

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

| | | |
|---|---|---------------------|
| In the Matter of |) | |
| |) | |
| Implementation of Section 304 of the Telecommunications Act of 1996 |) | CS Docket No. 97-80 |
| |) | |
| Commercial Availability of Navigation Devices |) | |
| |) | |
| Compatibility Between Cable Systems and Consumer Electronics Equipment |) | PP Docket No. 00-67 |
| |) | |

JOINT 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 | 3 |
| II. Discussion | 6 |
| A. <i>The Proposal Prohibits Copy Protection Measures Except in Two Special Cases.</i> | 6 |
| B. <i>A Mandated Standard for Copy Protection Would Affect Rightsholders in the Reproduction, Distribution, and Performance of Musical Works</i> | 9 |
| C. <i>The Proposed Process for Adoption of Copy Protection Technology Excludes Rightsholders in the Reproduction, Distribution, and Performance of Musical Works</i> ... | 12 |
| D. <i>Involvement of the Copyright Office is Recommended</i> | 14 |
| E. <i>Digital Outputs Are Required This Year while Copyright Protection Technology is Delayed.</i> | 15 |

F. *Remedies for Violation of the Device Compliance and Robustness Rules for DFAST
Copyright Protection are Unreasonably Limited* 16

G. *The Joint Commenters are Encouraged that Limitations on Downstream Use, Highly
Robust Technology and Watermarks are Recognized by the Consumer Electronics
Industry as Practical Solutions to the Piracy Problem.* 19

H. *Jurisdiction of the Commission Can Only Be Addressed on Further Development of the
Issues* 20

III. Conclusion 20

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 comments in connection with the Commission's Further Notice of Proposed Rulemaking ("FNPRM"), FCC 03-3 (Adopted: Jan. 7, 2002; Released, Jan. 10, 2003) in the above-captioned proceeding.

I. Introduction

NMPA's members, along with their songwriter partners, are the owners and administrators of copyrights in the musical works that are embedded in sound recordings, including many soundtracks 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 has hundreds of thousands of members 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 rights organization that represents approximately 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 5,000 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. The instant proceeding is of interest to NMPA, ASCAP, SGA, and BMI (collectively, the "Joint Commenters") primarily because of its potential impact on

digital distribution of music, including the use of the Internet. Music piracy is an issue of major concern to the Joint Commenters.

The FNPRM seeks comment on a Memorandum of Understanding (the "MOU") filed with the Commission by the Consumer Electronics Association ("CEA") and the National Cable and Telecommunications Association ("NCTA") which sets forth an agreement on the distribution of content via digital cable television. Accompanying the MOU are certain associated documents: a cover letter dated December 19, 2002 (the "Cover Letter"); a set of "Recommended Regulations to Ensure Compatibility Between Digital Cable Systems and Unidirectional Digital Cable Products and to Provide for Appropriate Labeling of Such Products" (the "Compatibility Regulations"); a paper entitled "Carriage of PSIP over Cable Plants," a technical paper relating to the Program and Safety Information Protocol ("PSIP") standard for carrying digital television system information and electronic program guide data; a set of "Encoding Rules" that are proposed by CEA and NCTA as Commission regulations dictating the limited circumstances (called "business models") under which copy protection technology may be applied to a signal distributed by a cable television system; and a "DFAST Technology License Agreement For Unidirectional Digital Cable Products" (the "DFAST License"), which licenses the first approved signal scrambling technique to the consumer electronics manufacturers that participate.¹ The DFAST License contains, as covenants to the license, product design rules that govern the operation of the devices that will receive digital cable signals and the necessary strength of the copyright protection implementation, respectively called the "Compliance Rules" and "Robustness Rules".

The Joint Commenters have several concerns about the MOU and the associated proposed regulations and license covenants. Of greatest concern is how the Encoding Rules are

¹ "DFAST" stands for "Dynamic Feedback Arrangement Scrambling Technique." It is a patented algorithm for scrambling digital data in a manner that makes the data useless without "knowing" the decryption "keystream." It is one of a family of similar encryption algorithms. See U.S. Pat. No. 4,860,353. Apparently, the patent expires in 2006 and is assigned to General Instrument, a predecessor to Cable Labs.

proposed: they are drafted as a broad prohibition *against* any application of any copyright protection to cable TV signals, with only two enumerated exceptions that constitute Commission mandated “business models.” Any additional copyright protection would require a petition to the Commission, a process which may result in an unreasonable impairment of the infringement remedies held by creators and copyright owners. Furthermore, the scheme proposes that certain modifications to these rules (including exemptions that are additional circumstances when copyright protection would be permissible and the extent of permissible downstream uses of digital content received through these devices) will be made by a single party or a group that does not include all of the affected owners of the copyrights that comprise the audio-visual works—and without any input from the Copyright Office. Moreover, if a consumer electronics manufacturer distributes product that, while including the cable TV signal descrambling technology, is not compliant with the copy protection scheme, third party beneficiaries of the patent license (who appear to be limited to owners of the audio-visual work, as distinct from, for example, any sound track or underlying song) have only a very restricted remedy: nominal money damages and injunctive relief that under the terms of the license will be delayed for a substantial period of time and may not exist at all if the breach is found by the cable television industry to be insufficiently “material.”

These points are explained in more detail in the discussion below. The Joint Commenters believe that the proposal should be amended in accordance with the suggestions in that discussion.

II. Discussion

A. The Proposal Prohibits Copy Protection Measures Except in Two Special Cases.

The proposed Encoding Rules, which will function as a Commission regulation, and the related interlocking exemptions provided by the Compliance and Robustness rules serve to limit and deter any further deployment of copyright protection technology for digital media. There are several interlocking features that when unwound and examined together demonstrate the grave danger this kind of formulation poses for copyright owners.

First, the proposed Commission regulations state that:

“A Covered Entity shall not attach or embed data or information with Commercial Audiovisual Content, or otherwise apply to, associate with, or allow such data to persist in or remain associated with such content, so as to prevent its output through any analog or digital output authorized or permitted under license, law or regulations governing such Covered Product.”²

This limitation is reinforced by the manner that the Encoding Rules for Commercial Audiovisual Content are drafted -- as a blanket prohibition on any protection: “Commercial Audiovisual Content *shall not* be Encoded so as to prevent or limit copying thereof except as follows...”³ (Emphasis added.) This is followed by a list of the only permissible circumstances where copy protection may be applied to the signal. Additional exceptions (*i.e.*, further conditions where copy protection may be applied to the signal) require petition to the Commission.

² § 76.1903. Interface and Encoding Rules, p. 5. The breadth of this language is exceedingly expansive. For example, the phrase “allow such data to persist...” would appear to require that cable television operators either strip any additional copyright protection mechanism in the audio soundtrack or require, through license covenants with music producers, that soundtrack masters be free of any such copyright protection, if such a mechanism interacts with the devices that receive the digital cable signal.

³ § 76.1903 2.(b)(A). The proposed regulations go on to say that “...Content delivered as Unencrypted Broadcast Television shall not be Encoded so as to prevent or limit copying thereof by Covered Products” § 76.1903 2(a). This raises questions about how this proposed scheme would interact with the parallel DTV broadcast flag regulations that are now subject to another Commission rulemaking.

Compounding the situation are provisions in the Robustness Rules to the DFAST patent license, which state an affirmative exemption from copyright protection: "... compressed audio data may be output to an external Dolby Digital decoder *in the clear* via the S/PDIF connection."⁴ (Emphasis added.) "In the clear" is a cryptographic term of art that means without any copy protection at all. The permission to output digital audio in MP3 format (which is one of several common "compressed audio data" formats) in the clear raises concerns that digital cable television could become the next source of illicitly distributed music on the Internet—a source mandated by the Commission.

This formulation, which allows two enumerated circumstances for copy protection and then affirmatively prohibits additional protection without a Commission proceeding, negatively impacts songwriters and publishers alike. First, the fact that the definition of "Commercial Audiovisual Content" includes "accompanying sounds," along with "related images," (which would include the visual screen accompanying music programming delivered over cable) makes it a regulatory violation for a copyright protection technology to be integrated into the soundtrack. Second, cable television operators frequently carry many music channels, in some cases 50 to 100, as part of their subscription services. On its face, such a regulatory framework would effectively prohibit any further application of copyright protection technologies to content or components of the content like the soundtrack or music channels delivered by cable television. This would facilitate the making of perfect digital copies of the soundtrack. This raises substantial concern that music piracy will be made easier, particularly given that the proposal includes a requirement that digital set top boxes include a "functional" computer interface

⁴ Robustness Rules § 2, p. 27.

connection called "IEEE 1394" by the end of this year⁵ and also includes the express exemption for compressed digital audio outputs through the digital audio output connection called "S/PDIF." The computer interface makes it likely that even the simplest digital cable television receiving device can supply digital data not otherwise protected to the personal computer for further distribution over the Internet.

Finally, the notion that a petition must be filed for the addition to or modification of exceptions, that is, the addition of circumstances where the application of copyright protection technology is permissible in the cable television signal, moves the ball too close to the wrong goal post. The regulatory process will inevitably add a detrimental time delay to the introduction of anti-piracy measures.

In addition, the Joint Commenters are concerned that the regulatory prohibition on additional copyright protection and the Commission's reliance on covenants in the DFAST license that also exempt data conversion and Internet functionality would adversely affect claims they might bring for infringement under copyright law. Defendants might argue that mere compliance by an electronics manufacturer with the DFAST license is an effective defense to a claim that their receiving device facilitates copyright infringement by converting cable television audio tracks into MP3 files (or some other format) for Internet re-distribution or re-transmission. If effective, this would preclude a remedy under the Copyright Act.

These prohibitions would preclude the ability of creators and owners of musical works to require copyright protection as part of the distribution or public performance licenses for their works because to do so, in the case of cable television, would be illegal under the proposed

⁵ MOU § 3.8.3.1. The breadth of the term "functional" is not explained. IEEE 1394 is commonly known as "Fire Wire." Again, this language raises questions regarding how this proceeding will interact with the broadcast flag proceeding already begun by the Commission.

regulations. This is of great concern in light of the emergence of the “media center” device that combines Internet connectivity, digital cable television and other media recording and playback. The Joint Commenters oppose any regulatory action that either limits or prohibits the application of additional copy protection technology to content that private parties may decide to implement. It is essential that the soundtrack be protected from piracy as effectively as the audio-visual program of which it is a part. Therefore, these limitations on additional copy protection are unacceptable in their current form.

B. *A Mandated Standard for Copy Protection Would Affect Rightsholders in the Reproduction, Distribution, and Performance of Musical Works*

Even if the objections raised by the Joint Commenters in part II.A above were addressed, the proposed scheme would still create problems for creators and owners of copyrighted musical works. This is because even if the severe restrictions on adoption of copy protection measures were removed, it is doubtful that the industry would voluntarily adopt additional copy protection measures beyond those proposed without some further impetus. While the Joint Commenters would not necessarily oppose the concept of a Commission-mandated minimum level of copy protection technology in digital cable receiving products, the standard would need to be highly effective and kept up to date. The proposed scheme, even if stripped of its *de jure* limits on the adoption of additional copy protection technology, would not meet these requirements.

As the Joint Commenters have explained in their filing with the Commission in the DTV broadcast flag proceeding,⁶ the Joint Commenters believe that it is crucial that the Commission

⁶Comments of the National Music Publishers’ Association, Digital Broadcast Copy Protection, MB Docket No. 02-230 (Oct. 31, 2002); Joint Comments of the National Music Publishers’ Association, The American Society of Composers, Authors and Publishers, The Songwriters Guild of America and Broadcast Music, Inc. (Feb. 19, 2003).

recognize that a Commission-mandated requirement for copyright protection in digital television receiving devices, whether for digital broadcast or digital cable signals, will have a substantial impact across a wide range of consumer electronic devices and media delivery formats well beyond the field of digital cable television distribution. The Joint Commenters believe that this scheme, in a manner similar to its sister rulemaking in the case of copyright protection for broadcast digital television, will likely establish a baseline standard copyright technology for all digitally distributed copyrighted works, whether distributed as a digital cable TV broadcast or not.⁷ The reason is simple: digital copyright protection is an added cost to these devices and the consumer electronics industry is highly cost-sensitive. Once the federal government establishes a copyright protection requirement for digital television, the consumer electronics industry will likely resist the inclusion of any additional technology unless it is required by law or regulation, because the additional engineering and production costs for the legally mandated technology will have already been incurred.⁸

This economic disincentive for additional copyright protection technologies is of great concern considering the recent development of new digital media center products for the home.⁹

⁷ This is an even more likely outcome in the case of digital cable TV because cable television plant is the fastest growing form of consumer access to high-speed Internet services. "It is clear that with 58% of the broadband pie, cable modem remains the leading broadband technology in use among consumers and businesses [in the U.S.]" Yankee Group News Release, September 18, 2002.

⁸ The fact that this scheme mimics the Audio Home Recording Act, 17 U.S.C. §§ 1001, *et seq.*, by permitting only a single copy of a first copy of a protected work by means of a "copy no more" indication, raises the question whether many issues would be solved if the application of the technology were broadened to include Serial Copyright Management System to all digital audio outputs, including the audio outputs. The incremental cost to consumer electronics manufacturers would be small if this proposed system were implemented.

⁹ 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 that "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.

These devices, which place in one appliance the combination of digital television receiver, hard disk recorder, Internet networking, DVD player and recorder, raise substantial concerns about how a proposed regulation with limitations on copy protection for its output would work to fully protect content delivered to the home over digital cable television. As mentioned in part II.A above, the digital audio output will be “in the clear,” which is problematic.¹⁰ In addition, the scheme does not address format conversions within the device, *i.e.*, ripping of audio tracks from the audio-visual work, except that the Compliance Rules “shall not prohibit ...conversion between widely-used formats for the transport ...of audiovisual signals or data...”¹¹ In addition, the entire scheme exempts the Internet.¹² Therefore, a multi-function device might record an audio-visual work, like a music video in an encrypted form, but then rip the audio track into an MP3 for transmission or distribution across the Internet using any of the digital network outputs. If this regime is adopted, then digital cable will provide a new source of digital music files that can be illegally distributed over the Internet—one expressly approved by Commission regulation. In other words, any regulation issued by the Commission that approves of or abstains from proscribing certain functionalities of these devices may have severe implications on related rights under copyright law. The Joint Commenters believe that any regulation of copyright protection technology for digital cable television should expressly include prohibitions

¹⁰ In addition, this exemption appears to support the conclusion that the term “Controlled Content” excludes the soundtrack of an audio-visual work, because otherwise Section 2.4 of the MOU, Digital Outputs would expressly contradict the exemption.

¹¹ Compliance Rules § 2.5.2(3) p. 22. This provision addresses limitations on use of content within the device that may impair a watermark.

¹² See Encoding Rules, § 76.211, which exempts data delivered by the Internet from the limitations of the Encoding Rules. The DFAST License Compliance Rules are limited to requiring copyright protection only for “Controlled Content”, which appears to be the enumerated methods of content delivery, *e.g.* video on demand, pay television, etc., that are subject to the Encoding Rules. Compliance Rules § 1.2., Encoding Rule 1(b)(A). Therefore, content delivered to the device by (i) the Internet or (ii) non-encrypted cable programming are entirely exempt and data that exits via the data network ports is exempt if it ceases to be “Controlled Content” (*e.g.* ripped audio data).

on devices that rip audio tracks from the audio-visual work and that limitations on further use or distribution of digital audio outputs be included.

C. The Proposed Process for Adoption of Copy Protection Technology Excludes Rightsholders in the Reproduction, Distribution, and Performance of Musical Works

The Joint Commenters are concerned that the proposed procedures governing changes or additions to the scheme's limitations and exemptions place parties other than copyright holders in the position of being de facto arbiters of copyright policy over their works. These are several examples of this problem. First, the Compliance Rules are drafted as requiring certain protections for "Controlled Content." The definition of "Controlled Content" is content marked in the signal by the cable television operator as protected.¹³ Thus, the entire decision to protect the signal at all is held solely by the cable television operator. Second, the DFAST License, which technically is a private agreement between CableLabs (a cable television industry consortium) and participating consumer electronics manufacturers, establishes that CableLabs will determine if any alternative digital outputs and/or any alternative copy protection technologies sought to be used by a consumer electronics manufacturer are sufficient to be considered usable under the scheme.¹⁴ Similarly, in another part of the DFAST license, members of the Motion Picture Association of America ("MPAA") are established as the

¹³ Compliance Rules, 1.2. Although apparently tautological, the intention appears to be to exclude the soundtrack. See *supra*, note 11. Thus, the definition appears to be any audio-visual signal where the type of programming it is part of needs the approved "business models."

¹⁴ MOU § 3.6.3; Compliance Rules § 2.4.4. This section states that "In making that determination, CableLabs shall take into account ... the effectiveness of the technology ... and other objective criteria." The paragraph goes on to state that if "... four (4) member studios of the Motion Picture Association [of America] approve a digital output or content protection technology Such output or content protection technology shall be deemed approved by CableLabs...."

decision makers that can override CableLabs in selecting any alternative copyright protection technology.¹⁵ These sections of the Compliance Rules, as drafted, do not require that any alternative digital outputs include copyright protection at all.¹⁶ In theory, if CableLabs or the MPAA approve a digital audio file output without any downstream protection at all, such a result would not violate the Compliance Rules or the Commission's regulations. Based on this drafting, it would appear that adoption of new or alternative technologies would be decided by the MPAA, NACTV and the CEA, a decision to be enforced by the Commission by means of the limitations on encoding copyright protection into the cable television signal—without the input of any of the Joint Commenters, whose works are included in the copyrighted audio-visual works that are to be protected by these technologies.

With regard to the watermark technology, it is promising that the scheme envisions use of a watermark to plug the “analog hole.” However, the Compliance Rules envision a “multi industry ... consensus” on selecting such a technology without indicating who the participants are and what the forum will be.¹⁷ And even when selected, the Compliance Rules leave it to the Licensee (*i.e.*, the consumer electronics manufacturer), to decide whether or not to adopt such technology.¹⁸

Copyright law vests the Joint Commenters with a number of legal rights that will be affected by the MOU and its accompanying documents. The Joint Commenters believe that all stakeholders, including the copyright owners whose works constitute the content distributed by

¹⁵ Compliance Rules §§ 2.4.4 and 3.5.1.

¹⁶ The Commission regulations are limited to the signal compatibility and Encoding Rules, while compliance with requirements to include copyright protection are covenants in the DFAST License, a private agreement.

¹⁷ Compliance Rules §1.1.

¹⁸ Compliance Rules § 2.5. This section prohibits interference with a watermark, but does not require the consumer electronic product to respond to the watermark at all.

the cable television operator, should have the opportunity to participate in the determination of any exemptions to or other limitation of the copyright protection scheme mandated by federal regulatory law.

D. Involvement of the Copyright Office is Recommended

As the Joint Commenters explained in detail in their comments in the Commission's broadcast flag proceeding, federal copyright law accords the U.S. Copyright Office an important role in setting standards for the use of copyrighted material and in mandating measures to avoid circumvention of copyright protection technology. Comments of the National Music Publishers' Association, *Digital Broadcast Copy Protection*, MB Docket No. 02-230 (Oct. 31, 2002); Joint Comments of the National Music Publishers' Association, The American Society of Composers, Authors and Publishers, The Songwriters Guild of America and Broadcast Music, Inc. (Feb. 19, 2003). NMPA believes that, in light of the Copyright Office's statutory duties, the Commission should also include it as an equal partner in any rulemaking proceeding on the MOU and accompanying documentation.

A regulatory scheme of this breadth that includes a mandate from the Commission for copyright protection technology and a determination of permissible downstream uses calls for participation by the Copyright Office. As explained earlier, the formulation of the regulations governing copyright protection for audio-visual works impacts related rights outside the right to broadcast these works. As such, it is important that certain procedural matters be well understood before the interlocking private agreements begin to carry the force of law on holders of legal rights who are not party to the agreements.

For example, consider the case where the Commission is to decide on a petition to approve a new “business model” that requires changes to the approved Encoding Rules. The proposed regulations require that the Commission consider “reasonable and customary expectations of consumers with respect to home recording” when considering new “business models” pursuant to a petition to permit additional copy protection.¹⁹ These types of decisions will inevitably require a determination whether some downstream uses of content distributed over the cable television system are within the fair use privilege or not. The fair use privilege is a creature of the Copyright Act, not federal telecommunications law.²⁰ Therefore, the proposed regulatory framework is in essence an invitation for the Commission to decide copyright policy, which is clearly within the purview of the Copyright Office. Therefore, the Joint Commenters recommend that the Copyright Office be involved, in order that the proposed regulatory framework administrated by the Commission and the private agreements involved are not detrimental to current copyright regulatory policy as set by the Copyright Office.²¹

E. Digital Outputs Are Required This Year, While Copyright Protection Technology is Delayed.

The Joint Commenters are concerned about the staged schedule of introduction of the scheme. Section 3.8.3.1 of the MOU requires a “functional” IEEE 1394 port on all set top boxes

¹⁹ § 79.1903 2(a) (ii)(a)(3), p. 7

²⁰ 17 U.S.C. § 107.

²¹ The Joint Commenters note that the reference in the MOU to the Digital Millennium Copyright Act is misplaced. The Audio Home Recording Act, 17 U.S.C. §§ 1001, *et seq.*, is the part of the Copyright Act that establishes the Serial Copy Management System whereby a single copy of a copy is made which then has a “copy no more” flag set. This is further evidence of why the Copyright Office, with its intimate familiarity with copyright law and policy, should be involved in setting the policy that results from the regulation of copyright protection technology.

by December 31, 2003, while there is no requirement to include copy protection with respect to this digital output until 18 months later, July 1, 2005.²² The term “functional” is not defined. The IEEE 1394 port is a commonly available computer connection called “Fire Wire” that is available on many personal computers either as manufactured, or as an inexpensive additional accessory. The Joint Commenters do not believe there should be any “requirement” for a digital output without a simultaneous “requirement” to provide digital copyright protection in the signal and in the receiving device. The reason is simple: by separating the two dates by 18 months, an extraordinary amount of material can be copied and distributed out of the IEEE 1394 port prior to copy protection being instituted, if “functional” takes its ordinary meaning. This is compounded by the fact that the Encoding Rules, which include limitations on copyright protection in the signal, appear to be effective only as of the date of adoption of the regulation by the Commission.²³ Further, history indicates that the Commission can grant waivers which could easily delay the roll-out of copy protection after the digital outputs are already in place.

F. Remedies for Violation of the Device Compliance and Robustness Rules for DFAST Copyright Protection are Unreasonably Limited

The consumer electronics manufacturer is not required to manufacture digital consumer products that are subject to the terms of the “Plug and Play” scheme, but if it does, it does so under the authority of the DFAST patent license and subject to the attendant covenants, the Robustness Rules and Compliance Rules. There is no regulatory violation if an electronic manufacturer decodes DFAST protected content without meeting the Compliance or Robustness

²² MOU § 3.6.2.1

²³ Encoding Rules § 76.1903

Rules unless the product is labeled or marketed as digital cable compatible.²⁴ Instead, it is a breach of the DFAST license covenants. The DFAST license establishes third party beneficiary rights in the “video programming provider” of an audiovisual work and the “copyright owners of such work.” These parties can sue the consumer electronics manufacturer for an injunction should it distribute a product that does not meet the Compliance and Robustness Rules.²⁵ However, the same provision limits actual damages to \$5,000 in the aggregate.²⁶ That is because the limitation on damages is to the “amount paid by [the manufacturer] to CableLabs.”²⁷ That amount is merely \$5,000.²⁸ In addition, injunctive relief can only be sought if CableLabs has been notified and has determined that the breach is “material” to the integrity of DFAST itself.²⁹ It is crucial to recognize that many of the Compliance Rules can be violated without introducing “material” damage to the integrity of DFAST itself. If the Joint Commenters, individually, are members of the defined set of “Third Party Beneficiaries,” then the remedies provided are too limited to be effective.³⁰ If not, then there is no remedy provided at all.

The Joint Commenters are concerned about how the DFAST Compliance and Robustness Rules would be enforced to protect their copyright interests. The copyrights owned or administered by the Joint Commenters are included as part of the audio-visual work as a result of

²⁴ See proposed regulations “Compatibility Between Digital Cable System and Unidirectional Digital Cable Products and Labelling” para. (b), p. 2.

²⁵ DFAST License § 11.1

²⁶ DFAST License § 11.2

²⁷ DFAST License § 10.2

²⁸ DFAST License § 5

²⁹ DFAST License § 10.2

³⁰ Section 10.2 of the DFAST License provides that CableLabs will determine whether a breach of the DFAST security technology is “material” and therefore subject to the third party beneficiary cause of action.

limited licenses granted to the audio-visual work “copyright owner” to synchronize a third party’s work with their video and consequently to publicly perform the resulting audio-visual work through the “video programming provider.”³¹ Therefore, any violation of the Compliance Rules or Robustness Rules results in an economic damage to the rights that have been reserved under the terms of such licenses by the creators and owners of the musical work, such as the right to distribute copies of the work.³² This potential economic damage must be addressed in any regulatory scheme that establishes a limited remedy solely as a private cause of action brought by a limited set of parties.

An example would be a popular music video (the audio-visual work) where the audio track is ripped, converted into an MP3 file, and retransmitted or redistributed across the Internet. Even if this occurs in violation of a compliance rule (should it be adopted), the owner of the music work would have no recourse under the current scheme.

The Joint Commenters believe that creators and owners of any copyright distributed by the cable television operator — not just the audio-visual work — should have an ability to enforce the copy protection requirements when CE manufacturers do not comply with them. In addition, the remedy must be adequate. Moreover, because a case would only come before a court after a substantial number of devices had already been distributed, there must be an affirmative requirement under the regulations that (i) the decryption key for any non-compliant device be immediately revoked and (ii) that monetary damages for contributory copyright infringement be permitted.

³¹ Typically, the “video programming provider” has a limited license to publicly perform the audiovisual work owned by the creator of the work. Yet the creator of the audio-visual work typically has licensed the audio, (*e.g.* music) from the owners of the music copyrights. 17 U.S.C. §§ 106 *et seq.*

³² Digital Cable Receiving boxes that can rip audio tracks and further distribute them over the Internet would jeopardize the value of legitimate digital downloads from websites licensed to offer such copies and the value of CDs of such works.

G. *The Joint Commenters are Encouraged that Limitations on Downstream Use, Highly Robust Technology and Watermarks are Recognized by the Consumer Electronics Industry as Practical Solutions to the Piracy Problem.*

Although the Joint Commenters are deeply concerned about the issues raised above, they do wish to express that they are encouraged that an effort is being made to address digital piracy. The points of encouragement include the recognition that a standardized copy protection technology must be resistant to sophisticated attack. For example, the Joint Commenters agree that the threat level as defined under the Robustness standards, Section 3(e), includes resistance against the use of widely available digital electronic diagnostic tools. We are also encouraged by the inclusion of copy protection capability in the category of “Critical Test” for a compliant device under the Compatibility Regulations. We appreciate the recognition that a watermark solution needs to be included in order to plug the “analog hole.” We are encouraged by the statement that “Covered Products” cannot “jeopardize the security of any services offered over the cable system,” assuming that such statement includes copy protection applied to any content delivered, including over the Internet.³³ Finally, we appreciate that the participants recognize the need to limit the scope of downstream copying and retransmission of the content received by the devices by adoption of a scheme that in essence is the application of the Audio Home Recording Act to audio-visual devices—a development that we support.

³³ DFAST License, § 2.2

H. Jurisdiction of the Commission Can Only Be Addressed on Further Development of the Issues

The Commission has asked in its FNPRM for comment on the jurisdictional basis for Commission action in this area. At this time, the Joint Commenters do not address this issue in depth. As discussed in some detail above, the Joint Commenters have several issues with the MOU and its associated documents. The proposal made to the Commission could seriously impact the ability of copyright holders to protect their legal rights by its prohibition on copy protection, and the Joint Commenters believe this would raise jurisdictional problems. The Joint Commenters believe it would be best to reserve extensive discussion of the jurisdictional issue for a later date, once the issues have been more fully developed. At the very least, however, the Commission should not proceed to adopt rules and, explicitly or implicitly, approve the MOU and related documents between private parties, without the participation of the Copyright Office.

III. Conclusion

NMPA, ASCAP, SGA and BMI request that the Commission address the complex but critical issues discussed above if the Commission proceeds with the proposed rulemaking.

Respectfully submitted,

BROADCAST MUSIC, INC.

NATIONAL MUSIC PUBLISHERS' ASSOC.

By *Marvin L. Berenson /cwt*

Marvin L. Berenson
General Counsel
Broadcast Music, Inc.
320 West 57 Street
New York, NY 10019
(212) 830-2533

By *Edward P. Murphy /cwt*

Edward P. Murphy
President and CEO
National Music Publishers' Association
475 Park Avenue South, 29th Floor
New York, NY 10016
(646) 742-1651

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By *I. Fred Koenigsberg /cwt*

I. Fred Koenigsberg
White & Case, LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8806

THE SONGWRITERS GUILD OF AMERICA

By *Lewis M. Bachman /cwt*

Lewis M. Bachman
Executive Director
The Songwriters Guild of America
1500 Harbor Blvd.
Weehawken, NJ 07086
(201) 867-7603

Date: 28 March 2003