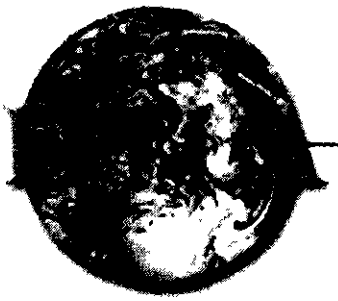

Digital Transmission Licensing Administrator

October 27, 2003

The Honorable Michael K Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re Response of Digital Transmission Licensing Administrator, LLC to the *Ex Parte* Submissions of Philips in the Matter of Digital Broadcast Copy Protection, MB Docket 02-230

Dear Chairman Powell.

On October 21 and 22, 2003, Philips Electronics submitted to you two letters criticizing the policies and proposals of the Digital Transmission Licensing Administrator, LLC, often referred to as the "5C." The October 22 letter asserted, erroneously, that certain provisions of the DTCP license were contrary to patent policies elsewhere adopted by the Commission. The October 21 letter responded to the DTLA's October 3 letter to you, in which DTLA explained why adoption of either of the Philips-proposed "criteria" alternatives would result in the Commission excluding all video protection systems currently used in DTV products from protecting digital terrestrial broadcast television programs marked with the Broadcast Flag (hereinafter "marked content") We respond to each of these letters below

The DTLA Patent License Policies Are Consistent With Commission Precedent.

The DTLA License Policy

DTLA noted in its October 3 letter that intellectual property licenses in the field of digital video content protection technology balance the equities between licensors and licensees differently than in most commercial technology licenses Rights for those patents (and other IP) "necessary" to implement or employ these protection systems are licensed on a cost recovery basis, and so the license fees for these technologies are substantially lower than the marketplace royalty rates ordinarily charged for intellectual property. In return, the licensees agree not to

assert any of their "necessary" patents within that scope against any other licensee.[1] The reciprocal non-assertion covenants in these licenses benefit all those who use the technologies (*i e*, manufacturers that implement the technologies and content owners that invoke their use)

DTLA believes that the reasons behind this predominant licensing model[2] are simple, sensible and pro-competitive Manufacturers compete with each other based on product features, and content protection generally is not considered a "product feature." All licensees benefit from both the lower costs, and from the certainty provided by the reciprocal covenants This is why the owners of the most widely used technologies for digital video content protection technologies, including CSS (used on DVD video discs), CPPM (used for prerecorded DVD audio discs), HDCP and DTCP -- and their scores of licensees – have deemed reciprocal non-assertion covenants rather than reciprocal licenses the appropriate model for these technologies.[3]

As a factual matter, DTLA is unaware of any actual prejudice from this approach DTCP has been licensed by more than 70 companies, and DTV products (including set-top boxes, DTV sets and digital video recorders) in the marketplace currently employ DTCP. Yet, over the five-year licensing history for DTCP, no DTCP licensee – including Philips – or any entity, has identified any patent rights that it otherwise might have licensed for a fee, but for the DTCP license provisions.

Approving "Table A" Technology is Not Mandating a Commission Standard

The analytical flaw in Philips's argument is that approval by the Commission of a list of optional technologies that can protect marked content is fundamentally different in kind from the adoption of mandatory standards like FM Stereo or DTV. Mandatory standards require every market competitor to use a single technology When adopting mandatory standards, the market participants have no choice but to license the technology, and the market provides no other checks against the commercial royalty rates charged by the licensor In such circumstances, the equities may favor reasonable and nondiscriminatory reciprocal licenses.

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[1] The Adopter Agreement for DTCP is available for viewing or download online at http //www.dtcp com/data/DTCP_Adopters_Agreement010730.PDF. The license grant and reciprocal non-assertion covenant are set forth at pages 6-7, paragraphs 5 1 - 5.4.

[2] Indeed, we are aware of at least two digital video content protection projects in which Philips participates as a patent licensor, which condition the license upon the licensee granting back to all other licensees a reciprocal non-assertion covenant, not a reasonable and nondiscriminatory license, to any necessary IP owned by the licensee.

[3] Philips also suggests that 5C, or other licensees, could give away their technologies for public use. Letter at 10 Such a suggestion might be realistic for marking technologies like SCMS or its own watermarks, but cannot be used for encryption-based systems, such as DTCP, that require the ongoing funding and operation of a secure cryptographic key generation facility

What is now before the Commission with respect to the approval of technologies to protect marked content, however, is not a mandatory standard MPAA identified in its Comments four technologies two transmission protection technologies (HDCP as well as DTCP) and two recording protection technologies (D-VHS and CPRM) – that it believes should be approved by the Commission Virtually all commenters to the Commission, DTLA among them, recommend the adoption of criteria by which numerous additional technologies rapidly could be approved by the Commission

Thus, unlike the cases of FM Stereo or the DTV Standard, the Commission here is not engaged in a standardization effort, and is not mandating the use of a particular technology. The Commission solely is being asked to approve a range of optional technologies from which a market participant can elect In this respect, Commission approval here of Table A technologies is no different from what the Commission has done in other contexts. Most recently, in the Plug and Play proceeding, the Commission approved a definition of "digital cable ready," "cable ready" or "cable compatible" that includes, as an option, a DVI or HDMI interface equipped with HDCP -- a technology whose license requires a reciprocal non-assertion covenant rather than a reasonable and non-discriminatory license back *See* Second Report And Order And Second Further Notice Of Proposed Rulemaking, *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Docket No 97-80, and Compatibility Between Cable Systems and Consumer Electronics Equipment, PP Docket No 00-67,* Appendix B, §15 123(b)(6)(i) and (ii) (October 9, 2003) (hereinafter, "Second Report and Order").[4] In that proceeding Philips, as a signatory to the "Memorandum of Understanding" between consumer electronics manufacturers and cable operators, encouraged the Commission to adopt regulations including HDCP as an optional protection technology, notwithstanding the reciprocal non-assertion covenants in the HDCP license

Moreover, requiring reasonable and non-discriminatory licensing for non-mandatory technologies, in all cases, would substantially disrupt a licensing option that, to date, has brought significant benefits to all participants. If, as Philips suggests, the Commission were to insist upon "reasonable and non-discriminatory" license back provisions, then it is likely that licensors would also insist upon extracting commercial rates for their technologies. This would substantially increase the cost of content protection for those who trigger use of the technologies, those who implement them and, potentially, for consumers who might be asked to shoulder the higher costs of commercial licensing fees

In any case, because use of any "Table A" technology is optional, the licensing approach offered by DTLA is merely one option If technology companies would prefer the type of mandatory license-back system that Philips suggests, or any other licensing approach, they can offer their own technologies on such terms Since at least 1999, Philips has claimed to have a technology, known as "OCPS," that operates in the same manner as DTCP, which Philips has

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[4] The HDCP license is available for viewing or download online at http://www.digital-cp.com/data/HDCPlicense061402b.pdf Paragraphs 2.2 and 2.3 at page 8 of that license set forth the reciprocal non-assertion covenants

described on paper but never brought to market Should the marketplace prefer the license terms offered by other technologies, such terms will redound to their licensors' competitive advantage. Having enabled competition among technologies, the Commission need not prescribe the competitors' licensing terms

The Philips Criteria Restrict Marketplace Competition by Limiting the Scope of Acceptable Technologies and Prescribing the Terms of Technology Licenses.

In our October 3, 2003, letter, DTLA explained specifically how the two Philips "criteria" proposals would restrain marketplace competition in general and, more specifically, would eliminate from Commission consideration virtually every digital video content protection technology currently in use in DTV products (including DTCP, HDCP, D-VHS, CPRM, RealNetworks' Helix and Microsoft's Windows Media System) Philips does not respond to the DTLA's detailed comments with a point-by-point rebuttal, for indeed the points made in the DTLA letter are factually correct Nevertheless, we address briefly below Philips's October 21 reply

First, we repeat the 5C protection technology encrypts content, but the 5C proposal on its face, intentionally, does not require use of encryption or any other specific technology.[5] Philips's attempt to read into the "at least as effective as" criterion a requirement to encrypt is simply false Any technology that offers effective protection, irrespective of whether it relies upon encryption, should be able to receive Commission approval under any or all of the 5C-proposed criteria. DTLA understands that past comments of MPAA companies have reflected their view that no one, including Philips, yet had demonstrated an effective technology that was not encryption-based. Notwithstanding, this merely serves to emphasize the importance of the third of the 5C-proposed criteria, which would enable such a technology to obtain Commission approval even over the objection of all MPAA companies, so long as it provides effective protection against redistribution of marked content outside the home or personal network [6]

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[5] *See* DTLA October 3, 2003 letter at 2. Thus, the applicable DTCP protection state in the DTCP specifications and licenses is called "EPN" (Encryption Plus Non-assertion of copying controls), inasmuch as DTCP does in fact use encryption. However, contrary to Philips's claims, DTLA nowhere has recommended "EPN" or encryption as a mandatory state for all technologies *See* Philips October 21 letter, page 3 bullet two.

[6] Philips erroneously claims, in the first bullet on page 2 of its letter, that proposed Rules X 6 and X 8 require Commission-approved output technologies to use encryption These proposals concern the potential exposure (to hacking, snooping or siphoning) of unencrypted content *within* devices, at points where no other protection would be available. Moreover, these proposals apply to devices such as personal computers, where the content travels over buses that are readily accessible to consumers, as opposed to typical consumer electronics devices that have no such accessible buses. In any event, the internal bus protection technologies described by X 6 and X 8 are not "Table A" technologies, because they operate only inside the device, they can be proprietary to the manufacturer and self-certified, without Commission involvement.

Second, the 5C proposal enables the Commission to approve a multitude of technologies that effectively protect marked content The effectiveness of the technology can be shown either by the fact that those whose content is to be protected, including motion picture studios and broadcasters, approve its use, or by an objective determination, by an independent and neutral decisionmaker, that the degree of protection offered by the proposed new technology is at least as effective as that of any technology already on the list Thus, the criteria provide the Commission with an affirmative demonstration that the technology has found acceptance in the marketplace, and a means for any technology to obtain approval without the support – indeed, over the objection of the studios and networks. Moreover, as DTLA consistently has stated, if technical criteria can be devised that balance the tensions between the need for specific "level-setting" today and flexible criteria for the future, DTLA would support them *See* October 3 DTLA letter at 3-4.

While DTLA appreciates that Philips shares the goal of developing appropriate technical criteria, the DTLA October 3 letter demonstrates that neither of the two Philips alternatives comes close to satisfying that goal Even with Philips's *post hoc* re-interpretations of its proposals, **each of the Philips proposals would disqualify *ab initio* virtually every digital video protection technology used in DTV products in today's marketplace.**[7] And, as Thomson Consumer Electronics has noted to the Commission, manufacturers could not even hope to include broadcast flag protection in plug and play sets unless manufacturers can take advantage of content protection technologies already implemented in DTV products. By contrast, **the 5C-proposed criteria would give all technologies a fair opportunity to obtain Commission approval, while enabling manufacturers to leverage existing technologies already in their products.**

While this by itself should be sufficient to merit rejection of the Philips proposals, DTLA addresses below several additional contentions in the Philips October 21 letter.

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[7] In this regard, while Philips suggests that its proposals are not meant to be exclusionary, Philips fails to refute the reality that they are. For example, several of the Philips "criteria" cannot be satisfied unless the protection system is technically capable of distinguishing protected DTV broadcast content from other protected content *See, e g.,* Philips September 23, 2003, *ex parte,* Appendix B, Section Z 2 b (iv), and Z.3 e and g As noted in the DTLA October 3 letter, most, if not all, protection technologies currently on the market distinguish content based on the protection rules being applied (*e g* , copy never, copy one generation, copy freely with redistribution control) rather than the source of the content. In fact, Philips's current attitude is consistent with its antagonistic stance in the BPDG process against virtually any technology other than its own *See,* BPDG Report, Tab C-2, which notes that Philips opposed DTCP, HDCP, D-VHS and CPRM as protection systems for marked content http //www.cptwg.org/Assets/BPDG/Tab%20C-2 doc DTLA notes, for the record, that it opposed no vendor's proposed qualifications as a protection technology

The Alleged "Discrimination" in the DTLA License between CE and IT Products is a Red Herring

Philips notes in its October 21 *ex parte* that the 5C Compliance Rules allow Copy One Generation content (and copies made therefrom) to pass through SVGA and other computer outputs widely in use as of May 2001, during a "phase-out" period until the end of 2005, but complains that the DTCP license gives no similar period for consumer electronics devices. The reason for this difference is not discriminatory in the least. Rather, this provision was intended to address a legacy problem specific only to personal computers.[8] As of the date of the Adopter Agreement, SVGA was widely used to get video content from computer boxes to computer monitors, and so some accommodation was necessary to avoid stranding these legacy devices By contrast, no legacy CE devices at that time, to our knowledge, had SVGA or similar computer-based outputs As a result, the "parity" that Philips seeks would have opened new avenues for avoiding content protection obligations, to which the Content Participant licensees of DTCP, with justification, objected [9]

Thus, computer devices needed a phase-out period to avoid a total shut-out of millions of existing devices, and there were no CE products to phase out This was not a question of "discrimination," but rather, of balancing the potential benefits and harms of applying content protection to legacy products, without opening additional holes in the system that would create new concerns for content owners

While this is but one specific case, it again exemplifies why the abstract, one-dimensional concepts proposed by Philips simply do not address the real-world complexities of the digital transition Blanket rules such as the Philips "non-discrimination" clause do not adequately accommodate the wide differences among legacy technologies already in the marketplace and new technologies, and the special cases that may justify different treatment in appropriate circumstances

The 5C Proposal Protects the Balance between the Interests of Consumers, Content Owners and Manufacturers

Philips spends much of its *ex parte* complaining that DTLA does not adequately take into account the fair use concerns of consumers DTLA finds this complaint especially inapt, for the following reasons

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[8] In this regard we note that, as part of the compromise, computers could not deliver "Copy Never" content that had been protected with DTCP over such SVGA outputs.

[9] For the same reason, the DTCP Adopter Agreement of July 2001 also provides a grace period, through December 31, 2005, for the delivery of protected content as a constrained image via unprotected DVI outputs. *See,* http //www dtcp com/data/DTCP_Adopters_Agreement010730 PDF, Appendix B Part 1 ¶ 4 4 2

DTLA consistently has championed the rights of consumers through the inclusion in its licenses of Encoding Rules, and was the first to agree with motion picture studios upon rules that ensure consumers' ability to pause "copy never" content on a personal video recorder, and to move copies of "copy one generation" content from a PVR or hard disk recorder to a removable medium These DTLA license provisions formed the basis of the rules recently adopted by the Commission in its Plug and Play decision The DTLA Encoding Rules, we believe, correctly balance the interests of content owners in robust protection against the consumer interests in reasonable and customary enjoyment of video content. The 5C Encoding Rules will allow DTV marked content to be copied freely and to be distributed freely within the home and personal network, and will not apply DTCP to DTV content that has not been marked with the broadcast flag DTLA continues to urge the Commission to incorporate these Encoding Rules as a necessary element of any Broadcast Flag regulation

Philips suggests that somehow allowing DTCP onto Table A would prevent more flexible new technologies from permitting personal transmissions of content such as between a primary residence and a vacation home DTLA has said exactly the opposite *See* DTLA October 3 letter at 5 and n 4 Although DTLA knows of no technology currently deployed that securely transmits personal use content between remote locations, DTLA continues to urge that any criteria adopted by the Commission should open the path for approval of such new technologies DTLA submits that the 5C-supported criteria do, in fact, give the Commission sufficient flexibility to approve such technologies, so long as they provide sufficient security for marked content along that personal network

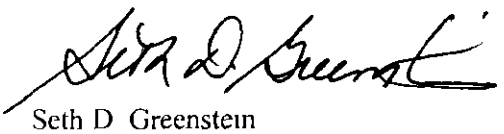
Notwithstanding, the basis for the Commission's authority and the touchstone for the Commission's judgment in this regard is not "fair use" The Commission correctly noted in its Plug and Play decision that its approval of encoding rules has nothing to do with the copyright law concept of "fair use"

> Our decision herein is not intended in any way to change or affect existing copyright law The encoding rules adopted herein are directed at MVPDs and their distribution mechanisms. As a result, the underlying rights and remedies available to copyright holders remain unchanged. In the same manner, this decision is not intended to alter the defenses and penalties applicable in cases of copyright infringement.

Second Report and Order, ¶ 9 Consistent with these observations, any decision by the Commission to enable remote personal transmissions relies upon its right to protect reasonable and customary consumer usages, not on copyright law

DTLA thanks the Chairman for his leadership in making the DTV transition a reality In this connection, we urge the Chairman and the Commission to support regulations that will enable a multitude of digital video protection technologies to be approved for controlling redistribution of DTV marked content, including technologies already in consumer DTV products and future technologies DTLA respectfully submits that the 5C-supported proposals will accomplish this purpose, and should be adopted by the Commission

Respectfully submitted,



Seth D Greenstein
Chair, DTLA Policy Committee

cc

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