

APPENDIX A

Revised Proposal for Table A Criteria¹

X.20 Application for Table A Authorization.

(a) Written application required.

[Anticipates regulations similar to 47 C.F.R. § 2.911.]

(b) Submission of Table A application or information to the Commission.

[Anticipates regulations similar to 47 C.F.R. § 2.913.]

(c) Information to be included in application. An application for Table A authorization shall include:

- (1) a demonstration that any one or more of the criteria specified in Section X.21(c)(1) is met;
- (2) any Associated Obligations applicable to the technology;
- (3) the technology's licensing terms and conditions concerning output and recording controls, including licensing terms and conditions claimed to establish compliance with Sections _____;
- (4) a statement whether the applicant is the licensor of the technology. If the applicant is not the licensor of the technology, the application shall:
 - (A) state that, prior to the filing of the application, the applicant has provided or is providing notice of the filing of the application, together with a copy of the application, to the person or company identified in the application as the licensor; and
 - (B) list the identity and business address of the licensor and, if applicable, the name of any individual employed by or representing such licensor to whom such notice has been provided;
- (5) for the criteria set forth in X.21(c)(1)(A):
 - (A) the identity of the companies that applicant avers have used or approved a technology as defined in Section X.25;

¹ As used herein "Table A" means a listing of digital output and recording technologies authorized for use under the Commission's Broadcast Flag regulations. The numbering of sections follows the February 18, 2003 submission of MPAA *et al.* in response to the initial NPRM in this docket.

(B) evidence of use or approval under Section X.25; and

(C) a detailed description of the technology's recording and/or output controls, as applicable, and how such controls prevent unauthorized redistribution of Marked Content and Unscreened Content (including redistribution over the Internet);

(6) for the criteria set forth in X.21(c)(1)(B):

(A) the identity of the companies that applicant avers have used or approved a technology as defined in Section X.25;

(B) evidence of use or approval under Section X.25;

(C) the identity of the companies that applicant avers have licensed the technology;

(D) evidence that the technology has been licensed; and

(E) a detailed description of the technology's recording and/or output controls, as applicable, and how such controls prevent unauthorized redistribution of Marked Content and Unscreened Content (including redistribution over the Internet);

(7) for the criterion set forth in X.21(c)(1)(C):

(A) evidence that the applicant's technology is at least as effective as a technology currently on Table A,

(B) evidence that the technology is in legitimate use in a Major Commercial Market in connection with the output or recording of a commercially significant amount of New Release Content, if applicable; and

(C) a detailed description of the technology's recording and/or output controls, as applicable, and how such controls prevent unauthorized redistribution of Marked Content and Unscreened Content (including redistribution over the Internet); and

(8) for the criterion set forth in Section X.21(c)(1)(D):

(A) the licensing terms expressly naming the technology as being permitted to be used for the output or recording of audiovisual content; and

(B) a detailed description of the technology's recording and/or output controls, as applicable, and how such controls prevent unauthorized redistribution of Marked Content and Unscreened Content (including redistribution over the Internet);

(d) Requests for Identification in Support of Applications.

(1) At least 60 days prior to making an application under this section, any prospective or actual applicant may file a request, on a form prescribed by the Commission, for information concerning whether one or more named Major Studios or Major Television Broadcast Groups have “used” or “approved”, as “use” and “approval” are defined in Section X.25, the technology proposed to be used by the applicant.

(2) The Commission shall promptly inform each company named in such a request that it has been so named, and request confirmation as to whether it has used or approved the technology, as defined in this subpart. All responses shall be signed as provided in Section X.20(a)__. In light of the interest of Major Studios and Major Television Broadcast Groups in the use of the Broadcast Flag, a failure to respond to the Commission’s inquiry within 60 days shall be deemed to be an admission of use or approval of the technology as defined in this subpart.

X.21 Process for Deciding Application.

(a) Notification of pending application.

(1) Applications claiming satisfaction of X.21(c)(1)(A), (B), or (D): Major Studios and Major Television Broadcast Groups shall be notified by the Commission in a timely manner of receipt of an application for Table A authorization. Specific notice of an application under this Section shall be provided to the companies listed pursuant to Section X.20(c)(5)(A). Any company named in an application, as well as any other interested party, shall have 60 days to comment on the facts alleged in the application.

(2) Applications claiming satisfaction of X.21(c)(1)(C): At the initiation of the licensor of the technology or of another company, the Commission shall issue a notice to Major Studios and Major Television Broadcast Groups providing 60 days for comment on the request to include such technology on Table A.

(b) Consideration of application. The Commission shall have the duty and responsibility to process applications for Table A authorizations under this subpart.

(c) Grant of application.

(1) The Commission shall grant an application for Table A authorization if it finds from an examination of the application and supporting data, as well as of relevant comments received thereon within the time periods specified herein, and other matter which it may officially notice, that the application sets forth information sufficient to demonstrate that the technology satisfies at least one of the following criteria:

(A) 3 Major Studios and/or Major Television Broadcast Groups (of which at least 2 must be Major Studios) use or approve the technology.

(B) 10 Major Device Manufacturers (including software vendors) have licensed the technology and 2 Major Studios use or approve the technology.

(C) The technology is at least as effective at protecting Unscreened Content and Marked Content against unauthorized redistribution (including unauthorized Internet redistribution) as is any one of the technologies currently listed on Table A (other than technologies determined to be “significantly compromised” pursuant to Sec. X.23(a)(1)). A determination of whether a technology is “at least as effective” requires consideration of the effectiveness of both the technology and any applicable licensing terms and conditions relating to security (including such technology’s compliance and robustness rules necessary to comply with the provisions set forth herein), enforcement, and Change Management.

(x) In connection with such determination, evidence that the technology is in legitimate use in a Major Commercial Market in connection with the output or recording of a commercially significant amount of New Release Content shall weigh in favor of a determination that such technology is “at least as effective” as a technology then on Table A, provided that if such technology has not been so used in connection with a commercially significant amount of New Release Content, such fact shall not be weighed against a finding that such technology meets such “at least as effective” standard.

(y) By way of example and not limitation, a technology shall not be deemed to be in use “in connection with the output or recording of a commercially significant amount of New Release Content” if:

(a) such use is solely for internal testing or other evaluation of such technology (including but not limited to testing or evaluation in the form of limited-duration “beta testing”);

(b) the company or companies that use such technology demonstrate their intent to use such technology solely outside the United States; or

(c) such use relates solely to the non-commercial distribution of audiovisual content, such as distribution solely to professional devices or for internal distribution within a company (including its Affiliates).

(D) The technology (together with its licensing terms and conditions concerning output and recording controls and Associated Obligations) includes output and recording controls that protect against unauthorized redistribution of audiovisual content (including unauthorized Internet redistribution) and

such technology was expressly named as being permitted to be used for the output or recording (as applicable) of audiovisual content (except where such permission does not extend to use in connection with New Release Content) under the license applicable to a technology listed on Table A (whether such license itself expressly names the technology or references another means by which such technology may be expressly named), either (a) at the time such listed technology was listed on Table A, or (b) at a later date, provided that a Change Management process applied to such subsequent naming of such technology and such subsequent naming complied with such Change Management process.

(2) An entity that is counted to satisfy one of the criteria specified in paragraph (1) cannot be counted more than once in satisfying that criterion.

(3) For purposes of satisfying subparagraph (1)(A) or (B), if an entity is counted as a Major Device Manufacturer, Major Studio, or Major Television Broadcast Group (each, an “Industry Category”), no Affiliate of such counted entity may be counted in the same or any other Industry Category, except that

(A) if an entity is counted as a Major Device Manufacturer, 1 Affiliate of such counted entity may be counted as either a Major Studio or Major Television Broadcast Group; and

(B) if an entity is counted as a Major Studio or Major Television Broadcast Group, 1 Affiliate of such counted entity may be counted as a Major Device Manufacturer.

(4) A failure to satisfy any of the criteria specified in paragraph (1) shall not preclude an applicant from filing a subsequent application for such technology, or the subsequent addition of the technology to Table A, pursuant to that or any other criterion.

(5) In the event that the licensor of such technology is not the initiator of the request and objects within the applicable notice period to the inclusion of such technology on Table A, then such technology shall not be included on Table A.

(6) In the event that 3 Major Studios and/or Major Television Broadcast Groups object, during the 60-day public notice period, to the inclusion of such technology on Table A on the basis that such technology does not satisfy Section X.21(c)(1)(C), the matter shall be resolved through an expedited review (not to exceed an additional 45 days) to determine whether or not that criterion is satisfied. In the event that there are fewer than 3 Major Studios and/or Major Television Broadcast Groups that so object within the specified period of time (and the licensor of the technology does not object) or if the result of the expedited process is a determination that the technology satisfies Section X.21(c)(1)(C), then the technology will be included on Table A. If the licensor of the technology objects, at any time prior to the conclusion of such process, to the inclusion of its technology

on Table A, then the technology will not be included on Table A. For purposes of this paragraph, if any Major Studio or Major Television Broadcast Group is counted as objecting to the inclusion of such technology on Table A, no Affiliate of such counted entity may also be counted as so objecting.

(7) Grants will be made in writing showing the effective date of the grant and any special condition(s) attaching to the grant. If no objections are received, or in the case of X.21(c)(1)(C) fewer than 3 objections from Major Studios and Major Television Broadcast Groups are received, during the 60-day public notice period relevant time periods for comment or objection specified herein, a grant shall be deemed effective as of the expiration of such period. If any objections (in the case of Sections X.21(c)(1)(A), (B) and (D)) or 3 objections (in the case of Section X.21(c)(1)(C)) are received from Major Studios or Major Television Broadcast Groups during such period, a grant shall be deemed effective as of the date the Commission resolves such objections in favor of the applicant.

(8) No technology shall be admitted to Table A, nor shall any technology authorization be deemed effective, until the application has been granted.

(9) Notwithstanding any other provision of these regulations, because content owners and broadcasters do not have privity with the manufacturers of devices in which the technology will be implemented, in the event that use or triggering of the technology imposes any obligations upon content owners or broadcasters, such technology may only be added to Table A if (a) such obligations have been fully disclosed on the record of the application; (b) that technology may be turned off, bypassed, or otherwise not used and triggered at the content owner's and broadcaster's election, (c) and content owners and broadcasters are provided with facile means of such election.

(d) Dismissal of application.

(1) An application which is not in accordance with the provisions of this subpart may be dismissed.

(2) Any application, upon written request signed by the applicant or his attorney, may be dismissed prior to a determination granting or denying the authorization requested.

(3) If an applicant is requested by the Commission to file additional documents or information and fails to submit the requested material within 60 days, the application may be dismissed.

(e) Denial of application. In the event that the required number of objections are received from Major Studios or Major Television Broadcast Groups during the relevant time periods specified herein and the Commission is unable to make the findings specified in Section X.21(c)(1), it will deny the application. Notification to the applicant will include a statement of the reasons for the denial.

(f) Petition for reconsideration; application for review.

[Anticipates regulation similar to 47 C.F.R. § 2.923.]

X.22 Continuing Obligations of Grantee

[Anticipates regulations similar to 47 C.F.R. §§ 2.929, 2.931, 2.932, 2.936, and 2.938.]

X.23 Disqualification as Benchmark and Withdrawal of Table A Authorization.

(a) Disqualification as benchmark.

(1) A Major Studio or Major Television Broadcast Group may request pursuant to Sec. 1.41 that the Commission disqualify a technology listed on Table A for use as a benchmark in the evaluation conducted under Sec. X.21(c)(1)(C) and X.23(b)(2), on grounds that the technology has been significantly compromised in relation to its ability to protect Unscreened Content and Marked Content from unauthorized redistribution (including unauthorized Internet redistribution). The grantee, and any other interested persons, shall be given 60 days to respond to such a request. The Commission shall disqualify the listed technology as a benchmark if it finds that the technology has been so significantly compromised. Disqualification under this Section X.23(a) does not remove such technology from Table A; such removal may only occur voluntarily, by order of the Commission for exigent circumstances, or pursuant to Section X.23(b).

(2) A grantee or any potential or actual licensee of a listed technology that has been disqualified pursuant to paragraph (1) may request pursuant to Sec. 1.41 that the Commission reinstate such technology for use as a benchmark pursuant to Secs. X.21(c)(1)(C) and X.23(b)(2). The request shall state what actions the grantee has taken to ameliorate the compromised aspects of its technology such that its technology is at least as effective as another technology currently listed on Table A. The party or parties initiating the request pursuant to paragraph (1), and any other person, shall be given 30 days to respond to or comment on such a request. The Commission shall reinstate the listed technology for purposes of Secs. X.21(c)(1)(C) and X.23(b)(2) if it finds that the technology protects Unscreened Content and Marked Content from unauthorized redistribution (including unauthorized Internet redistribution).

(b) Withdrawal of Table A authorization.

(1) The Commission may withdraw any Table A authorization:

(A) for material false statements or representations made either in the application or in materials or response submitted in connection therewith by the applicant, the licensor (if the applicant is not the licensor), the applicant's or licensor's Affiliates, or by any party where the applicant or licensor knows the statement or representation to be false at the time of submission, or in records required to be kept by Sec. X.22__.

(B) if it is determined that changes have been made to the technology other than those authorized pursuant to a process of Change Management or otherwise expressly authorized by the Commission.²

(2) A Major Studio or Major Television Broadcast Group may request pursuant to Sec. 1.41 of this chapter that the Commission withdraw the authorization granted to a technology listed on Table A on grounds that the technology has been substantially compromised in relation to its ability to protect Unscreened Content and Marked Content from unauthorized redistribution (including unauthorized Internet redistribution). The grantee, and any other interested persons, shall be given 60 days to respond to such a request. The response may state what actions the grantee has taken to ameliorate the compromised aspects of its technology such that its technology is at least as effective as another technology currently listed on Table A that is not then disqualified for use as a benchmark under Section X.23(a). The Commission shall withdraw the authorization granted to the listed technology if it is determined that the technology has been substantially compromised in relation to its ability to protect Unscreened Content and Marked Content from unauthorized redistribution (including unauthorized Internet redistribution).

(3) In making a determination under paragraph (2), the Commission shall consider the protection of Unscreened Content and Marked Content from unauthorized redistribution (including from unauthorized Internet redistribution), and the impact on content owners, consumers and manufacturers resulting from the continued use of such compromised technology and from any withdrawal of such technology from Table A.

[Anticipates additional regulations providing for a suitable grace period after revocation.]

X.24 Availability of information relating to grants.

(a) Grants of Table A authorization will be publicly announced in a timely manner by the Commission.

(b) Information relating to Table A authorizations, including any materials submitted by the applicant in connection with an authorization application, shall be available in accordance with Secs. 0.441 through 0.470 of this chapter.

X.25 Market Acceptance.

(a) For purposes of a determination pursuant to Sections X.21(c)(1)(A) and (B) (and for no other purpose, e.g., not for purposes of patent law), a company shall be deemed to have “used” or “approved” a technology (a “Proposed Table A Technology”) only if:

(1) such technology (together with its licensing terms and conditions concerning output and recording controls and Associated Obligations) includes output and

² The foregoing subparagraphs are based on 47 C.F.R. § 2.939(a).

recording controls that protect against unauthorized redistribution of audiovisual content (including unauthorized Internet redistribution); and

(2) at least one of the following conditions is true:

(A) such company or, where such company is a Major Studio, any of its Qualified Affiliates, has signed an agreement with the licensor of such Proposed Table A Technology that expressly authorizes (including, for avoidance of doubt, via license grant, non-assertion covenant or other authorization) the company or any of the company's Qualified Affiliates (either immediately or upon a specified future date or circumstance) to use or cause the use of such Proposed Table A Technology in a Major Commercial Market, in connection with the output or recording (as applicable) of audiovisual content (except where such authorization does not extend to use in connection with the company's New Release Content), provided that the use of such Proposed Table A Technology was expressly provided for in such agreement at the time the company enters into such agreement (whether such agreement then permits the use of the Proposed Table A Technology or then specifies a future date or circumstance upon which such use of such Proposed Table A Technology shall be permitted), and provided further that such "use" or "approval" shall not be deemed to exist prior to the effective date of any right to use such Proposed Table A Technology under such agreement;

(B) such company or, where such company is a Major Studio, any of its Qualified Affiliates, has entered into a content license or similar content-related agreement that, upon signature (and not pursuant to a Change Management procedure), expressly identifies, either directly, or indirectly by description or reference, such Proposed Table A Technology (i.e., by expressly naming such technology in such content license or content-related agreement or, indirectly, by expressly naming such technology in a specification, standard or license that is directly or indirectly linked by explicit reference through one or more instruments to such content license or content-related agreement) as being permitted to be used for the output or recording (as applicable) of the company's audiovisual content (except where permission does not extend to use in connection with the company's New Release Content);

(C) such company or, where such company is a Major Studio, any of its Qualified Affiliates, has signed an agreement with the licensor of another technology for which the applicable license specifically permits the use (either immediately or upon a specified future date or circumstance) of the Proposed Table A Technology in a Major Commercial Market in connection with the output or recording of audiovisual content (except where such permission does not extend to use in connection with the company's New Release Content), provided that the use of such Proposed Table A Technology was expressly provided for in such agreement at the time the company enters into such agreement (whether such agreement then permits the use of the Proposed Table A Technology or then specifies a future date or circumstance upon which such

use of such Proposed Table A Technology shall be permitted) and provided further that such “use” or “approval” shall not be deemed to exist prior to the effective date of any right to use such Proposed Table A Technology under such agreement;

(D) such company has issued an unambiguous public statement endorsing the Proposed Table A Technology for the output or recording (as applicable) of the company’s audiovisual content (except where such endorsement does not extend to use in connection with the company’s New Release Content) or the inclusion of the Proposed Table A Technology on Table A; or

(E) a General Counsel or equivalent legal representative of such company has approved in writing the inclusion of the Proposed Table A Technology on Table A.

(b) By way of example and not limitation, a company shall not be deemed to have “used” or “approved” a technology if: (A) its use or approval relates solely to internal testing or other evaluation of such technology (including but not limited to testing or evaluation in the form of limited-duration “beta testing”); (B) notwithstanding any contractual right to use such technology for New Release Content, the company demonstrates that it uses and intends to use such technology under such contract solely in connection with content other than New Release Content; (C) the company demonstrates its intention to use or approve the use of the technology solely outside the United States; or (D) its use or approval relates solely to the non-commercial distribution of audiovisual content, such as distribution solely to professional devices or for internal distribution within the company (including its Affiliates).

X.26 Authorization for Use With Unscreened Content. In order to be authorized for use with Unscreened Content, an Authorized Digital Output Protection Technology or Authorized Recording Method must, in addition to meeting other applicable criteria, further either:

(a) protect Unscreened Content in a manner that prohibits its digital recording (other than temporary storage solely for the purpose of enabling immediate or delayed display) unless and until the EIT or PMT for content contained in a stream that has not been altered following demodulation is inspected for the Broadcast Flag, in which case:

(1) if the Broadcast Flag is determined to be present, the content shall thenceforth be treated in the same manner as if it had been passed from a Covered Demodulator Product protected by such Authorized Digital Output Protection Technology (pursuant to 73,9004(a)(3) or 73,9006(b)), or recorded using such Authorized Recording Method (pursuant to 73,9004(b)(2)), as Marked Content; and

(2) if the Broadcast Flag is determined not to be present, no protections are thenceforth required to apply; or

(b) protect Unscreened Content so that such content may be accessed in usable form by another product only if such other product protects such content in accordance with the Compliance and Robustness Requirements applicable to Unscreened Content, as if it were a Covered Demodulator Product.

X.27 Definitions.

“Affiliate” means, with respect to any entity, any corporation, partnership or other entity that, directly or indirectly, owns, is owned by, or is under common ownership with, such first entity, for so long as such ownership exists. For purposes of the foregoing, “own,” “owned” or “ownership” shall mean holding ownership of, or the right to vote, more than fifty percent (50%) of the voting stock or ownership interest entitled to elect a board of directors or a comparable managing authority.

“Associated Obligations” means any obligations set out on, or proposed to be set out on, Table A for a given Authorized Digital Output Protection Technology or Authorized Recording Method, which pertain to the use of such technology by a Covered Demodulator Product to protect Unscreened Content or Marked Content pursuant to X.3(a)(3), X.4(a)(3) or X.6(b).

“Change Management,” for purposes of these criteria, means a process by which content owners are provided a specified right or ability to meaningfully object to particular amendments to content protection agreements.

“Major Television Broadcast Group,” for purposes of these criteria, means the 4 largest broadcast networks and the 5 largest television station groups that are not affiliated with Major Studios.

“Major Device Manufacturer,” for purposes of these criteria, means any member of CEA, ITI, BSA or CCIA, the total gross revenues of which from device manufacturing and software publishing exceed US\$_____ per year.

“Major Studio,” for purposes of these criteria, means, during the course of any year, any member of the MPAA or any other company that has generated U.S. box office revenues from theatrical releases of feature films in the immediately prior year that are at least as great as the MPAA member company with the lowest U.S. box office revenues from theatrical releases of feature films for that same year.

“Major Commercial Markets,” for purposes of these criteria, means the United States, any country within the European Community, Canada, Japan and Australia.

“New Release Content,” for purposes of these criteria, means, with respect to the application of any Proposed Table A Technology to audiovisual content, audiovisual content owned or acquired by license (with the right to determine distribution methods) by a Major Studio and first commercially released during the 24-month period preceding such application of such technology to such audiovisual content.

“Qualified Affiliate” means, with respect to a Major Studio, (a) an entity that directly or indirectly owns and controls such Major Studio or (b) an Affiliate of a Major Studio authorized to distribute the preponderance of the New Release Content owned or licensed by such Major Studio for one or more of the major content distribution channels (i.e., theatrical, home entertainment, pay-per-view, video-on-demand, pay television, basic cable or broadcast television). For purposes of the foregoing, “own” shall mean holding ownership of, or the right to vote, more than fifty percent (50%) of the voting stock or ownership interest entitled to elect a board of directors or a comparable managing authority.