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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of

Digital Broadcast Copy Protection

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MB Docket No. 02-230

Comments of the
Consumer Electronics Association

December 6, 2002

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content, with an expectation that devices will read and respond to such marks, offers the potential for content owners to choose by "remote control" not only the "copy status" of content in consumers' homes, but also the home interfaces that may be active at any time.' If response to such marks were to be mandated, they could even control the *viewing* resolution at which content may be enjoyed.'

The common law doctrine of fair use is at odds with such an outcome. Though codified by statute, it is a judicial doctrine, and it is neither practical nor desirable to resort to court action to test its every application. Nor is it desirable to mandate adoption of a technology that cuts too close to the boundary of fair use, as the technology cannot be sufficiently flexible to ensure that fair use is protected. Nor is it possible for every regulatory proceeding to reach an outcome that accounts for every conceivable case in which the question of authorization may arise. What is possible is the preservation of *fair* use values in the face of demands for more specific and granular levels of authorization.

In the particular case of free, terrestrial broadcasts, the public has a well-established stakeholder interest in fair use. Such broadcasts are the only means of acquiring broadcast or published audiovisual content that is *not* subject to some form of license.³ CEA believes it is important to maintain this consumer interest and freedom. Therefore:

- CEA is opposed to any source encryption of terrestrial DTV broadcasts as an alternative to the "flag" proposal;
- CEA believes that the nature of the original "broadcast flag" concept, as *not* addressed or designed to interfere with home recording, must be maintained at all costs; and
- CEA would oppose any "flag" regime that would require a higher level of user authorization for private, noncommercial activities within the home or the home network.

¹ The capability to turn off home interfaces by remote control is known as "Selectable Output Control."

² The capability to reduce display resolution by remote control is known as "Downresolution."

³ Cable and satellite programming is subject to user agreements; packaged media are commonly subject to "shrinkwrap" licenses or bailment agreements.

ii. The Supreme Court's holding in the "Betamax" case has been essential for new and beneficial technology, products, and services to reach consumers. The manufacture, distribution and sale of consumer electronics products and components with substantial non-infringing uses should continue to be legal.

Consumer freedoms depend on the ability to acquire products that empower consumers to exercise their fair use rights. When some content providers reacted to the first consumer VCR with a lawsuit, the Supreme Court had the opportunity to determine whether commercial freedom should be subservient to copyright owners' concerns. This was a collision of values. The Court chose to value freedom over constraint, based on a presumption of users' good faith, even in the face of a likelihood of misuse.⁴

The value choice in U.S. common law found by the Supreme Court has been under continuous attack by some content owners, even as they admit that the Betamax case was correctly (or at least fortunately) decided. Some now argue that any additional factor -- digital storage; greater capacity; cable delivery; linkage to in-home or out-of-home networks -- must reverse the Court's rationale, and lead to a choice of caution over commerce. CEA disagrees. CEA believes that the Betamax standard remains vital and viable. Indeed, its application should be clarified to assure that values of consumer choice and good faith are maintained in new contexts. CEA believes:

- No compelling evidence has been adduced to suggest that absence of a "flag" regime or the threat of retransmission to the public has kept DTV content from being broadcast;
- As DTV broadcasting is at an early stage, a flag regime may be appropriate as a prophylactic measure if it does not interfere significantly with consumer choice; but
- Even if some potential impact on content owners can be identified, reasonable and customary consumer choice must prevail as a value and should not be constrained.

⁴ *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984).

111. Consumer electronics manufacturers respect and *support* the intellectual *property* rights of content owners. However, *to* the extent manufacturers must constrain product design and performance in favor of such rights, any legally mandated restrictions should be narrowly tailored and construed to protect the right in question, should not unduly hinder technological innovation, and should foster the availability of content to consumers.

Consumer sovereignty requires that regulatory agencies, like courts, should issue only such mandates as are narrowly tailored and do not hinder technological innovation. Further, they should only be applied against a substantial, demonstrable threat. Government interference should not occur at all unless clearly necessary to foster availability of content, not just in theory, but in fact. CEA believes:

- The issue of FCC jurisdiction cannot be decided until all evidence in favor of action, rationales tying action to regulation, and nature of the regulation can be evaluated. In other words, there is no conclusive evidence at this time, either as to nature of need or scope of relief, that would compel a conclusion that the FCC has jurisdiction to issue and enforce a broadcast flag rule.

- IV. Legal restrictions against "circumvention" of technical measures should not be interpreted as affirmative design mandates. For example, the Digital Millennium Copyright Act should not be construed so as to mandate design conformance of a consumer electronics product with any particular technical measure other than the defined exception specified in section 1201(k) of the Act.

Technical mandates should not be lightly imposed or implied. Some, for example, have taken the position that any means of copy control or "extended" copy control status (*i.e.*, interface function or viewing resolution) should be regarded as an "effective" technological measure under the DMCA, and a duty of design conformance should then be implied in all products, so as to make the measure effective. ***Were this the state of the law, CEA would flatly oppose any implementation of a broadcast flag, voluntary or otherwise.***

Fortunately, this is not the state of the law. First, DMCA legislative history makes clear that the "anticircumvention" obligations apply only to technologies, such as encryption, that are themselves "effective" so as to require a user "key" to perform certain operations. Second, Section 1201(c)(3) of the DMCA -- the "no mandate" provision -- states explicitly that section 1201 does not impose any mandate on the

design or component choice of any consumer electronics, telecommunications, or information technology product. The only exception, recognized in 1201(c)(3), is section 1201(k), which does impose a design mandate on certain analog VCRs. That mandate, however, is explicitly limited by specific "encoding rules," governing when anti-copy encoding can and cannot be used. Therefore, CEA believes:

- Any mandate over the design of consumer products that is based on copyright considerations must be accompanied by "encoding rules" that preserve reasonable and customary consumer practices; and
- In the case of the "broadcast flag," encoding rules are necessary to prevent application of the "flag" to news and educational programming.⁵

V. The right of "first sale" disposition of content protected by intellectual property can and should **be** clarified to extend to content that has been digitally distributed.

Retailers who developed innovative ways of marketing audiovisual content to the public were protected by the copyright law's "first sale" doctrine from attempts by motion picture producers to stop these practices without specific authorization. (Ultimately, of course, video rental became the largest single revenue source from movies; it surpassed the box office more than a decade ago.) Today, the validity of the "first sale" right when content has been received via means of digital transmission, rather than packaged goods delivery, is not universally accepted. CEA believes this right should be accepted and clarified.

A controversial issue in "BPDG" deliberations has been the scope of redistribution against which the "flag" should be protective. CEA's answer derives from its principles on fair use, free commerce in devices, and first sale. CEA believes:

- There should not be any constraint on retransmission within a circle of friends and family, and this "circle" may appropriately extend both within and outside of the home.

⁵ In this respect CEA supports the formulation in the House Energy & Commerce Committee staff draft released prior to the September 25 hearing of the Subcommittee on Telecommunications & The Internet.

- VI. Legislated protections for "databases" as intellectual *property* should not be enacted or construed to confer proprietary control over program scheduling information *on* which consumer electronics devices and their users rely.

The inventiveness of content or data providers often comes to the fore in Washington and in courts. Having failed to persuade the U.S. Supreme Court to interpret existing law as affording copyright protection to most databases, some interests have pushed for legislation to give special protection to them nevertheless. Extreme versions of such legislation could give additional protection to ancillary data, of the sort represented by a "broadcast flag."

Data is the lifeblood of devices connected to networks; the operation of such devices through networked data should be subject to the principles of the *Betamax* case as enunciated by the Supreme Court. In other words, there should be a strong presumption in favor of unfettered commerce. Constraints based on the provision or presence of data should not be lightly created or implied. Accordingly:

- Were such "database" legislation enacted, CEA would oppose any use of the broadcast flag, voluntary or otherwise.

- VII. Home recording and piracy should not be confused. Home recording practices have nothing to do with commercial retransmission of signals, or unauthorized commercial reproduction of content.

In discussing home devices that may be connected to networks, some have found it tempting to apply the word "piracy" to what ordinary consumers do. Doing so moves the issue away from reasonable and customary home recording practices, and onto practices that have nothing to do with home recording at all. For example, a purchaser of a counterfeit copy of a prerecorded movie or a CD need not own a home recorder at all -- just the same playback device that is used to enjoy commercially authorized content.

In the age of Internet redistribution, drawing this line may require more care, but it is still essential that it be done. The issues pertaining to the operation of multi-function home devices, on broadband networks, are separate from those pertaining to the

networks themselves. In the context of the broadcast flag, it is essential to achieve balance, so as to assure that the competitive market for devices that serve valid consumer objectives is not impaired. Any FCC process will reach a seriously flawed result if consumer home network devices are viewed first as implements of "piracy," and only secondarily as devices essential to reasonable and customary consumer activity. Therefore, CEA believes:

- Any mandate arising from this proceeding should proceed from the premise that home network devices are legitimate, and that their functions relied upon for normal consumer activity should not be impaired.

Conclusion

CEA believes that the principles discussed in this Comment should guide the Commission in balancing broadcast flag implementation proposals against potential consequences for consumers. CEA will reply with more particularity to specific proposals as submitted in this round of Comments.

Respectfully submitted,



Michael Petricone
Vice President, Technology Policy
703 907-7544

Consumer Electronics Association
2500 Wilson Blvd.
Arlington, VA 22201

CEA GUIDING PRINCIPLES ON INTELLECTUAL PROPERTY ISSUES

1. Fair Use remains vital to consumer welfare in the digital age. For example, consumers should retain the right to private, noncommercial home recording of content originating as free terrestrial broadcasts, without requirement for authorization or technical restriction as to home recording.
2. The Supreme Court's holding in the "Betamax" case has been essential for new and beneficial technology, products, and services to reach consumers. The manufacture, distribution and sale-of consumer electronics products and components with substantial non-infringing uses should continue to be legal.
3. Consumer electronics manufacturers respect and support the intellectual property rights of content owners. However, to the extent manufacturers must constrain product design and performance in favor of such rights, any legally mandated restrictions should be narrowly tailored and construed to protect the right in question, should not unduly hinder technological innovation, and should foster the availability of content to consumers.
4. Legal restrictions against "circumvention" of technical measures should not be interpreted as affirmative design mandates. For example, the Digital Millennium Copyright Act should not be construed so as to mandate design conformance of a consumer electronics product with any particular technical measure other than the defined exception specified in section 1201(k) of the Act.
5. The right of "first sale" disposition of content protected by intellectual property can and should be clarified to extend to content that has been digitally distributed.
6. Legislated protections for "databases" as intellectual property should not be enacted or construed to confer proprietary control over program scheduling information on which consumer electronics devices and their users rely.
7. Home recording and piracy should not be confused. Home recording practices have nothing to do with commercial retransmission of signals, or unauthorized commercial reproduction of content.