

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

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In the Matter of)
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Digital Output Protection Technologies)
and Recording Methods Certifications)
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TiVoGuard Digital Output Protection)
Technology)
_____)

MB Docket No. 04-63

**OPPOSITION OF TIVO INC. TO THE PETITION FOR PARTIAL
RECONSIDERATION AND CLARIFICATION 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 LLP, THE WALT DISNEY
COMPANY, AND WARNER BROS. ENTERTAINMENT INC.**

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COMPANY, AND WARNER BROS. ENTERTAINMENT INC.**

TiVo Inc. (“TiVo”) hereby submits this Opposition to the Petition for Partial Reconsideration and Clarification (“Petition for Reconsideration” or “MPAA Petition”) filed by the Motion Picture Association of America, Inc. (“MPAA”), 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. (collectively, “the MPAA Parties” or “the Parties”) in response to the Federal Communications Commission’s (“FCC’s” or “Commission’s”) August 12, 2004 order¹ approving TiVo’s digital output protection

¹ *In the Matter of Digital Output Protection Technology and Recording Method Certifications, Order*, MB Docket Nos. 04-55, *et al.*, FCC 04-193 (rel. Aug. 12, 2004) (“Certification Order”).

technology for use in covered demodulator products pursuant to Section 73.9008 of the Commission's rules.

I. Introduction and Summary

The Commission's approval of all thirteen digital protection technologies and recording methods submitted to the Commission is proper, and TiVo appreciates the hard work and dedication of the Commission staff who reviewed and evaluated these technologies. With regard to TiVo's technology, the Commission properly concluded that TiVo's "TiVoGuard" security system achieves the Commission's stated goal of preventing mass indiscriminate redistribution of digital broadcast television ("DTV") content. The MPAA Parties' claims to the contrary have no merit.

In fact, none of the MPAA Parties' objections goes to the heart of the Commission's Broadcast Protection proceeding. Rather, the MPAA Parties make a series of unfounded and unsupported claims and raise issues the Commission already has stated are outside the scope of this proceeding. As they have done throughout this proceeding, the MPAA Parties attempt to distort the Commission's Broadcast Protection rules into a copyright enforcement scheme for purposes unrelated to the Commission's goals in this proceeding.

TiVo urges the Commission to reject the MPAA Parties' Petition for the following reasons: First, TiVoGuard is well-defined and, as the FCC recognized, capable of preventing indiscriminate redistribution of content. The MPAA Parties offer no evidence to the contrary and fail to link alleged gaps in the record to the mass, indiscriminate redistribution of content that would merit Commission reconsideration. Second, the MPAA Parties fail to establish that TiVo's secure viewing group feature fails

to prevent indiscriminate redistribution such that proximity controls are necessary. Rather, the Parties conflate “unauthorized” redistribution with mass, indiscriminate redistribution and ignore the Commission’s directive that proximity of redistribution concerns fall outside the scope of this proceeding. Third, the MPAA Parties have provided no evidence that TiVo’s interoperability with other technologies permits the mass, indiscriminate redistribution of content; there is no reasonable basis for imposing restrictions on that interoperability. To impose such restrictions would be anti-competitive and harmful to the DTV transition. Finally, the MPAA Parties’ request for sole approval rights over material changes to technologies where a proponent has submitted to a content participant agreement is improper as it would create a competitive disadvantage and provide the MPAA Parties even greater leverage to force proponents to enter into such agreements.

II. The Commission’s Authorization of TiVoGuard Is Proper Because TiVoGuard Achieves the Commission’s Stated Goal of Preventing Mass Indiscriminate Redistribution of Digital Broadcast Television Content

A. The Commission’s Determination that TiVoGuard Is Capable of Preventing Indiscriminate Redistribution in Remote Access “TiVoToGo” Devices Is Supported by a Well-Defined Record

The MPAA Parties challenge the Commission’s approval of TiVo’s digital output protection technology by suggesting that approval of the remote access “TiVoToGo” capability was premature.² The Parties claim the Commission cannot properly approve a remote access technology until after the issues raised in its Further Notice of Proposed Rulemaking are resolved, and until certain “lacunae” in the record are addressed.³ As

² MPAA Petition at 2-6.

³ *Id.* at 5.

explained below, these claims are unfounded and have no bearing on TiVoToGo's ability to prevent mass indiscriminate redistribution of digital broadcast content.

The MPAA Parties brazenly ask the Commission to require proximity controls for approved devices when the Commission has repeatedly and unambiguously stated that the issue of proximity control is irrelevant to the determination at hand.⁴ The FCC clearly relegated such determinations to its Further Notice of Proposed Rulemaking, and in doing so recognized that proximity controls are not necessary where other reasonable constraints are in place. The MPAA Parties fail to present any compelling rationale or evidence for their demand for proximity limitations at this stage; the Commission has granted its approval of TiVo's remote access capability and has expressly stated that proximity controls are not necessary to implement the broadcast flag.⁵

TiVo's digital output protection technology or "TiVoGuard" is not a "nascent" and "ill-defined" technology as the MPAA Parties assert.⁶ To the contrary, TiVoGuard is well-defined and, as the FCC recognized, capable of preventing indiscriminate redistribution of content in both DVRs and remote access TiVoToGo devices. While TiVo has stated that the TiVoToGo remote access device is "still at the concept stage," this should not surprise the MPAA Parties.⁷ It is entirely reasonable and to be expected that TiVo has not frozen its TiVoToGo device design for production; it would have been

⁴ See, e.g., Certification Order at ¶ 72 (stating that "we are not inclined as part of our review of these certifications to impose proximity controls as an additional obligation where other reasonable constraints sufficiently limit the redistribution of content"); *Digital Broadcast Content Protection, Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 23550, ¶ 10 (Nov. 4, 2003) ("Broadcast Protection Order") (stating that "we do not believe that it is necessary at this time to define the precise boundaries of a PDNE in order to initiate a redistribution control scheme for digital broadcast television. Our immediate concern is to adopt and begin implementation of a content protection scheme that will prevent the unfettered dissemination of digital broadcast content through means such as the Internet").

⁵ Certification Order at ¶ 72.

⁶ MPAA Petition at 3.

⁷ Indeed, the basic TiVoGuard protection technology, except for remote access, is deployed in today's analog TiVo digital video recorders (DVRs) and in digital DirecTV DVRs.

unwise for TiVo to do so until final approval of TiVoGuard by the Commission. Even if TiVo had acted on faith and moved forward with a design, it is unlikely that the product would be available today as it often takes 12-18 months after product design to actually produce a product for sale. More importantly, the Broadcast Protection rules did not require that all technology submissions be tried and tested; the MPAA Parties' suggestion to the contrary is merely a red herring. TiVo has clearly defined its TiVoGuard digital output protection technology in the record before the Commission and has certified to the Commission that its TiVoToGo products will employ that technology.⁸

The MPAA Parties quibble with the fact that TiVo never supplied the Commission with its subscriber agreement.⁹ The MPAA Parties seem to insinuate that TiVo has been dishonest or disingenuous in its representations to the Commission as to the contents of that agreement. What they fail to acknowledge is that TiVo was never required as part of this proceeding to supply its subscriber agreement, nor did the MPAA Parties or the Commission ever ask for it. Had TiVo known that the MPAA Parties were interested in reviewing its subscriber agreement, it happily would have supplied them with a copy or, alternatively, directed them to www.tivo.com where the agreement is publicly available and has been for years. Nevertheless, TiVo is at a loss to understand how the availability of a subscriber agreement has any bearing on Commission reconsideration.

Similarly, TiVo does not understand how "uncertainty remains" as to the maximum number of devices permitted in a secure viewing group or how the MPAA Parties find the record unclear as to the difference between a TiVo service subscription

⁸ TiVo Certification at 6.

⁹ MPAA Petition at 3.

and registration of a TiVo device.¹⁰ TiVo fully and accurately disclosed in the record the limited number of devices that are permitted in a secure viewing group, the restricted circumstances under which a waiver of that limit may be granted, and the process for registering a device as distinct from subscribing to the TiVo service.¹¹

While the MPAA Parties challenge TiVo's secure viewing group feature on the grounds that TiVo has no means of "ensuring that the devices in a [secure viewing group] 'belong to the same owner'" or of imposing "time constraints on re-registration,"¹² these minor points have nothing to do with TiVo's ability to prevent the indiscriminate redistribution of content. As is discussed more fully below, the MPAA Parties throughout their Petition conflate mass indiscriminate redistribution – which TiVo does not permit – with limited unauthorized redistribution, *i.e.*, the possibility that a few individuals may abuse their TiVo service and redistribute content in violation of their subscriber agreement and the Copyright Act. The MPAA Parties would like the Commission to believe that because a TiVo subscriber hypothetically could register another person's device in his secure viewing group, TiVo's digital output protection technology should not survive scrutiny. In reality, however, TiVo's technology is capable of preventing the mass indiscriminate redistribution of content even in the unlikely event that its secure viewing group feature is abused. Any such abuse would result in the unauthorized redistribution of only a limited amount of content among only a limited number of devices. Moreover, the MPAA Parties either ignore or purposefully

¹⁰ *Id.* at 4-5.

¹¹ See Broadcast Flag Certification of TiVo Inc., MB Docket 04-63 (February 27, 2004) at 25-26 ("TiVo Certification"); TiVo Reply to the MPAA Parties' Opposition ("Reply to MPAA Opposition"), MB Docket 04-63 (April 16, 2004) at 20; *Ex Parte* Letter (with attachments) filed by James M. Burger, MB Docket 04-63 (July 28, 2004).

¹² MPAA Petition at 4.

refuse to address the Commission’s clear statement that the broadcast flag goal is “not to prevent ‘unauthorized’ redistribution as advanced by the MPAA.”¹³

In asking the Commission to reconsider its Certification Order, the MPAA Parties offer no evidence linking the alleged “lacunae” in the record to the mass, indiscriminate redistribution that would merit Commission reconsideration. Instead, the Parties conclude only that TiVo’s technology, as described to the Commission, would permit certain “foreseeable mischief” to occur, such as a sports bar paying TiVo subscribers in other markets to register the bar’s TiVoToGo dongle in the subscribers’ markets.¹⁴ While TiVo is sympathetic to and shares the MPAA Parties’ concerns, such concerns are irrelevant to this proceeding. The Commission has made it clear that the broadcast flag scheme is **not** about policing violations of the Copyright Act or preventing unauthorized redistribution – it is about preventing mass indiscriminate redistribution. Content owners already use existing legal rights to stop the limited number of commercial establishments that publicly perform sporting events in violation of the Copyright Act.¹⁵ In the highly unlikely event a TiVo subscriber used a TiVo device in this manner, TiVo would, upon learning of and confirming such use, terminate that individual’s subscription, ending all TiVo services, including the secure viewing group feature. Moreover, using TiVo remote access in this manner would be expensive, inefficient, and would permit viewing of such sporting events only on, at best, a six-day delayed playback.¹⁶

¹³ Certification Order at ¶ 72.

¹⁴ MPAA Petition at 5.

¹⁵ See *Ex Parte* Letter filed by Frank Hawkins, National Football League, MB Docket 04-63 (June 24, 2004) at n.7 and *Ex Parte* Letter filed by James M. Burger, MB Docket 04-63 (June 30, 2004) text and n.3.

¹⁶ Today, a full-quality three hour high-definition game would take some 144 hours to transmit to a remote device. *Ex Parte* Letter filed by James M. Burger, MB Docket 04-63 (June 30, 2004) at 2.

Were the FCC to reconsider and/or revoke approval of TiVoGuard based on such misdirected arguments and quibbles with the record, the Broadcast Protection scheme, and the DTV transition, would be seriously undermined. While the Parties go to great lengths to find fault with the record, and the Commission's reliance on the record, they offer no support for their claim that approval of TiVoGuard was premature. As they have made clear throughout this proceeding, the MPAA Parties would like to micromanage digital output protection and recording method technologies for purposes entirely unrelated to the goals of this proceeding – namely, enforcement of their copyrights and preservation of their own business model.

B. The MPAA Parties' Concerns About Proximity Controls and Unauthorized Redistribution of Content Are Speculative and Irrelevant to the Commission's Stated Goal

The Commission has repeatedly and expressly stated that the goal of this proceeding is to **“prevent the mass indiscriminate redistribution of digital broadcast television content.”**¹⁷ The FCC committed that this goal “will not (1) interfere with or preclude consumers from copying broadcast programming and using or redistributing it within the home or similar personal environment as consistent with copyright law, or (2) **foreclose use of the Internet to send digital broadcast content where it can be adequately protected from indiscriminate redistribution.**”¹⁸ The Commission did not arrive at this goal haphazardly or without careful consideration of the interests involved.

¹⁷ See, e.g., Certification Order at ¶¶ 1, 4, 61, 69, 72; Broadcast Protection Order at ¶¶ 4, 6, 8, 10, 12, 14, 19, 34, 37 and 63 (emphasis supplied).

¹⁸ Broadcast Protection Order at ¶ 10 (emphasis supplied). Moreover, contradicting their Petition for Reconsideration, the MPAA supported this Commission position in testimony before Congress: “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.” (Testimony of MPAA General Counsel Fritz Attaway before the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property Oversight Hearing on “Copyright Piracy Prevention and the Broadcast Flag,” Mar. 6, 2003.)

To the contrary, the Commission recognized the advance of the DTV transition would require that a delicate balance be struck between the sometimes competing interests of content owners and technology providers.¹⁹ The Commission thoughtfully weighed the interests of content owners in protecting high value digital content against the interests of technology providers in adopting technical protection measures that promote, rather than inhibit, the use and enjoyment of such content.²⁰ With those interests in mind, the Commission issued its Broadcast Protection Order, instituted an ATSC flag-based content protection scheme, and embarked on the interim certification process for digital output protection technologies and recording methods.

Notwithstanding the Commission's thoughtful and careful determinations as to the proper scope of this proceeding, and its clear and unequivocal statements as to the proceeding's goal, the MPAA Parties, as they have done repeatedly throughout this process, ask the Commission to focus on matters irrelevant to the Commission's stated goal. By asking the Commission to reconsider and clarify its authorization of TiVoGuard so as to require proximity controls to confine redistribution to a "local" area, the MPAA Parties effectively are asking the Commission to make a determination as to the appropriate scope of redistribution that should be prevented. This is a bold request given that (1) the Commission previously considered and rejected the same demand when it was made by the MPAA Parties in opposition to TiVo's certification,²¹ and (2) the Commission has expressly relegated such determinations to its Further Notice of

¹⁹ Broadcast Protection Order at ¶ 1.

²⁰ *Id.*

²¹ See Opposition of the Motion Picture Association of America, et al, in *Digital Output Technology and Recording Method Certifications, Windows Media Digital Rights Management Technology*, MB Docket No. 04-66 at 4-6 ("MPAA Opposition"). The Commission nevertheless approved TiVo's technology, citing restrictions in TiVo's subscriber agreement and the 10-device secure viewing group limit as mechanisms that prevent content from being indiscriminately redistributed in a "daisy chain" fashion. Certification Order at ¶ 72.

Proposed Rulemaking (“FNPRM”).²² In fact, in its FNPRM, the Commission specifically stated that, although it was seeking comment on the scope of redistribution that should be prevented and the usefulness of defining a personal digital network environment, it did not wish to “foreclose the use of the Internet to send digital broadcast content where robust security can adequately protect the content and the redistribution is tailored in nature.”²³ The Commission reiterated this point in its Certification Order when it stated:

Although we will address the scope of redistribution issue in a broader context as part of our resolution of the *Further Notice of Proposed Rulemaking*, **we are not inclined as a part of our review of these certifications to impose proximity controls as an additional obligation where other reasonable constraints sufficiently limit the redistribution of content.**²⁴

Based on a complete, transparent, and accurate record, the Commission concluded that TiVoGuard has “other reasonable constraints” in place to protect against the mass indiscriminate redistribution of content.²⁵ Simply put, after careful consideration of the record, including the MPAA Parties’ earlier requests for proximity controls, **the Commission determined that proximity controls are not necessary to achieve the stated goal of this proceeding.** Nevertheless, the MPAA Parties continue to argue to the contrary and, in doing so, squarely attack the Commission’s decisions in its Certification Order. Again, the Parties take great efforts to find fault with the record and the Commission’s reliance on the record, but their arguments falter under scrutiny.

²² Broadcast Protection Order at ¶ 63.

²³ *Id.* at ¶ 63. The MPAA itself has acknowledged that the use of the Internet to send content should not be foreclosed where adequate protections exist. *See* Testimony of MPAA General Counsel Fritz Attaway, *supra* note 18.

²⁴ Certification Order at ¶ 72 (emphasis supplied).

²⁵ *Id.* at ¶¶ 4, 108. In fact, the Commission properly found that all thirteen technologies submitted for approval protect against the mass indiscriminate redistribution of digital broadcast content. *Id.*

The MPAA Parties claim, for example, that TiVo's technology fails to satisfy this proceeding's goal because it does not use "technological measures" to prevent any and all unauthorized redistribution.²⁶ Instead, TiVo relies in part on enforcement of its subscriber agreement, which restricts the use of copyrighted content to personal, non-commercial purposes.²⁷ The MPAA Parties assert that, because a subscriber agreement "is not itself a technological protection measure, and TiVo never introduced any evidence that it can technologically enforce its subscriber agreement," the Commission's approval of TiVoGuard was erroneous. The MPAA Parties appear to suggest that TiVoGuard should not be approved unless and until TiVo develops a technological means of ensuring that no content is ever redistributed in any unauthorized manner. This suggestion is not only beyond the bounds of reasonableness, it is completely irrelevant to the goal of preventing the **mass indiscriminate redistribution** of content. Moreover, the MPAA Parties themselves **asked** for non-technological measures to protect their content against mass indiscriminate redistribution when they (1) urged the FCC to control software demodulators via the Broadcast Protection rules, and (2) urged the FCC to rely on agreements as the means of controlling downstream products.²⁸

While the FCC committed to protecting broadcast content through technological measures, it did not endeavor, nor did it promise, to develop technological measures that would prevent all unauthorized redistribution.²⁹ The Commission has not developed, for

²⁶ MPAA Petition at 7.

²⁷ See TiVo Subscriber Agreement, available at <http://www.tivo.com/5.11.2.asp> (last accessed September 23, 2004).

²⁸ See, e.g., Comments of the MPAA, et al, in Docket MB 02-230 (filed December 6, 2002) at 14-18 and 16-18 ("Downstream Products' are a narrow subset of products whose manufacturers have filed a 'written commitment' to subject themselves to the Requirements." *Id.* at 17.); Joint Reply Comments of the MPAA, et al, in MB Docket No. 02-230 (filed February 20, 2003) at 41-43 ; Comments of the MPAA, et al , in MB Docket 02-230 (filed February 13, 2004) at 13-18.

²⁹ Certification Order at ¶ 72.

example, a technological means of preventing ordinary citizens from building software demodulators, and the MPAA Parties don't suggest that it should – they simply rely on the Commission's authority to police violations of its Broadcast Protection rules.

Contrary to the MPAA Parties' insinuation, TiVo does not intend, and has never intended, for its subscriber agreement to be a substitute for technological protection measures; but it does rely on its subscriber agreement as a means to police other types of unauthorized uses outside the scope of this proceeding. As the Commission concluded, TiVoGuard prevents against indiscriminate redistribution and is far more than the "speed bump" level of protection contemplated by the Commission and the MPAA Parties.³⁰

The MPAA Parties further claim that the Commission was wrong to conclude that TiVo's technology does not enable "daisy-chain" distribution. The Parties allege that even when content is kept within a secure viewing group, TiVoGuard "facilitates widespread and simple redistribution of broadcast content" because (1) "total strangers" could conspire to register each other's device or dongle in the same secure viewing group, and (2) TiVoToGo dongles could be physically exchanged.³¹ These allegations are unfounded.

It would be impossible for a "total stranger" to use remote access to receive content recorded by a registered subscriber. Secure viewing groups by their nature cannot be formed by arms' length exchanges between "strangers." Rather, TiVo requires that the registered subscriber forming the secure viewing group own, and authorize

³⁰ In its Broadcast Flag Order, the Commission acknowledged that the goal of the Broadcast Flag content protection system is to "creat[e] a 'speed bump' mechanism to prevent indiscriminate redistribution of broadcast content . . .," and also stated that the MPAA, as an advocate of the ATSC flag system, itself characterized the system as providing a "speed bump" level of protection. *See* Broadcast Protection Order at ¶¶ 14 (citing MPAA Comments at 12) and 19.

³¹ *See* MPAA Petition at 8.

registration of, the other devices in the group. The registered owner must subscribe to the TiVo service and must request that each device he or she owns be added to the secure viewing group. TiVo's subscriber agreement specifically provides that content may only be transferred among devices registered to a single account and used "within your household." While it is possible that a TiVo owner might be willing to include a friend or relative in his or her secure viewing group, such an arrangement hardly rises to the level of piracy the FCC is seeking to prevent. Likewise, while it is possible that TiVoToGo dongles could be physically transferred from one person to another, such an exchange would not expose free over-the-air DTV material to indiscriminate redistribution.

In an effort to paint these possibilities as a threat to the continued viability of free over-the-air DTV, the Parties present tortured, highly unlikely scenarios of possible abuses and attempt to equate these scenarios to mass, indiscriminate redistribution. In reality, these hypothetical scenarios illustrate only that a small segment of TiVo owners might go to extremes to abuse the TiVo service, in violation of TiVo's subscriber agreement, and engage in limited, unauthorized redistribution of content. The MPAA Parties suggest, for example, that people will be registering TiVo devices in others' secure viewing groups and in this manner will be engaging in "widespread and simple redistribution."³² In truth, however, it would take considerable effort and expense to buy a TiVo device and register it in another's secure viewing group, with the subscriber of record remaining solely responsible for paying for the TiVo service. Even then, one would only obtain access to the very limited amount of DTV content recorded by the nine or fewer other devices in a single secure viewing group. It would be far simpler and

³² *Id.*

cheaper to download the GNU radio project's ATSC software and use traditional peer-to-peer software to trade unlimited amounts of content with unlimited numbers of total strangers.³³

Nonetheless, the MPAA Parties want the Commission to suspend disbelief and equate their hypothetical story lines to mass, indiscriminate redistribution of content. The MPAA Parties have not shown that TiVoGuard enables unfettered, indiscriminate, "daisy-chain" redistribution of content – they have shown only that a TiVo user theoretically could violate his subscriber agreement, abuse his TiVo service, and engage in limited unauthorized redistribution in violation of the Copyright Act. As the Commission unambiguously stated in its Certification Order, **the broadcast flag proceeding goal is "not to prevent 'unauthorized' redistribution as advanced by the MPAA."**³⁴ The MPAA Parties have not shown, nor could they show, that TiVoGuard permits mass indiscriminate redistribution of content.

The MPAA Parties also suggest that to the extent the Commission relied on "other facts and arguments" submitted by TiVo the Commission was misguided. The Parties assert that given the "state of the record," the Commission should reconsider its decision not to require TiVo to adopt proximity controls.³⁵ However, the MPAA Parties again make unfounded claims that are irrelevant to the issue of whether TiVoGuard prevents indiscriminate redistribution.

³³ The GNU radio ATSC software is currently available on at least 12 web sites, the majority of which are located outside the US beyond the jurisdiction of the software demodulator rules sought by the MPAA Parties. <http://prdownloads.sourceforge.net/opensdr/gnuradio-0.9.tar.gz> (last accessed September 27, 2004); for screenshots of HDTV programs downloaded using the software see <http://www.gnu.org/software/gnuradio/hdtv-samples.html> (last accessed September 27, 2004).

³⁴ Certification Order at ¶ 72

³⁵ MPAA Petition at 11.

The MPAA Parties claim, for example, that TiVo’s arguments about the technical limits of sending programs don’t take into account future advances. To the contrary, TiVo acknowledges that advances in technology may increase in the future the “speed and ease” with which audiovisual content can be redistributed. However, in the unlikely event that “real-time” transfers of content become a problem worthy of FCC intervention, and if content owners are willing to invest in a solution, technology could be readily developed to ameliorate any such problem. Also, TiVo has met with content owners to discuss their concerns, and is willing to reasonably cooperate with content owners and accommodate their business model if it can be done without compromising TiVo’s technology and TiVo’s customers’ experience with DTV content. Nevertheless, future technological advances affect all technologies approved by the Commission. That is, of course, in part why the Commission retains oversight of all material changes to the technologies approved under the rules.

The MPAA Parties also state that TiVo’s “claims concerning revocation and renewal are ... unreliable.”³⁶ This claim is, at best, misleading. In attempting to support their claim, the MPAA Parties state the following, excerpting the latter part of their statement from the Commission’s Certification Order:

Nor does TiVoGuard ‘currently [have] in place appropriate mechanisms to disseminate revocation and renewal information.’³⁷

By quoting the Certification Order out of context, the MPAA Parties intimate that the above statement was a Commission finding; it clearly was not. This is the MPAA Parties’ own conclusory statement and it has no basis in fact and no support in the

³⁶ *Id.* at 11.

³⁷ MPAA Petition at 11, *citing* Certification Order at ¶ 103.

Parties' Petition. Indeed, the MPAA Parties do not define what is "appropriate," nor did they raise this issue in the certification proceeding.

The bottom line is that TiVoGuard provides for adequate revocation and renewal of compromised devices. Unlike most other proposed technologies, TiVoGuard directly disseminates revocation and renewal information to its devices. As TiVo explained in its Certification, TiVoGuard is unlike any other proposed technology in that it automatically revokes a TiVo device's remote access capability if it fails to "report in" to TiVo's server.³⁸ Because hacked or corrupted devices can be directly "turned off" by TiVo, there is no need for revocation and renewal information to be indirectly disseminated in content. It is difficult to understand why the MPAA Parties are uncomfortable with TiVo's direct revocation and renewal system, particularly when TiVo's business interests are such that TiVo would suffer even more harm than content owners if TiVoGuard's integrity was compromised.³⁹

The MPAA Parties conclude their attack on the Commission's determination by stating that the Commission should institute geographical limitations on content redistribution because to do otherwise, they speculate, would threaten the viability of the local broadcast television model.⁴⁰ The MPAA Parties express particular concern for syndication, program licensing, local advertising, and sports blackouts.⁴¹ While this proceeding is not designed to guard against every real or perceived threat to the content owners' business model, the MPAA Parties continue to urge the Commission to do just that, though their urging is done under the guise of promoting the Commission's goals.

³⁸ See TiVo Certification at 21.

³⁹ *Id.* at 9-10.

⁴⁰ MPAA Petition at 11.

⁴¹ *Id.*

Nevertheless, TiVo trusts that the Commission will stand by its policy decision and conclude once again, as it did in its Certification Order, that the MPAA Parties' concerns regarding the "impact of remote access on local and regional broadcast television markets" are "speculative and irrelevant to [the Commission's] stated goal of preventing indiscriminate redistribution."⁴²

C. The Restrictions on Interoperability Urged by the MPAA Parties Are Unnecessary and Would Hinder the DTV Transition

TiVo's interoperability with other technologies does not permit mass indiscriminate redistribution of content, and the MPAA Parties present only highly speculative examples of limited unauthorized redistribution to support their claim to the contrary. The Parties suggest that TiVo users across the nation are going to be engaging in a convoluted, inconvenient scheme which sounds more like a Hollywood B-movie script than reality: Alice takes a TiVoToGo dongle to her vacation home, downloads a program or programs stored on her home TiVo DVR to her dongle-equipped PC, then uses a DTCP output to send that program from her dongle to Bob's TiVo device (conveniently located in Alice's vacation home), and stands by while Bob then proceeds to transfer content to another TiVoToGo dongle-equipped PC in Bob's home or vacation home.⁴³ In reality, it would be far easier for Alice and Bob to simply mail each other copies of HDTV programs protected by an approved recording method. Tens of millions of people likely will exchange DVD copies across town, across the country, or across the globe, yet the MPAA Parties' have not opposed any recording methods submitted to the Commission in this proceeding.

⁴² Certification Order at ¶ 72.

⁴³ MPAA Petition at 12.

More importantly, this speculative tale is irrelevant as it doesn't come close to illustrating the mass indiscriminate redistribution whose prevention is at the heart of this proceeding. In fact, it is hard to imagine a better example of mere "unauthorized redistribution" that is **not** reached by this proceeding than the example posited by the MPAA Parties themselves. The MPAA simply refuses to acknowledge the Commission's and its own characterization of the broadcast flag system as a "speed bump" and the Commission's clear recognition that "it is not even possible to construct a content protection scheme that is impervious to attack or circumvention."⁴⁴ It bears repeating that TiVoGuard does not permit indiscriminate redistribution, whether "mixed" with proximity-based systems or not. Therefore, the restrictions on interoperability urged by the MPAA Parties are completely unnecessary.

Reversal of the Commission's decision to allow TiVo to interoperate also would be anti-competitive and contrary to the Commission's goal of promoting the DTV transition. As the Commission stated in its Certification Order, "interoperability is an important pro-competitive element in the consumer electronics and information technology marketplaces that benefits consumers by affording them the flexibility to choose among devices made by different manufacturers."⁴⁵ In fact, the Commission "strongly encourage[d] the technology proponents to strive for interoperability wherever possible ..." and stated that, in the event of a dispute regarding the license mechanisms used to approve downstream products, the Commission "will start with the presumption that if an output protection technology or recording method has been approved by the

⁴⁴ Broadcast Flag Order at ¶ 19.

⁴⁵ *Id.* at ¶ 83.

Commission, it should be permitted as a downstream technology where feasible.”⁴⁶

Instead, the MPAA Parties would have the Commission create a system where islands of devices exist without the ability to “talk” to each other. What the MPAA Parties’ couch as necessary to preserving the DTV transition in fact will destroy it.

III. The Commission’s Decision to Require Review of Material Changes in All Authorized Digital Output Protection Technologies or Recording Methods, Including Those with Content Participant Agreements, is Proper and Necessary to Ensure a Fair and Level Playing Field

Throughout the Broadcast Protection proceeding, the MPAA Parties have consistently endeavored to secure for themselves the authority to directly regulate protection technologies. The Parties have asked the FCC to delegate its authority and have pressured technology proponents to “voluntarily” grant such authority by submitting to the MPAA Parties’ oversight. In their Petition, the MPAA Parties now seek to substitute their judgment for the Commission’s as to approval of any material change to protection technologies where a proponent has submitted to a content participant agreement.⁴⁷ This would not be a problem for companies, like TiVo, that have submitted to the FCC’s jurisdiction rather than the studios’, except for the fact that such a delegation of power would create an uneven playing field.

Before and during the Commission’s rulemaking, and during the certification proceeding, the MPAA Parties have striven to arrogate to themselves the Commission’s regulatory power to approve and control technologies. During the rulemaking, the MPAA Parties called on the FCC to delegate to a small group of content owners the

⁴⁶ *Id.*

⁴⁷ MPAA Petition at 13.

power to decide what technologies would be permitted under the rules.⁴⁸ When denied,⁴⁹ the MPAA Parties asked the FCC to force proponents to submit to an onerous content participant agreement, which would have granted a few motion picture studios powers far in excess of those exercised by the FCC under the rules.⁵⁰ In a last-gasp attempt to usurp regulatory power, the Parties now ask the Commission to excuse from compliance with the rules those proponents that have acquiesced to the MPAA Parties' demands and entered into a content participant agreement with the Parties. TiVo would not take issue with this proposal if it weren't for the fact that this arrangement (1) would create a potential competitive disadvantage for proponents who do not enter into a content participant agreement, and (2) would give the MPAA Parties even greater leverage to force "recalcitrant" companies to sign a content participant agreement.

As discussed above, it often takes 12-18 months to produce a product once a company freezes product design. Every day a company must wait for approval of its product, or of changes to its product, is one more day it cannot compete. Once the Broadcast Protection rules were finalized, and in a Herculean and thoroughly professional effort, the FCC staff and the Commission processed and ruled on complex technologies in record time.⁵¹ Nevertheless, it took nine months from the Commission's issuance of

⁴⁸ Joint Comments of MPAA *et al.*, in MB Docket No. 02-230 (filed Dec. 6, 2002) at 20-23 and Attachment C.

⁴⁹ Broadcast Protection Order at ¶ 52. The FCC stated: "We are concerned with one industry segment exercising a significant degree of control over decisions regarding the approval and use of content protection and recording technologies in DTV-related equipment."

⁵⁰ *See, e.g.*, MPAA Opposition at 11; Consolidated Response to Oppositions to Certification of Microsoft Corp. at 27-32. The Commission was clear in its order approving technologies that it would retain jurisdiction and regulatory authority over any material changes to approved technologies. Certification Order at ¶ 99.

⁵¹ TiVo cannot sufficiently praise the Commission's staff, both Media Bureau staff and the Commissioners' personal staff, who had very little if any previous experience in complex encryption and robustness technologies. They went from zero to sixty in record time and clearly understood the technologies and their capabilities.

its final order⁵² to its approval of technologies.⁵³ Had the FCC decided not to impose a Broadcast Protection scheme last November, new products would be only three to nine months, rather than nine to twelve months, away from the market. Going forward, the Commission and technology proponents will need to continue to observe the requirements of the Administrative Procedure Act, which will require the Commission to provide notice, allow comment, and reach a deliberative rational conclusion for every material change. Given the impact of administrative and regulatory delays on a company's ability to compete, it would be unfair to burden one set of competitors with the full panoply of administrative and regulatory processes while giving another a "free pass" simply because they have signed a private agreement with one subset of content owners.⁵⁴ TiVo is confident the Commission will continue its skillful, unbiased stewardship of the Broadcast Protection rules as they apply to **all** approved technologies.

Finally, TiVo and others⁵⁵ have previously expressed to the Commission its grave concern about the leverage that would be granted by any delegation of Commission authority to content owners.⁵⁶ In its Reply to the MPAA Parties' Opposition during the certification process, TiVo noted the hazards of requiring every protection technology vendor to submit any proposed changes to all content providers under a content participant agreement – such a process would result in time-consuming negotiations and could place the security of technologies at risk.⁵⁷ Without the Commission as final arbiter, every competitor would feel pressure to short-circuit the MPAA's review process

⁵² Broadcast Protection Order.

⁵³ Certification Order.

⁵⁴ Indeed, the MPAA's reconsideration period, permitted by the rules, has now further delayed TiVo's DTV products, to the detriment of the DTV transition.

⁵⁵ See, e.g., Reply of RealNetworks, Inc. to Opposition of MPAA, *et al.*, MB Docket 04-65 (April 16, 2004).

⁵⁶ *Ex Parte* Letter of James M. Burger in MB Docket 04-63 and "Broadcast Protection Position Paper" attachment (July 12, 2004).

⁵⁷ Reply to MPAA Opposition at 8-12.

by conceding not only relevant issues but any other concessions the studios might desire. A company that has made a material change that does not bring its protection technology out of compliance with the Commission's rules nevertheless may be forced to make additional, studio-demanded, and unrelated changes simply to meet competitive market deadlines. TiVo is confident that, in the Commission's hands, evaluation and approval of material changes will rest only on issues directly related to the sufficiency of the particular technology.

IV. Conclusion

The MPAA Petition is a collection of rehashed, already-rejected arguments and red herrings. The MPAA Parties fail to adduce any credible justification for granting a reconsideration of the Certification Order with respect to TiVoGuard. The Parties also fail to produce any newly discovered evidence that would affect the Commission's Certification Order. The Commission has already determined, based on a thorough review of a complete record, that (1) TiVoGuard prevents the mass indiscriminate redistribution of content over the Internet, which is the standard for approval of technologies under this proceeding, (2) proximity controls are not necessary, and (3) interoperability of devices is desirable to facilitate the DTV transition. We oppose the MPAA Petition and respectfully ask the Commission to promptly deny the MPAA Petition on all counts. Delays in the definitive resolution of the TiVoGuard certification are delays to the DTV transition.

Respectfully submitted,

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September 27, 2004

CERTIFICATE OF SERVICE

I, Briana E. Thibeu, hereby certify that a true and correct copy of the Opposition of TiVo Inc. was served on the following parties on September 27, 2004, electronically and by first-class mail, postage prepaid:

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