

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | SUMMARY AND INTRODUCTION | 1 |
| II. | THE COMMISSION SHOULD NOT RECONSIDER OR REVISE THE ADOPTED ROBUSTNESS RULE..... | 3 |
| | A. The Commission’s Robustness Rule is More Consistent with the Carefully Limited Goals of the Broadcast Flag and Promoting the Transition to DTV than the MPAA’s Re-proposed Alternative Rules. | 4 |
| | B. The Commission’s Focus on the Skill Level of the Ordinary User is a Better Approach to Meeting the Commission’s Goal of Preventing Indiscriminate Redistribution. | 6 |
| | C. The Commission Has Already Adequately Considered the Jointly Proposed Robustness Rules But Has Instead Implemented a New Formulation Designed to Balance Equally Important, Competing Interests. | 8 |
| III. | THE COMMISSION SHOULD NOT MODIFY ITS RULES TO ADDRESS THE DIGITAL AUDIO CHANNEL | 10 |
| IV. | CONCLUSION | 11 |

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| Digital Broadcast Copy Protection |) | MB Docket No. 02-230 |
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| |) | |

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Public Knowledge and Consumers Union (hereinafter “Consumer Groups”) hereby oppose the Petitions for Reconsideration filed by the Motion Picture Association of America (hereinafter “MPAA”) and the National Music Publishers’ Association, *et al.* (hereinafter “NMPA, et al.”) in response to the Commission’s *Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-273 (adopted on Nov. 4, 2003) (“*Broadcast Flag Report and Order and FNPRM*”) in the above-captioned proceeding.

I. SUMMARY AND INTRODUCTION

The Petitions for Reconsideration filed by the MPAA and the NMPA, *et al.* propose expansions to the Commission’s broadcast-flag scheme that are contrary to the agency’s express goals of ensuring narrow rules that prevent indiscriminate redistribution of digital television content.¹ For this reason, the Commission should deny the petitions.

¹ In the Matter of Digital Broadcast Content Protection, ¶ 10, MB Docket 02-230, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-273, (Nov. 3, 2003) [hereinafter *Broadcast Flag Report and Order and FNPRM*].

The Consumer Groups oppose the MPAA's request that the Commission reconsider and revise the adopted robustness rule to target skilled users.² Not only would such a revision go far beyond the Commission's expressly limited goals of preventing indiscriminate redistribution of DTV content and advancing the DTV transition, but adopting an overly severe robustness standard will harm consumers and harm the development of technology. The Commission's robustness rule is a better approach, and there is no new evidence to support a "skilled user" robustness rule.

We also oppose the NMPA, *et al.* request for reconsideration of the scope of protection. NMPA, *et al.* ask the Commission to expand its rules to prevent the "piracy" of the digital audio channel.³ However, they provide not even a shred of evidence of an audio piracy problem associated with DTV broadcasts. Moreover, even if such a problem did exist, preventing piracy of the digital audio channel would require a massive undertaking well beyond the Commission's expressly limited goals in this proceeding.

The Consumer Groups encourage the Commission to move cautiously as it seeks to balance competing interests and to promote the interests of the public.⁴ The broadcast-flag scheme will have a long-term impact on technology and citizens' use of digital television content, consumer electronics and general purpose computers. It is vital that the

² Petition for Reconsideration and Clarification of the Motion Picture Association of America, Inc., 2-21, MB Docket 02-230, (Jan. 2, 2004).

³ Joint Petition for Reconsideration of the National Music Publishers' Association, *et al.*, 3-4, MB Docket 02-230, (Dec. 31, 2003); *see also* Joint Petition for Reconsideration of the National Music Publishers' Association, CS Docket 97-80, PP Docket 00-67, (Dec. 29, 2003).

⁴ *See* Comments of Public Knowledge and Consumers Union, MB Docket 02-230, (Feb. 13, 2003).

Commission's stated goal of balancing all affected interests guide this proceeding as it continues.⁵

II. THE COMMISSION SHOULD NOT RECONSIDER OR REVISE THE ADOPTED ROBUSTNESS RULE.

The MPAA requests that the Commission reconsider and revise the *Broadcast Flag Report and Order and FNPRM* robustness rule and implement the MPAA and 5C Jointly Proposed Robustness Rules, which recommend an expert level of robustness.⁶ The Consumer Groups agree with the Commission's original determination that the adopted robustness rule should strike a better balance between the interests of content providers and the interests of technology development and citizens.⁷

The Commission rule states:

The content protection requirements set forth in the Demodulator Compliance Requirements shall be implemented in a reasonable method so that they cannot be defeated or circumvented merely by an ordinary user using generally-available tools or equipment.⁸

This rule is more in keeping with the Commissions' deliberately limited goal of creating a "speed bump" that prevents "indiscriminate redistribution" of digital television content and yet promotes the transition to DTV.⁹

The Commission has already considered the Jointly Proposed Robustness Rule, which the MPAA now re-proposes, and determined, in light of its limited goal, that the adopted

⁵ Our comments in this opposition in no way should be interpreted to suggest that the Consumer Groups have abandon our earlier criticism that the Commission lacks jurisdiction to adopt this rulemaking or that any evidence has been presented to warrant this preemptive rulemaking.

⁶ Petition for Reconsideration and Clarification of the Motion Picture Association of America, Inc., 2-21, MB 02-230, (Jan. 2, 2004). See Joint Proposal from MPAA and 5C Companies, 15, MB Docket 02-230, (Dec. 6, 2003).

⁷ *Broadcast Flag Report and Order and FNPRM*, at ¶46.

⁸ *Id.* at § 73.9007.

⁹ *Id.* ¶¶ 10, 14, 19.

formulation for robustness best achieved the primary goal of the flag scheme while properly balancing the costs and burdens of implementation.¹⁰ A robustness rule focused on the ordinary user skill-level rather than on the expert level, is more likely to prevent indiscriminate redistribution of DTV content without hindering technology innovation that will spurn the transition to digital television. Moreover, the MPAA has not provided any new evidence to warrant that the Commission reconsider its robustness rule.

A. The Commission’s Robustness Rule is More Consistent with the Carefully Limited Goals of the Broadcast Flag and Promoting the Transition to DTV than the MPAA’s Re-proposed Alternative Rules.

The Consumer Groups note that the Commission considered the Jointly Proposed Robustness Rules but wisely chose not to rubber stamp the suggested language. The Commission, adhering to its stated goals, chose to adopt a robustness rule that targeted only indiscriminate redistribution. The Commission also recognized that an overly restrictive robustness rule could hurt consumers and the development of new technologies – ultimately thwarting the central goal of promoting the transition to DTV.

The Commission states:

Content owners assert that content protection mechanisms are needed to assure the availability of high value digital content to consumers in a secure, protected format. Others express concerns that the use of technical measures to protect content will inhibit consumers’ ability to enjoy programming when and where they choose. In order to advance the DTV transition, a delicate balance must be struck between these sometimes competing interests.¹¹

The robustness rule is an example of the balance the Commission struck. The *Broadcast Flag Report and Order* and *FNPRM* further states in regards to robustness, “an expert level of

¹⁰ *Id.* ¶ 46.

¹¹ *Id.* ¶ 1.

robustness is incongruous with the scope of the protection offered by an ATSC flag system...an “ordinary user” level is more appropriate in these circumstances.”¹² The Commission states, “we are adopting a more generalized robustness standard that will afford consumer electronics, IT and PC manufactures flexibility in determining how to effectuate our compliance rules and to ensure the security of content.”¹³

As we pointed out in earlier comments, creating an overly stringent robustness standard would effectively put up a wall between open-architecture technologies and DTV, thus depriving the DTV transition of the “convergence advantage.”¹⁴ The MPAA now again asks for this wall to be built– but erecting such a barrier is contrary to the Commission’s goal of speeding the transition to DTV and permitting IT and PC manufacturers the necessary flexibility to develop platforms and devices allowing consumers to enjoy DTV. New and innovative products are necessary to attract consumers to DTV. If the transition to DTV means more expensive products with less functionality, very few consumers will be motivated to make the switch. The Commission’s approach best ensures that innovations from software, general-purpose computing and consumer electronics can converge to create attractive digital television technologies.

¹² *Id.* ¶ 46.

¹³ *Id.*

¹⁴ Reply Comments of Public Knowledge and Consumers Union, 16-20, MB Docket 02-230 (Feb. 19, 2003).

B. The Commission’s Focus on the Skill Level of the Ordinary User is a Better Approach to Meeting the Commission’s Goal of Preventing Indiscriminate Redistribution.

The MPAA argues that the Commission misread or misunderstood the Jointly Proposed Robustness Rules.¹⁵ Although the MPAA admits¹⁶ there were varying levels of agreement about the proposed robustness rules it asserts that the Commission’s implementation of a standard addressing the ordinary user reflects a misunderstanding of the presumptions in the Jointly Proposed Robustness Rules.¹⁷ The MPAA argues that the skilled user is in fact the proper target for robustness rules. For the reasons discussed below, this level of robustness is unnecessary. Moreover, a “skilled-user approach” is inconsistent with the Commission’s narrow target of indiscriminate redistribution.

Contrary to the MPAA’s suggestions, the ordinary user is not likely to commit “piracy” or indiscriminately redistribute unauthorized digital television recordings. Indeed, the MPAA itself has stated, “it is wrong to presume every consumer is a thief...The Broadcast Flag will keep widespread unauthorized redistribution under control because most consumers will not hack their devices.”¹⁸ Now, the MPAA suggests that honest consumers have become thieves who will utilize the hacks of experts or skilled users to redistribute DTV content indiscriminately.¹⁹

¹⁵ Petition for Reconsideration and Clarification of the Motion Picture Association of America, Inc., 5, MB 02-230, (Jan. 2, 2004).

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 5-6.

¹⁸ Motion Picture Association of America, *et al* Reply Comments, 18, MB Docket 02-230, (Feb. 19, 2003).

¹⁹ Petition for Reconsideration and Clarification of the Motion Picture Association of America, Inc., 6, MB 02-230, (Jan. 2, 2004).

The Consumer Groups agree with the MPAA's first argument that consumers are not thieves, and we add, more importantly, that the ordinary users are not likely to hack their devices. One prominent example, the DVD, which the MPAA argues proves the need for a skilled user approach, supports the simple fact that the ordinary user does not hack devices. The CSS protection system for DVDs was cracked by a computer programmer, and DeCSS software, enabling the decryption of DVDs, is now widely available on the Internet for any non-programmer to utilize – but its availability has not lead to its widespread use by the ordinary user. The availability of a “hacking tool” does not suddenly cause the ordinary consumer to commit rampant decryption and redistribution of DVD content; in fact, DVD sales have continued to rise precipitously in the face of the availability of DeCSS.²⁰

Ordinary users do not download or make extraordinary attempts to learn or utilize skilled hacking techniques. Although DeCSS is widely available on the Internet, there is no evidence that the ordinary user, to any significant degree, is downloading these software tools to decrypt and then redistribute DVD content. The ordinary user does not download complex decryption software, navigate often difficult to understand software and menus, store massive files on his or her hard drive and then post these massive files for redistribution.²¹ Likewise, the ordinary user is not prone to open his or her expensive consumer electronics equipment, attach these devices or outputs to decompiling software and search for methods to circumvent redistribution controls. Past experience teaches us, that ultimately, the ordinary user is simply a consumer of content and is not likely to spend time searching for hacks or downloading complex software programs that help permit content redistribution.

²⁰ *Id.* at 6-7.

²¹ In addition, even in a case where a user does in fact improperly distributed copyrighted content, the copyright holder could still resort to copyright law for a remedy.

In addition, even the most robust rules are likely to be circumvented by skilled hackers. As the Commission noted, “We are equally mindful of the fact that it is difficult if not impossible to construct a content protection scheme that is impervious to attack or circumvention.”²² If the goal of the Commission becomes the prevention of skilled hacks, the robustness rules will then become a roadblock to the DTV transition. Although CSS was made available through a “non-compliant” device, it still took the work of skilled experts to discover and circumvent CSS.²³ If the Commission wishes to protect content from these kinds of skilled or expert users, then the entire nature of the broadcast flag scheme will need changing. As we have stated in previous filings, raising an impenetrable robustness wall based on the broadcast-flag scheme will kill the convergence advantage of the DTV transition and create little room for innovative technologies.²⁴ The Commission has instead tried to minimize the likelihood of such harm, but changing the focus of robustness to the expert user will undermine the compromise that the Commission has worked so diligently to achieve.

C. The Commission Has Already Adequately Considered the Jointly Proposed Robustness Rules But Has Instead Implemented a New Formulation Designed to Balance Equally Important, Competing Interests.

The MPAA has not presented a new proposal or advanced any evidence that has not already been considered by the Commission when it adopted the *Broadcast Flag Report and Order and FNPRM*. The Commission properly considered the Jointly Proposed Robustness Rules, but found the proposal too restrictive and as such, incompatible with the overall aims of the broadcast-flag scheme.

²² *Broadcast Flag Report and Order and FNPRM* ¶ 19.

²³ See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

²⁴ See Comments of Public Knowledge and Consumers Union, 5-6, MB Docket 02-230, (Feb. 13, 2003); Reply Comments of Public Knowledge and Consumers Union, 16-20, MB Docket 02-230 (Feb. 19, 2003).

The Commission stated, “[w]e concur with those critics of the Joint Proposal that find an expert level of robustness exceeds that which is needed to effectively implement an ATSC flag regime.”²⁵ Now, the MPAA re-proposes the same rules and argues that the Commission misunderstood the MPAA’s original proposal. In support of their argument, the MPAA provides an example which further shows that even more robust standards are not immune from hacks.²⁶ Cognizant of this reality, the Commission chose the better balance for the stated goals of the broadcast flag scheme. As discussed in our previous filings, changing that balance will cause significant harm to consumers, technology development and the transition to DTV.²⁷

In the absence of any new evidence, there is no reason for the Commission to change its course and implement overly broad and harmful robustness rules. Merely recasting ordinary consumers as citizens likely to utilize advanced techniques for cracking robustness standards, which we in fact have reason to doubt is the case, does not qualify as “new evidence.”

The MPAA’s stated “marketplace standards” are not new to this proceeding. In any event, these standards are far from a fair representation of the actual marketplace. Often, these standards are studio-dominated agreements that primarily reflect the content industries’ desires. Here, the Commission is setting a standard that reaches across a wide-range of markets and impacts parties, such as consumers, who often did not have any say in the private industry negotiated “market standards” or agreements. The Commission’s rules will reach different industries, broadcast television and consumers in a way that no private standards

²⁵ *Broadcast Flag Report and Order and FNPRM*, ¶ 46.

²⁶ See Section II. B.

²⁷ See Reply Comments of Public Knowledge and Consumers Union, 16-20, MB Docket 02-230 (Feb. 19, 2003).

agreement has ever done. The Commission has thus understandably departed from “industry standards,” recognizing that the true market affected by the broadcast-flag scheme is much broader than what is typically reflect in privately negotiated standards agreements.

More importantly, we trust that the Commission was aware of the standards utilized by many industries but, in tackling the complex and wide-reaching scope of digital broadcast copy protection, chose to implement a rule that best achieved its goals without unnecessarily harming consumers and technology development. Restated industry standards, designed to address much narrower problems and often without meaningful consumer input, are not new evidence warranting that the Commission change its rules.

III. THE COMMISSION SHOULD NOT MODIFY ITS RULES TO ADDRESS THE DIGITAL AUDIO CHANNEL

The NMPA, *et al.* request that the Commission reconsider the scope of its rules and address “piracy” of the digital audio channel.²⁸ While the Consumer Groups are sympathetic to the problems of redistribution of other forms of digital music media, it is not consistent with the Commission’s stated goal or the purpose of the broadcast flag proceeding to expand the scope of compliance in this proceeding. Furthermore, there is no evidence that the digital broadcast audio channel is subject to indiscriminate redistribution.

Although the audio channel is a vital part of the content, the primary “threat” considered by the Commission was the indiscriminate redistribution of the audio-visual content,²⁹ such as high-quality content like first-run television series and movies. If the NMPA, *et al.* are suggesting a new threat, they have failed to provide any evidence that digital

²⁸ Joint Petition for Reconsideration of the National Music Publishers’ Association, *et al.*, 3-4, MB Docket 02-230, (Dec. 31, 2003).

²⁹ In the Matter of Broadcast Copy Protection, *Notice of Proposed Rulemaking, passim*, MB Docket 02-230, (Aug. 8, 2002).

broadcast audio content, apart from the video content, is the subject of indiscriminate redistribution.

Changing the scope of the broadcast flag is a massive undertaking, and not a simple change as the NMPA, *et al.* suggest. If, and it is highly doubtful, the digital audio stream now requires regulations to prevent it from being indiscriminately redistributed, the solution is not a quick or easy fix to the current rules adopted by the Commission. This undertaking would require an entirely new proposal and comments.

Specifically, the Commission would need to initiate an inquiry into the redistribution of the digital audio channel and, more drastically, address unprotected digital audio outputs. This type of scheme, putting aside the wisdom of initiating any solution to a problem not proven to exist, is not a merely a simple “addition” to the broadcast flag scheme; it is its own massive and complex “audio flag regulation.” Already the Commission has instituted a far-reaching standard that will impact every device that can play, record or demodulate digital broadcast video content; an “audio flag” would separately impact these devices, different outputs and a huge number of new devices designed solely for audio content. This change is unwarranted by the evidence and well beyond the scope of this deliberately limited proceeding.

IV. CONCLUSION

Our comments, here, and in response to the *Broadcast Flag Report and Order and FNPRM*,³⁰ stress that any long-term implementation of a broadcast-flag scheme requires that the Commission adhere to its narrow goals and continually ensure that approval procedures

³⁰ See Comments of Public Knowledge and Consumers Union, MB Docket 02-230, (Feb. 13, 2004).

are carried out in a reasonable and non-discriminatory fashion.³¹ For these reasons, the Commission should not grant the MPAA and the NMPA, *et al.* petitions to reconsider the *Broadcast Flag Report and Order and FNPRM*. The Commission's current robustness rule and compliance scope strike a better balance between content owners' interests and the interests of citizens and technology development than the proposed revisions. Adopting an inordinate level of robustness and expanding the scope of protection is inconsistent with the Commission's purposefully limited goals and doing so will destroy the careful balance that the Commission sought to achieve, and most importantly, that the transition to digital television and digital television technology development require.

Respectfully Submitted,

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³¹ The Petition for Reconsideration of Genesis Microchip Inc., MB Docket 02-230, (Jan. 2, 2004), illustrates one hazard of moving too quickly to adopt a regulatory scheme that may raise significant proprietary technology issues.