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

RE *Ex Parte* Presentations in CS Docket No. 97-80 (Implementation of the Section 304 of the Telecommunications Act of 1996: Commercial availability of Navigation Devices); PP Docket No. 00-67 (Compatibility between Cable Systems and Consumer Electronics Equipment); and MB Docket No. 02-230 (Digital Broadcast Copy Protection)

Dear Ms. Dortch:

This is to notify the office of the Secretary that on August 29, 2003, Fritz Attaway of the Motion Picture Association of America, accompanied by Anne Lucey of Viacom Inc., Rick Lane of News Corp. and Preston Padden and Troy Dow of The Walt Disney Company, held an ex parte meeting with the below listed FCC Commissioner Kevin Martin and Anthony Dale.

The meetings covered material submitted to the FCC in the Joint Comments of Motion Picture Association of America, et al. on March 28, 2003, and Reply Comments on April 28, 2003, in CS Docket No. 97-80 and PP Docket No. 00-67, and in Joint Comments on December 6, 2002, and Reply Comments on February 20, 2003, in MB Docket No. 02-230.

The *ex parte* presentations focused on the following points

- Adoption of a "Plug & "Play" regulatory scheme should be based on multi-industry negotiations where all interested parties are provided an opportunity to participate.
- Subpart W is not necessary to achieve interoperability of cable interface devices.
- Subpart W issues should be resolved by marketplace negotiations among content owners, distributors and ultimately users.
- Subpart W forecloses new business models by imposing regulated, mandated content usage rules.
- Content providers and other interested parties should have an opportunity to participate in an open process to select new, protected outputs and de-certify previously protected outputs that have been compromised.

- Subpart W perpetuates the analog hole and discourages a complete transition from analog to digital.
- The same product cycle concern that supports prompt action on Plug & Play requires prompt action on Broadcast Flag. The first generation of Plug & Play receivers should not be rolled out without the broadcast flag technology.

In addition, the attached "MPAA Comments on Subpart W" was provided.

In accordance with Section 1.1206 of the Federal Communications Commission rules, this original and one copy are provided to your office. A copy of this notice is being delivered to the parties mentioned above.

Sincerely,

Enclosure

MPAA Comments on Subpart W

1 Interface Rules.

Output controls.

The unconditional prohibition against output control is, in effect, a requirement that all content be sent through unprotected high definition analog outputs (and potentially other unprotected outputs). This prohibition would require content owners who have never approved a particular output for their content to nevertheless use that output for any and all content they wish to transmit, based on the fact that some third party licensor has approved the output without the content owner's input and even over his objections. This prohibition would perpetuate the analog hole problem and is also inconsistent with the encoding rule portion of the MOU, in that the encoding rules contemplate copy restrictions for certain types of content. But if all content must be sent through unprotected analog outputs, then any limitations on copying are impossible.

Moreover, the prohibition against output control effectively precludes possible new business models based on the delivery of very high quality programming (such as pre-video release movies) where copy and redistribution protection is essential. If the technology cannot support new business models, content owners have only two options: don't make the new content products available to consumers at all, or make them available on platforms other than cable and satellite where they are not forced to send it out unprotected analog outputs. It is illuminating that the proposed Subpart W would place limitations on satellite as well as cable services in order to "level the playing field" to a non-competitive, lowest common denominator of service options.

Listing and delisting of authorized outputs

It now appears that this provision was not intended to forbid turning off every output that might not be prohibited by license, regulation, or law, but instead to prohibit turning off outputs

authorized by DFAST, PHILA, or any content-owner/satellite license. This raises three issues, however:

It is not what the text of the draft regulation literally says. Furthermore, the mere insertion of "and" instead of "or" in the proposed Section 76.1903(1) may not be an adequate fix, either for CE and cable companies, who may be concerned that it would only apply to outputs authorized not only by license, but also affirmatively authorized by law, or for studios and other content owners for the reasons next discussed.

(ii) The DFAST license does not have meaningful provisions for content owner input or control into the approval of outputs, and leaves the approval or disapproval in the hands of CableLabs, an entity funded by the Cable Industry. The prospect that four studios could make a license approving a particular TPM that would then bind all of their competitors to that TPM — which would apply here for satellite as well — is neither logical nor reasonable, was wholly unacceptable in the Broadcast Flag discussions, and is no more acceptable here.

DFAST does not have an explicit process for "delisting" an approved technology, although its general provisions for license changes by Cable Labs/FCC may or may not permit delisting in some indefinite cases. By contrast, the proposed Broadcast Flag regulation contains a provision for FCC-monitored delisting of Table A technologies under certain circumstances where the technology is substantially compromised.

In sum, what appears necessary here are procedures analogous to the proposed Broadcast Flag regulation's Table A and related approval criteria -- some benchmark that either lists approved technologies, or identifies kinds of licenses that qualify as acceptable standards for their approved TPMs, and a delisting process and standard. Indeed, this demonstrates a need to coordinate the release, potentially for combination as a single

package, of the proposed Broadcast Flag regulation being considered in M.B. Docket No. 02-230 and the proposed regulations here.

2. Basic Tier Cable Originations. Basic tier cable originations apparently can be encoded as "Copy Once" as Non-Premium Subscription Television under Paragraph 2(b)(A)(ii), but the encoding could be ineffective if it cannot be encrypted per FCC regulation (if applicable to digital) and will hence not pass through the POD. The FCC should therefore make clear that the existing FCC regulation prohibiting encryption of the basic tier are not applicable to digital basic tier services.

3. Scope of Waiver Provision for Defined Business Models Under Paragraph 2(c). This provision requires clarification. Under Paragraph 2(c), waiver is permissible only for a "service within a Defined Business Model" that apparently must differ from other services within the model. The notion of a discrete "service," however, is not clear and may unduly restrict the waiver process.

4. "Consumer Expectations". Although consumer expectations are important to content owners in marketplace contexts, it is not appropriate to formulate as a regulatory factor for both waiver of Defined Business Model Encoding Rules and Challenge to Undefined Business Model encoding the "effect on reasonable and customary expectation of consumers with respect to home recording." Experience amply shows that such expectations in the age of the Internet are not a measure of content owners' rights and interests. A "consumer expectations" criterion collides with, and in this context replaces, copyright law principles and should not be incorporated in the Commission's regulatory scheme.

5. Standard for Resolving Complaints Concerning Encoding of Undefined Business Models under Paragraph 3. Although the proposed regulation is more liberal than the 5C license because it does not impose any encoding standard on the launch of new business models (while the 5C license requires a "most approximate" encoding), that may be illusory because complaints may be filed and resolved shortly after launch. Resolution of

complaints is to be subject to Commission determination of the "public interest." Covered Entities (e.g. cable operators) have the burden of proof; and the "public interest" determination is to take into account consumer benefits, differences from pre-2003 service, and "consumer expectations" (see above).

We propose retaining the feature of the proposal that does not impose any initial standard for encoding new business models, because that is more in keeping with the healthy evolution of television service. If a complaint is lodged that the encoding used is not that applicable to the most approximate Defined Business Model the Commission should make a determination limited to whether the encoding that is employed does follow the most approximate Defined Business Model, as per the 5C license. If the Commission determines that it does not, the encoding for that model would have to be modified going forward.

6. "Certain Practices Not Prohibited" Under Paragraph 5(a). The purpose and intent of 5(a) must be clarified. In its current form, Paragraph 5(a) at least literally seems designed to permit more flexible encoding, image constraint, and/or output control than otherwise permitted by this regulation during the period of operator control, and hence may be acceptable. Paragraph 5(a) needs an additional sentence stating that this provision deals only with the prohibitions contained in this regulation and does not permit copying (e.g., in the cable operator's supplied PVRs) or other activity contrary to licenses, other agreements, or law. Finally, the purpose and intent of Paragraph 5(b) must also be clarified so as to insure that content which is outputted or converted pursuant to this provision be done in a manner consistent with the DFAST license.

7. Impact on the 5C License. Although the MOU purports to support the 5C license, it in fact undoes years of negotiations between content owners and 5C. For instance, the MOU allows Covered Products to have High-Definition analog outputs that are not capable of image constraint (down-resolution). Allowing a 5C source device to have unconstrainable High-Definition analog outputs has the perhaps unintended consequence under the 5C

license that 5C sinks could no longer be required to impose image constraint on ANY content (not just broadcast content) received from such a source device. This is just another example of how adoption of the MOU, including Subpart W, would have hidden dangers that should be evaluated with content owners at the negotiating table.

8 Procedure. Certain service requirements that will likely lead to very lengthy service lists in contested Waiver and Undefined Business Model proceedings should be eliminated, leaving parties to obtain documents from the Commission files and website as in Notice and Comment proceedings.

August 29, 2003