

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

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| In the matter of                     | ) |                      |
|                                      | ) |                      |
| Digital Broadcast Content Protection | ) | MB Docket No. 02-230 |
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**Reply Comments Of  
The Home Recording Rights Coalition**

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The Home Recording Rights Coalition (HRRC) submits these Comments in response to the Commission’s November 4 Further Notice Of Proposed Rulemaking.<sup>1</sup> HRRC’s initial comment in this Docket suggested: “As it proceeds, the Commission should seek to preserve the reasonable, customary, and legitimate expectations of consumers while seeking to balance the incremental demands of copyright proprietors.”<sup>2</sup> In its February 13 Comments,<sup>3</sup> HRRC cautioned (at 1):

“HRRC has continually encountered and resisted legislative, regulatory, and legal initiatives aimed at cutting back on the consumer rights and the design freedom for product developers that the Supreme Court protected. This Broadcast Flag proceeding, while not aimed at such a restrictive outcome, could still have such a result. It is on this potential that these HRRC comments focus.”

This concern has been proven appropriate by comments received in this proceeding:

- The Motion Picture Industry has endeavored to slip in language that would, in a single blow, have the Commission approve Selectable Output Control, so as to (a) turn this into a copy protection proceeding, and (b) eviscerate the Plug & Play Encoding Rules and DFAST Compliance Rules in the navigation device proceeding.

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<sup>1</sup> *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, FCC 03-273, Report and Order and Further Notice of Proposed Rulemaking, (Rel. Nov. 4, 2003) (“Broadcast Flag Order”).

<sup>2</sup> *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Comments of HRRC at 1 (Dec. 6, 2002).

<sup>3</sup> *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Comments of the HRRC On Further Notice of Proposed Rulemaking at 1 (Feb. 13, 2004).

- Representatives of sports leagues have emerged to urge the Commission to do a 180-degree reversal, from this proceeding being *not* about copy protection, to it being *only* about copy protection.
- Cable interests seek to use an alternative broadcast flag “signaling” mechanism as a reason for encrypting the basic cable tier, and thereby frustrate a longstanding congressional goal, expressed as an instruction to the Commission in Section 624, to make home recording *more* convenient for consumers.
- The overall effect of these proposals would be to validate the most extreme criticisms that were made of the Commission, and to invalidate the Commission’s own assurances, when it went down the path toward the “Flag.”

**I. MPAA’S REQUEST FOR SELECTABLE OUTPUT CONTROL POWER IN THIS PROCEEDING RAISES QUESTIONS ABOUT ITS GOOD FAITH WITH RESPECT TO ITS LIMITED BROADCAST FLAG GOALS.**

As HRRC pointed out in its Opposition to MPAA’s Petition for Reconsideration in the Plug & Play proceeding,<sup>4</sup> MPAA has directly and through the testimony of a senior executive of one of its principal members assured the U.S. Congress that it was not seeking to impose selectable output controls on consumers. And yet it continues to push for such anti-consumer tools, even in this proceeding, which it has urged is *not* about copy protection, and through which MPAA ostensibly wanted *only* to ensure that broadcast television programming would not find its way to indiscriminate Internet redistribution.

The MPAA and its members, for the past decade, have encouraged the development of copy protection tools and have expressed active interest in, and participated in, their refinement and licensing. They appear to be less forthcoming about paying for them. They have now asked the Commission to turn the Broadcast Flag proceeding into one which *would* grant explicit copy protection powers to MPAA members through Selectable Output Control, just so that MPAA members might have the option *not* to pay for the protections they have so vociferously demanded from the Commission, the CE and IT industries and, of course, the consumer.

If permitted to pursue this agenda, the MPAA will have converted this proceeding from one about whether digital broadcast television content can reach the Internet, to one about how much power the Commission will delegate to MPAA members to control what consumers can

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<sup>4</sup> *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, Opposition of the HRRC to Petitions for Reconsideration at 2-4 (Mar. 10, 2004).

see and do in the privacy of their homes. And the Commission would, as further “ancillary” fallout from granting MPAA members this power, also determine a key issue for purposes of the navigation device Encoding Rules regulations – an issue that the Commission, on October 9, decided *against* MPAA on the merits.<sup>5</sup>

**II. REPRESENTATIVES OF SPORTS LEAGUES HAVE EMERGED TO URGE THE COMMISSION TO DO A 180-DEGREE REVERSAL, FROM THIS PROCEEDING BEING NOT ABOUT COPYRIGHT LAW, TO IT BEING ONLY ABOUT COPYRIGHT LAW.**

In its Broadcast Flag Order, the Commission made clear that the broadcast flag regulation did nothing to alter copyright law. The Commission stated (Order ¶ 9):

“[T]he creation of a redistribution control regime establishes a technical protection measure that broadcasters may use to protect content. However, the underlying rights and remedies available to copyright holders remain unchanged. In the same manner, this decision is not intended to alter the defenses and penalties applicable in cases of copyright infringement, circumvention or other applicable laws.”

In other words, the broadcast flag provides an additional technological protection measure that is layered on top of copyright law—action permitted by the flag technologies may still be copyright infringement, fully subject to an extraordinary array of sanctions (potentially including enhanced, per-work statutory damages of up to \$150,000, attorneys’ fees, injunctions, lost profits, seizure of machinery and equipment) that are available to the copyright owner.<sup>6</sup>

The Sports Leagues egregiously miss this call. The Leagues base their entire set of comments on the erroneous premise that somehow, the broadcast flag will “force[] content owners to cede rights as a condition of making programming available for free, over-the-air digital broadcast television.”<sup>7</sup> Thus, they argue (at 3) that the scope of the conduct permitted by the flag technologies “must be consistent” with what they perceive to be the “very limited rights of consumers . . . under existing copyright law.”

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<sup>5</sup> *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, Report and Order and Second Further Notice of Proposed Rulemaking ¶ 44 (Rel. Oct. 9, 2003).

<sup>6</sup> 17 U.S.C. § 504.

<sup>7</sup> *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Comments of the Commissioner of Baseball, National Basketball Association, National Hockey League, National Football League, Women’s National Basketball Association, National Collegiate Athletic Association, PGA Tour, Inc. and Ladies Professional Golf Association at 6 (Feb. 13, 2004) (the “Sports Leagues”).

The HRRC disagrees strongly with the Sports Leagues' mischaracterization (at 4-5) of consumer rights and the scope of the Betamax decision -- which they read, *e.g.*, as denying any consumer expectation for instant replay via a home DVR. More fundamentally for purposes of this proceeding, however, the Sports Leagues are entirely off base in their effort to inject controversial copyright law issues into the broadcast flag proceeding. This proceeding does not approach such determinations of copyright law any more closely than Major League Baseball approaches Washington D.C. Nothing in the broadcast flag rule requires copyright owners to waive anything. In short, the concerns of the Sports Leagues are wholly unfounded.

Furthermore, the Commission lacks jurisdiction to expand the flag mandate as requested by the Sports Leagues. The broadcast flag regulation is not based on a conclusion that it is necessary to mandate technological protection measures that provide copy protection or that prevent all redistribution prohibited by copyright law. Rather, the flag regime is based on the very specific finding "that the potential threat of mass indiscriminate redistribution will deter content owners from making high value digital content available through broadcasting outlets ...." (Broadcast Flag Order ¶ 4) There is no basis in the Commission's Report and Order for prohibiting any conduct other than "mass indiscriminate redistribution."

There is one respect, however, in which the Commission must be mindful of copyright law—the flag regime should be narrowly tailored so that it minimizes any potential interference with consumer fair use rights. Because the limitations on use imposed by the flag technologies are added to those imposed by copyright law, the risks to copyright owners of under-regulation and the risks to consumers of over-regulation are not symmetrical. Fair use rights are at risk. While a copyright owner retains his or her full rights under copyright law to sue for copyright infringement when conduct is not prevented by the flag, a consumer is granted no ability to make use of DTV content that is prevented by broadcast flag technology, even if that use is wholly lawful under copyright law.

### **III. ENCRYPTION OF THE BASIC CABLE TIER HAS RECEIVED NO NEW SUBSTANTIVE SUPPORT; IT WOULD BE ANTICOMPETITIVE AND WOULD FRUSTRATE A LONGSTANDING CONGRESSIONAL GOAL.**

Over a decade ago, Congress sought through the enactment of Section 624 to enable consumers to have their cable products work with their consumer electronics products, and to

enhance prospects for competitive entry.<sup>8</sup> Then, in enacting Section 304 of the 1996 Telecommunications Act, it sought to assure the competitive availability of navigation devices for the benefit of consumers. In each case, Congress sought to give consumers the ability to make choices from among competing products. In fact, Congress sought to give consumers the option and the freedom of returning their set-top boxes and choosing a navigation device, produced by their preferred CE manufacturer, with such features as they thought valuable in enriching their television viewing experiences.

For over a decade, the Commission has wrestled with how to effectuate Congress's intention. What Congress most assuredly did not intend was to give MVPDs even more intrusive control over consumers by giving them the power to control a consumer's entire home network. If the Commission were now to allow cable operators to seize on "robustness" as a rationale for dominating and pre-empting competition in home network devices, it would gut the entire purpose underlying Senator Leahy's efforts, and those of the Congress as a whole, to give consumers meaningful choice once the cable signal passes through the wall of his or her home. HRRC, having supported Senator Leahy's efforts from the very beginning, trusts that the Commission will adhere to the goals laid out by Congress.

**IV. THE COMMISSION AND THE PARTIES RISK A SEVERE LOSS OF CREDIBILITY IF THE ANTI-CONSUMER PROPOSALS MADE IN COMMENTS ARE TAKEN SERIOUSLY BY THE COMMISSION.**

Over the objections of parties with whom the HRRC often works cooperatively in advancing fair use and other important consumer objectives, HRRC has sought to work with the Commission and other parties to develop a broadcast flag regime that would address legitimate concerns while preserving customary and reasonable consumer practices. HRRC has viewed pragmatically the ancillary and, hopefully, transitory limits on consumer freedom that Flag implementation may entail, out of a recognition that all parties stood to benefit if the Commission were successful in moving the DTV transition forward.

But all of that would be for naught if the Commission were now to give in to the subtle and not-so subtle efforts of the MPAA, the Sports Leagues, and the NCTA to negate a decade of

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<sup>8</sup> 47 U.S.C. § 549; S. Conf. Rep. No. 104-230, at 181 (1996); H.R. Rep. No. 104-204, at 112-13 (1995). *See, e.g.*, Statement of Senator Leahy, 138 Cong. Rec. 561 (1992).

cooperative efforts to find reasonable solutions to problems. The overall effect of these proposals would be to validate the most extreme criticisms that were made of the Commission, and to invalidate the Commission's own assurances, when it went down the path toward the "Flag."

We trust that the Commission will stick to the path laid out by the Congress, rather than being sidetracked for the benefit of interests who only purport to advance the interests of consumers.

Respectfully submitted,

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**THE HOME RECORDING RIGHTS COALITION**

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