

July 27, 2004

**FILED ELECTRONICALLY**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street SW, Room TW-A325  
Washington, DC 20554

Re: ***Ex Parte* Communication in MB Docket No. 04-63 (Digital Output Protection Technology and Recording Method Certifications: TiVoGuard Digital Output Protection Technology)**

Dear Ms. Dortch:

This letter, submitted on behalf of Public Knowledge, is in response to the *ex parte* letter filed in the above-referenced docket number on July 22 by the Motion Picture Association of America (“MPAA”) and its member companies. In its *ex parte* letter the MPAA attempts to answer Public Knowledge’s arguments against “proximity controls.”

In the hope of not taxing the attention of the Commission and its staff, we will attempt to keep this response short.

First, none of the arguments we offer against the use of “TTL” and “RTT” approaches to so-called “proximity controls” is changed by combining those approaches. A broken keyed lock and a broken combination lock provide no more protection together than each one does alone.

Second, “proximity controls” are not required of any technology by the *Report and Order*<sup>1</sup> in the Broadcast Flag proceeding. Indeed, as the Center for Democracy and Technology report<sup>2</sup> (*attached*) points out, the only reason some companies seeking certification have included the studios’ specifications for “proximity controls” is that the studios have demanded it – not because such controls are either effective anti-copying protections (everyone who incorporates “proximity controls” does so in addition to, rather than in place of, its protection technology), and not because “proximity controls” have anything to do with preventing “indiscriminate redistribution” of television content over networks like the Internet. It’s true that TiVo, unwilling to give in to MPAA demands, meets the broadcast-flag requirements in terms that are more likely to please

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

<sup>2</sup> *All Eyes on TiVo: The Broadcast Flag and the Internet*, Center for Democracy and Technology, July 26, 2002, available at [www.cdt.org/copyright/20040726tivoflag.pdf](http://www.cdt.org/copyright/20040726tivoflag.pdf).

consumers than to please the MPAA. This pro-consumer choice should not be penalized by the Commission.

Third, the MPAA has changed its story with regard to proximity controls. Originally, MPAA had said in more than one forum that limited redistribution of content over the Internet might be acceptable so long as indiscriminate redistribution is prevented. See, for example the testimony of Fritz Attaway, MPAA General Counsel, before Congress in spring of 2003:

Rep. BOUCHER: So would you agree, then, that as the broadcast flag proposal goes forward, if it does go forward, that legitimate fair use applications, including those that involve use of the Internet, should be permitted?

Mr. ATTAWAY: The broadcast flag is intended to prevent the widespread redistribution of content. If technology exists to permit secure delivery of that content to your summer home or to your office, that is not something that the broadcast flag is intended to prevent, and presumably, it will not.<sup>3</sup>

See also Mr. Attaway's comments at the Cato Institute-sponsored debate about the broadcast flag, held in February of 2003.<sup>4</sup>

As Public Knowledge has long predicted, the MPAA is using the approval process for protection technologies to prevent the deployment of models of content sharing it disapproves of, and not merely to prevent "indiscriminate redistribution" of content over networks like the Internet.

There is no question that TiVo has done its best to provide content protection that is designed both to enhance the consumer experience of television and to meet the requirements of the Broadcast Flag *Report and Order*. If the MPAA would like to change the requirements of the latter, it should seek such change by seeking a change in the Broadcast Flag *Report and Order* itself, not by attempting to exercise veto power over particular technologies it does not like.

Finally, MPAA acknowledges that since TiVo's software is upgradeable, there will be no legacy problem if TiVo is subsequently forced to change its feature set in response to an empirically demonstrated "indiscriminate redistribution" associated with TiVoGuard. MPAA then attempts to use the upgradeability of TiVo as an argument against allowing TiVo to do anything differently from any and every other technology provider. This too is inconsistent with the philosophy behind the *Report and Order*, which presumably was designed to allow content-protection technologies to compete on features as well as price. While TiVo is already a great product, if forced to compete on

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<sup>3</sup> House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property Oversight Hearing on "Copyright Piracy Prevention and the Broadcast Flag." (Mar. 6, 2003).

<sup>4</sup> See [www.cato.org/events/030205pf.html](http://www.cato.org/events/030205pf.html). Note in particular Mr. Attaway's comments regarding IBM's "XCP" protection technology, which allows remote users to share protected content.

price alone and forbidden to innovate on features by a prohibitive interpretation of the rules the Commission has promulgated, TiVo will have little to offer, competitively, against the personal-video-recorder systems that will be bundled with cable and satellite service.

We urge that the FCC continue down the path it has chosen – favoring competition on features and pro-consumer innovation – rather than revert to some constricted model of television watching favored by the Motion Picture Association of America.

In accordance with Section 1.1206(b), 47 C.F.R. § 1.1206, this letter is being filed electronically with your office today.

Respectfully Submitted,

A handwritten signature in black ink that reads "Mike Godwin". The signature is written in a cursive, flowing style.

Mike Godwin  
Legal Director  
Public Knowledge

cc:

Catherine Bohigian  
Jon Cody  
Stacy Fuller  
Jordan Goldstein  
Johanna Shelton  
Rick Chessen  
Susan Mort