

**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 PETITION FOR RECONSIDERATION OF
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION,
THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
THE SONGWRITERS GUILD OF AMERICA
AND BROADCAST MUSIC, INC.**

December 29, 2003

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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") (hereinafter "Petitioners") hereby request, pursuant to 47 C.F.R. § 1.429, that the Commission reconsider certain aspects of its Second Report and Order and Second Further Notice of Proposed Rulemaking ("Second R&O and FNPRM"), FCC 03-225 (Adopted: Sept. 10, 2003; Released, Oct. 9, 2003) in the above-captioned proceeding that arbitrarily disadvantage owners of copyright in audio sound tracks (music). The Second R&O and FNPRM relies on purported facts not made known to Petitioners and makes material errors that must be corrected to avoid serious harm to the music industry.

I. Introduction

Petitioners are organizations that represent the interests of copyright holders with respect to musical works. Petitioners' constituents include songwriters, composers, scorers of motion picture and television program soundtracks, and publishers: people who make their living from legitimate modes of distribution of music, one of which is the synchronization of pre-existing musical works to video to produce what the regulations adopted by the Commission in this proceeding have defined as "Commercial Audiovisual Works."¹

The Second R&O and FNPRM issued in this proceeding arbitrarily and erroneously fails to protect the audio channel of digital television programming while simultaneously

¹ 47 C.F.R. § 1902(b).

prohibiting Petitioners from employing copy protection measures to protect their property that is distributed through the audio channel of digital television programming. First, this is inconsistent with copyright law. Copyright law clearly states that “the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; . . .” 17 U.S.C. §106. The Commission contends that it has no intention of affecting rights, defenses, or remedies under copyright law. Unfortunately, the effect of its rule is the opposite. The Commission has limited the statutory rights granted under copyright law -- whether it chooses to acknowledge that it has done so or not -- but lacks the jurisdiction to take such an action. Second, the Commission has done this in a way that leads to an irrational result: the audio channel of an audiovisual work, which has suffered serious piracy problems, receives a lower standard of protection than the video channel of an audiovisual work, for which no independent market exists. (It is difficult to imagine people wanting to watch music videos without the music, while music without the video is obviously popular.) The Commission has created an arbitrary discrepancy in the protection that the Second R&O and FNPRM confers on the video signal and the lack of protection applicable to the audio channel when it is stripped from the audiovisual work. Third, the Commission has relied upon materially erroneous information provided to it by the Motion Picture Association of America (MPAA) in an *ex parte* letter that Petitioners had no opportunity to rebut.

Comparison of the Commission’s Second R&O and FNPRM in this proceeding with the more recently issued First Report and Order and Further Notice of Proposed Rulemaking in the broadcast flag proceeding highlights the error of the Commission’s actions. The Commission in that order made the same kind of conclusory statements regarding copyright law, and a member of the Commission noted his concern that the Broadcast Flag R&O

“potentially supersedes the balance of copyright law.”² Moreover, the treatment of Petitioners’ rights in this proceeding is incompatible with the Commission’s recognition, in the broadcast flag proceeding, of the piracy problems suffered by the music industry and the measures that the Commission adopted there to protect the motion picture industry from precisely the same ills.³

The Commission’s commentary appears to offer the possibility that the specific rules adopted in the Second R&O and FNPRM are flexible enough to change in the future. The Commission’s habitual aim that any and all legacy consumer products remain compatible, however, prove that Petitioners’ concerns about the encoding rules becoming a permanent cap are well-founded. This is why Petitioners must insist that soundtrack protection be incorporated into this scheme now: otherwise the new digital television products that the Commission wants to see marketed next year will quickly become the “legacy devices” that have created “consumer expectations” that under the Commission’s rubric will preclude protection in the future of musical works distributed through the audio channel.⁴ There is little doubt that if the Petitioners are advised that the Commission will revisit this issue later, it will be the cable TV operators and the consumer electronics industry, whose rules are now being ratified by the Commission, who will cry out for legacy device compatibility and invoke consumer expectations, even when fresh facts can be expected to show continued, if not

² In the Matter of Digital Broadcast Content Protection, *Report and Order and Further Notice of Proposed Rulemaking*, MB Docket 02-230, FCC 03-273 (Nov. 4, 2003) (“Broadcast Flag R&O”) (Statement of Commissioner Adelstein, approving in part, dissenting in part).

³ Broadcast Flag R&O at ¶8 (“We conclude that by taking preventative action today, we can forestall the development of a problem in the future similar to that currently being experienced by the music industry.”)

⁴ The issue is exacerbated by the architecture of the proposal: it is the DFAST license that prevents personal computers from being decoding devices, but DFAST is an agreement between private parties. Thus, the Commission has put private parties in the position of legislating should they decide to amend the agreement to include personal computers. See DFAST Robustness Rules, Exhibit C, paragraph 3(c)(iii).

worsened, rampant piracy of music extracted from the audio channel of digital TV programming delivered over cable television.⁵

The Commission in this proceeding adopted regulations that in substance are virtually identical to those proposed by the cable and consumer electronics industries.⁶ These are rules that were created without any opportunity for the Petitioners to participate. The Commission has, despite its protestations otherwise, actively curtailed Petitioners' ability under copyright law to protect their own interests while treating other copyright interests more favorably. Moreover, the Commission relied on a last-minute *ex parte* filing which Petitioners had no opportunity to rebut in making a crucial factual determination. Accordingly, as described below, Petitioners request that the Commission reconsider parts of the Second R&O and FNPRM in order to correct, at least in part, its erroneous position with respect to the rights of owners of copyright in musical works to protect their intellectual property under the Copyright Act.

Finally, Petitioners note that nothing in this Petition should be considered as waiving in any way Petitioners' rights to seek any other legal recourse with respect to the rules promulgated in Second R&O and FNPRM.

⁵ Piracy of music video soundtracks can be expected to greatly impact the sale of singles over the Internet by businesses such as I-Tunes and competitors that are rapidly springing up. The widespread popularity of legitimate music download sites that sell songs "a la carte" will be especially vulnerable to damage by piracy of songs pilfered from music video channels. This means that under the Commission's approach, a songwriter may have to choose between promotion of the song using music video, which will likely be pirated through the availability of the digital audio soundtrack in the clear, or forgoing this important music promotion mechanism. Because songs are less likely to be sold as albums in the future, the result will be fewer legitimate sales of artists' works.

⁶ In fact, the regulations were presented to the Commission as a package with the threat that should they be altered, the cable television and consumer electronics industries would abandon their agreement to deploy digital television. Cable/CE letter to Michael K. Powell dated December 19, 2002. This theme was repeated in the pleadings filed in this docket. *E.g.*, Comments of the National Cable & Telecommunications Association at pages 14-22 (March 28, 2003). As the Commission stated at paragraph 47 of its R&O and Second NPRM, "Absent adoption of these encoding rules, the cable and consumer electronics industries have indicated that the compromise agreement reached in the MOU will be upset and their efforts to produce unidirectional digital cable products will falter." Such threats by the CE and cable TV industry do not, however, justify erroneous and arbitrary rules that exceed the Commission's jurisdiction. (Petitioners recognize that the procedural provisions for undefined business models have been somewhat revised.)

II. Standard of Review¹

As the Commission has stated in the past, reconsideration is appropriate when the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.⁷ Moreover, §1.429(b) of the Commission's regulations sets forth the following standards for petitions for reconsideration:

(b) A petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only under the following circumstances:

(1) The facts relied on related to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission;

(2) The facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or

(3) The Commission determines that consideration of the facts relied on is required in the public interest.

⁷ E.g., In re Petition for Reconsideration by National Association of Broadcasters of Memorandum Opinion and Order Regarding Section 312(a)(7) of the Communications Act, *Memorandum Opinion and Order* at ¶4, FCC No. 03-279 (Released November 12, 2003).

III. Discussion

A. The Commission's Rules in this Docket, Relying on an Erroneous Ex Parte Filing, Establish an Arbitrary Disparity between Treatment of Copyrights in the Video Channel and those in the Audio Channel, Without Any Factual or Legal Basis.

Petitioners object to the arbitrary treatment in this proceeding of the musical works that make up the audio portion of the Commercial Audiovisual Works delivered over digital cable television, in comparison to the regulatory protection mandated for the video channel of the same Commercial Audiovisual Works. This inferior treatment will threaten legitimate Internet music delivery services and other legally authorized modes of music distribution well outside the “ancillary” jurisdiction of the Commission. The DFAST encryption technology license, stated to be “at the core” of the entire scheme,⁸ permits digital audio data to be output “in the clear” (*i.e.*, without any copyright protection) while at the same time imposing detailed requirements for copy protection of the analog video outputs.⁹ Nothing in the record of this proceeding justifies the arbitrary distinction between audiovisual works and the musical tracks making up the soundtrack, which, in accordance with the DFAST license and the Commission’s rules, are unprotected when they are separated from the audiovisual works.

Indeed, the only statement in support of such disparate treatment is a letter filed by the Motion Picture Association of America (MPAA) in response to an inquiry made by the Commission staff at an *ex parte* meeting at which the MPAA and the Commission discussed the Petitioners’ position in this and the broadcast flag proceedings. In that letter, the MPAA states that “the DFAST license proposed by cable and consumer electronics companies in the Plug & Play proceeding [and other negotiated agreements] all allow the output of unprotected

⁸ Cable/CE letter to Michael K. Powell dated December 19, 2002, at page 2.

⁹ See §76.1903 of the Encoding Rules. Compare Section 2 of the Robustness Rules in the DFAST license, relating to audio, with Section 2.2.1 of the license’s Compliance Rules.

CD-quality audio over digital outputs.”¹⁰ The MPAA then attempts to leverage this into a justification of the same inequitable treatment of audio in the broadcast flag proceeding by saying that it is necessary to protect “a legacy of millions of devices in the hands of consumers that receive audio content over unprotected digital connections.” The reference in the MPAA letter to this proceeding, as well as statements by the Commissioners regarding the related nature of the two proceedings, make clear that statements by the MPAA in the broadcast flag proceeding were considered by the Commission when it wrote the Second Report and FNPRM.¹¹

In fact, the MPAA’s statement is factually incorrect in two critical respects. First, the MPAA states that CD quality digital audio is “a certain limited type of unprotected digital output to transmit audio content at compact-disc quality in order to permit the continued functionality of existing legacy devices.” CD quality audio data is not “limited”. It far surpasses the digital audio quality necessary to create MP3 files that are routinely distributed across the Internet, especially by illegal peer-to-peer services that infringe the copyrights of the Petitioners and others.¹²

Second, the MPAA’s professed concern about legacy digital audio equipment in the home is pure rhetoric, in the worst sense of the word. According to the Consumer Electronics

¹⁰ Letter dated September 29, 2003 from Fritz E. Attaway, MPAA, to Rick Chessen, Associate Bureau Chief, Media Bureau. The other negotiated agreements referred to by MPAA are private agreements between the movie studios and the consumer electronics industry regarding copyright protection for movie content. Petitioners are not party to these agreements.

¹¹ Commissioner Martin indicated in his separate statement in this proceeding his disappointment that the Commission was not able to resolve the broadcast flag issues at the same time. Moreover, the Commission indicated in the Broadcast Flag R&O, at ¶2, that it had “already explored this dynamic [between content protection and consumers’ ability to enjoy programming when and where they choose] in the cable and multichannel video programming distribution (“MVPS”) context in our recent *Second Report and Order and Second Further Notice of Proposed Rulemaking* relating to digital cable compatibility.”

¹² “CD quality” means that the information present encompasses the entire hearing acuity of the human ear. The 44.1 Khz CD sampling rate is set by the Nyquist theorem to be twice the highest audible frequency (about 22 Khz) and the CD sampling bit width (16 bits per channel) is set to reduce the digital aliasing noise to below the human threshold of hearing (about -90 dB).

Association's publicly available market data, about 8,823,000 "Home Theater in a Box" audio systems were sold in the U.S. from 1997 through 2002.¹³ The reported average price paid for these devices was only \$302.¹⁴ Thus, the cumulative value of money paid for these devices during this period was about \$2.7 billion.¹⁵ In addition, the high-end "Rack Mount Audio" equipment market is very small and rapidly declining: the total cumulative units sold during the same period was merely 1,399,000 and totaled only \$787 million in cumulative revenue.¹⁶ It is important to note that a majority, if not all, of these devices also take analog input. In contrast to legacy audio equipment, the same report states that the number of Digital Televisions sold from 1997 through 2002 was 4,762,000 units. Assuming that all Digital Televisions sold in 2002 are equipped so that they are already capable of receiving encrypted digital video input, then the installed base of Digital Televisions without decryption capability is at least 2,229,000 units.¹⁷ The reported average price paid for these televisions from 1997 through 2001 was \$2151. Therefore, the sunk cost in Digital Televisions without digital decryption capability is at least \$4.8 billion.¹⁸ In other words, the sunk costs of the existing legacy Digital Televisions that will only be usable with video analog inputs is almost twice as

¹³ Electronic Market Data Book 2003, Library of Congress Card Catalog Number 72-627504, ISBN 1-58887-033. Prepared by eBrain Market Research www.eBrain.com, citing data from the Consumer Electronics Association. It is important to note that this category includes many systems that have no digital capability at all.

¹⁴ This is calculated by taking the total dollar sales reported and dividing by the number of reported units sold.

¹⁵ Further, it is not clear whether this reported data includes high-end digital audio equipment.

¹⁶ *Supra* note 13. In the same report, the category of "Rack Mount Audio" equipment (which typically is the expensive high end equipment). But in any case, that category represented only \$787 Million in cumulative sales during the same period. This number is so small because of the reported steep decline in the popularity of high-end audio equipment. The CEA data indicates that Rack Mount Audio unit sales in 2002 were only 6% of the unit sales in 1997.

¹⁷ . RCA reported that it introduced a DVI/HDCP equipped digital television at the 2002 Consumer Electronics Association trade show. See <http://www.rca.com/content/viewdetail/1,2811,EI700224-CI258,00.html> . The number of units sold in 2002 is reported to be 2,536,000.

¹⁸ This number is probably is a low estimate because the assumption that all digital televisions sold in 2002 equipped to perform digital decryption is quite generous: it has been reported that the number of DVI/HDCP equipped HDTV's sold is "minimal." http://www.hdtvpub.com/terms.cfm/category_D/.

large as the sunk costs of the Home Theater in a Box units that will also be usable with analog audio inputs.¹⁹ Further, the value of expensive legacy high-end digital audio equipment is tiny in comparison to either market. So the arbitrary distinction in treatment between the audio channel and the digital video signal it accompanies is simply not justifiable by concern about "legacy" digital audio equipment in "the hands of millions": not only is there a substantially larger problem with regard to legacy digital televisions, but the "millions" of digitally equipped high-end audio systems simply do not exist. Unfortunately, the Commission has chosen to accept the MPAA's factually erroneous statements without question. As such, the Commission's determination on this point is in error and must be reconsidered.

The Commission's reliance on the MPAA's letter has had fatal consequences in this proceeding. The letter itself, which was dated September 29, 2003, was apparently delivered to the Commission only a short time before the Second R&O and FNPRM was released on October 9, 2003. (The Commission's web site indicates that it received the letter on September 29th.) Although clearly relevant to both the proceeding at bar and the broadcast flag proceeding, the letter's caption referenced only the broadcast flag proceeding and it was posted on the FCC's web site only in that proceeding.²⁰ It was posted as having been filed not on behalf of the MPAA, but an MPAA executive (Mr. Attaway) himself. In his letter Mr. Attaway specifically cited and purported to rebut NMPA's Reply Comments in the broadcast flag proceeding. Yet he failed to provide a copy of the letter to the NMPA, which would have been consistent with customary practice for such a document filed outside of the normal comment period and addressed to the position of a specific, named party to the proceedings. Nor did the FCC contact NMPA to ask for a response to the MPAA's letter. The letter

¹⁹ Further disparity is apparent from the fact that to use the analog video inputs, the owner of a legacy digital television must purchase a decoder box in compliance with these regulations, while the owner of the Home Theater in a Box device does not.

²⁰ The relevance of MPAA's letter is also demonstrated by the fact that the record of both proceedings is devoid of anything else that might support the Commission's decision with regard to copyrights in the audio channel.

contains new and erroneous information in the form of allegations of fact by the MPAA, of which the NMPA did not know and to which NMPA did not have the opportunity to respond and on which the FCC, regrettably, relied. Accordingly, Petitioners' request for reconsideration should be granted pursuant to §1.429(b) of the Commission's regulations.

B. The Commission's Rules Arbitrarily and Erroneously Cap Copyright Protection of the Audio Channel, Contradicting its Actions in the Broadcast Flag Proceeding.

In the Broadcast Flag R&O, the Commission employed a "baseline" approach by requiring adoption of one particular anti-piracy measure but not prohibiting others.²¹ Petitioners remain concerned that this "baseline" does not prevent stripping out of music in the clear and that, due to the realities of the consumer electronics industry, it will become difficult if not impossible to improve upon it in the future. In the broadcast flag proceeding, however, the Commission at least recognizes the propriety of adopting a minimum, or baseline, level of protection. In contrast, in the Second R&O and FNPRM, the Commission adopted a regulatory prohibition on any additional copyright protection on works, including Petitioners', while at the same time forgoing any protection for copyrights in the audio channel when separate from the audiovisual work. That such a limitation is material error is confirmed by the Commission's alternative approach in the Broadcast Flag R&O.

In the Broadcast Flag R&O, the Commission adopted measures to prevent piracy of works transmitted by digital broadcast TV. The Commission there asserted as follows:

We conclude that by taking preventative action today, we can forestall the development of a problem in the future similar to that currently being experienced by the music industry.²²

²¹ "Given the circumstances and the potential harm to creators, it is appropriate to offer some baseline protection." Broadcast Flag R&O, Statement of Commissioner Adelstein, approving in part, dissenting in part.

²² Broadcast Flag R&O at ¶8.

The Commission thus recognized the impact that widespread illicit distribution of music files on the Internet has had on the music industry. In light of this, it is irrational in the Second R&O and FNPRM for the Commission to adopt rules that will only exacerbate this existing problem. The rules adopted in the Second R&O and FNPRM will facilitate flouting of copyright laws with respect to the soundtrack of Commercial Audiovisual Works, including the music, because they prohibit copyright protection for the soundtrack beyond that allowed by the new rules. The Commission disingenuously states that “we do not believe that these proposed requirements necessarily preclude the use of other content protection measures”,²³ but that is precisely what its regulations do. As the Commission states:

A key component of the MOU proposed to the Commission is a set of encoding rules that would set caps on levels of copy protection applicable to content distributed by MVPDs.²⁴

The Commission’s Broadcast Flag R&O contains the same breezy assurances that copyright law is unaffected as does the Second R&O and FNPRM in this proceeding. Out of concern that the rights of consumers under copyright law might nevertheless be adversely affected, Commissioner Adelstein warned, with respect to the broadcast flag:

While the item professes not to affect copyright law, by mandating a technological protection regime that can be used to restrict the flow of content that is in the public domain, or is not subject to copyright protection for other reasons, I am not convinced that we have adhered to our well-meaning pronouncements.²⁵

All that Petitioners ask is that the Commission also be concerned for the effect that its rulemakings have on the balance of copyright law when that law unambiguously protects rights in musical creations.

²³ Second R&O and FNPRM at ¶44.

²⁴ Second R&O and FNPRM at ¶11.

²⁵ Broadcast Flag R&O, Statement of Commissioner Adelstein, approving in part, dissenting in part.

The cap set by the Commission in this proceeding is both contrary to copyright law and inconsistent with the justification for the Commission's rules in the Broadcast Flag R&O. It is illogical that when both proceedings are aimed at stemming copyright infringement of digitally delivered television programming, the result in one is to require a standard of minimum protection of the signal while the other imposes a maximum permissible level of protection of the signal. Petitioners are asking the Commission to reconsider the Second R&O and FNPRM in this proceeding so that its regulations appropriately balance the interests of those who are affected by the rules but who have not had the opportunity to participate in the private transactions that led to this proceeding in the first place.

C. *The Commission Should Adopt Certain Specific Additions to the Encoding Rules to Prevent Piracy of the Digital Audio Channel while Maintaining Digital Audio Device Compatibility.*

Despite the concerns expressed by Petitioners in their prior filings, the Commission has adopted the substantive provisions of the Encoding Rules proposed by the cable television and consumer electronics industries essentially verbatim. In the broadcast flag proceeding, the Commission relies on Viacom's statement that "if first run DTV broadcast content were freely available over the Internet, then secondary, international and webcast markets could be threatened."²⁶ Viacom's fear is well placed and applies equally to the valuable soundtracks that accompany cable television: freely available soundtrack files would result in the same threat to nascent legitimate music downloading websites that comply with copyright law. It is arbitrary for the Commission to recognize this threat in one proceeding (digital broadcast television) and

²⁶ Broadcast Flag R&O at ¶6.

discount it in the next (here, with regard to music) when the fundamental technical issue is the same: copying and redistribution of digitally delivered audiovisual television content. Therefore, Petitioners propose a few specific changes that will mitigate their concerns with the Encoding Rules and ask that the Commission adopt these changes.

Section 76.1903 Interfaces should be revised to add the following language to the end of the paragraph, which should be designated subsection (a):

This paragraph shall not apply to embedded copyright protection data or information present in and relevant to the sound recordings or musical works comprising the audio soundtrack of such Commercial Audiovisual Content.

In addition, the following subsection (b) should be added to §76.1903 (as revised above):

(b) A Covered Product shall not make a copy of, playback or transmit in digital form any audio channel comprising Commercial Audiovisual Content except: (i) copies or transmissions made in compliance with the applicable Defined Business Model where the copy or transmission of the audio channel is an integral part of an Encoded copy or Encoded transmission or (ii) playback from a Covered Product made in synchrony with the performance of the Commercial Audiovisual Content it has been Encoded with, as permitted by the applicable Defined Business Model.

In §76.1904, the “and” at the end of subsection (b)(1)(i) should be moved to the end of subsection (b)(1)(ii), and the following new subsection (b)(1)(iii) should be added:

(iii) to prevent or limit copying, playback or transmission of the audio channel of Commercial Audiovisual Content not otherwise permitted by §76.1903.

Finally, the following statement should be added to the Commission’s regulations under §76.901:

(d) Compliance with any standards set by the Commission or implemented as a consequence of these rules shall not constitute a defense to any claim brought under copyright law.

As Petitioners explain below, these revisions would substantially alleviate the legitimate concerns that Petitioners have about piracy of their copyrighted material through the unprotected audio channel of digital television delivered over cable. They will also facilitate the production of content for digital cable TV, thus furthering the goals enunciated by the Commission.

First, Petitioners suggest that the Commission put into the regulations provisions that fortify its belief that the cap on copyright protection does not apply to non-television content²⁷ by adopting language that clearly exempts copyright protection signals that are applied to soundtracks. The Petitioners have already pointed out that there is a substantial market for sound recordings embodying the soundtracks of films and television shows, which is in addition to the market for sound recordings promoted through both music video channels and music-only channels offered by cable television services. The soundtrack of the “Commercial Audiovisual Content” therefore has substantial value when isolated from the visual signal. Many sound recordings are mastered and digital copyright protections signals embedded therein prior to their synchronization with video. The language proposed by Petitioners makes it possible for copyright owners to maintain persistent protection of their soundtracks without concern that distribution over cable television would require either re-mastering or other re-engineering of the sound recording. In addition, the exemption would be consistent with the Commission’s stated intent that the digital cable television copy protection regulations apply to

²⁷ Second R&O and FNPRM at ¶44.

audiovisual content delivered by cable television operators. Consumer expectations with regard to audiovisual receiving and recording equipment are maintained because the language proposed does not limit the permitted uses under the approved business models.

Further, the sweeping language in §76.1903 as adopted by the Commission in the Second R&O and FNPRM raises concerns that cable television operators and consumer electronic device manufacturers may be subject to potential liability under the Digital Millennium Copyright Act (DMCA) if they comply with the proposed regulation. Section 76.1903 broadly prohibits attaching or embedding data or information with Commercial Audiovisual Content, or otherwise applying to, associating with, or allowing such data to persist in or remain associated with such content so as to prevent its output through any authorized or permitted analog or digital output.²⁸ Compliance with the regulation would require either removal of any copy protection signal embedded in a soundtrack or digital cable television devices that ignore the embedded signal. Petitioners raise the question whether a device or service that ignores or removes a copyright protection mechanism embedded in the soundtrack in order to comply with the regulations promulgated in this proceeding violates the DMCA because it occurs without the consent of the copyright owner.²⁹ The net result would be a licensing nightmare: content with these signals embedded within them would have to be re-engineered and re-licensed. That re-engineering and re-licensing process would produce

²⁸ “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 regulation governing such Covered Product.”

²⁹ See 17 U.S.C. §1201(a)(3)(A), where the statute defines “to circumvent a technological measure” to include to “remove, deactivate or impair a technological measure, without authority of the copyright owner.”

substantial delays that could impede rapid adoption of digital cable TV. Inclusion by the Commission of the Copyright Office, as originally urged by Petitioners, would have helped avoid legal conflicts like this; however, adoption of Petitioners' proposed revisions to the regulations can ameliorate their impact.

Second, Petitioners suggest adding language to §76.1903 that prohibits the conversion of the soundtrack into a digital audio file that can be further distributed by the digital cable TV device. This language protects consumer expectations, because it permits the soundtrack to be recorded when it is embedded and protected together with the visual signal. Therefore, consumers who record audiovisual programming will still be able to make and play back such recordings within the limitations set by the approved business models. While permitting such uses of the audiovisual work delivered as a cable television signal, the additional suggested language prohibits the conversion of valuable soundtracks into digital audio files (such as MP3s) that can be illicitly distributed – an aspect of digital cable television distribution that the Commission has heretofore ignored. From an engineering standpoint, the proposed regulations do not prevent use of legacy devices that do not record the digital audio channel. Thus, existing Dolby Digital receiver/amplifiers may still operate. This addition is consistent with the Commission's intent not to interfere with the value of copyrights outside of digital TV by ensuring that the Commission's actions and any consumer product designs that rely on the digital television copy protection regulations do not unfairly impact existing Internet delivery services that provide digital sound recordings. It would be arbitrary and capricious for the

Commission to sacrifice its goal of increased content delivery by means of the Internet³⁰ in order to promote the adoption of digital television, and the Commission should take the opportunity upon reconsideration to correct this material error.

In addition, because the Commission has effectively approved the terms of the DFAST license – a private agreement to which Petitioners are not party -- it has therefore approved the digital audio output at CD quality without any copy protection at all.³¹ Although the Commission asserts that its discussion of the DFAST license is “not intended to reflect a review or an approval of its terms,”³² in reality it has effectively approved it.³³ It is irrational to contend that the video signal, but not the soundtrack, should be afforded the protection of downstream controls when the soundtrack has its own value independent of the television industry. Adoption of Petitioners’ language would make clear that DCTV devices that provide digital audio outputs will be used to drive home theater sound amplification equipment, rather than serving as a source of illicit digital music files for transmission over the Internet. Petitioners believe that the Commission must adopt this as a regulation because the DFAST license is a private agreement to which Petitioners were neither invited to join nor party to. As such, only the parties to the DFAST agreement are in the position of deciding whether to amend it. By establishing a boundary in its regulations, the Commission will ensure that the

³⁰ See <http://www.fcc.gov/broadband/> (the Commission’s stated objective is to “provide consumers integrated access to voice, high-speed data, video-on-demand, and interactive delivery services”).

³¹ See Section 2 of the Robustness Rules in the DFAST license.

³² Second R&O and FNPRM at ¶75.

³³ Petitioners acknowledge that the Second FNPRM will address procedural issues regarding changes to the DFAST license, but believe that since the license will be used immediately, it should immediately be fair.

effect of changes in the DFAST license compliance rules will be limited to television programming.

Incorporation of this additional language is also consistent with the Commission's professed intent not to impact the "rights and remedies" afforded copyright owners.³⁴ In that vein, the Petitioners raise the question whether a device that permits the recording of the audio channel in isolation and then outputs the audio alone in digital form, without any downstream copyright protection,³⁵ meets the requirements of the Audio Home Recording Act (AHRA).³⁶ If these devices are subject to the AHRA, then the digital audio recording capability must include the equivalent of the Serial Copy Management System. Furthermore, manufacture of the devices would result in royalties payable to copyright owners as set forth in the Copyright Act.³⁷

The additional language proposed by Petitioners for §76.1904 maintains consistency with the additional language proposed for §76.1903.

Finally, the Second R&O and FNPRM and the separate opinions of the Commissioners repeatedly iterate that the order is not intended to affect rights of copyright holders and consumers. These statements fail to consider an important aspect of defenses that may be raised in actions under the copyright law. In particular, Petitioners are concerned that a defendant in an infringement case may argue that compliance with the Commission's

³⁴ Second R&O and FNPRM at ¶9.

³⁵ Such output is permitted by the DFAST Robustness Rules, Section 2.

³⁶ 17 U.S.C. §1001(4)(B)(ii).

³⁷ 17 U.S.C. §§1002, 1003.

regulations absolves it of liability in a copyright case. The issue would arise in the following scenario. Assume that, for example, an equipment manufacturer is sued for contributory infringement in a case in which Petitioners' intellectual property is being pirated. A defense of compliance with some agency's (not necessarily the Commission's) regulations could be found by a court to preexist the Second R&O and FNPRM. In that case, the Commission's statements that it is not changing any defenses available under copyright law might be construed by the court to mean that the Commission meant for compliance with the rules it has promulgated to constitute a defense to an infringement action (*i.e.*, that the Commission was leaving that defense available for application to the Commission's regulations in this docket). In other words, the Commission has not changed defenses available under copyright law, because it has left in place a defense that actions complying with government regulations cannot constitute copyright infringement. The Commission has, however, provided a new basis for asserting that defense in a copyright infringement action, because it has created new regulations. Therefore, Petitioners ask that the Commission add the proposed statement regarding defenses to copyright actions.³⁸

³⁸ The situation posited is analogous to that addressed by 17 USC §108(f)(2). This provision says that use of a photocopy machine by a library patron where the library has posted the required copyright notice on the wall by the machine does not prevent a finding of infringement if the overall use does not meet the standard of fair use. Compliance with the notice formalities by a library with a photocopy machine does not provide a blanket exemption for all uses of the machine. Similarly, compliance with the requirements of the Commission's regulations relating to copyright controls should not provide an exemption from a finding of infringement by the user or contributory infringement by manufacturer/distributor.

IV. Conclusion

NMPA, ASCAP, SGA and BMI request that the Commission make these important revisions to the regulations it has adopted in this proceeding, and that it stay the effective date of its rules until its decision on this Petition.

Respectfully submitted,

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