technologies that enable such content to be passed and recorded in accordance with the Requirements.
- This proposal recommends that the Commission address the following issues:
 - i) A process by which (a) a party can file a notice demonstrating that any of the criteria is met, which notice would, where applicable, specify which companies have used or approved a technology as contemplated in the criteria; (b) each company named in the notice as having used or approved a technology is given adequate opportunity to dispute the facts alleged in the notice with respect to such company’s use or approval, and (c) any such disputes can be swiftly resolved.
 - ii) A process by which (a) a party can file a notice seeking information as to whether one or more companies have “used” or “approved” a technology, as “use” and “approval” are defined below; and (b) each company named in the notice is required to respond as to whether or not it has “used” or “approved” the technology.
 - iii) A process for ensuring that a listed technology that has been significantly compromised in relation to its ability to protect Unscreened Content and Marked Content from unauthorized redistribution (including unauthorized Internet redistribution) will not be used as a technology for “at least as effective” evaluation pursuant to criterion (3), below.

- iv) A standard by which a technology could be removed from the list where such technology has been compromised (where the level of “compromise” is substantially higher than the level required for the process contemplated in paragraph iii, above), which standard would take into account the protection of Unscreened Content and Marked Content from unauthorized redistribution (including from unauthorized Internet redistribution), and the impact on content owners, consumers and manufacturers resulting from the continued use of such compromised technology and from any removal of such technology from the list. This proposal recommends that the Commission will address a process by which (a) requests can be made to remove a technology from the list on the basis that such standard has been met; (b) interested parties can object to such requests for removal; and (c) a timely determination would be made as to whether or not such technology will be removed from Table A (after a reasonable grace period).
- v) The appropriate entity or entities that would administer Table A and the processes described above.

- This proposal also recommends that the Commission address the issue of the applicable grace period before the Compliance and Robustness Requirements become effective.
- Definitions for capitalized terms not otherwise defined herein will need to be defined.

Proposed Criteria:

A technology may be added to Table A by meeting any one of the following criteria:

- (1) 3 Major Studios and/or Major Television Broadcast Groups (of which at least 2 must be Major Studios) use or approve the technology;
- (2) 10 Major Device Manufacturers (including software vendors) have licensed the technology and 2 Major Studios use or approve the technology.
- (3) The technology is at least as effective at protecting Unscreened Content and Marked Content against unauthorized redistribution (including unauthorized Internet redistribution) as is any one of the technologies then listed on Table A (other than technologies then deemed to be “significantly compromised” pursuant to the process contemplated in clause (iii) in the note above). A determination of whether a technology is “at least as effective” requires consideration of the effectiveness of both the technology and any applicable license terms relating to security (i.e., output and recording controls), enforcement and Change

Management.¹ For purposes of this criterion, at the initiation of the licensor of the technology or of another company, a public notice will be issued providing 60 days for comment on the request to include such technology on Table A. In the event that the licensor of such technology is not the initiator of the request and objects within such 60-day period to the inclusion of such technology on Table A, then such technology shall not be included on Table A. In the event that the licensor of such technology does not object within such 60-day period but 3 Major Studios and/or Major Television Broadcast Groups object, during the 60-day public notice period, to the inclusion of such technology on Table A on the basis that such technology does not meet this criterion, the matter shall be resolved through an expedited process (not to exceed an additional 45 days) to determine whether or not the criterion is satisfied. In connection with such determination, evidence that the technology is in legitimate use in a Major Commercial Market in connection with the output or recording of a commercially significant amount of New Release Content shall weigh in favor of a determination that such technology is “at least as effective” as a technology then on Table A, provided that if such technology has not been so used in connection with a commercially significant amount of New Release Content, such fact shall not be weighed against a finding that such technology meets such “at least as effective” standard.² In the event that there are fewer than 3 Major Studios and/or Major Television Broadcast Groups that so object within the specified period of time (and the licensor of the technology does not object) or if the result of the expedited process is a determination that the technology meets this criterion, then the technology will be included on Table A. If the result of the expedited process is a determination that the technology does not meet this criterion or the licensor of the technology objects, at any time prior to the conclusion of such process, to the inclusion of its technology on Table A, then the technology will not be included on Table A. For purposes of satisfying this criterion, if any Major Studio or Major Television Broadcast Group is counted as objecting to the inclusion of such technology on Table A, no Affiliate of such counted entity may also be counted as so objecting.

- (4) The technology (together with its license terms) includes output and recording controls that protect against unauthorized redistribution of audiovisual content (including unauthorized Internet redistribution) and such technology was expressly named as being permitted to be used for the output or recording (as applicable) of audiovisual content (except where such permission does not extend

¹ The proponents understand that other parties may support the establishment of additional or variations of the objective criteria for this criterion 3. The proponents look forward to discussing such proposals with such other parties in greater detail.

² By way of example and not limitation, a technology shall not be deemed to be in use “in connection with the output or recording of a commercially significant amount of New Release Content” if: (i) such use is solely for internal testing or other evaluation of such technology (including but not limited to testing or evaluation in the form of limited-duration “beta testing”); (ii) the company or companies that use such technology demonstrate their intent to use such technology solely outside the United States; or (iii) such use relates solely to the non-commercial distribution of audiovisual content, such as distribution solely to professional devices or for internal distribution within a company (including its Affiliates).

to use in connection with New Release Content) under the license applicable to a technology listed on Table A (whether such license itself expressly names the technology or references another means by which such technology may be expressly named), either (a) at the time such listed technology was listed on Table A, or (b) at a later date, provided that a Change Management process applied to such subsequent naming of such technology and such subsequent naming complied with such Change Management process.

A failure to satisfy any of the above criteria shall not preclude the subsequent addition of the technology to Table A pursuant to that or any other criteria.

For purposes of criteria (1) and (2) (and for no other purpose, e.g., not for purposes of patent law), a company shall be deemed to have “used” or “approved” a technology (a “Proposed Table A Technology”) only if such technology (together with its license terms) includes output and recording controls that protect against unauthorized redistribution of audiovisual content (including unauthorized Internet redistribution) and:

(a) such company or, where such company is a Major Studio, any of its Qualified Affiliates, has signed an agreement with the licensor of such Proposed Table A Technology that expressly authorizes (including, for avoidance of doubt, via license grant, non-assertion covenant or other authorization) the company or any of the company’s Qualified Affiliates (either immediately or upon a specified future date or circumstance) to use or cause the use of such Proposed Table A Technology in a Major Commercial Market, in connection with the output or recording (as applicable) of audiovisual content (except where such authorization does not extend to use in connection with the company’s New Release Content), provided that the use of such Proposed Table A Technology was expressly provided for in such agreement at the time the company enters into such agreement (whether such agreement then permits the use of the Proposed Table A Technology or then specifies a future date or circumstance upon which such use of such Proposed Table A Technology shall be permitted), and provided further that such “use” or “approval” shall not be deemed to exist prior to the effective date of any right to use such Proposed Table A Technology under such agreement;

(b) such company or, where such company is a Major Studio, any of its Qualified Affiliates, has entered into a content license or similar content-related agreement that, upon signature (and not pursuant to a Change Management procedure), expressly identifies, either directly, or indirectly by description or reference, such Proposed Table A Technology (i.e., by expressly naming such technology in such content license or content-related agreement or, indirectly, by expressly naming such technology in a specification, standard or license that is directly or indirectly linked by explicit reference through one or more instruments to such content license or content-related agreement) as being permitted to be used for the output or recording (as applicable) of the company’s audiovisual content (except where permission does not extend to use in connection with the company’s New Release Content);

(c) such company or, where such company is a Major Studio, any of its Qualified Affiliates, has signed an agreement with the licensor of another technology for which the applicable license specifically permits the use (either immediately or upon a specified future date or circumstance) of the Proposed Table A Technology in a Major Commercial Market in connection with the output or recording of audiovisual content (except where such permission does not extend to use in connection with the company's New Release Content), provided that the use of such Proposed Table A Technology was expressly provided for in such agreement at the time the company enters into such agreement (whether such agreement then permits the use of the Proposed Table A Technology or then specifies a future date or circumstance upon which such use of such Proposed Table A Technology shall be permitted) and provided further that such "use" or "approval" shall not be deemed to exist prior to the effective date of any right to use such Proposed Table A Technology under such agreement;

(d) such company has issued an unambiguous public statement endorsing the Proposed Table A Technology for the output or recording (as applicable) of the company's audiovisual content (except where such endorsement does not extend to use in connection with the company's New Release Content) or the inclusion of the Proposed Table A Technology on Table A; or

(e) a General Counsel or equivalent legal representative of such company has approved in writing the inclusion of the Proposed Table A Technology on Table A.

By way of example and not limitation, a company shall not be deemed to have "used" or "approved" a technology if: (i) its use or approval relates solely to internal testing or other evaluation of such technology (including but not limited to testing or evaluation in the form of limited-duration "beta testing"); (ii) notwithstanding any contractual right to use such technology for New Release Content, the company demonstrates that it uses and intends to use such technology under such contract solely in connection with content other than New Release Content; (iii) the company demonstrates its intention to use or approve the use of the technology solely outside the United States; or (iv) its use or approval relates solely to the non-commercial distribution of audiovisual content, such as distribution solely to professional devices or for internal distribution within the company (including its Affiliates).

An entity that is counted to satisfy a criterion cannot be counted more than once in satisfying that criterion.

For purposes of satisfying criterion 1 or 2, if an entity is counted as a Major Device Manufacturer, Major Studio, or Major Television Broadcast Group (each, an "Industry Category"), no Affiliate of such counted entity may be counted in the same or any other Industry Category, except that (a) if an entity is counted as a Major Device Manufacturer, 1 Affiliate of such counted entity may be counted as either a Major Studio or Major Television Broadcast Group; and (b) if an entity is counted as a Major Studio or

Major Television Broadcast Group, 1 Affiliate of such counted entity may be counted as a Major Device Manufacturer.

“Affiliate” means, with respect to any entity, any corporation, partnership or other entity that, directly or indirectly, owns, is owned by, or is under common ownership with, such first entity, for so long as such ownership exists. For purposes of the foregoing, “own,” “owned” or “ownership” shall mean holding ownership of, or the right to vote, more than fifty percent (50%) of the voting stock or ownership interest entitled to elect a board of directors or a comparable managing authority.

“Change Management,” for purposes of these criteria, means a process by which content owners are provided a specified right or ability to meaningfully object to particular amendments to content protection agreements.

“Major Commercial Markets,” for purposes of these criteria, means the United States, any country within the European Community, Canada, Japan and Australia.

“Major Device Manufacturer,” for purposes of these criteria, means any member of CEA, ITI, BSA or CCIA, the total gross revenues of which from device manufacturing and software publishing exceed US\$_____ per year.

“Major Studio,” for purposes of these criteria, means, during the course of any year, any member of the MPAA or any other company that has generated U.S. box office revenues from theatrical releases of feature films in the immediately prior year that are at least as great as the MPAA member company with the lowest U.S. box office revenues from theatrical releases of feature films for that same year.

“Major Television Broadcast Group,” for purposes of these criteria, means the 4 largest broadcast networks and the 5 largest television station groups that are not affiliated with Major Studios.

“New Release Content,” for purposes of these criteria, means, with respect to the application of any Proposed Table A Technology to audiovisual content, audiovisual content owned or acquired by license (with the right to determine distribution methods) by a Major Studio and first commercially released during the 24-month period preceding such application of such technology to such audiovisual content.

“Qualified Affiliate” means, with respect to a Major Studio, (a) an entity that directly or indirectly owns and controls such Major Studio or (b) an Affiliate of a Major Studio authorized to distribute the preponderance of the New Release Content owned or licensed by such Major Studio for one or more of the major content distribution channels (i.e., theatrical, home entertainment, pay-per-view, video-on-demand, pay television, basic cable or broadcast television). For purposes of the foregoing, “own” shall mean holding ownership of, or the right to vote, more than fifty percent (50%) of the voting stock or ownership interest entitled to elect a board of directors or a comparable managing authority.