

October 3, 2003

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
TW-A325  
445 Twelfth St., SW  
Washington, DC 20554

**RE: *Ex parte* Communication in MB Docket No. 02-230**

Public Knowledge and Consumers Union (Consumer Groups) hereby submit these *ex parte* comments to follow up on issues discussed with the Federal Communications Commission staff regarding the proceeding to adopt a broadcast flag (MB Docket 02-230). In accordance with Section 1.1206(b), 47 C.F.R. § 1.1206, this letter is being filed electronically with your office today.

**The Commission Has Time To Get it Right**

Jack Valenti, head of the Motion Picture Association of America, stated this week that problems his organization once asserted to the Commission were occurring now<sup>1</sup> (such as instantaneous downloading of television and movies over the Internet redistribution) for digital broadcast television content are in fact at least *three to four years away*.<sup>2</sup>

We believe that Mr. Valenti underestimates the time it will take for the America's infrastructure to support the increases in bandwidth that the MPAA predicts in its filings in this proceeding<sup>3</sup> and elsewhere, and that the argument of a threat posed by Internet redistribution of television flies in the face of evidence we have recently presented to the Commission.<sup>4</sup> Mr. Valenti is correct to underscore the fact that the Commission has the time, if it decides to proceed with a broadcast-flag regulation, to implement such a regulation in ways that minimize the harms to reasonable consumer expectations and legal use.

**Public Knowledge and Consumers Union Support  
IT Coalition's Bifurcated Approach**

For this reason, we are writing in support of the approach suggested by the Business Software Alliance and the Computer Systems Policy Project (together the "IT Coalition") in their October 2, 2003 *Ex Parte* Communication in this docket. The IT Coalition filing proposes that the Commission bifurcate this proceeding in ways that (a) allow the many unanswered questions

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<sup>1</sup> Reply Comments of Public Knowledge and Consumers Union, at 10-11, MB Docket 02-230, Feb. 19, 2003 (citing the Motion Picture Association of America, *et al.* Comments).

<sup>2</sup> Testimony of Jack Valenti, President, MPAA, Hearing of the Senate Governmental Affairs Permanent Subcommittee on Investigations, Sept. 30, 2003.

<sup>3</sup> MPAA *Ex Parte* Communication, MB Docket 02-230, Sept. 26, 2003 (citing the development of FAST internet protocol).

<sup>4</sup> Public Knowledge *Ex Parte* Communication, MB Docket 02-230, Sept. 24, 2003.

about cost allocation, efficiency and consumer impact to be answered by inter-industry<sup>5</sup> consensus,<sup>6</sup> and (b) do not pick as a preordained “winner” of Table A any single broadcast-flag-based protection scheme that has never been tested in a prototype of a consumer product. The IT Coalition’s proposed bifurcation would allow the Commission to set the terms of the general approach to broadcast protection, but also would enable stakeholders to develop a range of models and technologies to respond to the broadcast-flag bits in the unencrypted video broadcast stream. ***We particularly endorse the IT Coalition’s proposal that a broadcast-flag-scheme Rule not take effect before a minimum number of technologies are admitted to Table A, and not until the certification and decertification framework is significantly revised, ideally by inter-industry and consumer-group consensus.***

Should the Commission proceed, it should first adopt general rules implementing the “flagging” of HDTV broadcasts, and second issue a further notice of proposed rulemaking seeking comment on specific robustness and certification and decertification guidelines. Bifurcation of the proceeding will help the Commission develop broadcast flag copy protection that meets the Commission’s and the content industries’ stated goals, while minimizing the financial and nonfinancial costs on consumers and on IT and consumer-electronics manufacturers. A wrong step here could slow public adoption of digital television; a properly considered step could accelerate it.

### **Phillips Correctly Raises Jurisdiction Concerns**

Public Knowledge and Consumers Union support a bifurcated flag proceeding if the Commission proceeds, but we also reiterate our longstanding argument that the Commission has no jurisdiction to implement the proposed broadcast copy protection technology. Specifically, as we asserted in our Comments and Reply Comments, and as Phillips recently stated in their September 22, 2000 *Ex Parte* Presentation, the Commission does not have jurisdiction to enforce a broad technology mandate impacting electronic devices well outside the realm of digital television broadcasts.<sup>7</sup>

### **Conclusion**

Even if the Commission believes it has jurisdiction, it is clear from Mr. Valenti’s comments, as well as from our own filings, that the Commission also has the time to structure a more considered regulatory framework that balances other stakeholder interests, and that allows stakeholder groups, including industry sectors and consumer groups, to develop objective framework for protection for broadcast content that does not simply endorse some version of the studios’ proposal. ***As yet there has been no industry consensus about the broadcast-flag scheme proposed by the studios, and there has been no field testing of the model that the MPAA supports. No standards group has ever voted on the broadcast-flag scheme, much less***

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<sup>5</sup> Public Knowledge and Consumers Union believe that the Commission must ensure that consumer groups are participants in any discussion of these questions.

<sup>6</sup> There was no broadcast flag agreement through BPDG, nor was any vote taken on implementation of digital broadcast copy protection.

<sup>7</sup> Phillips Electronics North America, *Ex Parte* Presentation in MB Docket 02-230, Sept. 22, 2003.

*the particular implementation of it advocated by the studios.*<sup>8</sup> We strongly urge that the Commission should take the time, if it proceeds to adopt the broadcast-flag model, to get the critical implementation issues right.

We stand by our technological, regulatory, and jurisdictional criticisms of the broadcast-flag proposal advanced by the MPAA. We also argue here, as does the the IT Coalition, that the Commission should implement a broadcast flag Rule, if at all, only through a bifurcated proceeding with further notice and comment. The devil is in the details, and it is important to consumers and citizens that we get these details right. As we have pointed out in our filings, and as Mr. Valenti now admits, time permits the Commission to develop a more effective and balanced approach to broadcast digital content protection.

Respectfully Submitted,



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Senior Technology Counsel  
Public Knowledge



Chris Murray  
Legislative Counsel  
Consumers Union

cc: (by email or facsimile)  
Chairman Michael K. Powell  
Commissioner Kathleen Q. Abernathy  
Commissioner Michael J. Copps  
Commissioner Kevin J. Martin  
Commissioner Jonathan S. Adelstein  
Mr. Paul Gallant  
Mr. Matt Brill  
Mr. Jordan Goldstein  
Mr. Anthony Dale

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<sup>8</sup> As it happens, not even the Content Protection Technology Working Group (CPTWG) or its subgroup, the Broadcast Protection Discussion Group (BPDG) – neither of which is standards body – ever took a formal vote to adopt the broadcast-flag approach to content protection.

Ms. Johanna Mikes  
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Mr. Rick Chessen  
Ms. Amy Nathan  
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