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

In the Matter of:	)	
	)	
Digital Output Protection Technology and Recording Method Certifications	)	MB Docket No. 04-298
	)	
DivX DRM	)	
	)	
Order Adopting Protective Order	)	
	)	

ORDER

Adopted: August 23, 2004 **Released: August 24, 2004**

By the Chief, Media Bureau:

1. In a *Report and Order and Further Notice of Proposed Rulemaking* in its *Digital Broadcast Content Protection* proceeding, the Commission adopted a redistribution control system for digital broadcast television.[1] As a part of this system, the Commission set forth a process by which digital output protection technologies and recording methods would be authorized for use in devices required to respond and give effect to the Redistribution Control Descriptor set forth in ATSC Standard A/65B (the "ATSC flag" or "flag").[2] Under this process, proponents of specific digital output protection technologies and recording methods can certify to the Commission that such technology is appropriate to give effect to the flag, subject to public notice and inspection.[3]

2. On July 22, 2004, DivXNetworks, Inc. ("DXN") filed a request for confidential treatment of certain proprietary and commercially sensitive information contained in Exhibit 5 of its certification for DivX DRM, which contains the license offered by DXN for its technology.[4] DXN states in its request that it will accede to a protective order-based disclosure to counsel for participants in the certification process, provided the protective order clearly subjects the disclosure to the conditions that the document (1) will be used for purposes of this proceeding and for no other purpose, (2) will not be disclosed to anyone other than counsel for a party to the proceeding, and (3) will be returned to the Commission or certified as having been destroyed at the conclusion of the proceeding. DXN also asks that violations of the protective order be made subject to legal penalties.[5]

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[1] *Digital Broadcast Content Protection*, 18 FCC Rcd 23550 (2003) ("*Broadcast Flag Order*").

[2] *Id.* at 23574-76.

[3] *Id.* at 23575.

[4] Request of DivXNetworks, Inc. ("DXN") for Confidential Treatment of Proprietary and Commercially Sensitive Information Contained in Exhibit 5 of the Attached Submission for Broadcast Flag Certification (July 22, 2004). DXN later narrowed its request to certain portions of Exhibit 5. *See* Request for DXN for Confidential Treatment of Proprietary and Commercially Sensitive Information Contained in Exhibit 5 of the Attached Submission for Broadcast Flag Certification (Aug. 23, 2004).

[5] *Id.* at 1.

3. In an effort to ensure that Exhibit 5 to DXN's certification for D-VHS is afforded adequate protection and yet remains available for review, the Media Bureau hereby adopts the attached Protective Order (*see* Appendix A).

4. DXN shall make the confidential or proprietary documents available for review at the offices of DXN's outside counsel or, if DXN has not retained outside counsel, at the offices of DXN's in-house counsel. Parties reviewing Exhibit 5 will be provided the following alternatives: (1) parties will be provided adequate opportunity to inspect Exhibit 5 on site; or (2) parties may inspect Exhibit 5 on site with the ability to request a copy, at cost. Any copies of Exhibt 5 that are removed from the offices of DXN's counsel will be stamped "CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN MB DOCKET NO. 04-298 before the Federal Communications Commission" and must be returned in accordance with the terms of the Protective Order. Any party seeking access to Exhibit 5 subject to the Protective Order shall request access pursuant to the terms of the Protective Order.

5. *Authority*. This Order is issued pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau

APPENDIX A

Protective Order

MB Docket No. 04-298

1. *Introduction.* On November 4, 2003, the Commission issued a *Report and Order and Further Notice of Proposed Rulemaking* adopting a redistribution control system for digital broadcast television ("*Broadcast Flag Order*").[6] As a part of this system, the Commission set forth a process by which digital output protection technologies and recording methods would be authorized for use in devices required to respond and give effect to the Redistribution Control Descriptor set forth in ATSC Standard A/65B (the "ATSC flag" or "flag"). Under this process, proponents of specific digital output protection technologies and recording methods can certify to the Commission that such technology is appropriate to give effect to the flag, subject to public notice and inspection. On July 22, 2004, DivXNetworks, Inc. ("Submitting Party") filed a request for confidential treatment of proprietary and commercially sensitive information contained in Exhibit 5 of its certification for DivX DRM ("Request for Confidential Treatment"), which contains the license offered by Submitting Party for its technology.[7] Submitting Party stated in its request that it would accede to a protective order-based disclosure to counsel for participants in the certification process.[8] Consequently, the Media Bureau ("Bureau") has adopted this Protective Order to ensure that any confidential or proprietary information contained in Exhibit 5 is afforded adequate protection. This Protective Order does not constitute a resolution of the merits concerning whether any confidential information would be released publicly by the Commission upon a proper request under the Freedom of Information Act ("FOIA") or otherwise.

2. *Definitions.* As used herein, capitalized terms, not otherwise defined herein, shall have the following meanings:

"Confidential Information" means information contained in the Stamped Confidential Document (as hereinafter defined) or derived therefrom that is not otherwise available from publicly available sources;

"Counsel" means In-House Counsel and Outside Counsel of Record;

"In-House Counsel" means the attorney or attorneys employed by a party to these proceedings or who is employed by an affiliated entity and who are actively engaged in the conduct of this proceeding, *provided that*, such counsel are not involved in competitive decision-making, *i.e.*, In-House Counsel's activities, association, and relationship with a client are not such as to involve such counsel's advice and participation in any or all of the client's business decisions made in light of similar or corresponding information about a competitor; and

"Outside Counsel of Record" means the firm(s) of attorneys, or sole practitioner(s), as the case may be, representing a party in these proceedings.

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[6] 18 FCC Rcd 23,550 (2003).

[7] Request of DivXNetworks, Inc. ("DXN") for Confidential Treatment of Proprietary and Commercially Sensitive Information Contained in Exhibit 5 of the Attached Submission for Broadcast Flag Certification at 1 (July 22, 2004); *see also* Request for DXN for Confidential Treatment of Proprietary and Commercially Sensitive Information Contained in Exhibit 5 of the Attached Submission for Broadcast Flag Certification (Aug. 23, 2004).

[8] *Id.*

3. *Use of Confidential Information.* Persons obtaining access to Confidential Information (including the Stamped Confidential Document) under this Protective Order shall use the information solely for the preparation and conduct of this certification proceeding before the Commission as delimited in this paragraph and paragraphs 5, 10, and 11, and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings. Should the Commission rely upon or otherwise make reference to the contents of the Stamped Confidential Document or Confidential Information in its decision in this proceeding, it will do so by redacting any Confidential Information from the public version of the decision and by making the unredacted version of the decision available only to a court and to those persons entitled to access to Confidential Information under this Protective Order.

4. *Non-Disclosure of the Stamped Confidential Document.* Except with the prior written consent of Submitting Party, or as hereinafter provided under this Protective Order, neither the Stamped Confidential Document nor any Confidential Information may be disclosed by a reviewing party to any person other than the Commission and its staff. "Stamped Confidential Document" shall mean Exhibit 5 to Submitting Party's Request for Confidential Treatment, or part thereof, that bears the legend (or which otherwise shall have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN MB DOCKET NO. 04-298 before the Federal Communications Commission" to signify that it contains information that Submitting Party believes should be subject to protection under FOIA and the Commission's implementing rules, unless the Commission determines, *sua sponte* or by request pursuant to Sections 0.459 or 0.461 of its rules, that any such document is not entitled to confidential treatment.

5. *Permissible Disclosure.* Subject to the requirements of paragraph 8, the Stamped Confidential Document may be reviewed by Counsel. Subject to the requirements of paragraph 8, Counsel may disclose the Stamped Confidential Document and other Confidential Information to: (1) outside consultants or experts retained for the purpose of assisting Counsel in this proceeding, *provided that,* the outside consultants or experts are not involved in the analysis underlying the business decisions of any competitor of Submitting Party nor participate directly in those business decisions; (2) paralegals or other employees of such Counsel not described in clause 3 of this paragraph 5 assisting Counsel in this proceeding; (3) employees of such Counsel involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding, or performing other clerical or ministerial functions with regard to documents connected with this proceeding; and (4) employees of third-party contractors performing one or more of the functions set forth in clause 3 of this paragraph 5. Individuals who have obtained access to the Stamped Confidential Document and Confidential Information in accordance with the provisions of this paragraph 5 and paragraph 8 may discuss and share the contents of the Stamped Confidential Document and Confidential Information with any other person who has also obtained access in accordance with the provisions of this paragraph 5 and paragraph 8, and with the Commission and its staff.

6. *Protection of Stamped Confidential Documents and Confidential Information.* Persons described in paragraph 5 shall have the obligation to ensure that access to the Stamped Confidential Document and Confidential Information is strictly limited as prescribed in this Protective Order. Such persons shall further have the obligation to ensure that: (1) the Stamped Confidential Document and Confidential Information are used only as provided in this Protective Order; and (2) the Stamped Confidential Document is not duplicated except as necessary for filing at the Commission under seal as provided in paragraph 10 below.

7. *Prohibited Copying.* If, in the judgment of Submitting Party, some portion of the Stamped Confidential Document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited," and no copies of such portion, in any form, shall be made. Application for relief from this restriction against copying may be made to the Commission, with notice to Outside Counsel of Record for Submitting Party.

8. *Procedures for Obtaining Access to Confidential Documents.* In all cases where access to the Stamped Confidential Document and Confidential Information is permitted pursuant to paragraph 5, before reviewing or having access to the Stamped Confidential Document or Confidential Information, each person seeking such access shall execute the Acknowledgment of Confidentiality ("Acknowledgment") (*see* Appendix B) and file it with the Bureau, on behalf of the Commission, and serve it upon Submitting Party through its Outside Counsel of Record so that the Acknowledgment is received by Submitting Party at least five business days prior to such person's reviewing or having access to the Stamped Confidential Document or Confidential Information, except that, where the person seeking access is one described in either clause 2, 3 or 4 of paragraph 5, the Acknowledgment shall be delivered promptly prior to the person's obtaining access. Submitting Party shall have an opportunity to object to the disclosure of the Stamped Confidential Document to any such persons. Any objection must be filed at the Commission and served on Counsel representing, retaining or employing such person within three business days after receiving a copy of that person's Acknowledgment (or where the person seeking access is one described in either clause 3 or 4 of paragraph 5, such objection shall be filed and served as promptly as practicable after receipt of the relevant Acknowledgment). Until any such objection is resolved by the Commission and, if appropriate, any court of competent jurisdiction prior to any disclosure, and unless such objection is resolved in favor of the person seeking access, persons subject to an objection from Submitting Party shall not have access to the Stamped Confidential Document or Confidential Information. Submitting Party shall make available for review the Stamped Confidential Document at the offices of such party's Outside Counsel of Record or, if Submitting Party does not have Outside Counsel of Record, at the offices of its In-House Counsel.

9. *Requests for Additional Disclosure.* If any person requests disclosure of Confidential Information outside the terms of this Protective Order, requests will be treated in accordance with Sections 0.442 and 0.461 of the Commission's rules.

10. *Filings with the Commission.* Persons described in paragraph 5 may, in any documents that they file in this proceeding, reference Confidential Information, but only if they comply with the following procedure:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings;

b. The portions of pleadings containing or disclosing Confidential Information must be covered by a separate letter to the Secretary of the Commission referencing this Protective Order;

c. Each page of any party's filing that contains or discloses Confidential Information subject to this order must be clearly marked: "Confidential Information included pursuant to Protective Order, MB Docket No. 04-298;" and

d. The confidential portion(s) of the pleading shall be served on the Secretary of the Commission, the Bureau, and Submitting Party. Such confidential portions shall be served under seal, and shall not be placed in the Commission's public file. A party filing a pleading containing Confidential Information shall also file redacted copies of the pleading containing no Confidential Information, which copies shall be placed in the Commission's public files. Parties should not provide courtesy copies of

pleadings containing Confidential Information to Commission Staff unless the Bureau so requests. Any courtesy copies shall be submitted under seal.

11. *Client Consultation.* Nothing in this order shall prevent or otherwise restrict Counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of the Stamped Confidential Document or Confidential Information; *provided, however*, that in rendering such advice and otherwise communicating with such client, Counsel shall not disclose the Stamped Confidential Document or Confidential Information.

12. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein by any person shall not be deemed a waiver by Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing parties, by viewing this material agree: (1) not to assert any such waiver; (2) not to use Confidential Information to seek disclosure in any other proceeding; and (3) that accidental disclosure of Confidential Information by Submitting Party shall not be deemed a waiver of any privilege or entitlement as long as Submitting Party takes prompt remedial action.

13. *Subpoena by Courts, Departments or Agencies.* If a court, or a federal or state department or agency issues a subpoena or orders production of the Stamped Confidential Document or Confidential Information that a party has obtained under terms of this Protective Order, such party shall promptly notify Submitting Party of the pendency of such subpoena or order. Consistent with the independent authority of any court, department or agency, such notification must be accomplished such that Submitting Party has a full opportunity to oppose such production prior to the production or disclosure of any Stamped Confidential Document or Confidential Information.

14. *Violations of Protective Order.* Should a person that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, that person shall immediately convey that fact to the Commission and to Submitting Party. Further, should such violation consist of improper disclosure of Confidential Information, the violating person shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Counsel from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to Submitting Party at law or in equity against any person using Confidential Information in a manner not authorized by this Protective Order.

15. *Termination of Proceeding.* The provisions of this Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of this proceeding and any administrative or judicial review, persons described by paragraph 5 shall destroy or return to Submitting Party the Stamped Confidential Document and all copies of the same. No material whatsoever derived from the Stamped Confidential Document may be retained by any person having access thereto, except Counsel (as described in paragraph 5) may retain, under the continuing strictures of this Protective Order, two copies of pleadings (one of which may be in electronic format) containing Confidential Information prepared on behalf of that party. All Counsel shall make certification of compliance herewith

and shall deliver the same to Counsel for Submitting Party not more than three weeks after conclusion of this proceeding. The provisions of this paragraph 15 regarding retention of the Stamped Confidential Document and copies of same shall not be construed to apply to the Commission or its staff.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau

APPENDIX B

Acknowledgment of Confidentiality

I hereby acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceeding, and I understand it. I agree that I am bound by the Protective Order and that I shall not disclose or use the Stamped Confidential Document or Confidential Information except as allowed by the Protective Order. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge specifically that my access to any information obtained as a result of the order is due solely to my capacity as Counsel or consultant to a party or other person described in paragraph 5 of the foregoing Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the Protective Order.

I hereby certify that I am not involved in "competitive decision-making" as that term is used in the definition of In-House Counsel in paragraph 2 of the Protective Order.

I acknowledge that it is my obligation to ensure that: (1) the Stamped Confidential Document and Confidential Information are used only as provided in the Protective Order; and (2) the Stamped Confidential Document is not duplicated except as specifically permitted by the terms of paragraph 10 of the Protective Order, and I certify that I have verified that there are in place procedures, at my firm or office, to prevent unauthorized disclosure of the Stamped Confidential Document or Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

Executed at _____ this ___ day of _____, ____.

_____
[Name]
[Position]

[Address]
[Telephone]