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600 13th Street, N.W.
Washington, D.C. 20005-3096
202-756-8000
Facsimile 202-756-8087
www.mwe.com

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Robert S. Schwartz
rschwartz@mwe.com
202-756-8081

MCDERMOTT, WILL & EMERY

May 11, 2004

VIA ECFS

Ms. Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

Re: Ex Parte Communication in MB Docket 02-230.

Dear Ms. Dortch:

On May 7, 2004, the undersigned, on behalf of the Home Recording Rights Coalition (HRRC), met with Rick Chessen, Susan Mort, Mary Beth Murphy, Alison Greenwald, Steve Broeckart, John Wong, and Mike Lance, all of the Media Bureau, with respect to matters of interest in this Docket. The meeting occurred in response an interest by the Bureau staff in the HRRC views on issues that may arise with respect to self-certification proceedings in related dockets.

Areas of inquiry by the staff concerned the views of HRRC, as an organization concerned with the home recording rights, expectations and practices of consumers, re possible outcomes in this Docket as a result of certification determinations in the related self-certification dockets. Items of inquiry were:

1. In light of the Broadcast Flag not being aimed at curtailing home recording, does HRRC take the position that all technologies approved for self-certification must support or enable home recording?
2. Would HRRC be concerned if Broadcast Flag regulations were to become effective and the technologies approved as certified did not include transmission technologies and recording technologies that support home recording to the extent that HRRC believes is appropriate?

3. To the extent HRRC is concerned with Broadcast Flag outcomes enabling home recording, is HRRC separately concerned with enabling home recording of HDTV content?

The undersigned said he was not in a position to provide definitive HRRC positions on all questions, but could discuss these issues based on HRRC positions of record and personal elaboration, subject to confirmation. The ideas expressed were as follows:

1. HRRC, as a public policy coalition, does not express preferences for or against particular technologies. HRRC has not taken the position that *all* technologies, as a condition of certification, must support home recording. However, this position is based on an assumption of market competition among interfaces and technologies that is informed by the Commission's determination *not* to allow "Selectable Output Control" in its regulations in Dockets 97-80 and 00-67, re MVPD transmissions. If a content owner or distributor were free to shut off MVPD interfaces and/or technologies that support home recording, HRRC might indeed take the position that all certified technologies must support home recording – otherwise, in a marketplace distorted by Selectable Output Control, only non-recordable interfaces and technologies might survive because only those interfaces and technologies could be considered reliable for *viewing* purposes. Such market distortion could cause only non-recordable technologies to be available for home network transmission and recording of digital broadcasts, even though such broadcasts are considered freely copiable and even though they themselves might be free from Selectable Output Control.

2. HRRC has not expressed a position on what should be done in the event that the FCC found that its certification choices at any particular time were such that the Broadcast Flag obligations on digital outputs or recording devices would not, in either area, leave any option available that supports home recording. The undersigned expressed the personal view, however, that in any such case the Commission should proceed with a certification that might otherwise have been granted, *but* should delay an effective date of the relevant portion of its regulations *until* marketplace alternatives that adequately support home recording had *also* been certified, and that any such calculation of effective date would need to build in an appropriate period for compliance (generally 18 – 24 months) for device manufacturers. Otherwise, imposition of the Broadcast Flag regulations would indeed curtail private, noncommercial home recording. Moreover, the undersigned expressed the personal view that any decision pursuant to the procedure suggested above should take into account whether the only approved recording method applies only to recorders with non-removable media ("PVRs"), as consumers have a reasonable expectation of making removable recordings of broadcast content, and "PVRs" often are supplied in "set-top boxes" that are rented and must at some point be returned. In such case, the undersigned suggested (again as a personal opinion), the Commission might also delay an effective date.

3. The undersigned expressed the personal opinion that the same concerns as noted above should apply if the outcome were limited to HDTV content. Consumers owning HDTV displays now expect and deserve to receive HDTV content on the same basis as other content, which includes reasonable and customary home recording. Consumer expectations with respect to HDTV also legitimately extend to removable media, and Broadcast Flag regulations should not interfere with such recording expectations.

This letter is being provided to your office in accordance with Section 1.1206 of the Federal Communications Commission rules. A copy of this letter has been delivered to the parties listed below.

Very truly yours,

Robert S. Schwartz

Robert S. Schwartz
Counsel to HRRC

cc: Rick Chessen
Susan Mort
Mary Beth Murphy
Alison Greenwald
Steve Broeckaert
John Wong
Mike Lance