Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

JOINT REPLY COMMENTS OF THE CORPORATION FOR PUBLIC BROADCASTING, THE ASSOCIATION OF PUBLIC TELEVISION STATIONS, AND THE PUBLIC BROADCASTING SERVICE

The Corporation for Public Broadcasting ("CPB"), the Association of Public Television Stations ("APTS"), and the Public Broadcasting Service ("PBS") hereby submit these reply comments in response to the comments filed regarding the Notice of Proposed Rulemaking, released August 9, 2002, in the above captioned proceeding (the "NPRM").

CPB is a private, nonprofit corporation created and authorized by the Public Broadcasting Act of 1967 to facilitate and promote a national system of public telecommunications. Pursuant to its authority, CPB has provided millions of dollars in grant monies for support and development of public broadcasting stations and programming. *See 47 U.S.C. § 390 et seq.*

APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation's 356 public television stations. APTS represents public television stations in legislative and policy matters before this Commission, Congress,

and the Executive Branch, and engages in planning and research activities on behalf of its members.

PBS is a nonprofit membership organization that serves individual public television stations by distributing national programming and providing other program-related services to the nation's public television stations.

As organizations involved in supporting the development and distribution of noncommercial educational programming, CPB, APTS, and PBS support a reasonable and effective means of protecting digital programming from unauthorized and unfair copying and distribution on the Internet or by other means. We file in reply to raise particular concerns about suggestions made in some comments that some programming be exempted from digital protection should the Commission adopt rules allowing for programming to be protected from mass copying and potential copyright infringement. Specifically, some commenters have suggested that public interest or educational programming be excluded from any copy protection regime the Commission may adopt.[1]

CPB, APTS, and PBS understand that these comments are well meaning in their attempts to ensure the maximum distribution of socially beneficial programming. CPB, APTS, and PBS fully support policies that encourage the production and distribution of educational, cultural and instructional programming to all Americans. In fact, public broadcasting's mission is to provide this type of public interest programming to the American people, with special emphasis on unserved and underserved audiences.[2]

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[1] See e.g. "In the case of the 'broadcast flag,' encoding rules are necessary to prevent application of the "flag" to news and educational programming." Comments of the Consumer Electronics Association at 6. "On the other hand, civic discourse would be enhanced and the public interest would be served if access to certain programming, such as news and public affairs, is not impeded, and such programming remains widely available." Comments of the IT Coalition at 31.

[2] 47 U.S.C. § 396(a)(5) & (6).

However, any exemption from copy protection for "public interest" programming would be devastating to the efforts of public broadcasters and the production of high-quality public service digital broadcast programming. As such, the Commission should not single out public interest programming in defining potential exclusions from any copy protection regime it adopts. The Commission must ensure that the copy protection regime it adopts, if any, balances and protects the rights of all parties and does not cause a wave of unintended consequences that causes havoc to noncommercial programming as it ripples through the media industry.

Under the Communications Act of 1934, as amended (the "Act"), CPB is authorized to "contract with or make grants to public telecommunications entities, national, regional, and other systems of public telecommunications entities, and independent producers and production entities, for the production or acquisition of public telecommunications services…." 47 U.S.C. § 396(g)(2)(B). In turn, public telecommunications services are defined as "…noncommercial educational and cultural radio and television programs, and related noncommercial instructional or informational material that may be transmitted by means of electronic communications." 47 U.S.C. § 397(14). The television programming that CPB supports is then distributed by PBS to its member stations, which make up APTS membership. In addition, PBS independently assists in funding programming that is distributed to its members and many of APTS member stations produce programming that is both aired locally and distributed nationally by PBS.

A broadly defined "public interest" or "educational" programming exemption to digital copy protection would greatly impair production of public television programming because much of the programming that public television airs would be denied copy protection. Instead, producers of public interest programming should enjoy the same copy protection as producers of commercial programming. Without such protection, investment in public interest programming will inevitably decline.

Due to the high cost of producing high-quality television programming, public television programming is rarely, if ever, fully funded by CPB or PBS or from any other single source. The ability of producers to produce high-quality public interest programming for broadcast purposes in large part depends upon their ability to hold and exploit various non-broadcast rights in that programming. Such non-broadcast rights might include, for example, certain ancillary market rights (e.g., distribution in the home video, educational audio-visual and foreign broadcast markets or in connection with consumer products) as well as cable and satellite retransmission rights (both U.S. and abroad). Exploitation of such rights depends upon a robust form of copy protection. Absent revenue generated through exploitation of such rights, producers will be hard-pressed to fund, produce and deliver high-quality public interest programming.

CPB, PBS, and APTS member stations that produce programming also rely on other entities to partner in the funding of programming (e.g. British broadcasters who retain foreign broadcast rights in the programming). If the Commission were to broadly exempt the type of programming shown on public television from copy protection, it would be extremely difficult for CPB, PBS, and APTS member stations to attract these funding partners. Public broadcasting relies on partners who understand the advantage of

being associated with high-quality educational and cultural programming. Public broadcasting, however, cannot rely on only altruism to attract partners. These partners also work with public broadcasting because their creative rights are protected and there is the potential for gain in places such as the ancillary market for video programming. Exemption of public interest programming from copy protection would preclude public broadcast programming producers from offering any copy protection guarantees for the funding partners' contributions, and much of their motivation for collaborating with public broadcasting would diminish.

The absence of copy protection also will complicate productions by making it more difficult to obtain permission to use important or essential material within programs. Producers rarely create all elements of their programs and instead license rights to use many program components copyrighted by others. A prime example of this is the use of music in programming. If the Commission were to exempt "public interest" or "educational" programming from copy protection, producers might be able to obtain rights to use underlying film clips, photographs, and other artistic material only when copyright holders are willing to waive copy protection for the use of their work in unprotected broadcasts. Such a waiver of rights would be difficult to obtain. Thus, a broad exemption of copy protection would cause ramifications that would make an already expensive and cumbersome production process even more difficult and costly.

Current laws and regulations do not unnecessarily curtail distribution of educational or public interest programming so that it is inaccessible to those who desire it. In the realm of copyright, the doctrine of fair use allows for certain educational uses of protected material. Additionally, public broadcasting has contractually allowed certain

off-air uses of some of its material so that teachers may take advantage of the rich educational material produced for public television. For example, some agreements for public broadcasting programming permit teachers (or video librarians at the request of a teacher) to record the program off-air and to use it in a classroom setting for one year from each broadcast of the program. They cannot create a lending library or otherwise authorize additional duplication and they are not allowed to duplicate for broader distribution. In short, public broadcasters have found ways to assist in access to their programming in a limited educational context to fulfill their statutory mission without overly broad exemptions from copy protection.

Moreover, an exemption based upon whether programming is considered educational or of public interest would be problematic for the Commission itself to promulgate and enforce. Any distinction in copy protection based upon the content of the programming would entail Commission review and adjudication of how to classify programming. Of course, this process would be administratively cumbersome for the Commission, but, more importantly, it implicates certain constitutional issues of free speech as well as the Commission's own statutory ban on censorship.[3]

Public broadcasting benefits from a long-term investment from the Federal government, and can claim over 35 years of serving the American public. It should not be disadvantaged by a broad exemption to copy protection that penalizes public broadcasting for successfully serving the public interest.

Respectfully submitted,

[3] See U.S. Const. amend 1, and 47 U.S.C. § 326.

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