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American Antitrust Institute

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., SW  
Washington DC 20554

October 21, 2003

Dear Chairman Powell:

**Subject: Digital Broadcast Copy Protection, MB Docket No. 02-230**

We are writing to urge the Commission to carefully consider the consumer effects, the anticompetitive impacts, and the extensive costs that a Broadcast Flag scheme will impose on a wide-range of consumer-electronics devices and personal computers. Despite our efforts to raise these questions about the Broadcast Flag approach—efforts that predate even the Commission’s decision to create a Broadcast Flag docket—they remain unanswered to this day, except by unsupported generalizations that the scheme will cost “pennies.”<sup>1</sup>

Because the proponents of the Broadcast Flag scheme have yet to address these issues—issues that may not only affect consumer pocketbooks but also may slow or even halt the transition to digital television—we believe the Commission does not yet have the complete record necessary to decide whether and how to implement this scheme. Below we suggest potential remedies to these deficiencies.

Here are three of the major questions that remain unanswered in the existing record:

- **After the flag is adopted, will consumers have the same reasonable and customary uses with their digital television content that they enjoy in today’s analog world?** The proposal offered by the Motion Picture Association of America makes clear that the Flag scheme will tether user-recorded content in new ways. It will not allow consumers to watch that content on machines other than new, compliant devices (but it is unclear if it will permit recordings to be shared within a user’s own “personal digital network”). Not only will current DVD players not be able to play the recording, but if someday more than one encryption technology is approved, recordings made with one technology

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<sup>1</sup> See, e.g., Letter of Jon A. Baumgarten to Rick Chessen, Oct. 8, 2003, in this proceeding.

probably will not play on players licensed to decrypt the other, absent an interoperability requirement from the FCC. Let's be clear: while the MPAA has offered assurances that users will have the same flexibility they currently enjoy, they have demonstrated no technology which shows this is indeed possible.

- **If the Flag scheme does not effectively prohibit internet transmission of recorded programming doesn't it follow that the scheme may fail to prevent the problem at which it aims?** For example, if users can play flag-protected content on any compliant device, it may be possible to transmit the encrypted data recorded on a DVD for a recipient to use on a remote compliant device. Or it may be possible to post a complete "compliant" DVD image on a website. Certainly, an individual could record on broadcast content from an analog output, and then simply distribute that content to another user over the internet. So much for defeating Internet copyright infringement.
- **Because the Flag is ineffective without mending the "analog hole," then is it perhaps not worth its costs? Shouldn't the Commission consider the costs and benefits of closing the analog hole in the context of this proceeding rather than some future proceeding.** As Chairman McCain noted in his letter to the Commission on Oct. 16, the Broadcast Flag is an incomplete, and therefore ineffective solution, absent a solution to the "analog hole." We agree that we cannot let the perfect be the enemy of the good, but lack of any analog-hole solution means that the broadcast flag scheme doesn't even qualify as "good." Nor can such a non-solution be worth the costs it would impose broadly on the consumer electronics and computer marketplaces.

Those who wish to distribute unauthorized copies of HDTV programming on the Internet are undoubtedly aware of the how easy it is to use the analog output on a TV to "redigitize" HDTV programming.

While some may claim that this extra step of redigitizing analog content is a disincentive that will "keep honest people honest" and provide a measure of protection, this is also misleading. Before one could redistribute high-definition digital TV on today's or even tomorrow's Internet in any reasonable amount of time, the resolution would first need to be dramatically reduced. Using an analog output and reducing resolution is the same number of steps as using a digital output and reducing resolution—and could even be the same equipment one would use to capture a digital signal. **In other words, it will be no harder for a would-be infringer to redistribute content on the Internet with the Flag in place than it would be without the Flag.**

A solution for the analog hole remedy is absolutely necessary for the Flag scheme to achieve its purported goals. But mending the analog hole may slow the DTV transition.

Here's why: blocking or inhibiting equipment with analog interfaces will likely force all consumers to buy all new components for their home entertainment systems. Essentially, this closes off the most inexpensive alternative for consumers to receive

digital TV signals—buying DTV tuner box that can be hooked up to existing analog TV sets and other equipment. Such a DTV converter box would have to have analog interfaces to connect with existing TV receivers—block the analog hole, and you destroy the converter-box path to DTV.

The MPAA proposal under consideration by the Commission fails to provide a process for approving alternatives to the Flag in the Order with a set of functional objectives that clearly delineate the road to approval. The practical result of this failure is that the proposal's process for approving other protection technologies is simply fig leaf covering a Commission decision that will lock in the Flag scheme based on a particular set of vendors and technologies. By approving the flag without simultaneously showing a clear, credible way for potential flag substitutes, the Commission will create path-dependency—ensuring not only that the next several product cycles will be Flag-based only, but causing yet another legacy problem should it become apparent that the Flag is an inferior technology. Expensive for consumers today, the flag scheme becomes expensive all over again for consumers tomorrow.

Furthermore, in the absence of objective criteria for the approval of substitute technologies (and rules that mandate interoperability between all approved technologies), consumers will be swiftly “locked-in” to devices that are compliant with only one technology. This is likely to cause the market to tip early on to the first mover, whatever its limitations and flaws are, to the detriment of competition and innovation. It may also give a leg-up to one particular DVD recording format favored by the Broadcast Flag proponents and a competitive disadvantage to competing formats. Competing consumer technologies should win because the consumer market favors them, not as the unintended consequence of governmental action. The agency should be cautious before proceeding with any scheme that gives advantages to any private party or group of private parties that own a particular protection technology.

Here we offer several ways to minimize the consumer harms of the Broadcast Flag proposal. We hope they will not be received as recognition that such a proposal is necessary or wise, but rather as our attempt to address the debate where it stands today. Any digital broadcast content protection scheme promoted by the Commission should offer the following:

1. Consumer guarantees ensuring that users will enjoy the same reasonable and flexible fair use they enjoy today, and an assurance that this scheme will not merely ossify current consumer uses, but instead will preserve the same dynamism seen in today's consumer electronics marketplace. It is especially important that the Commission guarantee that the Broadcast Flag will not tether content to the device a user recorded it on, or tether such content to one's home network in a way that disallows, e.g. a user's ability to take that content to a relative's or friend's house.
2. Objective criteria—spelled out with specificity when the order is released—for how alternatives to the Flag (and alternative technologies within the Flag scheme) will be approved and what the specific functional objectives are that they must meet.

3. A guarantee that consumers who do not want to buy new television sets (once the digital migration occurs) will not have to do so. In other words, the FCC should guarantee that were the agency to mend the analog hole, consumers would have an inexpensive option for making the switch to digital (e.g. a converter box).

The Broadcast Flag scheme is not a case of a crafty camel poking its nose into the regulatory tent. The camel is coming in from tip to tail—from the Broadcast Flag to the analog hole—and sound public policy is already being pushed out. It is disturbing to see the Commission fast-track a policy proposal that will likely have harmful effects on consumers, manufacturers, and on the DTV transition itself. We believe a better approach is for the Commission to take the time to arrive at a complete solution for broadcast protection, otherwise consumers will pay twice for the Broadcast Flag once a more comprehensive solution is deemed necessary.

We stand ready to help the Commission take the better path to better DTV policy; we are as committed as the Commission itself is to getting the DTV transition right.

Respectfully submitted,



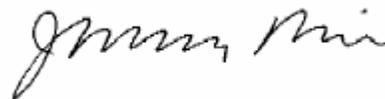
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