



**NATIONAL FOOTBALL LEAGUE**

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June 24, 2004

Mr. Rick C. Chessen  
Associate Bureau Chief, Digital Television Task Force  
Media Bureau  
Federal Communications Commission  
445 12th Street S.W.  
Washington, DC 20554

Re: *Digital Output Protection Technology and Recording Method Certifications:  
TiVoGuard Digital Output Protection Technology, MB Docket No. 04-63*  
  
*Digital Output Protection Technology and Recording Method Certifications:  
Helix Device DRM Trusted Recorder and Helix Device DRM Technology, MB  
Docket No. 04-65*

Dear Mr. Chessen:

Proximity controls for redistribution of digital content are an essential protection for digital broadcasts, particularly those of the National Football League (“NFL” or “League”). There are a number of unique aspects and economic factors underlying the NFL’s broadcast model, but the same core principle – a geographically limited right to distribute content – underlies a number of other distribution models. All of these models – which range from other sports leagues’ telecasting models to the network/affiliate model (only one station may become the affiliate of a particular network in a particular television market) to the post-broadcast syndication of programming (only one station in each DMA may acquire rights to a syndicated program) – would be similarly threatened by the absence of adequate proximity controls. Accordingly, the Commission should grant interim certifications for digital output protection technologies and recording methods used in Covered Demodulator Products<sup>1</sup> *only* if those technologies contain proximity controls that reasonably constrain the unauthorized redistribution of digital content from extending beyond a Covered Demodulator Product’s local environment.

In the above-captioned proceedings, TiVo and RealNetworks have filed applications for interim certification of technologies that fail to incorporate such proximity controls. Commenters have objected to the certification of TiVo’s TiVoGuard and RealNetworks’ Helix DRM technologies on grounds that neither technology incorporates a proximity limitation.<sup>2</sup> TiVo has sought to counter such objections by (1) noting the

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<sup>1</sup> See *Certifications for Digital Output Protection Technologies and Recording Methods to be Used in Covered Demodulator Products*, MB Docket 02-230, FCC 04-715 (rel. Mar. 17, 2004).

<sup>2</sup> In each proceeding, the Motion Picture Association of America, Inc., Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, The Walt Disney Company, and Warner Brothers Entertainment

commenters' failure to articulate any compelling reasons for a proximity limitation,<sup>3</sup> and (2) arguing that the question of proximity controls is beyond the scope of the certification proceeding.<sup>4</sup> RealNetworks argues that proximity controls are undesirable and unnecessary to prevent the indiscriminate redistribution of digital broadcast content.<sup>5</sup> The NFL submits this *ex parte* letter to demonstrate that its regional television plan (like other content owners' and distributors' similar plans) presents a compelling reason for the Commission to condition the interim certification of Covered Demodulator Products on the incorporation of a proximity limitation. Viewed in the context of this compelling justification for proximity controls, it is clear that proximity controls are both desirable and effective and, therefore, necessarily fall within the scope of the Commission's consideration in the above-captioned proceedings.

***The NFL's Regional Television Plan.*** The League owns the copyright in the telecasts of all regular season and post-season NFL games and, pursuant to the Copyright Act, therefore has the right to determine how those telecasts will be distributed. The League has

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Inc. filed comments in opposition to the applications for interim authorization, arguing, among other things, that TiVo Guard and the Helix Device DRM fail to adequately restrict the scope of redistribution of market and unscreened content because the technologies do not impose a distance-based limitation on the redistribution of content. *Opposition to the Application of TiVo for Authorization of TiVoGuard by the Motion Picture Association of America, Inc., Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, The Walt Disney Company, and Warner Bros. Entertainment Inc.*, MB Docket 04-63, at 4-5 (Apr. 7, 2004); *Opposition to the Application of RealNetworks Inc. for Interim Authorization of Helix DRM Trusted Recorder and Helix Device DRM by the Motion Picture Association of America, Inc., Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, The Walt Disney Company, and Warner Bros. Entertainment Inc.*, MB Docket 04-65, at 4-7 (Apr. 6, 2004).

<sup>3</sup> *Reply of TiVo Inc. to the Opposition of the Motion Picture Association of America, Inc., Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLP, The Walt Disney Company, and Warner Bros. Entertainment Inc.*, MB Docket 04-63, at 21 (Apr. 16, 2004); *see also id.* at 23 ("If the MPAA Parties perceive a threat to their business model, they have failed to clearly articulate it...").

<sup>4</sup> *Id.* at 21; *see Digital Broadcast Content Protection, Report and Order and Further Notice of Proposed Rulemaking*, MB Docket 02-230, FCC 03-273, at ¶ 10 (rel. Nov. 4, 2003) ["*Report and Order*"] (stating that the Commission does not "believe it necessary to define the precise boundaries of a [personal digital network environment] in order to initiate a redistribution control scheme for digital broadcast television").

<sup>5</sup> *Reply of RealNetworks to Opposition for Interim Authorization of Helix Device DRM Trusted Recorder and Helix Device RM by the Motion Picture Association of America, Inc., Metro[-]Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, The Walt Disney Company, and Warner Bros. Entertainment Inc.*, MB Docket 04-65, at 6 (Apr. 16, 2004) (noting that "if . . . the Commission requires proximity controls for interim approval of the Helix Applications, RealNetworks is prepared to further restrict the distribution of Internet Protocol based transmissions through the inclusion of a Time To Live field of the IP packet").

devised a Sunday afternoon television plan that seeks to maximize both the League's national television audience and the local attendance of each member club. League economics, and the need to present the NFL's product in the most exciting way possible, require that the balance be carefully struck and that neither end be slighted.

The essence of the League's unique plan is this: *every* NFL regular season and playoff game is televised on free, over-the-air television. However, because as many as 14 games are played in a six-hour period on any given Sunday, the League's television plan necessarily involves regionalization of NFL telecasts. Pursuant to the League's current television contracts, each Sunday afternoon two or three NFL games are broadcast live by Fox and CBS in each market in the country. The remaining games are available on a subscription basis via the League's out-of-market satellite television package, NFL Sunday Ticket – the revenues from which are shared with the Sunday afternoon telecasters,<sup>6</sup> thereby enhancing the NFL's ability to continue widely to distribute its games on free, over-the-air television.

Fans in each city see on free television a set of games chosen for the local market, which may differ from the regionalized games offered to fans in other cities. In television markets that are home to an NFL club, these regionalized sets of games include (1) all away games of the local club, (2) all sold-out home games of that club, (3) games of the local club's key rivals (further intensifying rivalries and enhancing fans' loyalties to their area teams, and further promoting both live attendance when those rivals come to town and substantial television audiences for their other games), and (4) games of special national interest (especially late-season games with major playoff implications). Two additional games are also telecast nationally in prime time – a Sunday night game telecast on cable and satellite by ESPN (which is simulcast on free television in the home cities of the participating clubs) and a Monday night game broadcast by ABC.

This television coverage is clearly designed to provide the most valued product to each and every local market. However, to ensure that this television coverage does not endanger the well-being of the home clubs, the League has established a blackout rule. The League's blackout rule provides that if a home game of a member club is not sold out 72 hours in advance, the game is not televised in that team's home territory. The rule is primarily designed to promote home game attendance and enhance the quality of the stadium experience.

Needless to say, local paid attendance is economically critical to all clubs, but especially critical to clubs located in smaller markets. In addition to the revenues earned from ticket sales, nearly all clubs derive additional revenue from concessions, parking, and the like. This money helps the home club pay rent for its stadium and pay coaches, players, and others whose efforts go into putting a competitive, appealing product on the field. Where state or local governments have invested in stadium facilities, these locally derived revenues are often relied upon to fund or repay those investments. The blackout rule and consequent live attendance at

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<sup>6</sup> 50 cents from each incremental dollar of NFL Sunday Ticket net income is currently paid to the two Sunday afternoon carriers.

games also enhances quality of the League's telecast product, as a stadium filled with enthusiastic fans adds to the excitement and entertainment value of televised games.

The NFL's plan has been the subject of extensive scrutiny for nearly five decades by Congress, the Commission, and numerous federal courts. These reviewers have recognized that the plan is consistent with the public interest and that it promotes the welfare of fans throughout the country. This program has allowed the NFL to establish 32 member clubs in communities of widely varying size and economic conditions. It has resulted in a number of teams from modest television markets regularly playing in the Super Bowl, with the Carolina Panthers (based in Nielsen DMA #28) being the most recent example. Teams from other relatively small communities, such as Kansas City, Green Bay, Indianapolis, and Nashville, have competed successfully on the playing field with teams from far larger cities. Through this plan, the NFL provides quality television service at virtually no cost to consumers by ensuring that a local team's fans will see *all* of its away games and *all* of its sold-out home games, and ensuring that fans in non-NFL markets will see a broad variety of NFL action. In this manner, the League has honored the commitments it made to Congress nearly 40 years ago, namely, that its television plan would give regular exposure to *all* teams, that the interests of *each* team's fans would be respected, and that the revenues derived from League television contracts would be shared equally by *all* clubs – regardless of market size.

The League's regionalized television policy thus represents a careful balance of competing interests that provides a solid foundation for League operations. If this balance is disrupted by geographically unrestricted redistribution of broadcast games, fan attendance at games is likely to be decreased, and the economic effect on the League and its clubs, and related effects on the quality of the League's televised and in-stadium product, are potentially far-reaching.

***The Impact of the Proposals on the NFL's Distribution Plan.*** The Commission's approval of TiVoGuard and Helix DRM technologies in the absence of a proximity limitation would undoubtedly endanger the balance that has heretofore been achieved in ensuring maximum stadium attendance while simultaneously permitting the broadcasting of home games in particular localities. The League recognizes the Commission's desire to not "foreclose use of the Internet to send digital broadcast content where it can be adequately protected from indiscriminate redistribution."<sup>7</sup> However, although the TiVoGuard and Helix DRM technologies in question impose personal-affinity based controls on the redistribution of digital broadcast content, these controls are not sufficient to protect the NFL from schemes involving the indiscriminate redistribution of digital broadcast content.<sup>8</sup> Because these

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<sup>7</sup> *Report and Order* at ¶ 10.

<sup>8</sup> In the past, individuals have almost routinely developed schemes to obtain and show for commercial purposes broadcasts of games that had been locally blacked out. Two types of schemes are particularly analogous to those the NFL fears could be facilitated by inadequate redistribution controls. First, because C-band satellite providers were not able to track the physical location of a Sunday Ticket box, many commercial establishments registered to purchase NFL Sunday Ticket as individual consumers, using false names and giving phony addresses outside a local blackout area in order to receive otherwise blacked-out games, and then

technologies permit the retransmission of digital content to other devices registered to the same account, it would be possible for a user improperly to allow another individual in a region where a non-sold-out game has been blacked out to access a digital recording of the game and to show that game commercially. This creates a significant potential for users to circumvent the blackout rule and thereby disrupt the balance that the League has long striven to achieve. The threat is especially grave because TiVo's and RealNetworks' applications for certification do not identify any constraints on the timing of redistribution in their technologies, meaning that users presumably would be able to redistribute games *as* they are broadcast, thereby directly misappropriating the League's core product of live game distribution. Thus, in the absence of proximity limitations on the redistribution permitted by TiVoGuard and Helix DRM technologies, the approval of these technologies would pose significant risks to the viability of the League's over-the-air television policy.

The risk that would be posed to the NFL's television plan were the Commission to approve the applications filed by TiVo and RealNetworks in the above-captioned dockets provides a compelling reason for imposing proximity controls. Because the NFL has established a compelling justification for the imposition of proximity constraints on the retransmission of digital content, we believe that it is both appropriate and necessary for the Commission to consider the issue of proximity constraints in the context of these interim certification proceedings and urge the Commission impose such constraints before approving any digital output protection technologies and recording methods. Indeed, the approval of any technology in these dockets without sufficiently robust proximity controls will have significant adverse effects on the broadcasting and sports industries and endanger precisely the values that this proceeding was intended to protect.

Respectfully submitted,



Frank Hawkins

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showed those games to paying customers in commercial establishments. Second, in other cases, commercial establishments illegally modified their decoder boxes to receive and show blacked-out NFL Sunday Ticket signals to which they were not entitled. The NFL has been awarded damages for these types of violations of Sunday afternoon game telecast copyrights in numerous actions. *See, e.g., National Football League and NFL Enterprises L.P. v. White*, No. 96-CV-0533E(H), 1997 U.S. Dist. LEXIS 18827 (W.D. N.Y. Nov. 19, 1997); *National Football League and NFL Enterprises L.P. v. Greenstein et al.*, No. 96-CIV-5714(JS) (E.D. N.Y. July 8, 1997); *National Football League and NFL Enterprises L.P. v. White*, No. 96-CV-0533E(H), (W.D. N.Y. May 8, 1997).