**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| 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 |

**Home Recording Rights Coalition**
**Opposition To Petitions For Reconsideration**

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March 10, 2004

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**Home Recording Rights Coalition**
**Opposition To Petitions For Reconsideration**

Throughout this "Plug & Play" proceeding, the Home Recording Rights Coalition has focused on the question: "To what extent may home-based consumer electronics and information technology products be constrained through the licensing of specifications under authority granted by the Congress to the FCC, and delegated to a private party?"[1] The Commission has drawn reasonable lines in issuing final regulations in its Report and Order of October 9, and where it has been unsure of a final answer the Commission has raised important questions in the accompanying Second Further Notice of Proposed Rulemaking.[2] Several of the Petitions For Reconsideration, reflecting dissatisfaction with the Commission's answer to this question, have averred Commission error by posing questions of their own, and then

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[1] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of the Home Recording Rights Coalition in Response to Further Notice of Proposed Rulemaking at 1 (Mar. 28, 2003) ("HRRC Comments").

[2] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking (Rel. Oct. 9, 2003) ("Oct. 9, 2003 Second R & O and SFNPRM").

complaining that the Commission's answers did not fit the new questions. If these parties wish to change the subject away from the introduction of competition via license and regulation, and toward new legislative or Commission mandates, that is their right. But the appropriate vehicle is not a petition for reconsideration in this Plug & Play proceeding.

## I. THE COMMISSION SHOULD NOT MANDATE A SELECTABLE OUTPUT CONTROL REGIME THAT THE MPAA AND ITS MEMBERS HAVE ASSURED THE CONGRESS THEY WOULD NOT SEEK.

The MPAA Petition for Reconsideration is headlined: "The Commission Should Revise the Plug and Play Order to Require Implementation of Selectable Output Control Capability and Permit Its Use in Certain Circumstances."[3] Barely two years ago, Senate Commerce, Science and Transportation Committee subcommittee Chairman Burns asked Peter Chernin, Chief Operating Officer of News Corporation, what "Selectable Output Control" means, and how studios might intend to use it. Mr. Chernin's exchange with Senator Burns, according to the "MP3" recording that HRRC is submitting for the record as an Exhibit to this Opposition, was as follows:

> Senator Burns:
>
> We've heard the concerns about Selectable Output Controls; can you tell me what that phrase means as injected into the public debate on this ....? I don't want to spend the next 20 years trying to find the definition to a term, so can you enlighten me on Selectable Output Controls?
>
> Mr. Chernin:
>
> I'm hardly a technologist but I believe Selectable Output Control was a very early stage proposal to try and solve these things and I know that Fox and I believe all the other content companies have explicitly abandoned

[3] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Petition for Reconsideration of the Motion Picture Association of America, Inc. at 2 (Jan. 2, 2004) ("MPAA Petition").

> this proposal many years ago so it's a non-issue for us. I think it has been largely superceded by the 5C negotiations.[4]

Two weeks later, MPAA head Jack Valenti responded similarly to questions put to the MPAA at a "roundtable" discussion conducted by Chairman Tauzin of the House Energy & Commerce Committee. In a March 2002 letter to Chairman Tauzin, Mr. Valenti said:

> Although the concept of selectable output controls was discussed a few years back in the 5C license discussions, **MPAA and its member companies are not seeking in the 5C license or in the OpenCable PHILA context the ability to turn off the 1394/5C digital interconnect in favor of a DVI/HDCP interconnect through a selectable output control mechanism.**[5]

### A. Selectable Output Control Is Anti-Consumer And Entirely Unjustified.

MPAA has the right to change its mind -- though it has not on the record updated House or Senate committee leaders or withdrawn these assurances. However, MPAA's Petition cites no sound or specific reason for doing so, other than a general future need for the "retirement" of interfaces; nor does it put forward any defined or limited proposal on which other parties can comment specifically. Accordingly, HRRC can only conclude that MPAA has reverted to its original quest, for the right to turn off consumers' home interfaces, for purposes of both viewing and recording, on a program by program basis without justification or warning. For reasons already expressed amply in the record, the Commission should reject this idea out of hand.[6]

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[4] Hearing on Protecting Content in a Digital Age – Promoting Broadband and the Digital Television Transition Before the Senate Commerce Comm., 107th Cong., Recording from Committee Webcast (Feb. 28, 2002).

[5] Letter from Jack Valenti to Chairman W.J. Tauzin (Mar. 20, 2002) (emphasis in original).

[6] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, HRRC Comments at 7-10; Reply Comments of the HRRC in Response to Further Notice of Proposed Rulemaking at 7-13 (Apr. 28, 2003) ("HRRC Reply Comments"); Consumer Electronics Industry Comments at 17-20 (Mar. 28, 2003); Consumer Electronics Industry Reply Comments at 8-11 (Apr. 28, 2003).

### B. Imposition Of A Mandated Response To SOC Triggers Would Require The Commission To Become The Author Of The DFAST License.

The Commission should also recognize that Congress was, in fact, the correct forum for the discussion of any *mandated* response to Selectable Output Control triggers in the DFAST license. As Consumer Electronics Parties reviewed in their comments on the January 10, 2003 FNPRM, MPAA sought only, with respect to DFAST, the restoration of contractual links with device manufacturers that it enjoys in the case of MSO-provided devices.[7] This the Commission has done. But, since CableLabs did not require any response to SOC triggers, this "link restoration" was not sufficient to grant MPAA's recent tack back toward requesting Selectable Output Control. So, the MPAA now claims that the Commission erred by failing to impose a response to SOC triggers as *the Commission's own mandate*.

The Commission has stated several times that it is not, and does not wish to be, the author of either the DFAST license or of any technical specifications or standards in this proceeding.[8] The Commission, going back to telephone deregulation precedent, has recognized its responsibility to confine the licensor to the exercise of only limited and reasonable powers over the licensee.[9] That is different from assuming the power to impose *new* restrictions that were not put in by the licensor itself. The appropriate audience for such a request is the Congress. At present, the MPAA's posture there is at variance with its posture before the Commission.

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[7] Consumer Electronics Industry Comments at 17-20; Letter from Fritz E. Attaway, Sr. V.P. Government Relations, MPAA, to Magalie R. Salas, Office of the Secretary, FCC, CS Docket No. 97-80 (Sept. 6, 2000).

[8] *See, e.g., In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order ¶ ¶ 74, 75, 132 (June 24, 1998); Further Notice of Proposed Rulemaking and Declaratory Ruling ¶ 29; Oct. 9, 2003 Second R & O and SFNPRM ¶ 47.

[9] 47 C.F.R. § 76.1201, 1204.

## II. HRRC OPPOSES THE ATTEMPT OF ASCAP AND BMI TO PERSUADE THE FCC TO GRANT CASE BY CASE EXEMPTIONS TO THE DIGITAL MILLENNIUM COPYRIGHT ACT.

Another seemingly misdirected petition is that of ASCAP and BMI, who file the following request:

> Petitioners propose that the Commission add a new section to its rules to allow performing rights organizations ("PROs") and entities working on their behalf to decrypt any digital rights management method adopted by the Commission solely for the purpose of performance monitoring and copyright royalty distribution.[10]

To HRRC this seems to be a request for the FCC to (1) mandate the use of "DRMs" in this proceeding, and (2) hand out an exemption not only to its own mandate, but also to the terms of Section 1201 of the Digital Millennium Copyright Act. The Commission has the power to do neither.

### A. The Commission Has Not The Power, And Has Not Shown The Inclination, To Mandate DRMs Or To Otherwise Become An Author Of New DFAST Impositions.

As HRRC discusses with respect to the MPAA request for a Selectable Output Control Mandate, the Commission was not the recipient of any congressional direction to mandate DRMs in this proceeding,[11] nor has it shown any inclination to do so. Therefore, the field of DRMs "adopted" by the Commission in this proceeding is an empty set.

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[10] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Joint Petition for Reconsideration of BMI and ASCAP at 1 (Dec. 24, 2003).

[11] In addition to the "navigation device" instruction from the Congress in Section 629, Section 624A instructs the Commission to address CE / cable compatibility issues, so is a basis for Commission regulation to achieve compatibility between cable and consumer electronics devices. This instruction does not, however, include or address the subject of imposing any independent DRM mandate on either cable or consumer electronics products or services.

### B. Neither The Congress Nor The Commission Should Grant Anyone The Power To Monitor Home Network Use – The Only Area Relevant In This Proceeding To Any Use of "DRMs."

The only areas in which the Commission has made some reference to content protection technologies have been (1) with respect to the use of the DVI / HDMI and 1394 secure digital interfaces, for CE / cable compatibility purposes, by, respectively, manufacturers wishing to earn the "Digital Cable Ready" ("DCR") logo for products,[12] and by cable operators offering set-top boxes to consumers with DCR products. In each case, the technology is applied *after* the content leaves a cable navigation device and enters the home network. Therefore, with even the broadest definition of "DRM," the only conceivable usage conduct that BMI and ASCAP could want to monitor would be that of consumers within their own home networks, *after* content has been lawfully acquired. BMI and ASCAP have not set forth any legal, regulatory, or other policy basis for making such a request. HRRC would strongly oppose granting such an in-home monitoring right to ASCAP, BMI, or anyone else.

### C. The Commission Does Not Have The Power To Grant Exceptions To The Digital Millennium Copyright Act.

HRRC, like ASCAP and BMI, was a party to the congressional debates over the Digital Millennium Copyright Act (the "DMCA"). HRRC and others who expressed concerns over the potential chilling effect on future practices of the DMCA -- which, without allowing any "fair use" defense, makes circumvention via unauthorized decryption illegal -- were challenged to come up with examples of the practices that could be impacted. HRRC does not recall any concern being voiced at that time by any performing rights organization. In response to the concerns that were expressed, Section 1201 of the DMCA, as enacted, includes a provision

[12] Oct. 9, 2003 Second R & O and SFNPRM, Appendix B at ¶¶ 4, 7.

allowing evidence of user frustrations to be provided to the Copyright Office, which would report periodically on the subject of exemptions. Neither BMI, ASCAP, nor any other performing rights organization has expressed any such concern to the Copyright Office.[13]

Six years after the DMCA's enactment, HRRC certainly appreciates the apparent belated recognition by the Music Petitioners that not all circumvention of technical measures is necessarily harmful. But they have not provided a sufficiently compelling rationale in their short filing to be given preferential status to circumvent any digital rights management method adopted by the Commission. And, even if they had, there would be no apparent way for the Commission to insulate performing rights organizations from criminal and civil liability under the DMCA; nor does it appear, no matter what the Commission might say in any Order, that any fair use defense would be available, under the present DMCA, to performance rights organizations or anyone else, no matter what rationale the Commission might put forward.[14]

## III. HRRC OPPOSES THE REQUEST OF NMPA, *ET AL.* FOR A COMMISSION-FORMULATED MANDATE ON HOME TRANSMISSION OF MUSICAL WORKS.

The National Music Publishers Association and *et al.* accuse the Commission of being "disingenuous" and "breezy" because in this proceeding the FCC declined to (1) include an affirmative protection *mandate* in its Encoding Rules, or (2) add audio-specific exemptions to its Encoding Rules.[15] There is no basis for either accusation, and there is no basis on which the Commission could take either action.

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[13] Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works, Proceedings summarized by the U.S. Copyright Office at www.copyright.gov/1201.

[14] *E.g., 321 Studios v. MGM*, No. C 02-1955 SI, Order Granting Defendants' Motion for Partial Summary Judgment and Resolving Related Motions (N.D. Cal. Feb. 19, 2004).

[15] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No.

(continued…)

### A. **The Commission's Encoding Rule Regulations Do Not And Should Not Include Affirmative Content Protection Mandates.**

NMPA, *et al.* would like to see the Encoding Rule regulations include a technical restraint on products not found in any license agreement:

> (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.[16]

1. There is no basis or precedent for including a product compliance rule in Encoding Rule regulations.

There is no precedent or basis for jamming a *product compliance rule* into an Encoding Rule regulation. Nor is there any extant *business model* referenced in any license relevant to this proceeding – at least there is no such reference in the record. Apparently, then, NMPA, *et al.* is requesting that the Commission, in the context of Encoding Rule limitations on licensor impositions on devices, impose a broad and vague technological mandate, without *any* of the definitions, standards references, or procedural protections that attach to license compliance and robustness rules. For reasons akin to those discussed above re the MPAA and ASCAP / BMI invitations, the Commission cannot and should not go so far afield.

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97-80, PP Docket No. 00-67, Joint Petition for Reconsideration of NMPA, ASCAP, SGA, and BMI at 11-13 (Dec. 29, 2003) ("Joint Petition of NMPA, *et al.*").

[16] *Id.* at 13.

2. Based on the vague and incomplete description of the NMPA, *et al.* proposal, HRRC is opposed to it.

The HRRC also reserves the right to oppose this proposal on its merits – but at present, has no reference whatsoever to interpret it. HRRC is unaware of any "business model" that presently is defined in this record or anywhere else for the distribution of audio content over MVPD systems. Hence, HRRC and other members of the public are in no position to consider or formulate any substantive opposition based on the effect on consumers' reasonable and customary practices. Based on the NMPA's discussion of the impact on "legacy" consumer devices,[17] however, it appears that the models that NMPA have in mind would have quite drastic effects on legacy consumer devices, by denying them content because they are not equipped with any decryption capability. Any such drastic proposal should be spelled out in detail, so HRRC and others who are concerned with consumer fair use rights can oppose it in detail.

### B. HRRC Opposes The Accompanying Proposed Change To The Encoding Rule Regulations.

NMPA, *et al.* do not spell out any proposed definitions of "business models" to add to the Commission's Encoding Rule regulations, but they nevertheless request broad exceptions to those rules, based on their illicit proposed "business model mandate." The result is an undefined request for unbridled power. There is no basis for the Commission to even consider granting such a request, especially on reconsideration.

[17] *Id.* at 6-9.

1. Granting The NMPA, *et al.* request would require replacing all FCC actions since 1998 with an administrative regime in which the FCC is the author of all licenses.

It is the NMPA parties who are "breezy" in ignoring the context, history, and congressional purpose of this proceeding. They cite the fact that the DFAST licensor has *not* imposed a particular technical imposition as a basis for Commission error in declining to issue a technical mandate for audio streams. In so doing, they do not just miss, they reverse the entire point of the navigation device dockets, the Plug & Play proceeding, and the Encoding Rules. The proceeding starts from a congressional instruction to the FCC to, in its rules, assure the competitive commercial availability of products to obtain MVPD services. The FCC issued rules requiring cable operators to support the attachment of such products, and in these rules limited the constraints that the MVPD licensors could put on those who were entering to compete with them. The FCC subsequently determined that some degree of copy protection could be included in such constraints, subject to Commission review, and subsequently enacted Encoding Rules for that purpose.

Nowhere did the Commission provide for any copy protection mandates on *all* navigation devices. Were it to have done so, it would have to have imposed such copy protection requirements on MSO and DBS-provided devices as well. It has not done so, because content licensees have contractual dealings with MSO and DBS providers, so can negotiate for such constraints themselves. Therefore, what NMPA, *et al.* are requesting is for the FCC, on reconsideration, to scrap all it has done since 1998, and instead to enact a quasi-statutory regime in which it becomes the original author of *every* MVPD license (and, based on other reconsideration requests, non-MVPD licenses as well).

2. HRRC opposes the proposed Encoding Rule changes.

As in the case of the crypto-compliance rule requested by NMPA, *et al.*, HRRC opposes the proposed changes to the Encoding Rules to the extent they can be understood at present. However, because there is no definitional basis in either the rules or the DFAST license, HRRC can interpret this proposal only as giving un-named content providers unlimited control over consumer practices, to the point of making any or all presently owned consumer devices useless. HRRC opposes any such action by the Commission.

### C. <u>The FCC Has Not Imposed Any "Cap On Copyright Protection."</u>

Another accusation leveled by NMPA, *et al.* is that the Commission has somehow imposed a "cap on copyright protection."[18] The FCC explicitly has not done so, and would not have the power to do so. NMPA, *et al.* nevertheless propose another novel twist to the Encoding Rules:

> (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.[19]

This proposal is aimed at an empty set – as HRRC has discussed throughout, the Commission in this proceeding has not "set" any copy protection standards in this proceeding, nor has a single technical requirement been "implemented" as a result of the Encoding Rule regulations. These regulations are aimed only at *constraining* the implementation of licensors' technical requirements as to copy protection. Equally fundamentally, it is not clear how the FCC

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[18] *Id.* at 14.

[19] *Id.*

could purport to nullify the legal rights of content owners to pursue claims under the copyright law. The FCC has already made clear that it is not purporting to do so.[20]

## IV. HRRC AGREES WITH DIRECTV THAT THE COMMISSION SHOULD NOT IGNORE THE INTERESTS OF 21 MILLION DBS SUBSCRIBERS; SUCH INTERESTS WOULD BE JEOPARDIZED BY A CHANGE TO THE FCC'S ENCODING RULE REGULATIONS RE SELECTABLE OUTPUT CONTROL.

While HRRC does not support the particular reconsideration proposals made by DirecTV, because they also encourage the Commission to get into the business of, itself, imposing mandates on consumers in this proceeding, the HRRC does endorse DirecTV's sentiment as expressed in its Petition:

> The Commission should not ignore the interests of more than 21 million DBS subscribers and the countless additional cable and other MVPD subscribers who benefit from the competition that DBS operators provide.[21]

These 21 million subscribers would, like cable subscribers, be placed in direct jeopardy by any change to the FCC Encoding Rules that would subject them to the loss of value that Selectable Output Control would inflict. Similarly, they would suffer in the event that the FCC were to enact a final rule that allows HDTV "downresolution."[22] Section 629 was enacted to protect *all* MVPD customers, not just cable subscribers. HRRC agrees that the interests of 21 million DBS subscribers should not be ignored. HRRC fails to understand, however, how it is in the interests of these subscribers to subject them to the arbitrary and capricious loss of viewing and recording capabilities for which they have paid, and which are otherwise preserved by the Encoding Rules. That is what Selectable Output Control does. That is why, as a policy matter,

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[20] Oct. 9, 2003 Second R & O and SFNPRM ¶¶ 44, 52, 54.

[21] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Petition for Reconsideration of DirecTV at 3 (Dec. 29, 2003).

[22] *See* HRRC Comments.

DirecTV and others who value direct customer relationships should be against it rather than for it.

## V. CONCLUSION – THE FCC SHOULD KEEP ITS FOCUS ON PROTECTING CONSUMERS RATHER THAN SUBJECTING THEM TO NEW MANDATES.

HRRC, in its twenty-two year existence, has responded to many legislative proposals for new impositions on consumers. The petitions for reconsideration that are discussed herein are, simply, new quasi-legislative proposals. HRRC is willing to debate them in the proper forum – which is not this proceeding.

Respectfully submitted,

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The undersigned hereby certifies that true and correct copies of the foregoing were served on the following individuals on March 10, 2004, by first-class mail, postage prepaid:

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