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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of:	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67

To: The Commission

JOINT COMMENTS OF BROADCAST MUSIC, INC. AND THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Broadcast Music, Inc. ("BMI") and the American Society of Composers, Authors and Publishers ("ASCAP") hereby submit these joint comments in response to the Commission's Third Further Notice of Proposed Rulemaking in the above-captioned proceeding, FCC 07-120, released June 29, 2007 ("Third FNPR").

I. BACKGROUND.

In the Third FNPR, the Commission is requesting comments on proposed standards to ensure bidirectional compatibility of cable television systems and consumer electronics equipment, and on whether any rules the Commission enacts in this proceeding should apply to non-cable multi-channel video programming distributors ("MVPDs"). The Commission pointed out that the cable TV and consumer electronics industries have attempted to negotiate an agreement on how to achieve bidirectional

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compatibility, but have not been successful. Therefore, the Commission is seeking comment on proposals submitted by both – by the Consumer Electronics Association ("CEA") and twelve consumer electronics and information technology companies and by the National Cable and Telecommunications Association ("NCTA"). The Commission is also seeking comment on "any other proposals or rule changes that we should consider in order to permit the development of two-way digital cable-ready devices."

Both proposals on which the Commission is seeking comment – the CEA's and the NCTA's – refer to content protection. The CEA's proposal states that consumers "should be able to view, move, store, and access cable content ... in accordance with reasonable content protection requirements."[1] The NCTA refers to content protection as well,[2] and its proposed rule would allow output controls "to prevent or limit the output ... through any analog or digital output.[3]

BMI's and ASCAP's concern in this proceeding is that any rules the Commission adopts must protect their ability to fulfill their traditional roles of monitoring performances of music for royalty collection and distribution.

II. BMI'S AND ASCAP'S POSITION.

BMI and ASCAP protect the public performing rights of their affiliate/member songwriters, composers and music publishers by ensuring that they are compensated for certain uses of their musical works. Collectively, BMI and ASCAP represent nearly all U.S. songwriters, composers and music publishers in all genres of music, and the works

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[1] November 7, 2006 letter from CEA to FCC (attached as Appendix B to the Third FNPR), at page 3.

[2] November 30, 2005 letter from NCTA to FCC (attached as Appendix C to the Third FNPR), at page 9.

[3] *Id.* at Exhibit B ("Proposed Regulations"), page 9.

of foreign composers licensed through foreign societies. BMI and ASCAP collect license fees for, among other uses, radio and television broadcasts, cable television carriage, Internet, live and recorded performances. They then distribute these license fees as royalties to their affiliates and members. BMI and ASCAP also have arrangements with performing right organizations ("PROs") worldwide through reciprocal performing rights agreements.[4]

The PROs such as BMI and ASCAP have for decades monitored the public performance of music contained in audiovisual works broadcast by local television stations, broadcast networks, and cable and satellite networks for purposes of distributing royalties to their respective affiliates and members, who are the authors and copyright owners of the musical works contained in such transmissions. BMI and ASCAP participated in earlier phases of the present proceeding, explaining their concern that any copy-protection regime might restrict or inhibit the PROs' ability to conduct their customary business practices.[5]

Because the Commission did not address the PROs' concern in its *Second Report and Order*, BMI and ASCAP submitted a Petition for Reconsideration, which is still pending before the Commission.[6] Because automated tracking techniques are becoming

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[4] The Copyright Act defines "Performing Rights Society" as "an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc." 17 U.S.C. Sec. 101.

[5] *See Joint Reply Comments of the National Music Publishers' Association, the American Society of Composers, Authors And Publishers, the Songwriters Guild of America and Broadcast Music, Inc.*, submitted April 28, 2003; *Joint Petition for Reconsideration of Broadcast Music, Inc. and the American Society of Composers, Authors and Publishers*, submitted December 24, 2003; and *Reply of Broadcast Music, Inc. and the American Society of Composers, Authors and Publishers to Oppositions to Joint Petition for Reconsideration,* submitted March 24, 2004.

[6] *Joint Petition for Reconsideration, id.*

the new standard for cost-efficient performance monitoring and royalty distribution, the PROs now have an even more acute need for exemption from any copy protection regime the Commission enacts in this proceeding.

BMI and ASCAP urge that any rules the Commission enacts in this proceeding allow an adequate and reasonable opportunity for PROs, in connection with their automated royalty compliance processes, to access protected content and to decrypt any protection if necessary to monitor and copy audiovisual works using their respective computer systems for the purpose of auditing content for public performance of music.

The majority of BMI's and ASCAP's affiliates and members are not megastars and do not receive income from making sound recordings of their own music, or from concert tours, television appearances, commercial endorsements, sales of souvenirs or any of the other activities associated with the music industry. Indeed, the majority of these songwriters receive only modest incomes from their creative efforts in writing music that is performed by others. As a result, the majority of BMI's and ASCAP's songwriters are the ultimate "small businessmen and women" who depend on their royalties for a major portion of their income.

BMI's and ASCAP's primary concern is the protection of their affiliates' and members' rights. To the extent the Commission decides to maintain its current content protection rules and/or approve content protection technology, or broaden them in any way, the Commission should adopt a professional use exemption that will permit PROs access to content and permit them to decode or decrypt any digital rights management method such as an encryption technology or redistribution protection "flag" in order to

fulfill their customary roles of monitoring performances of music for royalty collection and distribution, and also for deterring unlicensed performances.

As BMI and ASCAP have previously advised the Commission, the PROs' business models depend on access to this data. BMI and ASCAP have invested and continue to invest in technology that can analyze the performance of musical works using systems that automate the very costly process of monitoring airplay, with substantial gains in accuracy and reductions in costs. Such technologies benefit BMI's and ASCAP's affiliates and members, who depend on complete and accurate monitoring. As these technologies are applied to track more types of public performances, they also benefit BMI's and ASCAP's licensees, who do not wish to bear the expense of reporting music usage to BMI and ASCAP and who want to obtain the benefit of the cost savings afforded the PROs by use of new technologies. Adoption of rules that do not grant PROs access to data they need for the lawful purpose of monitoring will significantly reduce the ability of PROs to satisfy their licensing responsibilities, which ultimately will affect the ability of hundreds of thousands of songwriters and publishers to be compensated for the public performance of their works. This, in turn, will affect adversely the creation of new musical works in the future.

In order to enable the PROs to fulfill their obligations under the new technologies, BMI and ASCAP hereby propose that the Commission adopt the following regulation:

> **Nothing in the Commission's rules shall preclude or prevent a performing rights organization, a mechanical rights organization, a monitoring service, a measuring service, or any entity owned in whole or in part by, or acting on behalf of, such an organization or service, from monitoring or measuring public performances or other uses of copyrighted works, advertisements, or announcements contained in performances or**

other uses, or other information concerning the content or audience of such performances or other uses.

Each performing rights society or mechanical rights organization, or any entity acting on behalf of such a society or organization, is granted a license for free or for a de minimis fee to cover only the reasonable costs to the licensor of providing the license, and on reasonable, nondiscriminatory terms and conditions, to access and retransmit as necessary any content contained in such transmissions protected by content protection or similar technologies, if –

"(A) the license is used to carry out the activities of such society, organization, or entity in monitoring the public performance or other uses of copyrighted works; and

"(B) such society, organization, or entity employs reasonable methods to protect any such content accessed from further distribution.

This regulation will protect the PROs' traditional-business practice from encryption and/or overly restrictive licensing terms that would have the effect of preventing them from tracking transmissions and distributing royalties in a cost-efficient manner in the future.

III. CONCLUSION.

The PROs are planning to begin using systems in the near future that can automate the monitoring of music with a greater precision and lower cost than ever before possible. Now is the time for the Commission to act and ensure that its rules do not keep the PROs in a technological stone age. Without a recognized exemption, the Commission's content protection regime could hamper BMI's and ASCAP's ability to monitor public performances, collect appropriate licensing royalties and distribute those royalties to its affiliates. Accordingly, any regulations adopted by the FCC should allow PROs such as BMI and ASCAP an exemption for the limited purpose of monitoring

programming content so that such organizations may continue to protect their affiliated songwriters, composers and music publishers, and should require that digital rights management administrators make licenses available to PROs on reasonable and non-discriminatory terms.

Respectfully submitted,

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