

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of )  
 )  
Digital Broadcast Content Protection ) MB Docket No. 02-230  
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 )  
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**REPLY COMMENTS OF  
PHILIPS ELECTRONICS NORTH AMERICA CORPORATION  
ON  
FURTHER NOTICE OF PROPOSED RULEMAKING**

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**I. INTRODUCTION AND EXECUTIVE SUMMARY**

In its November 4, 2003 *Broadcast Flag Report and Order*,<sup>1</sup> the Commission, in its Interim Approval rules, “got it right,” balancing the strong interests of myriad industry stakeholders in the digital media marketplace in this proceeding, while remaining committed to preserving consumer use and enjoyment of digital broadcast content. The Commission established an open and transparent process for the approval of digital broadcast content protection technologies, safeguarding against undue influence by any one industry segment or a favored group of competitors and grounding approval on objective, functional technical criteria and reasonable and nondiscriminatory licensing terms.

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<sup>1</sup> *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 23550 (2003) (“*Broadcast Flag Report and Order*” and “*Broadcast Flag FNPRM*,” as appropriate).

In their comments responding to the *Broadcast Flag FNPRM*, some parties implore the Commission to abandon these pillars of its *Broadcast Flag Report and Order*, inviting the Commission to accept proposals it explicitly rejected less than four short months ago. The Motion Picture Association of America (“MPAA”) once again seeks what it calls a “market-based” approach for the selection of digital broadcast content protection technologies, and the Digital Transmission Licensing Administrator LLC (“DTLA”) suggests that the Commission need not concern itself with license terms and conditions. Absolutely nothing has occurred since the Commission’s issuance of its *Broadcast Flag Report and Order* to justify any such retreat from the Order’s core principles.

Philips cannot stress enough the importance of continuing to ensure that no industry segment – content owners, consumer electronics (“CE”) manufacturers, or information technology (“IT”) manufacturers – or a subset thereof, be permitted to assume the role of gatekeeper, or otherwise obtain veto power, individually or acting in concert, over any other stakeholder. At stake is nothing less than the shape of both the market for digital content protection technologies and the market for CE and IT products. Having determined to regulate in this area, the Commission must do all in its power to ensure that these markets are characterized by robust competition, spurring innovation.

To that end, in its final rules, the Commission should reaffirm its role as the entity responsible for approving digital content protection technologies. The views of stakeholders, especially the content community that has such an important interest in protecting its valuable intellectual property (“IP”), should be given due weight in this approval process. Approval should be based on sound, objective technical criteria,

essentially adopting the Commission's interim process for the near-term. After permitting its interim process to produce the practical experience on which final rules may be fashioned, the Commission should, if marketplace conditions warrant, adopt a self-certification process.

As important as any other aspect of the Commission's Broadcast Flag regulation is the degree to which the Commission requires that approved technologies be licensed in a reasonable and nondiscriminatory manner. In its final rules, the Commission should imbue with meaning this core licensing principle to which the Commission has adhered steadfastly for more than forty years. The Commission must make clear that non-assert clauses, change provisions that give absolute control of the evolution of technologies to licensors, and assertion of the right to reject downstream digital broadcast content protection technologies already approved by the Commission simply have no place in the context of an embryonic marketplace that is a result of a government mandate. Should the Commission fail to be absolutely clear regarding these particulars of licenses, it could undermine all of its good works in the interim approval process, by providing the very same gatekeeper status to technology licensors it is seeking to avoid in the approval of new technologies.

Regardless of whether a stakeholder opposed or supported the concept of the Broadcast Flag in the past, it is now incumbent upon all participants in this proceeding to recognize the enterprise of digital broadcast content protection as a partnership, and to work together to ensure its success for industry and consumers alike. Philips is committed to such a collaborative approach.

## **II. THE COMMISSION MUST MAINTAIN ITS INTERIM APPROVAL PROCESS AS A PRELUDE TO SELF-CERTIFICATION**

The process established by the Commission for the approval of new digital broadcast content protection and recording technologies will have a major impact on the digital media marketplace now and into the future. The approval process must encourage the active participation of all stakeholders – content owners, major broadcast networks, CE manufacturers, and IT manufacturers alike – required for the successful protection of digital broadcast content. At the same time, it must inspire consumer confidence that their expectations in the use and enjoyment of such content will be met, and their digital experience will surpass their analog experience. A final rule that creates significant disparities among these key participants in terms of market power or regulatory treatment will jeopardize the success of the Broadcast Flag regime.

### **A. The Commission Was Correct In Seeking To Protect Against Gatekeeper Control**

Philips again commends the Commission for recognizing the threat to competition posed by delegating approval over digital broadcast content protection and recording technologies to *any* stakeholders in this proceeding, and for adopting an interim approval process that places the critical role of approval with the Commission, based on objective technical and licensing criteria.<sup>2</sup> The Commission correctly recognized the inherent difficulty in “...one industry segment exercising a significant degree of control over

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<sup>2</sup> See Comments of Philips Electronics North America Corporation, MB Docket No. 02-230 (Feb. 13, 2003) (“*Philips FNPRM Comments*”) at 7.

decisions regarding the approval and use of content protection and recording technologies in DTV-related equipment.”<sup>3</sup>

Philips continues to recommend that, for the near-term, the Commission maintain its role of approving technologies—and entertaining objections to the approval of technologies—in the interim process it has created. When market conditions warrant, it would be appropriate to move to a true self-certification process (see comments *infra*), wherein the Commission may relinquish its approval role, remaining available, however, to resolve serious objections to a self-certified digital broadcast content protection technology.

**B. The Commission’s Interim Rules for Approving Broadcast Flag-Compliant Technology Must Be Preserved**

The MPAA again offers what it characterizes as a “market-based” technology approval mechanism to the Commission as the best means of identifying Broadcast Flag-compliant content protection and recording technologies.<sup>4</sup> Alternatively, both the IT Coalition and DTLA, to varying degrees, recommend that the Commission adopt *both* a “market-based” approval mechanism, as well as a self-certification approval mechanism based on objective criteria.<sup>5</sup>

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<sup>3</sup> *Broadcast Flag Report and Order* at ¶52.

<sup>4</sup> See Comments of the Motion Picture Association of America, Inc., *et al.*, MB Docket No. 02-230 (Feb. 13, 2004) (“*MPAA FNPRM Comments*”) at 2-7.

<sup>5</sup> See Comments of Digital Transmission Licensing Administrator, MB Docket No. 02-230 (Feb. 13, 2004) (“*DTLA FNPRM Comments*”) at 5; Comments of the Business Software Alliance and Computer Systems Policy Project, MB Docket No. 02-230 (Feb. 13, 2004) (“*IT Coalition FNPRM Comments*”) at 9.

The issue of how best to deem content protection and recording technologies as Broadcast Flag-compliant has been thoroughly vetted in this proceeding. The Commission carefully considered the “market-based” approach, found that it posed an unacceptable risk to the development of a competitive marketplace, and rejected it, concluding that the Commission could not permit *any* industry segment to control this process.<sup>6</sup> Nothing has changed in the marketplace or in this proceeding that warrants the Commission’s revisiting this fundamental tenet of its *Broadcast Flag Report and Order*. To change course at this juncture would cause chaos in a process that is only now beginning to get underway. The Commission’s *Broadcast Flag Report and Order* achieved the critical balance necessary to move the transition to digital television forward, and it should be confident and settled on this matter.

Accordingly, Philips will not re-argue here the case against the “market-based” approach to selection of digital content protection technologies. Philips’ views are part of the record of this process and are incorporated herein by reference.<sup>7</sup> We reiterate only that the “market-based” criteria proposed by MPAA and the DTLA accommodate the views of only a portion of the relevant market – the content owners and certain

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<sup>6</sup> *Broadcast Flag Report and Order* at ¶52

<sup>7</sup> See Comments of Philips Electronics North America Corporation, MB Docket No. 02-230 (Dec. 6, 2003) at 6, 22-23; Reply Comments of Philips Electronics North America Corporation, MB Docket No. 02-230 (Feb. 19, 2003) at 27-30; See also September 23, 2003 Letter from Lawrence R. Sidman, on behalf of Philips Electronics North America Corporation, to Marlene Dortch in MB Docket No. 02-230 at 4 and Appendix B, Section Z.3, “Licensing Terms for Authorized Technologies;” October 21, 2003 Letter from Thomas B. Patton of Philips Electronics North America Corporation to Chairman Michael K. Powell in MB Docket No. 02-230; October 22, 2003 Letter from Thomas B. Patton of Philips Electronics North America Corporation to Chairman Michael K. Powell in MB Docket No. 02-230.

technology licensors. The interests of other, critical segments of the relevant market – namely the public and the vast array of licensee manufacturers – are wholly unprotected by this approach. In particular, the proposed “market-based” criteria provide no review at all of whether the “favored” technologies are licensed on reasonable and non-discriminatory terms or inhibit competition and create barriers to entry.

Philips does wish to comment, however, on the notion of adopting two independent approval mechanisms—one “market-based,” and one requiring Commission approval based on objective criteria—as recommended by the IT Coalition and DTLA. At first blush, their suggestion appears attractive, seeming to offer a classic compromise to reconcile the strongly-held, competing views of various stakeholders in this proceeding. Unfortunately, the appeal of this two-track approach is illusory. The Commission should not succumb to it.

Permitting some technologies to proceed via a “market-based” process, while others, likely those less favored by the content community, proceed through the Commission’s approval process presents unacceptable opportunities for regulatory arbitrage. As favored technologies proceed through the “market-based” regime, less favored or disfavored technologies would almost certainly be slowed by objections from competing interests. In its Comments, MPAA acknowledges that reality.

In criticizing a self-certification regime based on objective criteria, MPAA states, “...they will in all likelihood result in an authorization process that may become mired in procedural and substantive challenges...”<sup>8</sup> In short, the dual track approach will

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<sup>8</sup> *MPAA FNPRM Comments* at 6.

inevitably lead to the favored “market-based” selected technologies obtaining a significant head start in the marketplace, likely translating into *de facto* standards foreclosing competition. This is particularly dangerous where, as here, certain favored technologies have already been provided substantial head start advantages, without searching review of whether they are offered on reasonable and nondiscriminatory terms. Such a government-sanctioned lead time to market advantage is precisely what the Commission already has rejected. A dual track approval process would ultimately force all technologies to proceed through the “market-based” approval process for fear of being left behind. Thus, the Commission approval track would wither and vanish, and the practical result would be only a “market-based” selection process. The Commission has deemed that approach unacceptable. It is no more acceptable when that result is attained indirectly than when it is reached directly.

The core fallacy in DTLA’s independent two-track approach is captured by its assertion that, “Inasmuch as content owners are the parties most concerned with protecting against unauthorized redistribution of broadcast programming, there is no logical reason not to certify any technology that is acceptable to content owners.”<sup>9</sup> What about a content protection technology that also prevents consumers from making copies? What about a content protection technology that has the capability to collect personal data about a consumer to profile whether the consumer presented a high risk of unlawfully redistributing content? What about a technology that needlessly restricts consumer use and enjoyment? What about a technology that is made available on terms

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<sup>9</sup> *DTLA FNPRM Comments* at 5.

that inhibit competition or that are otherwise unreasonable or discriminatory?

Commission approval is necessary to protect consumers and competition.

**C. Prior Approval of a Digital Content Protection Technology Under the DFAST or PHILA Licenses Should Not Lead to Automatic FCC Approval of Such Technology for Broadcast Flag Purposes**

DTLA contends for automatic Commission approval of a digital content protection technology if it has already received approval under the DFAST-PHILA license. Philips respectfully disagrees for two important reasons and urges the Commission to reject this proposition.

First, such automatic approval is simply another backdoor means of adopting a “market-based” selection approach with no protection for the public or for competition. Under the DFAST license, if a digital content protection technology is approved by four major studios, it must be approved by CableLabs.<sup>10</sup> This would give the studios as much or arguably more control of the selection process than the “market-based” approach proffered by MPAA and DTLA and rejected by the Commission in the initial phase of the proceeding. It would violate the basic precept that one industry segment should not be allowed to exercise inordinate control of the selection process.

The second and related reason why an automatic approach in this context is inappropriate is that the CableLabs approval process under DFAST or PHILA has not yet been subjected to the same rigorous public interest requirements as is Commission

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<sup>10</sup> See *DFAST License, Appendix B, Compliance Rules, Para. 2.4.4.*, available at [http://www.cablelabs.com/udcp/downloads/DFAST\\_Tech\\_License.pdf](http://www.cablelabs.com/udcp/downloads/DFAST_Tech_License.pdf) (“*DFAST License*”).

regulation of the Broadcast Flag. The Commission here must ensure that consumer use and enjoyment of digital broadcast content is protected. The Commission is obligated to require fair and nondiscriminatory licensing to safeguard against anticompetitive conduct. While similar rules are appropriate in the DFAST and PHILA approval process, they have not yet been instituted. Further, at least one technology has gained DFAST approval without any Commission review of its licensing terms. Thus, granting automatic Commission Broadcast Flag approval to technologies approved under DFAST or PHILA would permit circumvention of key elements of the Commission's *Broadcast Flag Report and Order*. That cannot occur.

**D. Digital Content Protection Technologies Approved by the Commission Under the Broadcast Flag Rules Should be Entitled to a Presumption of Approval for Purposes of the DFAST and PHILA Licenses**

Philips believes that the approximate converse of what DTLA argues regarding automatic approval should be reflected in the Commission's Plug and Play rules.<sup>11</sup> If a digital content protection technology is approved by the Commission for Broadcast Flag purposes, that means that the Commission has found that it is effective—highly secure—in preventing unauthorized redistribution and also meets the public interest criteria regarding consumer use and enjoyment and safeguarding competition through reasonable and nondiscriminatory license terms.

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<sup>11</sup> See *In the Matter of the Implementation of Section 304 of the Telecommunications Act of 1996, the Commercial Availability of Navigation Devices*, PP Docket No. 00-67, CS Docket No. 97-80, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20885 (2003) (“*Plug and Play Second Report and Order*”).

Under those circumstances, there is no reason that such Broadcast Flag approved technology should not be entitled to a presumption of approval (and a fast-track process) for purposes of the DFAST and PHILA licenses. Philips recognizes that, unlike the Broadcast Flag, DFAST and PHILA require various copy control measures for cable programming (copy one generation) and pay per view and video on demand (copy never). Clearly, CableLabs needs to evaluate any Commission-approved digital content protection technology to ensure that it can provide the additional copy control limitations contemplated in the cable environment. However, such an evaluation can and should proceed in an expeditious manner in order to ensure that diverse, competitive technologies are available to protect both broadcast and cable content.

**E. Content Providers' Views Regarding Technology Should Be Accorded Substantial Weight**

Although Philips believes that it is critical for the Commission to retain its primary approval role pending a shift to more true self-certification, Philips believes that, within that framework, with respect to the technical aspects of technology intended to protect valuable digital broadcast content from indiscriminate redistribution, content owners' views and/or acceptance of such technology should be given substantial weight. If content owners believe that a technology provides adequate security, it is likely to do so. Of course, the Commission should confirm that fact in the discharge of its approval responsibility. Further, the Commission must still provide careful, independent scrutiny of whether the technology is offered on terms that are reasonable and nondiscriminatory and that do not harm competition.

Philips has great respect for the value of the intellectual property created by the studios. Ideally, studios and technology companies will work together to improve the

effectiveness of digital broadcast protection technologies to meet their intended purpose. At the same time, technology companies can enhance their value to consumers by enabling them to take advantage of digital technology while still respecting the imperative of preventing indiscriminate redistribution over the Internet. The Broadcast Flag regulatory scheme will only be successful if it truly becomes a partnership going-forward between technology and the content it seeks to protect.

Thus, Philips urges the Commission to adopt for now its interim approval process, which employs objective criteria for the Commission's assessment of whether a technology conforms to the Broadcast Flag regulation. Philips also suggests that the Commission announce that it will revisit this rule no later than three years from its adoption, to ascertain if it should be changed in favor of a pure self-certification process based on objective criteria absent the need for Commission pre-approval. Philips is hopeful that marketplace developments, enhanced trust and a recognition of mutual interdependence among all parties will enable the Commission to assume a vastly reduced role in this area. That time is not yet at hand, however. Direct Commission involvement in digital broadcast content protection technology approval is indispensable at this time to fostering competition and protecting consumers.

### **III. DTLA HAS OUTLINED VERY USEFUL OBJECTIVE CRITERIA TO SUSTAIN THE COMMISSION'S APPROVAL PROCESS AND FUTURE SELF-CERTIFICATION**

Although Philips takes issue with DTLA regarding the selection method for digital content protection, and the role of the Commission regarding license terms and conditions, Philips commends DTLA for its significant contribution to the dialogue regarding objective technical criteria for Commission consideration of digital broadcast

content protection technologies. In its Comments in this proceeding, Philips offered specific guidance and comment regarding these objective criteria. Philips respectfully submits that the views it and DTLA have expressed on the *Broadcast Flag FNPRM*, with some important distinctions discussed below regarding “interoperability” and the scope of redistribution, adequately outline and define the range of objective technical criteria required for the Commission to properly assess the compliance of content protection and recording technologies with the Broadcast Flag regulation. This applies for both the Commission’s rules to be adopted here, and any true self-certification process the Commission may ultimately adopt.

DTLA suggests that “...reliance on functional criteria as the sole means of obtaining certification could result in the unnecessary and unwarranted exclusion of protection technologies that otherwise would provide an acceptable level of protection.”<sup>12</sup> Philips agrees that objective technical criteria must be applied with care. Thus Philips has previously commented that encryption-oriented objective criteria may not provide an adequate approval methodology for the Commission to review a technology such as watermarking.<sup>13</sup> The Commission should retain the flexibility to adapt its criteria to accommodate fundamentally different, yet effective, technologies.

Philips reemphasizes the importance, as well, of ensuring that *all* technologies, whether they resemble a traditional television set, or a personal computer, be treated

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<sup>12</sup> *DTLA FNPRM Comments* at 7.

<sup>13</sup> *See Philips FNPRM Comments* at 13

equally to the greatest extent possible under the Commission’s objective criteria. While inherent differences in some forms of devices are unavoidable, the marketplace continues to converge, with formerly distinct product categories, such as television sets and personal computers, becoming increasingly similar every day.

**A. One Aspect of “Interoperability” Should Be Required**

One area where Philips distinguishes its views from DTLA in the present round of comments is in the area that has been referred to as “interoperability.” DTLA has identified interoperability as “generally desirable,” yet states that it should not be an “absolute requirement.”<sup>14</sup> According to DTLA, “...sufficient economic incentives exist so as to promote interoperability, such that decisions with respect to interoperability of technological measures should best be left to the marketplace.”<sup>15</sup> Philips disagrees in one respect.

DTLA’s faith in marketplace-promoted interoperability fails to acknowledge that competitors often employ non-interoperability in order to preserve their competitive position. For instance, General Motors manufactures vehicles that cannot use Ford replacement parts, and vice versa. Likewise, the software industry often uses non-interoperability as a means of preserving market advantage. Such non-interoperability in the context of the government-mandated digital broadcast content protection technology market would only serve to magnify any first-mover advantage created when the

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<sup>14</sup> See *DTLA FNPRM Comments* at 14.

<sup>15</sup> *Id.*

government approves some technologies before others. Consumers who have already purchased some devices containing content protection technology will not likely purchase devices with alternative technology if they cannot use all of them together. Where the later-approved technology proves superior for purposes of simultaneously protecting content from indiscriminate redistribution over the Internet *and* preserving consumer use and enjoyment of digital broadcast content, the Commission's stated goal in this proceeding, non-interoperability would lead to the rejection of the superior technology by the government-mandated marketplace. The Commission should not engineer the defeat of its goals in this proceeding in such a manner.

As Philips observed in its Comments in response to the *Broadcast Flag FNPRM*, in the unique context of content protection technologies, technical interoperability requires only that various rights states be understood and be able to be communicated from one device to another.<sup>16</sup> This is a much narrower concept of interoperability than is customarily used. In this more precise usage of technical interoperability, it is only necessary for one approved digital content protection technology to be capable of signaling that content is redistribution-controlled content in a way that will allow the receiving device to use any other technology approved by the Commission. Absent compelling circumstances, this should be required.<sup>17</sup>

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<sup>16</sup> See *Philips FNPRM Comments* at 19.

<sup>17</sup> An example of such compelling circumstances would be HDCP, which was designed solely for uncompressed interfaces that carry content to HD displays. Because these uncompressed streams are expected to be displayed and never transmitted to devices other than displays, or devices that facilitate displays, HDCP does not carry CCI and cannot interface to other protection technologies.

## **B. Scope of Redistribution**

Philips agrees with the sentiments expressed by DTLA that no protection system can prevent all acts of unauthorized distribution, whether caused by hacks or imprecise efforts to build technologies that respect the bounds of copyright law.<sup>18</sup> However, Philips disagrees with DTLA to the extent it urges the Commission to revise its scope of redistribution to prohibit all electronic redistribution or to impose regulation of any redistribution other than indiscriminate redistribution to the public.<sup>19</sup> The Commission should not revise the scope of redistribution to preclude the future development of secure Internet point-to-point redistribution technologies, or the use of the Internet for lawful acts of redistribution where such activities are possible today. To the extent secure Internet point-to-point redistribution technologies are not technically feasible currently, the Commission's scope of redistribution as-is will provide maximum impetus to the competitive and innovative spirit of the marketplace, which are the requisite elements for such capabilities to be devised. Restricting the scope of redistribution as suggested by DTLA will only serve to sap the very innovation needed to make the Broadcast Flag a success in the marketplace.

## **IV. REQUIRING REASONABLE, AND NON-DISCRIMINATORY LICENSING IS VITAL TO PROTECT COMPETITION**

While acknowledging that reasonable and nondiscriminatory licensing is a "basic requirement,"<sup>20</sup> DTLA nonetheless urges the Commission not to concern itself with

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<sup>18</sup> See *DTLA FNPRM Comments* at 8.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 8.

license terms.<sup>21</sup> DTLA cites the existence of alternative technologies as negating the need for the Commission to concern itself with license terms, and that licensors and the marketplace should be free to define licensing terms.<sup>22</sup>

Philips cannot disagree more strongly with DTLA in this regard. Superintendence of licensing terms and conditions *must* be at the very heart of the FCC’s role in approving content protection and recording technologies. It is through licensing terms that the Commission will ultimately discharge its role in protecting competition, and the public interest in consumers’ use and enjoyment of digital broadcast content. As Philips has previously explained, “...the regime adopted by the Commission to implement the Broadcast Flag is a unique hybrid, combining a government technology mandate, with the full force and effect of law, together with reliance on a private license agreement which has the potential to confer enormous power on the licensor relative to other manufacturers.”<sup>23</sup> By virtue of the Commission’s decision to remove protection of digital broadcast content from the marketplace, the Commission cannot now rely solely on the marketplace to shake out anticompetitive licensing terms.

A principal weakness in DTLA’s preference for the elimination of reasonable, nondiscriminatory licensing terms is its reliance on a “list of alternative technologies,” which would indicate competition in the marketplace that would shake out unreasonable, discriminatory licensing terms. However, no such list of approved digital broadcast

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<sup>21</sup> *Id.* at 16.

<sup>22</sup> *Id.*

<sup>23</sup> *Philips FNPRM Comments* at 22.

content protection technologies exists. That is the whole point of this rulemaking – to develop a list of FCC-approved technologies. The very absence of a competitive marketplace for digital content protection and recording technologies is one of the reasons why reasonable and nondiscriminatory licensing is so important.<sup>24</sup>

At the outset, the Commission’s regulatory regime may result in only one or two technologies for any given purpose. For example, there are likely to be very few interface protection technologies that permit consumer recording. Even if there is more than one, those technologies that are presented may be based on very different architectures or use by different types of devices. Thus, there will be a virtual certainty of creating a very formidable first-mover advantage in the marketplace. Failure to require reasonable and non-discriminatory licensing of approved technologies will ensure that a licensor can utilize licensing terms to compete unfairly, as well as to rewrite the Commission’s rules through one-sided change management procedures.

As Philips has previously recommended, the Commission must adopt licensing safeguards to protect against this first-mover advantage, and ensure that its goals in this proceeding are not frustrated through licensing.

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<sup>24</sup> DTLA engages in an ironic inconsistency when discussing the “marketplace.” DTLA’s advocacy of the so-called “market-based” criteria of approval rely exclusively on approval by one segment of the market—content providers and favored technology providers—and ignore the interests of licensees and the public. However, the only marketplace competition that can have any effect on unreasonable, discriminatory and anti-competitive license terms is competition for adoption by manufacturers. In other words, the selection criteria advocated by DTLA will inhibit the very type of competition on which DTLA relies to argue against Commission review of license terms and conditions.

### A. Automatic Approval of Downstream Products

DTLA opposes Philips' recommendation that any Commission-approved technology be automatically approved, absent compelling circumstances, as a downstream output or recording protection technology by all other approved technologies.<sup>25</sup> Instead, DTLA, a proponent of a digital content protection technology, is requesting to be permitted to decide which competing technologies are approved or not. As Philips has stated *supra*, it is critical that proponents of approved technologies do not become gatekeepers, creating insurmountable barriers to entry for competing technologies. DTLA's preference is even *more* anticompetitive than giving an "industry segment" control over technology, as it would provide DTLA with the right to approve its direct competitors.

If the FCC does not require such automatic approval, any new technology will need to seek out and obtain separate approval not only from the FCC, but also from *every other provider of a technology* that may protect content provided to a device that will use the technology. Thus, for example, a technology designed to protect digital interfaces would need approval from the Commission, CableLabs, DTLA, the 4C, and any other administrators of approved technologies. Such approvals will be burdensome and will likely take long periods of time, in circumstances where delay can kill or cripple the adoption of a new technology. Further, in many cases, these approvals would require the blessing of direct competitors or of each member of consortia containing companies with interests in direct competition. This would create intolerable entry barriers, destroying the very competitive marketplace the Commission seeks to foster.

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<sup>25</sup> See *DTLA FNPRM Comments* at 16.

Nothing in the DTLA comments justifies a different rule. DTLA refers to (but does not explain) the “economic law of network effects,” which says nothing about the extent to which any given competitor, particularly one with first mover advantage and the ability to control competition, will yield its control over a market. Further, the fact that a technology may “be used to protect content other than Unscreened and Marked content” is irrelevant. The very premise of the broadcast flag rule is that digital content made available through the digital broadcast platform should not be disadvantaged or receive inferior protection against redistribution compared to the redistribution protection afforded to content on other platforms. Otherwise, high-value content will migrate from broadcast to pay services, jeopardizing the continued viability of free over-the-air broadcasting.<sup>26</sup> If a technology does not distinguish between different sources of “redistribution control” content, there is no justification for treating broadcast content any differently than other content for which the same level of protection is signaled.

Failure of the Commission to require automatic approval of any FCC-approved digital broadcast content protection technology as a downstream output or recording technology would, in essence, provide the very same industry veto the Commission sought to avoid in reserving to itself initial technology approvals. Again, having removed the protection of digital broadcast content from the marketplace, the Commission may not now rely solely on the marketplace, particularly where there are likely to be direct competitive interests that could benefit from delay or disappearance of a competing technology. Various Commission approved digital content protection

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<sup>26</sup> See *Broadcast Flag FNPRM* at ¶ 6, 31.

technologies must work with other technologies, be they upstream or downstream, *without any further approval required by licensors.*

**B. Reciprocal Non-Asserts**

Philips reiterates the need for the Commission to recognize the inherent anticompetitive tendency and discriminatory effect of a licensing agreement that requires a licensee to surrender its intellectual property rights against the licensor. As Philips has commented, it would be nothing less than perverse for the government, as a result of regulation seeking to protect the intellectual property of content providers, to require technology manufacturers to sacrifice their own intellectual property.<sup>27</sup> Moreover, in this context, such provisions discriminate against manufacturers that own relevant IP. Such manufacturers must pay more (by giving up IP rights) than manufacturers that do not own IP. This disparity among competing manufacturers in the costs of obtaining a license is the very definition of discrimination in licensing. It is no coincidence that the entire CE industry, in the DFAST license, agreed upon a reciprocal obligation to license on reasonable and nondiscriminatory terms rather than accepting a reciprocal non-assert.<sup>28</sup> Further, mandatory reciprocal non-asserts are inconsistent with the Commission's own recognition that competition and fairness are served by a regime of reasonable and nondiscriminatory licensing. Permitting a licensing regime for the Broadcast Flag government mandate predicated upon reciprocal non-asserts would contravene a core principle engrained in Commission practices for more than four decades.

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<sup>27</sup> See *Philips FNPRM Comments* at 24-25.

<sup>28</sup> *DFAST License* at ¶ 3.5.

### C. Change Management

DTLA contends that licensors should have a nearly unfettered right to alter their technologies or licenses “so long as there are adequate protections to ensure that such changes will not materially affect the level of security applied to Unscreened and Marked Content.”<sup>29</sup> DTLA then proceeds to refine that concept to conclude that no problem exists as long as content owners have the right to “meaningfully object to material and adverse changes.”<sup>30</sup> DTLA’s formulation is an admission that as long as the licensor and the content owners agree on a change, anything goes.

Philips respectfully poses the question: what about the rights of licensees, who invest millions of dollars in product design, development and manufacturing on the basis of the approval of a technology? Change management processes advocated by DTLA would do nothing to prevent unilateral changes by the licensor that could potentially have the effect of rewriting the Broadcast Flag regulation itself, including requirements regarding copy protection, restrictions on digital and analog outputs, limitations on PVR processing, and other such restrictions. Not only do one-sided changes threaten competition by permitting the licensor to develop and implement changes first, ensuring it can deliver products to market sooner than the competition, but they could also significantly threaten consumer use of digital broadcast content in a manner that falls outside the scope of the Broadcast Flag regulation. Only by providing implementers with the ability to participate in any changes to an approved technology can the Commission be sure that “change management” does not become synonymous with “rewrite” of the

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<sup>29</sup> *DTLA FNPRM Comments* at 12.

<sup>30</sup> *Id.*

Broadcast Flag regulation, or permit unshakeable first-mover advantages to licensors in the marketplace.

DTLA mischaracterizes the Philips approach to change management, arguing it would require that “any changes to a protection technology or license terms be subject to consensus among all licensees and content owners.”<sup>31</sup> That is a figment of DTLA’s imagination. In its Comments in response to the *Broadcast Flag FNPRM*, Philips clearly articulated its notion of appropriate change management procedures. Reduced to its essence, it simply envisions basic due process for licensees: notice, an opportunity to be heard and a means to resolve disputes by an objective third-party. DTLA’s opposition to such fundamental due process is simply indefensible.

Finally, Philips wants to make clear that it believes content owners should be full participants in the change management process, with the same rights as licensees. Conversely, licensees should be full participants, with the same rights as content owners.

#### **D. Nondiscrimination Between CE and IT Devices**

Another important reason for the Commission to maintain its requirement that licensing go forward on reasonable and nondiscriminatory terms is to ensure parity between CE and IT products for purposes of Broadcast Flag regulation. As Philips has previously advised, there have been past attempts to use licensing to distinguish between CE and IT products, even though they are increasingly direct competitors. Just as the Commission should judge CE and IT devices for compliance with the Broadcast Flag regulation under one set of objective criteria, licensing terms should be required to do the

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<sup>31</sup> *Id.*

same to the greatest extent possible. CE products have not been used for the indiscriminate redistribution of music and analog broadcast content over the Internet, and there is no justification for placing more stringent digital content protection restraints on them compared to IT products. In fact, just the opposite is true, although Philips does not seek such an approach.

**V. REVOCATION OF A TECHNOLOGY MUST ONLY OCCUR ON A GOING-FORWARD BASIS, AND ONLY WHEN A COMPROMISE IS SIGNIFICANT AND WIDESPREAD**

Like many of the parties submitting comments to the Commission on the issue of revocation, Philips notes that the term “revocation” has been used with different meanings depending on the context. Philips recognizes that the term has been used to refer to the “revocation of devices,”<sup>32</sup> as well as the “revocation of technologies,”<sup>33</sup> which is more appropriately described using a term such as “withdrawal of approval.”

Of particular concern, Philips concurs with the comments by both the Consumer Electronics Association (“CEA”) and the Home Recording Rights Coalition (“HRRC”) that any revocation of a technology must only occur on a going-forward basis, so as to ensure that consumers making use of devices that include the revoked technology are not

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<sup>32</sup> See, e.g., *MPAA FNPRM Comments* at 9; *DTLA FNPRM Comments* at 11; Comments of Matsushita Electric Corporation of America, MB Docket No. 02-230 (Feb. 13, 2004) (“*Panasonic FNPRM Comment*”) at 4; *IT Coalition FNPRM Comments* at 12-13; Comments of the Home Recording Rights Coalition, MB Docket No. 02-230 (Feb. 13, 2004) (“*HRRC FNPRM Comments*”) at 4-5; Comments of the Consumer Electronics Association, MB Docket No. 02-230 (Feb. 13, 2004) (“*CEA FNPRM Comments*”) at 8.

<sup>33</sup> See, e.g., *DTLA FNPRM Comments* at 11-12; Comments of the Electronic Freedom Foundation, MB Docket No. 02-230 (Feb. 13, 2004) (“*EFF FNPRM Comments*”) at 9-11; *Panasonic FNPRM Comments* at 3-4; Comments of Verizon, MB Docket No. 02-230 (Feb. 13, 2004) at 8-10; *HRRC FNPRM Comments* at 4-5; *CEA FNPRM Comments* at 8-9.

disenfranchised, or otherwise penalized for the bad acts of a select few.<sup>34</sup> As Philips has previously commented, revocation of an entire technology must only be employed upon a showing that a compromise is significant and widespread.<sup>35</sup>

**VI. A DEFINITION OF PDNE MUST GIVE EFFECT TO THE COMMISSION'S ADOPTED SCOPE OF REDISTRIBUTION, NOT LIMIT OR EVISCERATE IT**

In the analog marketplace, consumers have become accustomed to time-shifting broadcast content (where they record it for later viewing), and space-shifting broadcast content (where they make a recording to enable them to watch the recorded content in alternative locations, such as secondary residences, friends homes, the office, and so forth). In the digital environment, CE manufacturers, IT companies, and content companies envision a networked world where consumers can access their content libraries using the Internet or other public or private networks. In Philips' view, this ultimately includes ensuring that consumers can continue to time- and space-shift, albeit *virtually*, as they access legally recorded content via the Internet instead of actually carrying physical recordable media with them.

It is with the innovation of *virtual* time- and space-shifting, and with consumer use and enjoyment of digital broadcast content in mind, that Philips encourages the Commission not to consider a *limiting* definition of PDNE, as encouraged by the MPAA.<sup>36</sup> A narrow definition of PDNE could artificially eliminate the lawful, expected ways in which consumers may take advantage of new digital devices and digital content

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<sup>34</sup> See *CEA FNPRM Comments* at 9; *HRRC FNPRM Comments* at 4-5.

<sup>35</sup> See *Philips FNPRM Comments* at 32.

<sup>36</sup> See *MPAA FNPRM Comments* at 7-8.

to perform traditional activities in new, secure ways. As the Professional and Collegiate Sports Leagues have commented, “[t]he boundaries of a PDNE should not be set to foreclose innovative solutions that permit consumers to do what the law allows them to do...”<sup>37</sup>

However, Philips disagrees with the primary argument of the Professional and Collegiate Sports Leagues—that the flag technology must be structured to confine consumers to only those rights permitted by copyright law. The Professional and Collegiate Sports Leagues have it backwards. The flag was adopted to address a specific, defined threat to the DTV transition—the threat of indiscriminate Internet redistribution. It was not adopted to be a new form of technological “super-copyright.” Contrary to the Professional and Collegiate Sports Leagues’ fears,<sup>38</sup> nothing in the broadcast flag rule forces copyright owners “to waive” anything connected with their copyright. Rather, the flag introduces an added layer of technological protection from one type of conduct that supplements the legal protection provided by copyright. In this regard, Philips agrees with Time Warner<sup>39</sup> that it is important for the Commission to continue to make clear, as it has throughout this proceeding, that nothing in this proceeding shall have any effect on or revise copyright law through the adoption of a defined scope of technologically prevented redistribution or a definition of PDNE. The Commission has been unequivocal in its insistence that implementation of the Broadcast Flag regime does not change or

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<sup>37</sup> Comments of the Office of the Commissioner of Baseball *et al.*, *MB Docket No. 02-230* (Feb. 13, 2004) at 6.

<sup>38</sup> *See Id.* at 3

<sup>39</sup> *See* Comments of Time Warner Inc., *MB Docket No. 02-230* (Feb. 13, 2004) at 11.

affect copyright law.<sup>40</sup> Adherence to that tenet requires the Commission to reject the Professional and Collegiate Sports Leagues' approach.

Conversely, while the flag is not a threat to the rights of copyright owners, if the Commission is not careful, flag technologies could be used in ways that interfere with lawful consumer conduct. In a narrowly defined PDNE, consumers could find their use and enjoyment of digital content artificially limited, where in the absence of such a definition they would be empowered by remote usage technologies, such as the Internet. Instead of being able to use the Internet to *securely* access content legally recorded and stored on a home network, consumers could be artificially forced to rely on physical media, or purchase multiple copies of content for use in alternative locations and on multiple devices. The Commission's role in this regard must be to balance the affected interests, and not to enshrine regulation of new business models hoped for or anticipated by any stakeholders.

Philips concurs with the sentiments expressed by Time Warner and many other commenters that the Commission should, ideally, refrain from defining the PDNE to avoid such pitfalls.<sup>41</sup> Should the Commission determine that some form of PDNE is necessary to give effect to the Broadcast Flag's scope of redistribution, yet ensure its effectiveness in prohibiting indiscriminate redistribution of digital broadcast content over the Internet, Philips recommends a definition similar to the "safe harbor" definition

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<sup>40</sup> *Broadcast Flag Report and Order* at ¶ 9.

<sup>41</sup> *See, e.g., Panasonic FNPRM Comments* at 3; *Verizon NPRM Comments* at 3-6; *IT Coalition FNPRM Comments* at 6-8; *Comments of the Center for Democracy and Technology*, MB Docket No. 02-230 (Feb. 13, 2004) at 9.

advocated by CEA.<sup>42</sup> Instead of a limitation, the PDNE definition should serve as an objective for manufacturers to achieve, and that objective should be coextensive with the scope of redistribution. Philips has previously suggested certain lawful acts of personal use that the Commission should include in any such definition of PDNE, including redistribution between and among all devices in the home; to personal portable devices (such as a PDA, laptop computer or mobile phone); or to one's motor vehicle or boat; and between an individual's primary and secondary residences, and between one's home and office.<sup>43</sup>

Should the Commission adopt this approach, such a definition must only exist within the context of an evolving marketplace and technology. At such time as increasingly secure point-to-point technologies come to exist, the need for any definition of the PDNE will decline, and ultimately become unnecessary.

**VII. ALTHOUGH THE BROADCAST FLAG AND PLUG AND PLAY CONTENT PROTECTION SCHEMES SHOULD NOT BE UNIFIED, CABLELABS SHOULD BE BOUND BY COMMISSION DETERMINATIONS REGARDING REASONABLE AND NONDISCRIMINATORY LICENSING AND REDISTRIBUTION CONTROL**

Concurring with CEA<sup>44</sup> and the IT Coalition,<sup>45</sup> Philips, as a general matter, opposes the unification of the Plug and Play and Broadcast Flag content protection approval processes. However, there is one area where Commission determinations within the Broadcast Flag approval process should be conclusive upon CableLabs.

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<sup>42</sup> See *CEA FNPRM Comments* at 6.

<sup>43</sup> See *Philips FNPRM Comments* at 30.

<sup>44</sup> See *CEA FNPRM Comments* at 5.

<sup>45</sup> See *IT Coalition FNPRM Comments* at 14-16.

Where the Commission determines that certain license terms are inconsistent with the core principle of reasonable and nondiscriminatory licensing required by Commission policy<sup>46</sup> those determinations should extend to the appropriateness of the digital content protection licenses covering technologies used in connection with the DFAST license. The process for approval under the DFAST or PHILA licenses in the Plug and Play regime affords none of the protections for competition and consumers required by the Broadcast Flag rules. Those protections are essential to carrying out the core policies of the Commission regarding the DTV transition. They must be given effect in the context of Plug and Play to the same extent as they are under the Broadcast Flag regulation.

Conversely, as discussed in Part II-D, above, if a digital content protection technology is approved by the FCC for Broadcast Flag purposes, that means that the Commission has found that it is effective—highly secure—in preventing unauthorized redistribution and also meets the public interest criteria regarding consumer use and enjoyment and safeguarding competition through reasonable and nondiscriminatory license terms. In that case, the technology should be entitled to a presumption of approval (and a fast-track process) for purposes of the DFAST and PHILA licenses, with CableLabs review limited to evaluation of the copy control measures employed by the technology.

### **VIII. ALL DEMODULATORS MUST RECEIVE EQUAL TREATMENT UNDER THE BROADCAST FLAG REGULATION**

Philips agrees with comments filed by Panasonic and MPAA that software demodulators should be included within the protections the Commission seeks to

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<sup>46</sup> See discussion in Section II-C and section IV, *supra*.

establish for digital broadcast content in the Broadcast Flag scheme.<sup>47</sup> Although Philips recognizes the potential for innovation flowering from software demodulators and wishes to encourage it, the price of such innovation cannot be government creation, through regulation, of a severe competitive imbalance between CE and IT products for purposes of compliance with the Broadcast Flag regime.

Philips strongly believes that any final Broadcast Flag regulation must ensure that CE and IT devices remain in parity for competitive purposes.<sup>48</sup> As convergence increasingly wipes away traditional boundaries delineating differences between CE and IT devices, there is no need to create separate regulatory requirements for each. To permit software demodulators to go unregulated would not only eviscerate the protection goals established by the Commission, as MPAA correctly observes,<sup>49</sup> but also ensure any hardware demodulator product is hamstrung in its ability to compete in the converging digital marketplace.

## **IX. CONCLUSION**

The Commission's November 4, 2003 Broadcast Flag Order struck the proper balance among competing interests of content providers, CE and IT product manufacturers and, most importantly, consumers. Rules that might result from this FNPRM cannot alter that balance. The approval process established in that Order, based upon objective technical criteria and reasonable and nondiscriminatory licensing, must remain the hallmarks of the Commission's broadcast flag rules until such time as

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<sup>47</sup> See *Panasonic FNPRM Comments* at 2; *MPAA FNPRM Comments* 13-18

<sup>48</sup> See *Philips FNPRM Comments* at 28.

<sup>49</sup> See *MPAA FNPRM Comments* at 14.

experience and marketplace conditions warrant migration to a true self-certification regime. In the meantime, the Commission should focus upon refining the objective technical criteria and making crystal clear that certain licensing provisions are simply incompatible with reasonable and nondiscriminatory licensing and will preclude approval by the Commission of digital content protection technologies.

Respectfully submitted,

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