



March 17, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th St., SW
Washington, DC 20554

Re: *Ex parte* presentations in MB Docket No. 02-230

Dear Ms. Dortch

Pursuant to Section 1.1206 of the Commission's rules, I write to report several *ex parte* meetings with staff members of the Commission in connection with the above-referenced proceeding.

On the following dates, the identified Commissioner and staff members met *ex parte* with Fred von Lohmann, representing the Electronic Frontier Foundation (EFF):

March 12, 2003	Sarah E. Whitesell (Office of Comm. Adelstein)
March 12, 2003	Susan Eid (Office of Chairman Powell) Richard Chessen (Media Bureau)
March 13, 2003	Catherine Bohigian (Office of Comm. Martin)
March 14, 2003	Jordan Goldstein (Office of Comm. Copps) Alex Johns (Office of Comm. Copps)
March 14, 2003	Commissioner Kathleen Q. Abernathy Stacey R. Robinson (Office of Comm. Abernathy)

In each case, our discussions concerned the proposed broadcast flag solution that is being considered by the Commission in MB Docket 02-230. At each meeting (with the exception of the meeting on March 14 with members of Commissioner Copps staff, which was by phone), I distributed the attached 2-page summary document, as well as a copy of the EFF's Reply Comments, filed on Feb. 18, 2003 in MB 02-230, and a copy of the Report of the Seventh Meeting of the FCC Technical Advisory Council II, available on the Commission website at http://www.fcc.gov/oet/tac/TAC_II_Report_7.zip.

Sincerely,

Fred von Lohmann
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**The Broadcast Flag Mandate:
An Unnecessary, Ineffective, Costly Regulatory Intrusion in the DTV Market**

MB 02-230 Comments: <http://bpdg.blogs.eff.org/archives/eff-comments.pdf>

MB 02-230 Reply Comments: http://www.eff.org/IP/Video/HDTV/20030218_reply_comments.pdf

- I. There is No Evidence of a DTV “Content Protection” Problem.**
 - A. High-value content is not being withheld from terrestrial DTV broadcast today.
 - B. Cartel threats to withhold content in the future should be viewed with skepticism.
 - C. Digital broadcasts are huge, and already resistant to Internet redistribution.
- II. The Broadcast Flag Mandate Will Not Fix the Purported Problem.**
 - A. It leaks like a sieve.
 - 1. The analog hole.
 - 2. The legacy devices hole.
 - 3. The software receivers hole.
 - 4. The cable hole.
 - 5. The DVI hole.
 - B. Making the Broadcast Flag effective will require unspecified additional expansive technology regulations.
 - C. The cautionary tale of DVDs: the failure of content protection.
 - D. “Break-once, break-everywhere” security is ineffective in a “darknet” world.
- III. The Doubtful Benefits are Outweighed by Its Costs.**
 - A. Will harm consumers.
 - 1. Imperils future fair uses.
 - 2. Stymies current fair uses.
 - 3. Obsolescing existing home networking investments.
 - 4. What about technologies revoked from Table A?
 - B. Will harm competition and innovation.
 - 1. Table A selection criteria will favor 5C/4C companies.
 - 2. Killing “convergence”.

- C. Will violate the First Amendment rights of computer programmers.
 - 1. The “compliance and robustness” rules effectively ban open source DTV products, such as GNU Radio.
- IV. There are Alternatives.**
 - A. First, do no harm.
 - B. By broadcasting in higher definition, content owners can increase resistance to Internet redistribution.
 - C. Piecemeal technology regulation is no substitute for a copyright solution, such as compulsory licensing.
- V. The BPDG process was hopelessly flawed.**
 - A. Failed to consider whether a regulatory mandate was necessary, or any approach other than the broadcast flag.
 - B. The process was dominated by a few large companies; press, consumers and innovators were effectively excluded.
 - C. There was no consensus on many important issues.

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