

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**JOINT REPLY COMMENTS OF
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION,
THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
THE SONGWRITERS GUILD OF AMERICA
AND BROADCAST MUSIC, INC.**

TABLE OF CONTENTS

I. Introduction.....	2
II. Discussion.....	3
A. <i>The Effect of the Proposed Standard on Rightsholders in the Reproduction, Distribution, and Performance of Musical Works</i>	3
B. <i>Involvement of the Copyright Office</i>	7
C. <i>Resolution of Critical Process-Oriented and Technical Issues</i>	9
Level of Robustness.....	10
Scope of Regulation on Downstream Devices.....	12
Analog Hole.....	13
III. Conclusion.....	14

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AND BROADCAST MUSIC, INC.

The National Music Publishers' Association ("NMPA"), The American Society of Composers, Authors, and Publishers ("ASCAP"), The Songwriters Guild of America ("SGA"), and Broadcast Music, Inc. ("BMI") hereby submit these joint reply comments in connection with the Commission's Notice of Proposed Rulemaking ("NPRM"), FCC 02-231 (Aug. 9, 2002) in the above-captioned proceeding.

I. Introduction

NMPA filed initial comments in this matter which focused on three basic points. First, the Commission should, if it decides to adopt a regulatory copy protection regime for digital broadcast television ("DTV"), consider the fact that any mandated copyright protection standard for DTV will inevitably establish a base-line copyright protection standard for all digitally delivered content, including music. Second, the Commission should include the Copyright Office when developing a regulatory regime governing copyright protection. Third, the broadcast flag proposal currently under consideration is incomplete, because while a broadcast flag acts as notice that content should be protected, many details remain open as to what mechanisms will prevent flagged content from unlawful copying and distribution while permitting its lawful use.

NMPA, ASCAP, SGA, and BMI (collectively, the "Joint Reply Commenters") show in these reply comments why NMPA's original recommendations should be adopted by the Commission and will address certain technical and process-oriented issues that arise under the broadcast flag proposal. Comments filed by other parties in this proceeding have demonstrated the accuracy of NMPA's original points. A number of pleadings have raised issues that verify that the interests of copyright holders such as the members of NMPA, ASCAP, SGA, and BMI

are implicated by this proceeding, and that the participation of the Copyright Office is needed to help resolve these issues. The Joint Reply Commenters also urge that any process adopted by the Commission ensure that they have a right to participate, and that any technical standard adopted provide a sufficiently robust level of protection, regulate downstream devices, and seek to resolve the analog hole issue.

The Joint Reply Commenters agree with the goals of many commenting in this proceeding, including those signing the MPAA Comments,¹ that digital television broadcast signals that are received by consumer electronic devices should be protected from further copying and redistribution in violation of the Copyright Act, and that this protection should be built into consumer electronic devices. These reply comments describe our interest in avoiding adverse or unintended consequences to music publishers, songwriters and composers in the course of achieving this laudable goal.

II. Discussion

A. *The Effect of the Proposed Standard on Rightsholders in the Reproduction, Distribution, and Performance of Musical Works*

NMPA's members are the owners of copyrights in the musical works that are embedded in sound recordings, including many sound tracks that are used in audiovisual works. NMPA's sister organization, the Harry Fox Agency, administers licenses for the reproduction and distribution of musical works in the form of sound recordings. ASCAP is a membership association of over 160,000 U.S. composers, songwriters and publishers of every kind of music and hundreds of thousands worldwide. ASCAP protects the rights of its members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works. BMI is a performing right organization that represents approximately

¹ BMI and ASCAP joined in the initial comments of MPAA et al. because they support the need to protect digital television broadcasts from piracy.

300,000 songwriters, composers and music publishers in all genres of music. BMI operating as a non-profit-making company, was founded in 1939. It collects license fees for “public performances” of music on behalf of those American creators and copyright owners it represents, as well as thousands of creators from around the world through its affiliation with foreign performing right societies. Organized in 1931, SGA is the nation’s oldest and largest organization run exclusively by and for songwriters, with over 5000 members nationwide. The Guild is a voluntary association comprised of composers and the estates of deceased members. SGA provides contract advice, royalty collection and audit services, copyright renewal and termination filings, and numerous other benefits to its members.

Although the broadcast flag regime is designed with audiovisual works in mind, it will also affect the members of NMPA, ASCAP, SGA and BMI, who hold copyrights for musical works. In its initial comments, NMPA discussed how any rules adopted in this proceeding would likely establish a baseline standard copyright technology for all digitally distributed copyrighted works that are at some point distributed as a DTV broadcast. Other comments that have been filed in this proceeding have now highlighted that the legal rights of members of NMPA, ASCAP, SGA and BMI are not only implicated in this fashion, but are also directly impacted by virtue of the audio component of audiovisual works broadcast for DTV.

A clear example of this effect is the joint comments of the Motion Picture Association of America (“MPAA”) and others. MPAA favors adoption of the broadcast flag as described in the Broadcast Protection Discussion Group (“BPDG”) Final Report. MPAA also urges adoption of its refinements to that Final Report and provides further draft rules that it believes will resolve “all remaining outstanding issues”. According to MPAA, “No other mechanism would be as comprehensive or effective in implementing the regulatory regime.” Joint Comments of MPAA and others at p. 10. The Joint Reply Commenters’ reading of the regime proposed in the MPAA Comments is that it would: (1) create a “market acceptance” procedure by which technologies are deemed compliant with the broadcast flag regime requirements that includes *only some* copyright owners, and (2) permit digital output of audio separate from the

audiovisual works immediately at issue in this proceeding at CD quality levels without any encryption or other use control applied at all.²

Under this regime, a personal video recording device (PVR) that records a music video would have controls placed on the downstream use of the audiovisual content, but according to the proposed regulation, there would be no prohibition against stripping the audio track off and freely distributing it over the Internet in the form of an unprotected MP3 file. If this regime is adopted, then DTV will provide a new source of digital music files that can be illegally distributed over the Internet—one expressly approved by FCC regulation. This example shows how the regulation of one kind of media, DTV, can adversely impact the rights of those outside the field of DTV. In other words, any regulation issued by the FCC that approves of or abstains from proscribing certain functionalities of these devices may very well have significant implications for other copyright owners.

Current economic factors also influence how FCC regulation of broadcast-flag regime technology can impact other copyright rights. As pointed out by NMPA in its initial comments, the consumer electronics industry would resist providing any more than the minimum required copy protection technology. For example, Phillips states that it would be a “burden” for manufacturers to provide “multiple encryption and decryption technologies” because they “add[] costs to manufacturers ...”³ Similarly, the Business Software Alliance notes that robustness requirements “increase cost and lower performance.” The effect of the “burden” would be for the electronics industry to resist any additional copy protection designed to protect the other rights unless it was based on or similar to the FCC mandated regime.⁴ For this reason, the FCC mandated technology would likely be the only one in a

² Requirements for the Protection of Unencrypted Digital Terrestrial Broadcast Content Against Unauthorized Redistribution Final Discussion Draft June 3, 2002, paragraph X.5: “Except as otherwise provided in Sections X.3(a) or X.4(a), Covered Products shall not output the audio portions of Unscreened Content or of Marked Content in digital form except in compressed audio format (such as AC3) or in Linear PCM format in which the transmitted information is sampled at no more than 48 kHz and no more than 16 bits.” This last exemption permits unprotected CD quality audio output as well as MP3 files (MP3 being a “compressed audio format.”).

³ Comments of Phillips North America, at p. 28.

⁴ It is important to note that the recently announced agreement between the NCTA and the CEA regarding copy protection for devices receiving cable television appears to affirmatively prohibit the cable television operator from

device -- which is especially problematic when these devices now serve multiple functions other than DTV, including the playback of CDs, MP3 files, and the recording of DTV programming.⁵

These dynamics directly and negatively implicate the reproduction and distribution rights of NMPA and SGA members, as well as the rights of ASCAP members, and BMI affiliates, under Section 106 of the Copyright Act. Such a result would be neither fair nor acceptable to their members and affiliates. If the Commission decides to promulgate regulations in this area, the Joint Reply Commenters urge it to do so in a way that will protect the rights of their members and affiliates. One way to ensure such a result is to involve the Copyright Office in the proposed regulatory proceeding, as described below.

Despite their concerns regarding the proposals in the MPAA Comments, the Joint Reply Commenters are in agreement with the MPAA on certain points. For example, NMPA, ASCAP, SGA and BMI: (1) agree with the MPAA that reaching prompt agreement on a DTV anti-piracy protection standard will have the desirable effect of limiting the number of "legacy" products in the market, (2) agree with the MPAA that digital television broadcast signals that are received by consumer electronic devices should be protected from further copying and redistribution in violation of the Copyright Act, and that this protection should be built into consumer electronic devices that receive DTV signals or handle the downstream data, (3) have no objection to use of a "broadcast flag" as an indicator of content subject to protection

instituting on its own a copy protection scheme that prevents device functionality otherwise permitted under FCC regulation. . See NCTA Agreement, Pg 36, Proposed rule 76.1903 1. "Rule as to Interfaces." "[a] Covered Entity shall not attach or embed data or information with Commercial AudioVisual Content ... or allow such data to persist in ... such content, so as to prevent its output through any analog or digital output authorized or permitted under license, law or regulation governing such Covered Product." In addition to these limitations on copy protection for the digital audio outputs, the proposed regulations in the NCTA CEA agreement expressly exempt internet, DSL and cable modem services provided by the cable operator.

⁵ Consider the Samsung Home AV Center, announced with a brochure at the 2003 Consumer Electronics Show, January 9th, 2003. The device combines, among other capabilities, a DTV receiver, Personal Video Recorder, DVD player, MP3 player, and complete network connectivity, ranging from USB ports, Ethernet to wireless 802.11(b). The brochure states "...it is possible to share, edit and store moving pictures in various formats... through a USB 1.1 cable connection... also available [is] Ethernet." The brochure includes a chart that notes the interconnectivity of the PC, internet, DTV broadcast signal and other kinds of functionality and media.

beginning at the radio signal demodulator, but rather are interested in whether the subsequent protection for content identified by the flag is adequate in light of the fact that the digital data accompanying the broadcast flag is completely unencrypted and in the clear; and (4) agree with the MPAA that the extent to which copies of DTV signals can be created and redistributed within the home and the exact range of what constitutes a “personal digital network” are critical issues that must be addressed and sufficiently limited in order to prevent circumvention of the entire broadcast flag regime.

B. Involvement of the Copyright Office

In its original comments, NMPA emphasized the statutory responsibility of the Copyright Office for matters that would be implicated by this proceeding should the Commission decide to develop rules for protecting digital broadcast content from piracy. This position is reinforced by the comments of other parties who have noted that the Copyright Office is charged with responsibility for digital copyright matters and should be included in any proceeding. *E.g.*, Comments of IT Coalition at p. 10.

Other commentators have raised the question of the effect that any Commission rules would have on consumer rights under copyright law, including the doctrine of fair use. The scope of a consumer’s “personal digital network,” a term used to describe the space within which copies of DTV signals arguably can be created and redistributed, and the extent to which copies can be created and redistributed within that environment, are critical issues that are still open and must be sufficiently limited in order to prevent circumvention of the entire regime. The varying positions taken by a number of commenting parties on copyright law -- in particular the “fair use” privilege -- confirms NMPA’s contention that the Copyright Office should be involved in formulating any rules that might be adopted in this proceeding.⁶ NMPA, ASCAP, SGA and BMI take issue with some commentators’ descriptions of the breadth of

⁶ See footnote 7, *infra*.

permissible use of copyrighted material under applicable law, including uses that are authorized by the fair use privilege, and note that only the Copyright Office has the expertise and legal jurisdiction to consider and resolve these issues.

A number of the commenters who express concern that protective measures will frustrate legitimate uses of material offer examples in which non-copyrighted materials (such as home movies) or small excerpts from copyrighted materials are being used for educational purposes. These commenters then argue that the scope of the personal digital environment should be broad. The technologies that enable performances of these works, however, are identical to those that are and would be involved in illegal distribution of copyrighted works over the Internet. These examples strike us as disingenuous—especially when the technologies are subject to limitations based on the source of the material. In addition, many of the examples provided of the purported “legal” use of copyrighted works limit themselves to discussions of the public performing right under section 106(4) of the Copyright Act, without discussing the related reproduction and distribution rights at sections 106(1) and 106(3) of the copyright law.⁷ This further demonstrates the failure of many commenting parties to grasp (or

⁷ For example, the comments of Philips Electronics North America Corporation as to what copies of a broadcast work may be made by a consumer, and to whom they may be sent, fail to address an important distinction under copyright law between performance rights and reproduction rights. These are entirely separate rights under Section 106 of the Copyright Act. The rights held by NMPA’s members are reproduction rights. Philips’ comments state, at pages 8-9, that “Consumers of free, over-the-air television should be permitted to send their favorite programs over the Internet to their own second homes, vehicles or boats, and to their family and friends, so long as reception can be limited, in the words of the Copyright Act, to within ‘a normal circle of a family and its social acquaintances.’” In support of this proposition, Philips cites 17 U.S.C. § 101, which defines what it means to perform or display a work publicly. Sending programs over the Internet, however, involves not just a performance, but the making of multiple copies (reproductions) of a work. These reproductions can then be circulated broadly via the Internet, and substitute for purchases of the work from which the holders of the reproduction rights would be entitled to royalties.

In addition, the American Library Association cites the Supreme Court’s decision in Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984) as follows: “Implementation of the broadcast flag risks rolling back or even eliminating the doctrine [of fair use] as applied to digital media. In *Sony v. Universal*, the Supreme Court recognized that new technologies can enable fair use. Unless they are created for the unambiguous purpose of copyright infringement, the public interest dictates that such new technologies should not be suppressed.” Comments of the American Library Association and others at p. 13. In fact, in the Sony case, it was found that most consumers use video recorders to make a single copy of a program in order to engage in time-shifting of programs (watching them at a different time than when they were broadcast) and that many content providers consented to this practice. Even where content providers did not consent, time-shifting was shown to be a non-commercial use and thus not an infringement. Because the equipment was “capable of substantial noninfringing uses”, 464 U.S. at 442, Universal could not maintain an action against Sony for contributory infringement for

perhaps acknowledge) all of the copyright rights that are implicated by digital television transmissions and is a further justification for the involvement of the Copyright Office in this proceeding.

Although the Joint Reply Commenters believe that Copyright Office participation in this proceeding is advisable, they do not wish participation by the Copyright Office to delay a resolution of the issues related to making digital television transmission and reception generally available by the year 2006 statutory deadline. It is the belief of the Joint Reply Commenters that Copyright Office involvement can be obtained without causing such delay. Indeed, inclusion of the Office initially will avoid inevitable delays that would be caused by failure to address all of the copyright law issues adequately at the appropriate time in any regulatory proceeding.

C. Resolution of Critical Process-Oriented and Technical Issues

Rather than set a regulatory technical specification for devices subject to this proceeding, the proposal of the Broadcast Protection Discussion Group, as embodied in the Joint Comments, is that compliant technologies be placed on an approved list if they meet one of following four tests:

- (A) 3 Major Studios and/or Major Television Broadcast Groups (of which at least 2 must be Major Studios) use or approve the technology;
- (B) 10 Major Device Manufacturers (including software vendors) have licensed the technology and 2 Major Studios use or approve the technology;

manufacturing and selling video tape recorders. The Supreme Court also specifically stated that at trial in the district court, "No issue concerning the transfer of tapes to other person . . . was raised." 464 U.S. 417, 425. NMPA does not object to a consumer's practice of recording a television program solely for viewing at a more convenient time. The Joint Reply Commenters, however, disagree with the ALA's mistaken application of the Sony decision to the digital environment, where copying a work for purposes of time-shifting can change with relative ease to "file sharing," which can seriously diminish the potential market for the copyrighted product.

(C) The technology is at least as effective at protecting Unscreened Content and Marked Content against unauthorized redistribution (including unauthorized Internet redistribution) as is any one of the technologies then listed on the approved list; or

(D) The technology includes output and recording controls that protect against unauthorized redistribution of audiovisual content and such technology was expressly named as being permitted to be used for the output or recording under the license applicable to a technology on the approved list.

The technologies on the approved list are subject to removal if they are later compromised.

As is apparent, this process makes the music industry largely dependent on other companies and industries to determine which copy protection technologies are sufficient. Given the extent to which a single consumer electronics device will act as the central control of all forms of copyrighted entertainment products received in the home, including music, the above procedure must be changed to accommodate the concerns of NMPA, ASCAP, SGA and BMI.

The Joint Reply Commenters do not object to a market-acceptance based test in concept, so long as music copyright owners are included in the decision-making process. NMPA's experience with the Secure Digital Music Initiative, in which its voice was not heard by the other industry players, leads the Joint Reply Commenters to request that any process adopted by the Commission ensure that as interested parties, NMPA, ASCAP, SGA and BMI are included in a meaningful manner.

Level of Robustness. The Commission may also wish to consider substantive standards that copy protection technologies must meet. NMPA, ASCAP, SGA and BMI urge that such efforts be undertaken with great care. Detailed technical requirements should not be mandated by the Commission. Nor should the Commission pick one or more specific compliant solutions. Such an approach could, for example, make it difficult for a technology to be "delisted" quickly if it is cracked or otherwise becomes insecure and ineffective. It might, however, be helpful for the Commission to set results-oriented standards. For example, the

Commission might require that any technology not rely on “shared secrets” where the compromise of one device results in compromise of the entire regime.⁸

Some commentators have suggested that the level of robustness to be required by the Commission should be such that a device should be able to resist only the skill of an ordinary consumer or user, and not an expert hacker. *E.g.*, Comments of IT Coalition at pp. 27-29. The Joint Reply Commenters suggest that the appropriate level depends on the architecture of the security regime. For example, if the FCC were to take the IT Coalition’s suggestion of a system encrypted at the source, not using “shared secret” keys⁹, then the robustness may not have to be as high as the regime set forth by the BPDG, where the signal is broadcast “in the clear” and reliance is placed on the receiving devices’ response to the broadcast flag. Nonetheless, the question of robustness level depends on whether a single fissure defeats the entire scheme. The CSS scheme used by DVD technology again provides a perfect example of the problem: an expert cracked it, but because CSS relies on a shared secret, the expert created a “hack” (the well-known “De-CSS” program) that any amateur can download to a computer and use to “rip” any DVD movie with ease. Adding to the difficulty of using intermediate levels of robustness is the semantic problem. The “average consumer” or user may not be as skilled at circumventing protection technology as, say, the average “college student”. Yet a significant portion of music piracy is due to trading of illegally copied files by college students with access to computer and broadband facilities at educational institutions. So what will be considered the “average consumer” level of difficulty? Experience suggests that the standard of robustness should be significant, because piracy is not a hobby, it is an industry. To the

⁸ The DVD protection scheme called “CSS” relied on a “shared secret”: the same encryption keys were to be used in all DVD devices. Once the keys were compromised, the resulting hack, called DeCSS, would work on all DVDs, even those not yet manufactured. A California state appellate court recently determined that an injunction against the posting of the decryption code should be dissolved on First Amendment grounds. DVD Copy Control Assn. v. Bunner, 93 Cal. App. 4th 648 (Nov. 1, 2001). This decision is now on appeal to the California Supreme Court, DVD Copy Control Assn. v. Bunner, 41 P.3d 2 (Feb. 20, 2002). This result clearly demonstrates the danger of reliance on any mandated “shared secret” architecture.

⁹ Comments of IT Coalition at p. iii; Comments of Veridian Corporation at p. 10.

extent that hacking the system requires an investment in tools or expertise, this investment will be provided if the outcome generates substantial returns.¹⁰

Scope of Regulation on Downstream Devices. The comments of the MPAA address protection of "audio-visual works." Under the Copyright Act, these are works that are composed of "... a series of interrelated images ... together with accompanying sound" 17 U.S.C §101. Typically, these are films or television programs that include music that is incorporated into the soundtrack. NMPA's constituents license their works (typically through ASCAP or BMI) to be part of audiovisual works that are publicly performed. The rights of a broadcaster or film studio to publicly perform an audio-visual work containing a musical work does not include the right to distribute phonorecords of the same work. It is fundamental that the phonorecord of a work has a separate and inherent value. Therefore, any broadcast flag regime designed to encourage digital broadcasting must take into account that the digital audio portion of the audiovisual work may have a substantial value on its own that should be protected. Unfortunately, the proposal made by the MPAA does not address this problem. In fact, it expressly mandates a result detrimental to those whose rights are in the manufacture and distribution of works. In particular, the proposed regulation X.5, which addresses the audio outputs of a DTV receiving device, expressly exempts from any downstream copy protection the soundtrack audio even though according to its language the quality of the audio will be CD quality. NMPA is concerned that this kind of oversight will introduce a new source of illicitly pirated material. For example, one can envision the soundtrack of a popular music video being captured in an unprotected state, and then compressed and further distributed over the Internet. Once this occurs, the legitimate sale of digital copies of the same work will be impaired. Therefore, NMPA, ASCAP, SGA and BMI believe that any DTV receiving device and downstream device must prevent the separation of the audio from the video unless the audio data stream is subject to downstream copy protection. In addition,

¹⁰ It is clear from the NCTA-CEA agreement that there is room for consideration of "expert level" robustness.

downstream devices should be required to maintain protection on the constituent elements of the audio-visual work when the devices are capable of taking the DTV source content and manipulating it into other forms. For this reason, the Joint Commenters urge the FCC to reject any proposed regulation that includes exemptions from the broadcast flag regime simply because the rights affected are not those exercised by broadcasters and film studios. This example goes to the heart of the fundamental point that the conduct of the FCC with regard to piracy protection for DTV will have collateral effects in other fields, and why participation of the Copyright Office, which has experience with this kind of problem, is recommended.

Analog Hole. A number of commenters have raised the analog hole problem. The term “analog hole” describes the situation in which digital content is passed through an unprotected analog output and then redigitized using an analog-to-digital converter. Some seem to believe that the problem is insoluble (short of banning all analog outputs) and constitutes such a large loophole that the broadcast flag will be ineffective to protect digital contents. *E.g.*, Comments of Philips Electronics North America Corporation at pp. 11-13; Comments of the Electronic Frontier Foundation at pp. 7-8, 11-12. The agreement between the NCTA and the CEA (to which Phillips is a signatory) belies this position: in it, the parties contemplate the use of a “consensus watermark” for control of downstream uses of the audio-visual signal delivered by the cable operator.¹¹ The Joint Commenters are not aware of any technical reason the same benefit cannot apply to audiovisual signals delivered over the air or the audio tracks that are output from the DTV receiving devices. Other participants in this proceeding indicate that possible solutions are under consideration by the industry at this time. For example, comments filed jointly by a number of organizations that make up Professional

¹¹ See “DFAST Technology License Agreement for Unidirectional Digital Cable Products,” at pp. 19 *et seq.* (Exhibit B), appended to the Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers which was filed with the Commission on December 19, 2002 and which is currently the subject of the Commission’s proceeding Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment, CS Docket No. 97-80, PP Docket No. 00-67.

and Collegiate Sports note that a watermark or other devices may solve the problem. Comments of National Football League and others at pp. 12-13.

NMPA, ASCAP, SGA and BMI believe that the analog hole is an important issue. The Joint Reply Commenters agree with Professional and Collegiate Sports that possible solutions to this problem should be explored, and that any rules adopted by the Commission should include provisions aimed at plugging the analog hole.

III. Conclusion

NMPA, ASCAP, SGA and BMI have raised a number of issues that must be addressed if the Commission proceeds with the proposed rulemaking. It is important to note, however, that the Joint Reply Commenters support protecting the rights of copyright owners whose works would be carried by digital television transmissions and that it agrees with the goal of ensuring that the full scope of content is available in a vibrant digital television marketplace. For the reasons stated above, Joint Commenters request that the Commission, in any rules it may decide to promulgate related to digital broadcast copy protection, consider and protect the rights of music publishers, composers and songwriters.

Respectfully submitted,

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