

Before **the**
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)
)
Implementation of the Child Safe Viewing Act;) MB Docket No. 09-26
Examination of Parental Control Technologies for)
Video or Audio Programming)

NOTICE OF INQUIRY

COMMENTS OF DIGITAL MEDIA ASSOCIATION

Introduction

The Digital Media Association (DiMA) is a trade association whose membership has – from the dawn of the Internet – revolutionized consumer media and democratized creative opportunity. DiMA members include Amazon.com, AOL, Apple, Best Buy/Napster, iMeem, Live365, Microsoft, MTV Networks, Nokia, Pandora Media, RealNetworks, Sandisk, Slacker, Spacial Audio Solutions and YouTube.

DiMA members support Congress’s goal of empowering parents to control their children’s access to content that parents consider indecent or objectionable, while not limiting anyone’s access to the widest possible range of appropriate material. In the broadest, sense DiMA members endorse President Obama’s goal: to “[g]ive parents the tools and information they need to control what their children see on television and the Internet in ways fully consistent with the First Amendment.”

DiMA appreciates that Congress has always promoted parental and media industry collaboration and has chosen not to legislate content accessibility rules or mandate particular ratings systems or technological enforcement tools. Moreover, DiMA members acknowledge industry’s responsibility to participate constructively in the public information and educational process, to develop tools that assist parents make educated choices with their children, and to help parents use tools that are already available.

In these Comments DiMA will provide an overview of our member companies’ dynamic services and their business environment, and will detail some of our member companies’ steps to assist parents to make educated decisions on behalf of their families, including informational and technological activities. We will also discuss the challenges of developing so-called “advanced blocking technologies”, particularly as they relate to the increasingly complex media delivery ecosystem that our members operate within.

Background

DiMA members’ media offerings are remarkably diverse, and are continuously becoming more diverse as global citizens and cultures and markets become increasingly connected. Individuals’ creativity and their adoption of ever-simpler technology is driving media creation, collaboration and enjoyment. The resulting opportunities also pose challenges.

In general terms DiMA members:

- provide digital “new media” entertainment services;
- develop software that powers those services;
- develop related consumer electronics products; and
- market and sell new media products and services to the public.

DiMA members “business ecosystem” is increasing in size and complexity. Our members offer or otherwise make available musical, spoken word and audiovisual programming. The programming falls within general categories of entertainment, education and research, news, sports, and genres or sub-categories of each. DiMA members’ programming and offerings are

available for purchase, for passive enjoyment, for on-demand enjoyment, and on either (and often both) a subscription and advertiser-supported basis. Moreover, the programming is (or in some cases will soon be) available via a remarkable number of networks and on an extraordinary variety of devices.

Several DiMA members' services are music-oriented, and they have changed the ways that consumers enjoy music and that artists promote their work.

- Apple's iTunes Store revolutionized music purchasing, and along with Amazon.com, Best Buy and several other DiMA members, makes finding and acquiring new music easier than ever before.
- Pandora and Slacker offer user-influenced radio that dynamically modifies playlists as consumers inform the service what songs they like or dislike. Pandora and Slacker are available over the Internet, through the iPhone and the Blackberry when the user downloads specialized software (now commonly known as "apps"), through the Sprint Nextel network, and through traditional home consumer electronics systems utilizing specialized media networking equipment sold by, e.g., Sonos, Logitech or Cisco.
- Rhapsody (from RealNetworks), Napster (owned by Best Buy) and Microsoft's Zune service offer music subscriptions that permit users to enjoy all the music they want, streamed from the Internet or stored locally on their computer, or stored on specialized portable music devices.
- Live365 and LoudCity aggregate thousands of individually programmed radio stations at www.live365.com, and make them available over mobile devices also.

Several DiMA members' offerings include audiovisual programming.

- Amazon.com and iTunes sell downloaded movies and television programs that play on consumers' televisions, computers and portable video devices. Amazon.com also permits consumers to store purchased media on Amazon.com servers, and then to stream the programming on any IP-enabled device whenever the user chooses.
- In addition to the Rhapsody music service, RealNetworks offers several subscription services that include news, sports and entertainment-oriented audiovisual programming, which is accessible from a computer or any IP-enabled device.
- YouTube offers short-form audiovisual programming produced by individual consumers who upload their product to YouTube servers, and also offers professionally produced content from 3rd party licensors including record companies and television producers.

Additionally, several DiMA members offer specialized consumer electronics products that are developed particularly for their own media offerings, but which in some circumstances may also be used to distribute others' programming or services.

- Microsoft's Zune product is integrated with the Zune service, which offers music and audiovisual programming for sale and for subscription.
- Apple's iPod is tightly integrated with the iTunes Store which sells music and audiovisual programming. The iPhone and iPod Touch are also platform devices that host 3rd party applications which are often oriented toward entertainment media. For example, millions of Pandora and Slacker listeners enjoy those services on their iPhone and/or iPod Touch, rather than through their PC or through a single-purpose device.

- Amazon.com developed the Kindle e-book reader, but also provides consumers with software to read their e-books on the iPhone and the iPod Touch.

The current complexity of DiMA members' services, and the rapid pace of technological and business model innovation, creates enormous challenges to the development of "all purpose" services, devices and software applications of any kind. The digital media ecosystem is very different from the relatively static television environment that awaited the V-Chip. The development of multi-platform, multi-media advanced blocking technologies that will integrate with multiple ratings systems is an extraordinary undertaking and one which must be approached with caution.

Efforts to develop advanced blocking technologies are not unlike historical efforts to develop digital rights management solutions, and the challenges will be at least as difficult. Single company DRM initiatives often succeed by meeting internal goals, such as supporting a music or media subscription service (e.g., Zune or Rhapsody) or locking content to a specific family of approved devices (e.g., iPods and Kindles). Similarly, single company "marketplace" DRM development has also succeeded, as evidenced by Macrovision, Microsoft and others that develop and the license DRM solutions to third parties. Additionally, the DVD protection software known as CSS represents perhaps the most successful multi-party DRM standardization effort, but it was limited to a single product (motion picture DVDs) and a single set of non-networked devices – DVD players. These successes seem rudimentary, however, in comparison to the advanced blocking technology initiative that seems to be contemplated by the Commission.

A multi-party, multi-platform, multi-industry "advanced blocking technology" effort seems most similar to the recording industry's 1998-2001 project to develop cross-platform anti-piracy DRM software for music, known as the Secure Digital Music Initiative. For three years more than 200 companies, associations and consumer groups met in person and collaborated in small groups with a common goal – to prevent copyrighted music from being pirated while permitting it to be enjoyed in ways that consumers expected and on platforms that were then known or being developed.

The Secure Digital Music Initiative was much narrower than an advanced blocking technology effort that seems to be suggested by the Commission. SDMI addressed only music; the universe of devices and applications was much smaller; and the variations in consumer choice associated with music were certainly fewer than the variations associated with parental definitions of content that is appropriate for 80+ million families. But SDMI was an expensive failure and seems to have marked the beginning and the end of multi-party, multi-industry cross-platform DRM standardization efforts.

DiMA and our Members are Committed to Empowering and Educating Parents About Their Entertainment Choices.

Beginning in 2004, DiMA joined with three other entertainment retail associations to promote parental empowerment, education and media choice, through our joint sponsorship of Entertainment Ratings and Labeling Awareness Month (ERLAM). DiMA, the Entertainment Merchants Association, the National Association of Recording Merchandisers, and the National Association of Theatre Owners represent a combined 2,000 companies that operate more than

30,000 theaters, video and video game stores, music stores, online music and media websites, and other retail establishments that offer entertainment products.

Entertainment Ratings and Labeling Awareness Month is scheduled every June as the school year ends, as this is a time when children are likely to be increasing their media activities. The groups develop educational signage in brick-and-mortar stores and movie theatres, public service advertisements on participating websites and in Internet radio programming, and media outreach to promote news stories about entertainment ratings. (See attached Exhibit ___ which includes examples of in-store and movie theatre signage, online banner advertising; in-store video public service announcement scripts; and Internet radio public service announcement scripts.)

Between June 2007 and February 2008 alone, the printed public service announcement created for Entertainment Ratings and Labeling Awareness Month generated 264 articles in newspapers in 23 states with a readership of more than 10 million people. Additionally, thanks to the widespread participation of our associations' member companies, in the five years of its existence Entertainment Ratings and Labeling Awareness Month activities have resulted in many millions of dollars worth of promotion for entertainment ratings systems.

DiMA Members Inform Parents by Participating in Existing Ratings Systems.

In their capacity as retailers or service providers working with pre-recorded professionally-produced content, DiMA members generally participate in broad-based industry ratings systems developed by Recording Industry Association of America, the Motion Picture Association of America, and the Entertainment Software Rating Board. In each context, DiMA members prominently post ratings information provided by producers in order to inform consumers and specifically to help parents who are engaged with or overseeing their family media experience.

As the Commission is aware, participation in the ratings systems is voluntary and there is variance in how companies implement the ratings. For example, in the music context the iTunes Store prominently informs consumers of recordings with explicit lyrics by (a) including a large graphic version of the traditional RIAA-endorsed "Parental Advisory: Explicit Lyrics" label on the webpage near the album cover or alternative "cover art," and (b) with a red-colored all-capital letters **EXPLICIT** identifier on the playlist listing. Both the traditional graphic and the **EXPLICIT** identifier incorporate hyperlinks to an iTunes page that describes the RIAA labeling policies.

Similarly, Amazon.com posts the Parental Advisory graphic on album art and prominently identifies in multiple places when albums or individual songs include explicit lyrics. Though Amazon.com and iTunes (and other DiMA member services) utilize different font sizes, different colors and different presentations, the effect is the same – that engaged parents are educated before permitting their children to purchase labeled recordings.

In response to the NOI's question, historically DiMA has not engaged with its member companies to develop or standardize content ratings systems or the methods of presenting ratings information to consumers. Our companies maintain interactive relationships with millions of consumers and prospective consumers and are uniformly responsive to consumers concerns as well as their corporate citizenship responsibilities.

Media Services that Invite Third Party Creators and Applications Present Consumer Information Challenges that DiMA Companies Are Addressing.

In very different ways, YouTube and the iPhone App Store may be the most prominent DiMA member business models that rely in significant part on content that is developed and uploaded by parties not affiliated with the service. Both businesses are quite new, yet both became phenomenally popular virtually overnight due in large part to the ways they invited third party creativity and made it widely available. By doing so, however, YouTube and the iPhone App Store exemplify a vexing problem for the growing number of services that invite third party creative participants – how to accurately, simply, clearly and consistently inform consumers about content that is developed by third parties and made available in vast quantities.

The iTunes App Store offers tens of thousands of downloadable video games that in theory could each be rated by the ESRB prior to being marketed. YouTube offers literally millions of video that in theory could be rated by the MPAA prior to being marketed. Of course the traditional ratings alternatives simply cannot keep up with the vast quantities of content being developed and marketed through iTunes, YouTube and other open or Web 2.0 platforms, so companies have developed alternatives.

The App Store provides simple age-based ratings that allow consumers to quickly identify a game's likelihood of being appropriate for a child. The four ratings categories are for children aged 4+, 9+, 12+ and 17+, and the factors that determine a rating are one click away from each game's "home page" in the App Store. (*See attached Exhibit __*) Trained App Store employees rate each game during the approval process that each application undergoes prior to being made available in the App Store.

Prominently displayed on each game's home page is the rating and the reasons for the rating, which can include items such as "infrequent/mild cartoon or fantasy violence" for a game rated 9+, or "infrequent/mild mature/suggestive themes" for a game rated 12+.

In contrast, YouTube has taken a multi-faceted approach to creating and enforcing content standards. The first mechanism is YouTube's Terms of Service, which must be agreed to by registered users (and only registered users are permitted to upload videos). The second mechanism, a community-based approach, may be the only rational enforcement option in an environment where literally hundreds of thousands of videos are uploaded daily. The YouTube user community flags videos if they are believed to violate YouTube's Terms of Service, and YouTube staff generally review those videos promptly. YouTube also utilizes filtering software to screen for pornography prior to videos being uploaded.

In both the App Store and YouTube context, DiMA members are voluntarily experimenting with new consumer education models in an effort to identify that which will effectively communicate important information to an audience that is itself experimenting with the new platform. The explosive adoption of these platforms by millions of consumers has sparked creative and entrepreneurial energy, investment capital, and opportunity. The Commission and all of America should embrace these successes and not propose regulatory or one-size-fits-all industry standards that could inhibit their growth or continuing innovation.

The Commission should also be cognizant of the “consumer information” opportunity that platforms such as the App Store present. Many applications in the App Store are not entertainment, but have educational, mapping, cultural and other values. There is every opportunity for an entrepreneur to create a ratings enforcement application that will work in the iPhone and iPod Touch environment, the Blackberry environment, and the Android environment. And perhaps this application like many others will surprise consumers with its ingenuity and experts with its popularity. In this way the very technology platform that invites third-party creativity which causes some concern will use the same resource to resolve those concerns.

The Commission should also be mindful throughout this proceeding that government restricting content or restricting innovation that promotes content dissemination may solve a social concern, but the cost will be enormous. Restraining platform innovation will limit access to content that some may deem inappropriate but others consider vital. Government action of this sort will reduce innovation and economic growth, will diminish the First Amendment, creativity and cultural advances, and as noted above – may restrain the development of the very solutions that the government seeks to promote.

FCC Should Not Expand this Inquiry Beyond What Congress Assigned.

Notwithstanding DiMA’s broad-based comments which are provided in a constructive spirit, DiMA believes that the Child Safe Viewing Act clearly directs the Commission to focus this inquiry only on audiovisual programming, and that it specifically does not to focus on audio-only (e.g., radio) programming or video games. This comports with Congress’s traditional view of focusing on mass media that has the widest impact on our citizens, and it also focuses on the

Within the universe of audiovisual programming, DiMA agrees with the suggestion in the NOI that Congress intended the Commission to focus only traditional video programming, which is that “provided by, or generally considered comparable to programming provided by, a television broadcast station.”