

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
) MB Docket No. 02-230
Digital Broadcast Copy Protection)
)
)
)

**REPLY COMMENTS OF
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seriously concerned with, if not outright opposed to, the Commission's adoption of such a system. And with good reason. As Philips observed in its initial comments, the MPAA/5C Proposal fails virtually every important public policy and public interest test to which it must be put. Indeed, it even fails to meet the shared objective of Philips and MPAA/5C to prevent unauthorized Internet redistribution to the public of digital broadcast content.

It would require, based on the most scant and problematic jurisdictional support, the establishment of a new and mammoth regulatory regime that insinuates the government, either directly or indirectly by mandating the use of "authorized" technologies, into the design, manufacture and licensing of virtually every conceivable consumer electronics and computer product within (and some outside of) a consumer's home network. In so doing, it would have the Commission, without prior congressional authorization, implement an approach directly contrary to the public policy decision made by the Congress just a few short years ago in Section 1201(c)(3) of the Digital Millennium Copyright Act not to require consumer electronics or computer products to respond to particular technological measures.⁴

Instead of preserving consumers' fair use expectations—so essential to driving consumer acceptance of the DTV transition—the MPAA/5C Proposal would create a major economic barrier to consumers' ability to record and play back broadcast DTV content within their home network and prohibit any possible point-to-point exchange of digital content with family and friends over the Internet.

It addresses a "threat" that even its strongest proponents cannot prove actually exists, either at all or at least not for the foreseeable future.

⁴ Pub. L. No. 105-304, 112 Stat. 2860 (October 28, 1998) (codified at 17 U.S.C. § 1201(c)(3)).

It includes no safeguards to prevent a cartel of content owners and digital content protection licensors from abusing their control of “authorized technologies” and the licenses that accompany them, limiting competition and impeding innovation.

But most incredibly, by failing to protect digital content passed through analog outputs (and recognizing that restrictions on analog outputs would doom the DTV transition to certain failure vis-à-vis its acceptance by consumers), the MPAA/5C Proposal, in the end, *fails to achieve its core purpose of effectively preventing unauthorized redistribution of digital broadcast content to the public over the Internet.*

Instead of approving this MPAA/5C Proposal, Philips urges the Commission to choose a more prudent course that serves the public interest and promises to facilitate the DTV transition. Philips suggests that the Commission obtain clear statutory authority from the Congress for a digital content protection solution that would balance the legitimate interests of the content community, the consumer electronics and IT industries, and the fair use expectations of consumers, using objective criteria, in a holistic manner, encompassing both digital and analog outputs. There is time to do it right.

II. THE RECORD REFLECTS BROAD OPPOSITION TO OR CONCERNS ABOUT THE MPAA/5C BROADCAST FLAG PROPOSAL

Although the MPAA-led coalition and the 5C companies would like the FCC to believe that their Proposal enjoys broad support, the record reflects quite the opposite. Indeed, the American Foundation for the Blind (“AFB”), the Computer and Communications Industry Association (“CCIA”), the Consumer Electronics Association (“CEA”), the Arizona Consumers Council (“ACC”) and numerous consumer protection organizations joining in its filing, the Electronic Privacy Information Center (“EPIC”), the Home Recording Rights Coalition (“HRRC”), the Business Software Alliance and Computer Systems Policy Project (jointly, the

“IT Coalition”), the Information Technology Association of America (“ITAA”), the Information Technology Industry Council (“ITI”), Motorola, the National Music Publishers Association (“NMPA”), numerous library associations (“Libraries”), Public Knowledge and Consumers Union, TiVo, Veridian, and Verizon—and thousands of individual consumers—all expressed significant concerns regarding the Proposal or advocated its outright rejection. Significantly, the MPAA/5C Proposal was not based on consensus, even among those afforded an opportunity to attend the meetings that produced it, as many commenters point out.⁵

Many commenters argue that the MPAA/5C Proposal would directly harm consumer interests by violating fair use and First Amendment rights.⁶ They also argue that the flag (or, more specifically, the “authorized technologies” mandated by such a regime) would cause compatibility problems in the consumer electronics equipment marketplace.⁷

Many commenters also argue that the regime would harm consumers by handicapping the consumer electronics industry. They point out that the Proposal requires the FCC to create an extensive, invasive, and cumbersome regulatory regime that would affect virtually all consumer electronics devices, including audio equipment, as well as computers.⁸ Verizon questions whether the FCC could even enforce such a massive and complex proposal,⁹ and notes that the MPAA/5C Proposal’s supposed “standards” are extremely vague and anything but objective.¹⁰

⁵ See AFB at 3; ACC at 14-15; CCIA at 5, 19; EPIC at 3; IT Coalition at ii, 21-22, 27-28, 32; ITAA at 3, 8-10, 13, 15; ITI at 4; National Cable Television Association (“NCTA”) at 7; Public Knowledge and Consumers Union at 13-14; TiVo at 3 & n.4; Verizon at 9.

⁶ See AFB at 3-4; ACC at 1, 5-6; CCIA at 5-6, 11, 15, 17, 19; CEA at 2-3, 6; HRRC at 6-7, 8; Libraries at 10-11, 13-16; Public Knowledge and Consumers Union at 23; Veridian at 12.

⁷ See CCIA at 8, 16, 21-22; EPIC at 4-5; HRRC at 7; ITAA at 15; ITI at 3-4; Verizon at 5-6.

⁸ See CCIA at 15-20; EPIC at 3; ITAA at 6; ITI at 4-5; NMPA at 3, 4-5; Public Knowledge and Consumers Union at 15, 17; Veridian at 2, 5, 12; Verizon at 1, 4, 5.

⁹ See Verizon at 8-9.

¹⁰ See *Id.* at 9-10.

TiVo and a multitude of consumer organizations express concern over the essential veto power of the studios and the 5C companies regarding selection and approval of content protection technologies and changes thereto.¹¹ Numerous commenters also argue that the regime is inflexible, and would hinder competition and stifle innovation.¹² They also express concern over the substantial costs that the broadcast flag regulatory regime would impose on manufacturers and consumers.¹³

Not only does the MPAA/5C Proposal suffer from all these flaws, it will not even stop the unauthorized redistribution and copying that it seeks to eliminate, as CCIA, consumer interest groups (including ACC and Public Knowledge and Consumers Union), EPIC, HRRC, ITAA, ITI, Motorola, the Professional and Collegiate Sports Leagues, TiVo, Veridian, and Verizon observe.¹⁴ They maintain that imposing digital content protection technologies associated with the broadcast flag is not only unnecessary to promote DTV, but will hinder the DTV transition.¹⁵ Verizon argues that FCC intervention is not necessary, advocating instead reliance on existing copyright law.¹⁶

Moreover, CCIA, HRRC, CEA, consumer organizations, the IT Coalition, Libraries, Public Knowledge and Consumers Union, and even the 5C companies question whether the FCC

¹¹ See ACC at 15-16; TiVo at 7-8 & n.10.

¹² See AFB at 3; ACC at 1-2, 8-9; CCIA at 4-8, 16, 18; EPIC at 1-2, 6; ITAA at 9-11, 15-17; ITI at 4; Libraries at 13; Public Knowledge and Consumers Union at 21-22; TiVo at 3, 8-9 & n.10; Verizon at 1, 5-7.

¹³ See ACC at 8-9; CCIA at 5, 8, 12, 15-19, 22; EPIC at 5-6; IT Coalition at 11, 14; ITAA at 3, 11-12; ITI at 4; NMPA at 5-6; Public Knowledge and Consumers Union at 3-6, 21; Veridian at 12-13.

¹⁴ See ACC at 1, 9-10; CCIA at 5-8, 11-12, 17, 20, 22; EPIC at 2; HRRC at 5 & n. 6; ITAA at 12; ITI at 3-4; Motorola at ii; NFL *et al.* at 12-13; Public Knowledge and Consumers Union at 16; TiVo at 4-5; Veridian at 2, 5-6; Verizon at 3-4.

¹⁵ See ACC at 1, 6-11; CCIA at 17, 20; CEA at 4; EPIC at 2; HRRC at 4-5; IT Coalition at 11-14; Libraries at 8-10; Public Knowledge and Consumers Union at 6-13; TiVo at 3.

¹⁶ See Verizon at 4-5.

currently has the authority to impose a broadcast flag-driven digital content protection regulation.¹⁷

One important aspect of the MPAA-led coalition's effort to provoke a rush to judgment by the Commission is the notion that there exists consensus support for its broadcast flag proposal. The record before the Commission dispels that myth. Indeed, the overwhelming weight of reasoned argument and law in the record of this proceeding is against the Commission's adopting the MPAA/5C Proposal. Its support is narrow; its cure is far worse than the problem it seeks to remedy; and its impact would be to impede rather than advance the DTV transition.

III. A PLAIN ENGLISH TRANSLATION OF THE MPAA/5C PROPOSAL CONFIRMS THAT THE PROPOSAL REQUIRES AN ENORMOUS AND INVASIVE REGULATORY REGIME THAT WOULD APPLY TO VIRTUALLY EVERY CONSUMER ELECTRONICS DEVICE AND COMPUTER IN THE HOME NETWORK

Notwithstanding proponents' attempts to paint the MPAA/5C Proposal as comparatively simple (or, in MPAA's preferred parlance, "practical")¹⁸ and narrowly tailored,¹⁹ adopting the Proposal would require the FCC to impose an invasive regulatory regime affecting virtually all consumer electronics devices and computer equipment within the digital home network.²⁰ In fact, the regime would be far more extensive and burdensome than the regulations required by the explicit congressional mandates for closed captioning, the V-Chip, cable compatibility, and

¹⁷ See ACC at 1, 11-14; CCIA at 16; 5C at 12, 15-16; IT Coalition at 3-10; Libraries at 17-21; Public Knowledge and Consumers Union at 23-28; HRRC at 9; CEA at 5.

¹⁸ MPAA at 11.

¹⁹ See, e.g., MPAA at 14-15; 5C at 8-9.

²⁰ Indeed, their own comments belie their claim. See MPAA at 14 (stating that "it is essential, and we assume the Commission intended, that computer or 'IT' products be regulated, as well as so-called 'CE' products"). See also NMPA at 4 (arguing that "any mandated copyright protection standard for DTV...will have a substantial impact across a wide range of consumer electronic devices and media industries well beyond the field of DTV broadcasting").

competitive availability of navigation devices. At a time when the FCC is trying to reduce unnecessarily cumbersome regulations, especially those that hinder the development and consumer enjoyment of the Internet,²¹ adopting the MPAA/5C Proposal would be directly contrary to the policy direction the Commission is charting.

By relying on technical jargon, proponents obscure the incredibly invasive and far-reaching impact of the MPAA/5C Proposal. The proponents advocate FCC adoption of twenty, single-spaced pages of “Requirements”²² and an additional six pages of selection criteria for “authorized technologies.”²³ The true nature of the regulatory regime that the Proposal would require the FCC to impose becomes evident, however, once these exceedingly opaque descriptions are translated into plain English.

The Proposal calls for “requirements to be imposed on certain products that demodulate unencrypted digital terrestrial broadcast content and certain other products that modulate content which could be sent to demodulators.”²⁴ When deciphered, however, the only thing certain about the Proposal is that it would directly or indirectly subject to FCC regulation virtually every conceivable consumer electronics product within a consumer’s home network. In fact, as reflected in their own comments, proponents envision an environment in which every device

²¹ See, e.g., Jonathan Krim, *FCC Preparing to Overhaul Telecom, Media Rules*, WASH. POST, Jan. 3, 2003, at E1 (explaining that Chairman Powell has said “he is determined to keep the Internet relatively free from the decades-old, tightly regulated framework of local telephone service”).

²² See MPAA, Attach. B.

²³ See MPAA, Attach. C.

²⁴ MPAA, Attach B at 1 (emphasis added).

must be shackled to an FCC-“authorized technology” or forgo access to digital broadcast content.²⁵

The first category of FCC-regulated devices under the MPAA/5C Proposal is “demodulators,” which would be subject to a direct FCC mandate vis-à-vis their compliance with the Proposal’s “Requirements.”²⁶ Demodulators take signals transmitted over the air, cable or satellite, and convert them into usable form. At a minimum, “demodulators” include those products typically used as the initial point of entry of broadcast DTV signals into the home network, whether received over the air or on a cable or satellite system. Thus, they include integrated digital television sets, digital cable set-top boxes, direct broadcast satellite (“DBS”) receivers, TiVo-type personal video recorders and, increasingly, computers with DTV tuner cards. Moreover, consistent with consumer electronics companies’ commitment to offer consumers the greatest degree of product flexibility possible, other devices not typically used as a “point-of-entry”—such as DVD recorders and D-VHS recorders—likely will include a demodulator to provide consumers with additional functionality.

The MPAA/5C Proposal also would subject modulators to direct FCC regulation – again, vis-à-vis their compliance with the FCC-adopted “Requirements.” Modulators are “devices that convert a signal into the same form as is used by a digital broadcast television station...[and]...can be used as a means of connecting products to a home network.”²⁷

Modulators could be included in any number of consumer home network devices, depending

²⁵ See 5C at 7-8 (describing an “unbroken chain of compliance obligations”); MPAA at 14-15 (stating that “[r]egulation of Downstream Products is necessary” even though “only products containing demodulators or modulators will be directly subject to the Commission’s mandate”) (emphasis added and footnote omitted). See also *id.* at 6-8 (advocating a “comprehensive regulatory framework” that governs retransmission over and to devices other than receivers).

²⁶ See MPAA at 14-15.

²⁷ MPAA White Paper, at 4-5, Attach. B at 8-11, 15-20.

upon the chosen manner in which a manufacturer would transport video throughout the home network. Devices with modulators can include cable set-top boxes, DBS receivers, PVRs, DVD players, DVD recorders, D-VHS recorders, and computers.

Finally, the Proposal, by its terms, also requires FCC regulation, either indirect or direct, of “downstream products.” Under the MPAA/5C Proposal, downstream products can receive digital broadcast content by incorporating FCC-“authorized technologies” (*i.e.*, those included on Table A),²⁸ or by signing a written commitment to abide by the Proposal’s FCC-adopted “Requirements” provisions.²⁹ In the case of the former, the protection would derive from the licensing terms of the authorized digital content protection technologies “critical...for gaining admission to Table A.”³⁰ In the case of the latter, denominated by MPAA/5C as “Downstream Products,” protection would be achieved by compliance with the Compliance and Robustness rules of the proposed FCC regulations, precisely the same as apply to demodulators.³¹ These downstream products clearly encompass DTV monitors, DVD players, DVD recorders and other digital recording devices, computers, and, depending on how they are used within a consumer’s home network, can also include integrated DTV sets, as well as networking routers/switches and more.

²⁸ Indeed, under any encryption-based regime, including the MPAA/5C Proposal, FCC regulation of “authorized technologies” is critical to protect all parties, including the public and consumer electronics and computer manufacturers, from cartel-driven rules that might threaten fair use, harm competition and stifle innovation.

²⁹ See MPAA at 16, Attach B at 6-7. The MPAA/5C Proposal distinguishes between lower-case “downstream products” and initial-capped “Downstream Products,” the latter of which is a defined subcategory of “downstream devices” whose manufacturers sign a written commitment to comply with the Proposal’s FCC-adopted Requirements provisions. Under the MPAA/5C Proposal, downstream products also may receive content over an analog output.

³⁰ MPAA at 17.

³¹ *Id.* It appears that such “Downstream Products” would include units within devices, *e.g.*, an MPEG decoder within an HDTV set.

Consequently, as illustrated in the graphic below, the “certain products” that the Proposal asks the FCC to regulate includes virtually every device within a consumer’s home network. For the MPAA to characterize it as regulating “a few types of consumer products”³² is misleading. Moreover, as television, computer and communications technologies continue to converge, the Proposal could potentially cover new devices *outside* the home network, such as next-generation cell phones and other wireless devices, that could have DTV reception capability.

³² See MPAA at i.

FCC-REGULATED DEVICES UNDER THE MPAA/5C PROPOSAL

DEVICE	DEMODULATOR	MODULATOR*	DOWNSTREAM PRODUCT**
Integrated DTV Sets	✓		✓
DTV Monitors			✓
Cable Set-Top Boxes	✓	✓	
DBS Receivers	✓	✓	
Personal Video Recorders (e.g., TiVo, Replay)	✓	✓	✓
Advanced PVRs (incorporating twin-tuning, video editing and other capabilities)	✓	✓	✓
DVD Players		✓	✓
DVD Recorders	✓	✓	✓
D-VHS Recorders	✓	✓	✓
Computer with DTV Tuner Card	✓	✓	✓
Computer without DTV Tuner Card			✓
Network Routers/Switches			✓

* Devices identified ✓ in this category could include modulators and therefore be subject to FCC regulation.

** Devices identified ✓ in this category could be used as a “downstream product” within a consumer’s home network. For the consumer to utilize the device on that network and be able to access flagged digital broadcast content, however (*i.e.*, as opposed to its being a “stand-alone” device), the device would be required to utilize FCC-“authorized technologies,” or comply with the MPAA/5C’s FCC-adopted “Requirements.”

IV. THE OVERWHELMING REGULATORY CONSEQUENCES OF THE MPAA/5C PROPOSAL ARE COMPLETELY UNJUSTIFIED GIVEN PROPONENTS' CONFIRMATION THAT THEIR SYSTEM CANNOT EFFECTIVELY PREVENT DIGITAL BROADCAST CONTENT FROM UNAUTHORIZED REDISTRIBUTION TO THE PUBLIC OVER THE INTERNET, AND THEIR FAILURE TO PRESENT EVIDENCE THAT THE "THREAT" OF WIDESPREAD PIRACY OF HIGH-VALUE DIGITAL PROGRAMMING IS EITHER REAL OR IMMINENT

Before the FCC should even consider the intrusive regulation of the consumer electronics and computer industries required by the MPAA/5C Proposal, particularly given the FCC's lack of clear authority to do so, proponents must provide compelling evidence that the threat of unauthorized redistribution of high-value, digital broadcast content to the public over the Internet is real and imminent, that the potential harm to be prevented outweighs the huge burdens of the proposed broadcast flag regime, and that the Proposal effectively addresses the threat. Proponents fail to make that case in any respect.

As a threshold matter, the MPAA/5C Proposal cannot possibly be justified unless the system is actually capable of effectively and comprehensively addressing content owners' core concern – *i.e.*, the unauthorized redistribution of high definition or other high-value digital video content to the public over the Internet. Ironically, however, the very aspect of the MPAA/5C Proposal that enables content owners to claim, albeit erroneously, that the system can be regulated in a relatively simple and consumer-friendly fashion—*i.e.*, its hands-off approach to unprotected analog outputs—is what makes the system unacceptably deficient in preventing redistribution of digital content to the public over the Internet. A digital broadcast content protection system that does not also protect that content when passed through an analog output is, by definition, incomplete and ineffective. The MPAA/5C Proposal is an elaborate and costly

security system for the “front door” that proudly boasts of leaving the “back door” wide open and unprotected.³³

This glaring defect in the MPAA/5C Proposal impels Philips to implore the Commission to take a holistic approach to this issue and simultaneously to consider, in a Further Notice of Proposed Rulemaking following enactment by the Congress of appropriate enabling legislation, digital content protection solutions that address both digital and analog outputs. For example, the Commission should explore existing technologies, such as watermarking, and newer technologies in development, such as fingerprinting. Only in that way can we collaboratively develop an effective digital broadcast content protection system and be honest with consumers about the ramifications of their making the transition to DTV.

Imposition of the regulation attendant to the MPAA/5C Proposal also is unwarranted because the record is devoid of any evidence that the threat of unauthorized Internet redistribution of high value digital content to the public over the Internet – today or in the foreseeable future – reaches anywhere near the “crisis” levels claimed by content owners. Unable to provide any such evidence, or any evidence to refute the technical/bandwidth limits that today and for the foreseeable future foil widespread file-sharing of broadcast HDTV or even SDTV programming, content owners present the Commission with nothing more than naked assertions and threats to take their HDTV programming and go home. That is not a legally sustainable basis for imposing the regulation urged by the MPAA/5C Proposal.

³³ *See*, MPAA at 26-27.

A. Proponents' Broadcast Flag Regime Would Still Leave Broadcast DTV Content Unprotected From Unauthorized Retransmission To The Public Over The Internet

No proponent of the broadcast flag regulation in this proceeding has advanced any response to the question of how the regime proposed by MPAA/5C would be effective in preventing unauthorized redistribution of broadcast DTV content to the public over the Internet after it has been passed through an unprotected analog output. In fact, the very lynchpin of proponents' claim that their broadcast flag proposal would have "no effect on consumers," with regard to obsolescence of legacy equipment, is that it would permit unprotected analog outputs to remain viable.³⁴ As proponents and others clearly recognize, the continued availability of analog outputs is essential to driving consumer acceptance of DTV, as it ensures future interoperability between legacy devices – including hundreds of thousands of early adopters' HDTV receivers – with next-generation products equipped with digital content protection.³⁵ Importantly, legacy devices also include hundreds of millions of analog television receivers having *only* analog inputs, which will require a conversion device—having analog *outputs*—to work at all once analog broadcasts end.

However, this same "saving grace" of proponents' broadcast flag proposal is simultaneously its greatest and most irredeemable flaw. By permitting digital broadcast content to bypass the content protection system through unprotected analog outputs, the system loses any credibility that it is actually capable of effectively protecting that digital content in the first place. This key factor, more than any other, demonstrates that the broadcast flag "solution" is nothing more than a digital rendition of "The Emperor Has No Clothes."

³⁴ MPAA at 27.

³⁵ *See, e.g.*, Professional and Collegiate Sports at 13, Thomson at 10 n.9.

B. The Asserted Threat of Massive Digital Piracy Posed By The Absence Of A Broadcast Flag Regulatory Regime Is Wholly Unsupported

If the threat of illegal piracy is such that content owners are comfortable with a system that falls so far short of effectively protecting their content, the question must be asked, “How truly urgent is the need for the broadcast flag?” What evidence exists to show that unauthorized redistribution of high-value digital broadcast content constitutes a real and imminent threat to content owners? A review of the record in this proceeding makes clear the answer to this question: There is no clear and present danger here, much less one that could possibly justify adoption of the MPAA/5C Proposal.

Perhaps to divert attention from the massive regulatory regime required to implement the broadcast flag, perhaps to trivialize the deficiencies of the MPAA/5C Proposal, but likely both, content owners lay before the Commission numerous claims of dire consequences if the Commission does not act immediately to prevent mass-scale piracy of their content. Yet, in the end, these claims prove vaporous, as content owners provide no evidence to back up their assertions. Even a cursory review of these assertions quickly reveals their ethereal and ultimately illusory quality.

For example, MPAA asserts:

Unlike other digital programming distribution methods..., digital broadcast television is transmitted in the clear, and thus is subject to an extraordinarily high risk of unauthorized redistribution.³⁶

This is not a function of digital transmissions. There is a risk of unauthorized redistribution of in-the-clear broadcast television of *any kind*, be it digital or analog. Yet, broadcasters have never advocated encrypting their transmissions at the source, a solution that would eliminate the in-the-clear nature of broadcast TV and thus alter fundamentally the nature

³⁶ MPAA *et al.* at 6.

of free, over-the-air broadcasting.³⁷ As discussed above, the risk of redistribution is not reduced meaningfully by the MPAA/5C Proposal given how easy it is to redigitize digital video after it has been passed through an unprotected analog output (something that system expressly would not restrict).³⁸

Proponents of the Proposal also note:

*The capability of the Internet to allow distribution worldwide, instantly, to millions of recipients, distinguishes the looming threat of piracy from previous technologies, such as the VCR, that rely on the creation and distribution of physical copies.*³⁹

*Digital recordings can be reproduced forever without any degradation in the quality of successive copies. And digital recordings can be instantly distributed to millions of people by virtue of the Internet, peer-to-peer sharing, and other technologies. Because digital television removes the limitations that tempered piracy in the analog world, it is incumbent upon the Commission to adopt regulatory limitations to protect the public from the consequences of piracy in the digital world.*⁴⁰

As CCIA correctly points out in its comments, the content community, and now broadcasters, “[make] much of the ‘perfect copies’ argument.”⁴¹ To rationalize adoption of a digital broadcast content protection system based on the fact that “digital copies can be reproduced forever without degradation,” is misleading. It ignores the reality of digital copies of

³⁷ In fact, the very wide availability of broadcast content is possibly a major contributing factor to why consumers generally lack the motivation to devote hours to redistributing that content (i.e., something so ubiquitously available) to the public over the Internet. Limiting this availability, as an “encrypt-at-the-source” approach would do, could have the unintended consequence of making that content a more attractive commodity for purposes of its unauthorized redistribution over the Internet to a wide audience. Philips’ concerns regarding proposals to encrypt over-the-air broadcast transmissions are discussed in Section VII.

³⁸ Moreover, as discussed below, once digitized, successive copies of analog-originating content are just as immune to degradation as copies of digital-originating content. See CCIA at 7.

³⁹ MPAA *et al.* at 7.

⁴⁰ Banks Broadcasting *et al.* at 2.

⁴¹ CCIA at 7.

analog content, which are equally as immune to degradation as digital copies of digital content.

If the problem is redistribution of digital copies over the Internet, the broadcast flag regime is not the answer. Further, it fails to account for the real-world limitations on bandwidth that will greatly inhibit, for the foreseeable future, redistribution of high value digital content over the Internet.⁴²

Another proponent of regulation argues:

*Given the rapid increase in music and movie piracy, the only reasonable conclusion is that file-sharing of broadcast programming will increase exponentially. Thus ..., redistribution concerns are real and imminent.*⁴³

There is no dispute that some file-sharing of broadcast programming is going on today, but to suggest that this activity is having an economic impact, even if it were to “increase exponentially,” that would justify urgent adoption of any digital broadcast content protection system – particularly the MPAA/5C Proposal – rings hollow. The basis on which this claim is made, in fact, calls into question whether this content owner’s redistribution concerns – at least as they relate to their stated goal of protecting “high quality digital programming”⁴⁴ – are either real or imminent. To wit, the content owner points to the popularity of two of its prime time programs on one file-swapping service,⁴⁵ but conveniently omits mention of the fact that the files found on this service are not typically, *if ever*, HDTV, SDTV or even NTSC-quality resolution!⁴⁶ Thus the only “real” problem to which they can point involves redistribution of very-low-

⁴² See discussion *infra* at 18.

⁴³ Disney at 5.

⁴⁴ *Id.* at 1.

⁴⁵ *Id.* at 5.

⁴⁶ A survey of ABC programming on KaZaA recently found 8 episodes of “Alias,” all of which were sub-NTSC quality (352x240 resolution).

resolution copies. In fact, the record reflects a notable consensus among MPAA/5C proponents that, to the extent there is any “real” problem, it is an *anticipated* one.⁴⁷

Moreover, content owners offer no evidence to counter Philips’ and others’ assertion that existing bandwidth constraints stand as an effective obstacle today, and for the foreseeable future, to the redistribution of high-value digital programming (either HDTV or SDTV),⁴⁸ thereby negating any notion that the problem is “imminent.” Indeed, as discussed in Philips’ comments, the immediacy of the threat of widespread redistribution of digital content over the Internet is largely mitigated by the state of consumer broadband technology, given that most consumers do not subscribe to broadband services and even those with broadband Internet access do not have the necessary bandwidth to engage in widespread uploading and downloading of HDTV or even SDTV content to and from the Internet.⁴⁹

The MPAA concludes:

*With worldwide unauthorized redistribution of digital content so easy to accomplish, the threat of widespread piracy is enormous, even if the number of pirates is low.*⁵⁰

The acknowledgement that “worldwide” digital redistribution is possible “even if the number of pirates is low” proves an important point, but not the one MPAA is trying to prove.

All it takes is a few skilled persons to obtain access and create a few digital-to-analog-to-digital

⁴⁷ See Viacom at 10; Disney at 3;

⁴⁸ See, e.g., CCIA at 9-11; Philips at 13-14; HRRC at 5; Public Knowledge and Consumers Union, Appendix B at 13; NCTA at 3.

⁴⁹ As discussed (at 13) in Philips’ comments in this proceeding, even conservatively, it would take 25 hours using a 1.5 Mbps broadband connection, and 28 days using a more common 56 Kbps telephone modem, to retransmit a two-hour broadcast HDTV movie onto the Internet. To do so in any reasonable amount of time (*i.e.*, 30 minutes or less) would require such a level of compression as to necessarily degrade the signal well below its native high definition resolution. Even a two-hour SDTV broadcast would take approximately 5 hours to retransmit in its native resolution using a 1.5 Mbps broadband connection, or 142 hours over a 56 kbps dial-up modem.

⁵⁰ MPAA at 7.

copies, and the horse is out of the barn. An encryption-based solution, such as the MPAA/5C Proposal, will neither deter nor prevent the relatively small number of lawbreakers from obtaining and redistributing digital content. The broadcast flag solution thus would be ineffective in combating the very problem cited by content owners/broadcasters.

These and other claims by broadcast flag proponents establish that, as one commenter aptly states, “the problem faced by [content owners], in fact, is in no way novel. Their solution, furthermore, will do essentially nothing to solve it.”⁵¹ The imposition of any content protection mandate, but particularly one as complex and intrusive as that which would be required to implement the broadcast flag, is not justified by the record and should be rejected in favor of a more comprehensive solution that also protects the interests of consumers as well as promotes a more rapid transition to digital television.

C. Threats To Withdraw HDTV Programming If The MPAA/5C Proposal Is Not Adopted Defy Logic And Are Not Calculated To Produce A Reasonable Solution

Apparently to underscore the severity of their concern about the need to prevent unauthorized redistribution of HDTV content over the Internet, two content providers have threatened to withdraw all of the HDTV programming from the respective broadcast networks they own, in one case as early as the 2003-2004 television season, if the Commission does not adopt rules mandating the broadcast flag regime.⁵² Neither company threatens to withhold standard definition digital programming, which presumably would continue to be transmitted unrestricted even if HDTV is withheld, and which content owners have cited as being in much more immediate danger of unauthorized distribution than HDTV. Thus, as is the case with

⁵¹ CCIA at 7.

⁵² See Viacom at 1, Disney at 4.

unprotected analog outputs, their resort to “self-help” focuses on a distant, potential problem leaving unaddressed one that is more plausible.

Instead, Philips urges these companies to honor their commitment made in response to Chairman Powell’s April 4, 2002 voluntary plan to *increase* the amount of HDTV programming they make available. Providing more HDTV to consumers rather than withdrawing it from the marketplace is the way to increase pressure for a truly broad-based digital content protection system. Threats cannot justify adoption of the MPAA/5C Proposal (or any similarly deficient encryption-based system) in light of its multiple other infirmities.

V. THE MPAA/5C PROPOSAL WOULD CREATE AN UNACCEPTABLE ECONOMIC BARRIER TO CONSUMERS’ HOME RECORDING CAPABILITIES AND UNNECESSARILY RESTRICT LAWFUL POINT-TO-POINT RETRANSMISSION OF DIGITAL BROADCAST CONTENT TO FRIENDS AND FAMILY. BOTH OUTCOMES WOULD CHILL CONSUMER ACCEPTANCE OF DTV AND SLOW THE TRANSITION

A. The MPAA/5C Proposal Will Interfere With Legitimate, Fair Use Copying

The 5C companies argue that “no copy restrictions should be imposed upon DTV broadcast content when recorded by the consumer” and that “DTV broadcast content...must be freely copiable.”⁵³ The 5C licensors further argue that “these principles recognize the importance of maintaining consumer use and expectations with respect to broadcast content, and consumer rights to reap the benefits of the digital transition through digital recording, display and home networking technologies.”⁵⁴ Philips agrees wholeheartedly.

Regrettably, however, the MPAA/5C proponents have an Orwellian view of what constitutes “freely copiable,” and the system they propose to the Commission would certainly fall short of meeting consumers’ expectations that the digital transition brings advances, not

⁵³ 5C at 11.

⁵⁴ *Id.*

regression, in digital recording, display and home networking. In fact, by its terms, the MPAA/5C Proposal would create significant economic barrier to consumers' realization of any type of "freely copiable" environment under that regime, such that it would amount to a de facto impingement on fair use.

Under the MPAA/5C Proposal, consumers may only make digital copies of broadcast DTV in encrypted form, after investing in equipment that is licensed to make copies using an authorized recording technology, and then may play those copies back only on the device that made the copy or on another device that itself is licensed to decrypt and play back using the authorized recording technology (if the consumer is fortunate enough to have two such devices).⁵⁵ In other words, for a consumer to replicate today's "freely copiable" environment, after an MPAA/5C regime is implemented, the consumer would first have to replace any non-compliant recording and playback devices (*i.e.*, any legacy equipment, including their most recently purchased devices) in the home network. To say that such a system equates to "freely copiable" is like paying protection money, in this instance quite literally. The consumer is given little choice but to go along with the scheme, and he comes away from the encounter substantially poorer. In any event, it is disingenuous to tell consumers that they will experience no diminution of their home recording capabilities under the MPAA/5C Proposal if they are not simultaneously informed about the very substantial expenditures they will be required to make in the process beyond those already contemplated in making the DTV transition.

⁵⁵ The MPAA argues, in addition, that the "[r]equirements do not place restrictions on analog copying." Such statements, however, stand in stark relief to the stated positions, in other fora, of certain of its member studios, which seek to eliminate analog outputs (and, presumably, analog copying) entirely for digital source content, regardless of the intensely anti-consumer impact such a action would have vis-à-vis wholesale obsolescence of consumer equipment.

Proponents concede that “incompatibility between secure recordings and legacy players will commonly” occur when “distribution of the recording to other persons or locations” is involved.⁵⁶ Philips disagrees with their characterization of such incompatibility as “incidental.”⁵⁷ Under an MPAA/5C regime, any legacy device with an unrestricted input would not be able to receive or record any flagged digital broadcast content from a new device unless the content was output, in (lower-resolution) analog form. Moreover, if someone records flagged broadcast content using new equipment designed in compliance with the broadcast flag requirements, that recording could not be played back on any legacy equipment—including legacy digital equipment. Such incompatibility would occur regardless of whether the legacy device is one that the person who recorded the content keeps at another location in or outside the home, or one belonging to a friend or relative that the person wishes to visit. Thus, the bottom line for consumers is that the MPAA/5C Proposal will require major new purchases by consumers if they wish to view, record and play back protected digital broadcast content.

The proponents of the MPAA/5C Proposal will argue, however, that consumers will not be required to replace their current recording and playback equipment which lack copy-protected input/outputs because analog outputs will continue to be available under this Proposal. What has been carefully concealed in the comments in this proceeding is that certain proponents are advocating elimination of analog outputs, or at least high definition component analog outputs, both in industry discussions and before the Congress. Under that scenario, if the MPAA/5C Proposal were adopted, consumers would, indeed, be forced to purchase all new 5C/4C-compliant products. It is manifestly unfair to consumers to consider sequentially the MPAA/5C

⁵⁶ MPAA at 28.

⁵⁷ *Id.*

Proposal, *which relies on the continued availability of analog outputs to mitigate harm to consumers* and then to proceed immediately thereafter to consider proposals to prohibit the very analog outputs that proponents of the MPAA/5C Proposal advertise as a safety valve for consumers.

The imperative to be honest with consumers is another compelling reason why Philips requests that the Commission address digital broadcast content protection for both digital and analog outputs together, considering how proposed solutions will work with each other and impact the consumer. In this way, consumers will be on notice how the system will work and when and what new consumer electronics equipment and computers they might be required to purchase. Only through such a comprehensive approach can the Commission hope to strike the right balance between legitimate concerns of the content community and consumers' fair use and economic expectations.

B. The MPAA/5C Proposal Will Prevent Legitimate, Fair Use Transmissions

According to content owners' own submissions, the alleged threat to the studios and broadcast networks is the redistribution of broadcast DTV programming to the public over the Internet in a way that will harm syndication markets and foreign rights.⁵⁸ However, no claim can be made that the targeted transmission from a consumer to his or her family, close friends, summer home or vehicle threatens any of these broadcast markets. Indeed, as Philips demonstrated in its earlier comments, such transmissions are wholly lawful and may actually enhance the value of broadcast television content by increasing its viewership.⁵⁹

⁵⁸ See Viacom at 4, MPAA at 16.

⁵⁹ See Philips at 8-10.

Nevertheless, the MPAA/5C Proposal would prevent consumers from making such directed (i.e., non-public) transmissions.⁶⁰ As Philips asserted in its comments in this proceeding, the lack of any capability to utilize digital communications technology to share, for personal, non-commercial use, free, over-the-air content with friends and family impinges on fair use and needlessly constrains consumers' enjoyment of exciting new digital functionality.⁶¹ It is the type of regulatory constraint calculated to frustrate consumers and slow the DTV transition.

VI. THE MPAA/5C PROPOSAL WOULD HARM COMPETITION AND INNOVATION

As discussed above, Philips believes that the risks of unauthorized redistribution of HDTV or other high-value digital broadcast content are neither sufficiently great nor imminent as to warrant imposition of an invasive and sweeping FCC regulatory regime rooted in an unbroken chain of encryption and decryption while leaving the “analog hole” open. Nevertheless, if the Commission concludes otherwise, it still should reject the MPAA/5C Proposal because of its method of selecting “authorized” technologies and the overreaching and anticompetitive licensing terms associated with two of the technologies, DTCP and CPRM, which are certain to be authorized under the Proposal. The Proposal asks the FCC to abdicate responsibility for determining whether the particular digital content protection technologies and their licensing terms, including compliance and robustness rules, are consistent with competition, innovation, and the public interest, leaving such determinations to a closed group of private parties guided only by their own collective self-interest. The Commission cannot accede to such

⁶⁰ See MPAA at 26-27 (The MPAA/5C Proposal would permit redistribution of protected digital content within a “personal digital network environment,” but not “between and among” these locations).

⁶¹ See Philips at 8-11.

an approach without doing incalculable harm to the public interest it is statutorily obligated to protect.

A. The MPAA/5C Proposal’s “Authorized Technologies” Are Controlled By A Small Group Of Self-Interested Entities

Under the MPAA/5C Proposal, each device that handles broadcast DTV content over a digital interface or from a digital recording would be subject to a regulatory regime triggered by the mandatory use of “authorized” technologies. As the 5C companies acknowledge, the proposed regulation will establish “an unbroken chain of compliance obligations” that begins at reception of the digital signal and prohibits subsequent transmission to any device that does not incorporate “authorized technologies” designed to restrict the distribution and recording of the content.⁶² Demodulators, modulators and “Downstream Products” would be subject to such restrictions by direct operation of the proposed FCC rules, while other downstream devices would be restricted by privately imposed licensing terms tied to the authorized output technologies.⁶³

The designation of the authorized technologies would be subject to private control. To pass muster, the technology would have to be:

1. approved by three major studios or two major studios and a major television broadcast group;
2. licensed by ten major device manufacturers and approved or used by two major studios;
3. at least as effective as a technology already approved, subject to objection by major studios and/or major television broadcast groups; or
4. listed as permitted under a license applicable to an already-approved technology.⁶⁴

⁶² 5C at 7-8.

⁶³ See MPAA at 14-18; 5C at 3-4.

⁶⁴ See MPAA, Attach C at 2-4.

These thinly veiled criteria, which proponents claim to be market-based, are neither market-based nor objective, and will restrain immediately competition in the market for digital content protection technologies, with consequential anticompetitive effects in the consumer electronics product market. They grant the major studios, broadcasters and 5C companies control over selection of the authorized technologies.

The first two criteria require at least two of the major motion picture studios to grant approval. Criterion 1 also requires an additional major studio or major television broadcast group to approve, but since three of the four major broadcast networks are owned by major studios, and the remaining “broadcast groups” are dependent on studios for programming, this criterion is essentially a studio designation mechanism. Criterion 2 at least affords device manufacturers a role, but requires licensing by ten major device manufacturers before a technology will be accepted, and still necessitates approval by two major studios, highlighting studio dominance of the selection process. Criterion 3 would appear to allow the addition of alternative technologies, but is still vulnerable to studio and broadcast group veto, followed by an uncertain process with no clear criteria. Moreover, the technologies that MPAA and 5C argue should be exempt from analysis are proprietary, making it difficult, if not impossible, for a developer of new technologies to learn the standards against which it will be judged. They also provide more restrictions on legitimate transmissions than is reasonable or necessary, making them inappropriate as a baseline.⁶⁵ Criterion 4 turns licensors of previously approved technologies into gatekeepers, and allows them to leverage their control over those technologies to new technologies. In short, the criteria for selection of authorized technologies are studio-based, not market-based.

⁶⁵ See discussion in Section V(B) *supra*.

B. Under The MPAA/5C Proposal, Use Of “Authorized Technologies” Is Tied To Overreaching Private Licensing Terms Not Subject To Regulatory Oversight

To make matters worse, overreaching licensing terms govern use of the authorized technologies, and set out complex rules restricting consumer electronics and computer products.⁶⁶ These overreaching terms go far beyond prevention of unauthorized redistribution,⁶⁷ and beyond even broadcast video.⁶⁸ Because downstream devices other than so-called “Downstream Products”⁶⁹ that could accept flagged digital content would be subject to these licensing terms, the terms would affect products such as DVD players and general purpose computers.

These licensing terms can be even more restrictive than the proposed FCC rules. For example, both 4C and 5C require protection of outputs and recording functions not necessarily germane to the proposed FCC rules, and require licensor approval of the “companion” protection technologies, *e.g.*, record control to be used with DTCP, and output controls to be used with

⁶⁶ See MPAA at 17 & Attach C at 1; 5C at 4.

⁶⁷ See, *e.g.*, *Digital Transmission Protection License Agreement*, Exh. B, Part 1, at §§ 2.1-2.4 (imposing obligations regarding “persistent storage” of content, *i.e.*, copying). These provisions limit, for example, how long a licensed product, such as a PVR, may store content designated “copy once” before that designation expires – something that has nothing to do with unauthorized redistribution over the Internet, http://www.dtcp.com/data/DTCP_Adopters_Agreement010730.PDF.

⁶⁸ See *id.* at § 4.6 (restricting digital audio output of licensed products); *Digital Transmission Protection License Agreement*, Exh. B-2 (establishing compliance rules for products that receive or transmit audio-only works (*e.g.*, sound recordings)), http://www.dtcp.com/data/Compliance_Rules_Audio_020610.pdf ; *4C CPRM/CPM License Agreement*, Exh. C-2 (comprising thirteen pages of “Compliance Rules for Recording and Playback of Audio Content,” including rules for copying CD-formatted audio, § 6.2, and DVD-Audio content (separate compliance rules), and requiring that products combining audio and video recording functions protect audio content received through the course of video recording, § 7.), <http://www.4centity.com/licensing/adopter>.

⁶⁹ See discussion in Section III, *supra*.

CPRM, even if such technologies had already been approved by the FCC.⁷⁰ Further, neither 5C nor 4C would allow use of VSB or QAM remodulation for home networking, even though the MPAA/5C Proposal would allow products under direct FCC regulation to use such retransmission technology.⁷¹ Both 5C and 4C require PVRs to encrypt copies, thereby restricting consumer flexibility, even though no such rule is applied to PVRs that receive and demodulate content themselves under the MPAA/5C Proposal's FCC rules.⁷² Certainly measured against the MPAA/5C-proposed FCC rules, these unique licensing terms of the 5C and 4C licenses are unduly restrictive and overreaching on their face.

Perhaps most significantly from the perspective of potential anticompetitive effect, both the 5C and 4C licenses provide that licensors and the studios may agree on changes to the technologies and to the associated license rules, *with no public policy or regulatory oversight* and then require licensees to comply with such changes.⁷³ Such privately negotiated and coercively imposed changes could be more or less restrictive than provided under current versions of the licenses, in either case creating the potential for anticompetitive effects. There is nothing to assure that copy limitations, restrictions on digital and analog outputs, limitations on PVR processing, and other rules won't be imposed in the future by a self-interested cartel. By

⁷⁰ See *Digital Transmission Protection License Agreement*, Exh. B, Part 1, at § 4 (establishing requirements for various types of outputs and content passed thereto); 2.2.1.1 – 2.2.1.3 (requiring DTLA recognition or approval of copy protection technologies); *4C CPRM/CPPM License Agreement*, Exh. C-3 (establishing rules for recording and playback of content), *id.* at § 1.2, 4.2 (requiring “Authorized Secure Digital Outputs”).

⁷¹ See *Digital Transmission Protection License Agreement*, Exh. B, Part 1, at § 4.1, 4.4 (restricting digital output of licensed products); *4C CPRM/CPPM License Agreement*, Exh. C-3, §§ 1.2, 4.2.1. See *Digital Transmission Protection License Agreement*, Exh. B, Part 1, at §§ 4.4.1, 4.4.4; *4C CPRM/CPPM License Agreement*, Exh. C-3, §§ 1.2, 4.2.1.

⁷² See *Digital Transmission Protection License Agreement*, Exh. B, Part 1, at §§ 2.2.1; *4C CPRM/CPPM License Agreement*, Exh. C-3, § 3.1.3.

⁷³ See *Digital Transmission Protection License Agreement*, at § 3.3; *4C CPRM/CPPM License Agreement*, at § 3.3.

virtue of their licenses with associated approval rights for changes and compliance and robustness rules, the 5C and 4C consortia would be positioned to exercise unlawful market power to restrain competition in the digital content protection technology market and to leverage that advantage into adjacent markets for consumer electronics products themselves. They would have advance, inside information, affording them substantial lead time to market and other competitive advantages in their investments, business strategies, and product design. One likely area where this arrangement would stifle innovation and raise the spectre of leveraging market power in digital content protection technologies into a competitive advantage in consumer electronics product design is in the area of manipulation, organization, processing and storage of digital content.

This danger to competition is made more acute by the system of interlocking approvals of 5C and 4C, a feature all the more troubling because of the overlap among 4C and 5C membership.⁷⁴ Under the 5C license, a device that receives content over a DTCP restricted link may, in turn, only use a digital output that is protected by DTCP or, in the case of computers, through a DVI output.⁷⁵ Such a device must use CPRM or D-VHS if it makes a removable digital recording of the protected content.⁷⁶ The 4C license provides that a device that plays back CPRM-protected content may, in turn, only use a digital output that is protected by a 4C-approved technology,⁷⁷ and have announced that they are in the process of approving the 5C's

⁷⁴ Matsushita Electric Industrial Co., Ltd. (Panasonic); Intel Corp.; and Toshiba Corp are members of both 5C and 4C (IBM Corp. is the only other 4C member).

⁷⁵ See *Digital Transmission Protection License Agreement*, Exh. B, Part 1, at §§ 4.4.1 (DTCP-protected output), 4.4.2 (DVI output).

⁷⁶ See *Digital Transmission Protection License Agreement*, Exh. B, Part 1, at §§ 2.2.1.3; Provisional Approvals for Persistent Storage and Digital Output Reprotection Technology, at § 1 (January 17, 2002) (approving CPRM and D-VHS as storage protection technologies to be used with DTCP) http://www.dtcp.com/data/WDC99_461526_21.pdf.

⁷⁷ See *4C CPRM/CPDM License Agreement*, Exh. C-3, § 4.2.1.

DTCP.⁷⁸ For a new technology to have a fighting chance, devices that receive content from incumbent technologies will need to have the right to use the new technology. Otherwise, any consumer wishing to connect equipment to an existing device would be precluded from buying a new device that can use the new technology. This is clearly at odds with the proponents' claims that "the Broadcast Flag will in no way retard the development of new consumer technologies."⁷⁹

C. Any Further Consideration Of The MPAA/5C Proposal By The Commission Must Ensure Adherence To Key Principles That Preserve Consumers' Fair Use Expectations, And Promote Innovation And Competition

Philips urges the Commission to take note of the incredible irony of the MPAA/5C Proposal requiring regulation of a very broad range of consumer electronics and computer products while insulating from FCC review and oversight the technology selection process and private license terms with facial or clearly foreseeable anticompetitive effects that form the foundation of the regulation they seek. MPAA/5C cannot have it both ways. If there is to be broadcast flag implementation regulation (objected to by Philips and so many other commenters), the Commission, not a small group of self-interested companies, must ensure the fairness and objectivity of the technology selection process and eliminate licensing terms or procedures that are anticompetitive. A process must be created to ensure that changes to those licenses or to the technologies themselves are subject to FCC approval and public review. As discussed in Philips' initial comments,⁸⁰ the following principles must be followed to safeguard the public interest:

- Preserve the functionality of consumer equipment for lawful, non-commercial use and protect consumers' fair use expectations;

⁷⁸ See "Notice Concerning 4C Entity, LLC Provisional Approval of DTCP-Protected Outputs," http://www.4centity.com/docs/Provisional_Approval_of_DTCP.pdf

⁷⁹ MPAA at 28.

⁸⁰ See Philips at 3-4.

- Be established and implemented through open, transparent and pro-competitive processes;
- Employ objective technical criteria;
- Be narrowly tailored to address only those content protection problems, if any, found to be impeding the DTV transition;
- Protect the reasonable expectation of the content community to prevent the unauthorized Internet retransmission to the public of content deemed essential to driving the DTV transition (*i.e.*, HDTV or other high-value digital content);
- Promote innovation and rapid roll-out of content protection technologies and consumer electronics products, including those used to record, shift, and store digital content;
- Not enshrine private licensing arrangements that confer, or are capable of conferring, competitive advantages on licensors of particular content protection technologies or systems;
- Promote competition by allowing the use of any competing content protection technology that is conducive to competition, innovation and consumer fair-use expectations so long as it meets certain objective technical criteria; and
- Ensure that compliance and robustness rules determined by the public policy process apply uniformly to receiving devices and to downstream sink and playback devices that receive content protected using authorized protection technologies.⁸¹

VII. ENCRYPTING DIGITAL CONTENT AT THE SOURCE IS ANTITHETICAL TO THE NATURE OF FREE, OVER-THE-AIR BROADCASTING AND ALSO SUFFERS FROM SOME OF THE SAME DEFECTS AS THE MPAA/5C PROPOSAL

A number of commenters propose that broadcasters encrypt content prior to broadcast, rather than have devices respond to a flag after transmission. They claim that this is a more effective option that might avoid some of the complexities regarding the regulation of receivers and downstream devices, the creation of compliance and robustness rules, and the imposition of

⁸¹ Philips also suggests that the Commission consider carefully the September 22, 2002, draft of DTV legislation circulated by the bipartisan staff of the House Energy and Commerce Committee.

licensing terms.⁸² They also argue it would avoid involving the FCC in copyright issues.⁸³ The purported advantages of this alternative are illusory.

First of all, the fundamental nature of free, over-the-air broadcasting is that it is a public resource provided with government oversight, and transmitted in-the-clear. Encrypting broadcasts at the source would be contrary to the fundamental nature of broadcast television.⁸⁴ Encrypting content at the source would also make all previously purchased DTV receivers that do not process encrypted broadcasts obsolete.⁸⁵ HRRC and the Professional and Collegiate Sports Leagues also point out that requiring encryption at the source would hinder content owners' ability to allow viewers to easily share content where doing so is consistent with the content owners' business plans.⁸⁶ Moreover, the Commission would have to confront many of the same difficult questions raised by the MPAA/5C Proposal. How would the digital content protection technology be selected? What would the licensing terms be? How would the Commission safeguard against anticompetitive and innovation-hindering practices by licensors?

VIII. THE REGULATORY IMPLICATIONS AND WIDE-RANGING DEFICIENCIES OF THE MPAA/5C PROPOSAL SHOULD PROMPT THE COMMISSION TO EXPLORE A HOLISTIC APPROACH THAT PROTECTS DIGITAL BROADCAST CONTENT IN BOTH THE ANALOG AND DIGITAL DOMAINS

Given the deficiencies of the MPAA/5C Proposal and the failure of Proponents of the MPAA/5C to make a colorable, much less convincing case that unauthorized Internet redistribution to the public of digital broadcast content is an imminent threat, Philips again urges that the most appropriate and prudent course for the Commission to take at this juncture is to set

⁸² See IT Coalition at 18-19; ITI at 3-4; Motorola at 4-10; Veridian at 5 & n.6.

⁸³ See IT Coalition at 18-19.

⁸⁴ Accord CEA at 3; HRRC at 6.

⁸⁵ Accord HRRC at 6.

⁸⁶ See HRRC at 6; Professional and Collegiate Sports Leagues at 13-14.

aside any further consideration of encryption-based proposals (including those based upon the broadcast flag or at-the-source encryption) and instead to focus seriously and specifically upon more comprehensive alternatives that would yield: stronger protection (i.e., for digital broadcast content received over both digital and analog outputs), a more consumer-friendly DTV experience, a robustly innovative and pro-competitive marketplace for DTV technology and equipment, and a speedier and more successful DTV transition.

One very promising such solution, but not the only one, is digital watermarking—an area in which many companies are now actively engaged and which is currently available. With watermarking, the distribution of broadcast digital content can be monitored by the content owner world-wide and in real-time. Unlike the broadcast flag, once applied, the watermark cannot be deleted or altered without the knowledge of the secret key information that was used to create it. It is inextricably bound to the content, surviving signal-processing steps such as copying, editing, data compression and even conversion to the analog domain. Already, one major broadcast network is employing a watermarking technology to detect possible infringement of select content,⁸⁷ and it and other content owners have recommended in this proceeding that the Commission investigate this technology.⁸⁸ In short, Philips strongly believes that watermarking, which clearly can be used to protect content passed through an analog output, presents a viable and more desirable alternative to protect digital video content than encryption-based solutions such as the MPAA/5C Proposal.

⁸⁷ See “NBC News Channel Signed Long-term Agreement With Teletrax...,” COMM. DAILY, Jan. 22, 2003, at 11. (“[The Teletrax watermarking] technology isn’t being used now to monitor streaming content or other Internet applications...but could be used that way in [the] future.”)

⁸⁸ Notably, several content providers recognize that watermarking technologies could be used to more fully protect their digital content. See NBC at 4; Disney at 6; Professional and Collegiate Sports Leagues at 13.

There is time for the Commission to investigate other developing technologies, such as fingerprinting. Unlike watermarking, fingerprinting does not add anything to the multimedia signal, but rather extracts essential features (the “fingerprint”) from the signal and stores these in a database. An unknown multimedia signal can then be identified by extracting its essential features and subsequently cross-referencing with those in the database. Fingerprinting might be used alone or in conjunction with watermarking to provide additional digital broadcast content protection.

IX. THE FCC LACKS CLEAR JURISDICTION TO REQUIRE CONSUMER ELECTRONICS AND IT PRODUCTS TO RECOGNIZE AND RESPOND TO THE BROADCAST FLAG

Any honest observer recognizes the jurisdictional problems posed by the proposed broadcast flag regime. The Communications Act does not clearly authorize the FCC to require consumer electronics and computer devices to respond to the flag, and the FCC cannot regulate such devices absent an unambiguous grant of congressional authority, as Philips and others explained in their comments.⁸⁹ Only the MPAA and its joint commenters aggressively argue that the FCC can impose such requirements without enabling legislation. The consumer electronics regulations they cite,⁹⁰ however, undercut their own argument, as they are regulations that the FCC imposed only after Congress passed the All Channel Receiver Act, and V-Chip and closed-captioning legislation.⁹¹ Thus, even were the FCC to find an urgent need to impose broadcast flag regulations now, and to conclude that the need outweighed the enormous burdens such

⁸⁹ See Philips at 28-33; ACC at 1, 11-14; CCIA at 16; IT Coalition at 3-10; Libraries at 17-21; Public Knowledge and Consumers Union at 23-28.

⁹⁰ See MPAA at 31

⁹¹ See Philips at 29-31.

regulations would create, neither of which are supported by the record, the Commission would likely be compelled as a matter of law to wait for an explicit grant of authority from Congress.

The MPAA claims that the FCC already has authority to impose broadcast flag regulations on consumer electronics and computer manufacturers, but takes twelve pages to describe the source of that alleged authority—evidence that the FCC’s authority is far from clear. Even the 5C companies hedge, stating that although “a case can be made” that the FCC has authority to impose requirements on demodulators and perhaps even modulators, the FCC would be on “safer ground” if it waited for an explicit grant of congressional authority.⁹²

The MPAA/5C Proposal relies in some measure on Section 336 of the Communications Act, arguing that paragraphs (4) and (5) of subsection 336(b) authorize broadcast flag regulations.⁹³ Section 336(b), however, only grants authority that the FCC may exercise “[i]n prescribing the regulations required by subsection (a).”⁹⁴ Section 336(a) directs the FCC to “limit the initial eligibility” for advanced television service licenses and to “adopt regulations that allow the holders of such licenses to offer ... ancillary or supplementary services.”⁹⁵ Thus, when Section 336(b)(4) authorizes the FCC to “adopt such technical and other requirements as may be necessary or appropriate to assure the quality of the signal used to provide advanced television services,”⁹⁶ it authorizes the FCC to regulate the quality of the DTV signal that licensees broadcast. Similarly, when Section 336(b)(5) authorizes the FCC to “prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and

⁹² 5C at 15.

⁹³ *See* MPAA at 29-30.

⁹⁴ 47 U.S.C. § 336(b).

⁹⁵ 47 U.S.C. § 336(a)(1), (a)(2).

⁹⁶ 47 U.S.C. § 336(b)(4).

necessity,⁹⁷ it authorizes the FCC to promulgate other regulations with respect to the licensing of broadcasters for digital services and the ancillary services they may transmit.

Consumer electronics and computer manufacturers are not broadcast licensees, and requiring devices to respond to a broadcast flag does not constitute regulation of DTV license eligibility or of the quality of the signal that a DTV licensee broadcasts. Nor does requiring consumer electronics manufacturers to respond to a broadcast flag constitute regulation of the way broadcasters provide ancillary or supplementary services; it constitutes regulation of the way non-broadcasters respond to the primary video signal once transmission and reception are complete. Thus, paragraphs (4) and (5) of subsection 336(b) cannot be the source of authority to require consumer electronics and computer manufacturers to respond to the flag.

Perhaps recognizing the weakness of the Section 336 argument, the MPAA spends the vast majority of its jurisdiction discussion trying to bootstrap FCC authority on ancillary jurisdiction grounds, relying on Sections 4(i) and 303(r).⁹⁸ The MPAA apparently believes that the FCC can impose broadcast flag regulations on consumer electronics and computer manufacturers merely because “the public interest would be served by rules designed to prevent the unauthorized redistribution of programming.”⁹⁹ This unbounded view of FCC jurisdiction proves too much. Were it true, the FCC would have plenary authority to regulate consumer electronics and computer devices, and there would have been no need for Congress to delegate authority to the FCC to implement its policy objectives: (1) in the All Channel Receiver Act,¹⁰⁰

⁹⁷ 47 U.S.C. § 336(b)(5).

⁹⁸ *See* MPAA at 32-41.

⁹⁹ MPAA at 30-31.

¹⁰⁰ Pub. L. No. 87-529, 76 Stat. 150 (1962) (codified at 47 U.S.C. §§ 303(s), 330(a)).

(2) to prevent harmful interference from radiating devices;¹⁰¹ (3) to require closed captioning;¹⁰² or (4) to mandate the V-Chip.¹⁰³

Ancillary authority only supports regulations that are reasonably required for the “necessary and proper” administration of other aspects of the Act,¹⁰⁴ and “Section 4(i) is not infinitely elastic.” Courts have allowed the FCC to exercise ancillary authority over ordinarily unregulated activities when necessary to effectuate other explicit statutory provisions. In *North American Telecommunications Association v. FCC*, 772 F.2d 1282 (7th Cir. 1985), for example, the court held that the FCC had ancillary jurisdiction to require regional Bell operating companies to submit capitalization plans—even though the Communications Act did not specifically authorize the FCC to impose such a requirement—because the requirement was necessary to effectuate the FCC’s separate-subsidary requirements.¹⁰⁵

Finding ancillary authority over the ordinarily unregulated activities of generally unregulated entities, such as consumer electronics and computer manufacturers, is something very different, especially when it is being done, as here, to accomplish a goal that Congress has not previously delegated to the FCC. *GTE Service Corp. v. FCC*, 474 F.2d 724 (2nd Cir. 1973), is a good case in point. There, the court held that although ancillary authority was sufficient to require generally regulated common carriers to move their unregulated data services to separate

¹⁰¹ See Pub. L. No. 90-379, 82 Stat. 290 (1968) (codified at 47 U.S.C. § 302).

¹⁰² See Pub. L. No. 101-431, 104 Stat. 960 (1990) (codified at 47 U.S.C. §§ 303(u), 330(b)).

¹⁰³ See Pub. L. No. 104-104, sec. 551, 110 Stat. 56, 139-42 (1996) (codified at 47 U.S.C. §§ 303(x), 330(c)).

¹⁰⁴ See *MPAA v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (plurality opinion); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *North America Telecomm. Ass’n v. FCC*, 772 F.2d 1282, 1292-93 (7th Cir. 1985); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1036 n.25 (8th Cir. 1978), *aff’d* 440 U.S. 689 (1979); *HBO v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

¹⁰⁵ 772 F.2d at 1291-94.

subsidiaries as a means of effectuating existing provisions of the Act, it was impermissible for the FCC to attempt to extend its authority to regulate the way the unregulated subsidiaries provided those data services to their common-carrier affiliates.¹⁰⁶ Mere interaction between the common carriers and the unregulated subsidiaries did not make regulation of the subsidiaries necessary and proper for the effectuation of an existing provision of the Act.

Similarly, ancillary authority is insufficient to require consumer electronics and computer manufacturers to respond to the broadcast flag. Like the unregulated subsidiaries in *GTE Service Corp.*, consumer electronics and computer manufacturers are not subject to the general jurisdiction of the FCC. Rather, they are only subject to specific FCC regulations promulgated in response to particular enabling legislation, such as pertaining to spurious radiation, the V-Chip and closed captioning. Imposing broadcast flag obligations on consumer electronics and computer manufacturers is not necessary and proper for the effectuation of any of those previously delegated objectives. If ancillary authority was insufficient to regulate the relationship between heavily regulated common carriers and their affiliates in *GTE Service Corp.*, clearly it is insufficient to regulate the relationships here between broadcasters and the completely unaffiliated device manufacturers.

MPAA devotes much of its argument to *United States v. Southwestern Cable*, 392 U.S. 157 (1968), in which the Court held that the FCC could exercise ancillary authority over cable “to further the achievement of long-established regulatory goals in the field of television broadcasting.”¹⁰⁷ The Court’s ruling was nowhere as broad as MPAA portrays it, however, because in the infancy of the cable industry, community antenna television service, as it was then

¹⁰⁶ 474 F.2d 724, 729-36 (2nd Cir. 1973).

¹⁰⁷ *United States v. Midwest Video Corp.*, 406 U.S. 649, 667-68 (1972) (plurality opinion); *see also* *Midwest Video Corp. v. FCC*, 571 F.2d at 1040-41; *HBO v. FCC*, 567 F.2d 9, 27 (D.C. Cir. 1977).

called, was little more than a retransmitted broadcast service. The limits of the FCC's ancillary jurisdiction over cable became clear in *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd* 440 U.S. 689 (1979), where the court held that the FCC could not impose mandatory public access and channel capacity requirements on cable operators because there was no traditional basis for such regulation.¹⁰⁸ Not until Congress passed the Cable Communications Policy Act of 1984¹⁰⁹ could the FCC impose such requirements.¹¹⁰

Just as the cable entities in *Midwest Video* were not generally regulated entities prior to 1984, consumer electronics and computer manufacturers are not generally regulated by the FCC now. They are subject to narrow requirements tied to very specific provisions in the Act. And just as there was no long-established FCC goal prior to 1984 to support public-access requirements, there is no long-established goal in the Communications Act of protecting free, over-the-air content transmitted in the clear after it has been received by consumers. That is traditionally the province of copyright law, not communications law.

When Congress wishes to address copyright issues, it does so explicitly, such as in the recently enacted Digital Millennium Copyright Act ("DMCA"), as CCIA, CEA, and the Libraries observe.¹¹¹ And as CCIA and CEA point out,¹¹² Congress struck a very deliberate balance in the anti-circumvention provisions of the DMCA, specifically declining to require consumer electronics and computer manufacturers to design their equipment to respond to any

¹⁰⁸ See *Midwest Video Corp. v. FCC*, 571 F.2d 1025.

¹⁰⁹ P.L. 98-549, 98 Stat. 2780 (1984) (codified at 47 U.S.C. tit. VI).

¹¹⁰ See 47 U.S.C. § 531(a).

¹¹¹ See CEA at 5-6; CCIA at 18-19; Libraries at 20-21.

¹¹² See CEA at 5-6; CCIA at 18-19.

particular copy protection technology.¹¹³ Thus, MPAA is inviting the Commission to use its ancillary authority to require consumer electronics and computer manufacturers to design their products to respond “to a particular technological measure,” namely the broadcast flag, using specified content protection technologies. That result is the opposite of the very recent policy judgment made by the Congress in the DMCA, a judgment that was central to the compromise paving the way for enactment of that legislation. Absent express statutory authority to implement a new policy at odds with prior recently-enacted statutory pronouncements, the Commission would be wise to decline MPAA’s invitation.

The MPAA also refers to FCC regulations in the navigation devices¹¹⁴ and cable compatibility proceedings¹¹⁵ to support its advocacy of ancillary jurisdiction. Yet, they prove precisely the opposite. In both instances, the FCC’s authority to promulgate those regulations derived from explicit authority that Congress granted the FCC to ensure compatibility between consumer electronics devices and cable television systems, and to provide for competition in navigation devices used by multichannel video programming distributors.

¹¹³ See 17 U.S.C. § 1201(c)(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).”)

¹¹⁴ See MPAA at 32 n.17.

¹¹⁵ See *Id.* at 39 n.25

Section 624A of the Communications Act specifically instructs the FCC to issue regulations “assuring compatibility between televisions and video cassette recorders and cable systems, consistent with the need to prevent theft of cable service.”¹¹⁶ In issuing such regulations, the FCC is to “determine whether and, if so, under what circumstances to permit cable systems to scramble or encrypt signals or to restrict cable systems in the manner in which they encrypt or scramble signals.”¹¹⁷ The FCC is also to “periodically ... modify the regulations ... to reflect improvements and changes in ... technology.”¹¹⁸ Thus, the Act explicitly authorizes the FCC to regulate cable compatibility, to do so in a way that allows limited protection of cable signals, and to keep the regulations current with innovation, such as digital technology.

Similarly, Section 629 of the Communications Act directs the FCC to issue regulations to ensure that third-party consumer electronics equipment is commercially available for subscribers to use in accessing multichannel video programming and services.¹¹⁹ Again, the statute explicitly states that the FCC is to do so in a way that allows cable and satellite operators to implement a limited degree of service protection.¹²⁰ Specifically relying on Section 629, the FCC has concluded that Congress authorized it both to assure commercial availability of navigation devices and to adequately safeguard MVPD.¹²¹

¹¹⁶ 47 U.S.C. § 544a(b)(1) (emphasis added).

¹¹⁷ 47 U.S.C. § 544a(b)(2).

¹¹⁸ 47 U.S.C. § 544a(d).

¹¹⁹ *See* 47 U.S.C. § 549(a).

¹²⁰ *See* 47 U.S.C. § 549(b).

¹²¹ *See In re* Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, CS Docket No. 97-80, *Further Notice of Proposed Rulemaking and Declaratory Ruling*, 15 FCC Rcd. 18199, 18209-11 & n.59 (2000) (emphasis added) (discussing *In re* Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, CS Docket No. 97-80, *Report and Order*, 13 FCC Rcd. 14775, 14800 (1998)).

By contrast, Congress has yet to enact an analogous provision authorizing the FCC to address protection of free, over-the-air digital broadcast signals transmitted in the clear.¹²² Indeed, proposed new Section 340 in draft legislation circulated in September, 2002, by the House Energy and Commerce Committee staff.¹²³

X. CONCLUSION

Proponents of the MPAA/5C Proposal that urge the Commission to impose massive and intrusive regulation of consumer electronics and computer equipment without clear statutory authority to do so have utterly failed to meet their heavy burden justifying such regulation. They have not demonstrated a real and imminent threat to their high definition and other high value digital broadcast content. The MPAA/5C Proposal itself suffers from numerous fatal flaws, including its lack of effectiveness to fulfill its intended objectives, its impingement upon consumer fair use expectations and the virtual certainty that, if adopted, it will restrain competition in both the digital content protection technology and consumer electronics products markets and impede innovation.

¹²² The significance of the absence of statutory direction is notable because broadcast, unlike cable, is a free service that historically has not been encrypted.

¹²³ While the MPAA makes much of the letters from Chairman Tauzin and Congressmen Dingell and Chairman Hollings on the subject of the FCC's jurisdiction over the broadcast flag, it conveniently omits mention of the letter from Chairman Sensenbrenner and Senator Leahy expressing the opposite conclusion. *See* Letter from Chairman Sensenbrenner and Senator Leahy to FCC Chairman Powell (dated Sept. 9, 2002). As Philips noted in its Comments in this proceeding, such dueling letters underscore the lack of clarity concerning FCC jurisdiction in this area.

Accordingly, the Commission should not adopt the Proposal but instead should work with the Congress and all interested parties to explore alternative digital content protection systems that strike a lawful and healthy balance among the interests of content producers, the consumer electronics and IT industries and, most importantly, consumers who hold the ultimate key to the success of the DTV transition.

Respectfully submitted,

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