

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
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)
Amendment of Parts 2, 15, 18 and Other)
Parts of the Commission's Rules to) ET Docket No. 97-94
Simplify and Streamline the Equipment)
Authorization Process for Radio Frequency)
Equipment)

COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), by its attorneys, submits these comments in connection with the above-captioned Notice of Proposed Rulemaking released by the Federal Communications Commission ("FCC or Commission") on March 27, 1997.^{1/} Time Warner is a division of Time Warner Entertainment Company, L.P., a partnership which is primarily owned (through subsidiaries) and fully managed by Time Warner Inc., a publicly traded Delaware corporation. Time Warner is the second largest operator of cable television systems nationwide.

In the NPRM, the Commission has proposed a number of measures designed to streamline its existing equipment authorization procedures in order to permit manufacturers to more rapidly bring their products to market. Specifically, the Commission has proposed to consolidate the five existing equipment authorization procedures (type acceptance, certification, verification, notification, and declaration of conformity) into three procedures (by eliminating type acceptance and notification procedures); to deregulate the authorization requirements for

^{1/} Notice of Proposed Rulemaking, ET Docket No. 97-94, 62 Fed. Reg. 24383 (rel. March 27, 1997) ("NPRM").

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certain types of equipment; and to institute an electronic filing system for equipment authorization applications.^{2/} Although the Commission proposes to relax equipment authorization procedures (from certification or notification to the less stringent declaration of conformity) for TV Interface Devices (“TVIDs”) generally, the NPRM proposes to make the equipment authorization process more stringent for the subcategory of TVIDs known as Cable System Terminal Devices (“CSTDs”), which includes cable television converters and descrambling equipment that perform critical signal security functions in multichannel video programming delivery systems.^{3/} Specifically, the Commission has proposed to upgrade the current equipment authorization process applicable to CSTDs from notification to certification “to ensure against marketing of such devices for theft of cable service.”^{4/} Time Warner wholly supports the Commission’s tentative decision to subject CSTDs to a more rigorous equipment authorization process and these comments will focus on that specific issue.

Time Warner believes that more careful scrutiny of CSTD equipment authorization applications is long overdue. Time Warner, as the nation’s second largest operator of cable television systems, has had first hand experience in combating signal piracy and the increasing sophistication of unscrupulous manufacturers and dealers of unauthorized black market descramblers and other devices used to pirate the services of multichannel video programming distributors. Time Warner has repeatedly sought and obtained injunctive relief against the manufacturers and/or distributors of illegal modified analog descramblers and has been relatively

^{2/} NPRM at ¶ 1.

^{3/} *Id.* at ¶ 18.

^{4/} *Ibid.*

successful in having the illegal inventory seized and confiscated.^{5/} In one case, the court's decision to grant injunctive relief appears to have been based, at least in part, on its finding that the descramblers in question had not received FCC authorization pursuant to Parts 2 and 15 of the FCC's regulations.^{6/}

Time Warner's efforts to combat signal piracy have recently been made more difficult by the changing tactics of black market descrambler manufacturers and distributors to stay ahead of the law. In addition to modifying descramblers by inserting microchips, quickboards and "bullet busters" designed to allow the descrambler to decode scrambled signals which have not been authorized by the cable operator and to prevent the cable operator from electronically deactivating these unauthorized devices, certain manufacturers have sought and have been successful in obtaining FCC equipment authorization for some of their products under the current lenient notification procedures. For example, the Commission has granted equipment authorization for several descramblers manufactured by United Imports d/b/a Everquest d/b/a MD Electronics, which is the same company that Time Warner has successfully brought suit against previously for selling illegally manufactured or modified decoders.^{7/} Indeed, Time

^{5/} See e.g., Time Warner Cable of New York City v. Freedom Electronics, Inc., 897 F. Supp. 1454 (S.D. Fla. 1995); Oceanic Cablevision, Inc. v. MD Electronics, 771 F. Supp. 1019 (D. Neb. 1991) (suit brought by Time Warner related entity); Time Warner Cable of New York City v. U.S. Cable T.V., Inc., et al., 95 Civ. 2810 (E.D.N.Y. 1995) (consent order); Time Warner Cable of New York City v. U.S. Cable T.V., Inc., et al., 920 F. Supp. 321 (E.D.N.Y. 1996) (contempt order finding U.S. Cable in violation of earlier consent order); Time Warner Cable v. Cable Box Wholesalers, Inc., 920 F. Supp. 1048 (D. Az. 1996).

^{6/} Freedom Electronics, *supra*, 897 F. Supp. at 1457.

^{7/} On October 3, 1996, the Commission issued an equipment authorization for Everquest's IVA-Navigator 6000 and on November 14, 1996 the Commission issued an equipment authorization for Everquest's IVA-Infinity 3000. Ironically, the Commission had previously denied equipment authorization for several other Everquest devices based on theft of services concerns. See Letter dated April 17 1995 from Julius P. Knapp, Chief Equipment Authorization

Warner is presently involved in a series of suits against this same company and related entities. In that litigation, Time Warner had succeeded in obtaining a temporary restraining order and preliminary injunction from the United States District Court for the Eastern District of New York preventing United Imports from selling pirate decoders, destroying records or transferring assets. United Imports' response was to file a petition for bankruptcy in Nebraska in an attempt to nullify the TRO and preliminary injunction.^{8/}

In the bankruptcy proceeding, United Imports has filed a Motion for Authority to Disassemble and Sell Certain Inventory.^{9/} In support of that Motion, United Imports has argued that the Commission's equipment authorization rules allow it to restore the addressability functions which had been disabled on certain units that had been modified and to sell these "restored" units in the stream of commerce without the need to have them reauthorized. United Imports has also argued that it should be allowed to sell certain units for which FCC equipment authorization had neither been sought nor received until after the bankruptcy petition had been

Division to John M. Boehm, Attorney at Law (ET Reference No. 31010EQU 4-3-4). Everquest has sought reconsideration of that decision. See In re Applications of Everquest, Inc., ET Reference 31010EQU 4-3-4, (Petition for Reconsideration filed May 17, 1995).

^{8/} The history of this litigation is succinctly summarized in Time Warner Cable of New York City v. M.D. Electronics, 101 F.3d 278, 279-81 (2nd Cir. 1996).

^{9/} Motion for Authority to Disassemble and Sell Certain Inventory filed January 23, 1997, Case No. BK96-81674 (Chapter 11) (Bankr. D. Neb. 1996). A similar tactic has recently been utilized by Nu-Tek Electronics & Manufacturing, Inc. ("Nu-Tek"), owned by David Abboud, another member of the Abboud family (see footnote 10, *infra*). Nu-Tek was sued by General Instrument Corp. of Delaware in the Eastern District of Pennsylvania. See General Instrument Corp. of Del. v. Nu-Tek Electronics & Mfg. Inc., No. CIV.A. 93-CV-3854 (E.D. Pa.). After judgment was granted against it, which judgment included monetary damages, attorneys' fees and a permanent injunction against distribution of pirate decoders, Nu-Tek promptly filed for bankruptcy in the U.S. Bankruptcy Court for the Western District of Texas. In Re: Nu-Tek Electronic & Manufacturing, Inc., Chapter 11 Case No.97-11338-FM (W.D. Tex.) on April 3, 1997. On or about April 23, 1997, it moved in the bankruptcy court for the identical relief sought by United Imports, *i.e.*, permission to sell pirate decoders.

filed. In other words, it appears that the Commission's equipment authorization process is being misused by United Imports to convince the bankruptcy court to allow the sale of certain decoders which were covered by the TRO and preliminary injunction issued by the federal district court in New York prohibiting such sales.^{10/}

The difficulties in prosecuting manufacturers and distributors of black market descramblers intended to allow customers to illegally receive cable services they have not purchased will be magnified as the Commission adopts rules to implement Section 629 of the Communications Act which requires it to "adopt regulations to assure the commercial availability, to consumers of . . . equipment used . . . to access multichannel video programming . . . from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor."^{11/} In that proceeding, the Commission has acknowledged that Congress' substantial concern with theft of service issues, as reflected in Sections 629(b), 633 and 705 of the Communications Act, make it crucial to ensure "that whatever action is taken to implement Section 629 does not conflict with the maintenance of

^{10/} The TRO was originally issued by the federal district court in New York on July 11, 1996 and the bankruptcy petition was filed by United Imports on August 1, 1996. Equipment authorization applications for the Everquest Navigator 6000 and Infinity 3000 descramblers were not submitted to the FCC until August 27, 1996 and September 12, 1996, respectively. One can only conjecture whether the FCC would have authorized those descramblers had its equipment authorization procedures been designed to make the Commission aware of the pending and prior litigation involving the applicant. Indeed, it has been reported recently that the principals of MD Electronics, Joseph and Gene Abboud, have been sentenced in Atlanta, Georgia to six months home detention, \$1.7 million in fines and to surrender 10,000 modified descramblers in a suit brought by Scientific Atlanta. "Judge Hands Major Pirate Small Fine," Multichannel News (June 16, 1997).

^{11/} 47 U.S.C. § 549(a).

system security *nor inadvertently validate the manufacture and distribution of equipment intended for the unauthorized reception of communications services.*"^{12/}

In the Navigation NPRM, the Commission tentatively proposes to incorporate the basic Carterfone principle^{13/} into its rules regarding the commercial availability of navigation devices, *i.e.*, attachment must be permitted so long as the devices do not adversely affect the network and are privately beneficial without being publicly detrimental.^{14/} While Time Warner has generally supported this proposal in its comments submitted in response to the Navigation NPRM, it has also highlighted the need for the Commission to make absolutely clear that such a right does not extend to any equipment which is used or useful to receive services for which the user has not been authorized. In nearly every theft of service case that Time Warner has been involved in following passage of the 1992 amendments to the Communications Act, which added Section 629, the manufacturers and/or distributors of unauthorized decoders have raised as a defense the argument that Section 629 establishes a federal right for consumers to purchase and own their own equipment -- even pirate boxes used to aid in theft of service. The creation of a vague and unlimited right to attach, coupled with the fact that at least some of these manufacturers are able to claim that their product has received authorization from the FCC, allows them to cloak their activities in a mantle of legitimacy, thereby making it even more difficult than it already is to successfully and effectively prosecute theft of service actions.

^{12/} Notice of Proposed Rulemaking, CS Docket No.97-80, 62 Fed. Reg. 10011 (rel. February 20, 1997) ("Navigation NPRM") at ¶¶ 31-33 (emphasis supplied).

^{13/} See Use of the Carterfone Device in Message Toll Telephone Service, 13 FCC 2d 420, 13 RR 2d 597 (1968), *recon. denied*, 14 FCC 2d 571, 14 RR 2d 185 (1968).

^{14/}NPRM at ¶ 56.

The Commission has recognized that “[s]ervice theft is a serious matter.”^{15/} The most recent available study undertaken by the cable television industry estimates that signal piracy costs approximately \$5.2 billion annually, or approximately 20 percent of the industry’s annual revenue.^{16/} Indeed, in the course of Time Warner’s efforts to combat piracy at least one judge has commented on the organization and sophistication of cable pirates:

There is a nationwide, “black market” industry of various manufacturers, vendors and distributors of “pirate” converter-decoders or descramblers, who market devices and equipment to subscribers of plaintiff’s cable television programming services seeking to avoid the payment of subscription fees to view premium and Pay Per View cable programming services.

Freedom Electronics, *supra*, 897 F. Supp. at 1457. For these reasons both the FCC and Congress have recognized that the distribution of descrambling equipment, especially analog descramblers, must be strictly controlled.^{17/}

To the extent that the Commission creates a Carterfone-based “right to attach” devices to an MVPD’s network, it must make absolutely clear that any such right does not extend to any device which has not been authorized by the FCC or, even if authorized, is capable of allowing

^{15/} Navigation NPRM at ¶ 31.

^{16/} “NCTA Estimates Loss to Piracy at \$5.2B,” Multichannel News (April 14, 1997) at 10. This estimate is based on data collected during 1995 and the first six months of 1996.

^{17/} See, e.g., 47 U.S.C. § 544A(c)(1)(A) (“In prescribing the regulations required by this section, the Commission shall consider . . . the need to maximize open competition in the market for all features, functions, protocols, and other product and service options of converter boxes and other cable converters *unrelated to the descrambling or decryption of cable television signals*”) (emphasis supplied); First Report and Order in ET Docket 93-7, 9 FCC Rcd 1981 (1994) at ¶29 (“We disagree . . . that we should require cable operators to allow consumers to own descrambling equipment and to purchase such equipment from third parties. While we are aware that there have been advancements in encryption technology, we also understand that it is most important to cable operators that they be able to control the means used to access their programming. Moreover, signal thieves have been notoriously successful at defeating security systems for video programming services. We therefore will not require cable systems to allow their subscribers to own descrambling equipment.”)

the user to receive cable services without the knowledge or authorization of the cable operator. Without such a limitation, signal piracy cases will become much more difficult to prosecute, in violation of the Section 629(b) mandate that the Commission not prescribe regulations which would jeopardize the security of services offered over MVPD systems or impede the legal rights of MVPDs to prevent theft of service. A corollary of this principle is that MVPDs would not be allowed to take any action to disable or restrict consumers from obtaining authorized services using authorized navigation devices supplied by unaffiliated parties in an authorized manner, and that the FCC establish procedures to revoke the authorization for any devices which do not satisfy the foregoing criteria.

For the foregoing reasons, Time Warner supports the Commission's proposal to make its equipment authorization process more stringent as it relates to obtaining approval for CSTDs. The simplicity and relaxed showing required to authorize a CSTD under the present notification procedures has allowed companies (some of whom are believed to be affiliated with individuals adjudicated to have been engaged in signal piracy) to obtain FCC authorization for devices which have not, to Time Warner's knowledge, been purchased or authorized for use by a single legitimate MVPD, but which are nonetheless capable of defeating a number of scrambling schemes commonly utilized to secure MVPD services. These companies often trumpet this FCC authorization as if it should provide cover for any use of the devices, including unauthorized and illegal receipt of service.

Time Warner believes that the Commission's proposal to upgrade the process of obtaining equipment authorization for CSTDs from notification to certification will help "to ensure against the marketing of such devices for theft of service."^{18/} This is an essential first

^{18/} NPRM at ¶ 7.

step to retard the manufacture and distribution of equipment used to pirate MVPD services. However, additional procedures, applicable specifically to CSTDs, should be implemented as well. These include the following:

1. Applicants seeking FCC equipment authorization for any CSTD should be required to provide a detailed description of the features contained in the equipment for which approval is sought which are designed to prevent unauthorized access to programming, and to prevent unlawful modification of the equipment. The courts have recognized that the sole purpose in modifying an addressable descrambler to bypass the addressability function is to enable the user to receive and unscramble programming without notifying the signal provider.^{19/} Accordingly, the Commission should adopt a standard that prevents unscrupulous companies from manufacturing substandard terminal equipment which allows the conditional access or scrambling/encryption functions to be easily deactivated or bypassed, or that is designed to defeat electronic countermeasures employed by the service provider to deactivate unauthorized services.
2. Applicants seeking FCC equipment authorization for any CSTD should be required to detail steps taken to ensure distribution of the equipment by legitimate cable equipment distributors, *e.g.*, so equipment cannot be altered and then distributed on the black market. The Commission has noted that in the analog environment, control over the distribution of descrambling equipment is an essential component in preventing theft of service.^{20/} Indeed, one critical distinction between legitimate descrambler manufacturers and their black market counterparts is that legitimate manufacturers maintain stringent procedures for verifying that orders are accepted from legitimate operators only.^{21/}
3. The Commission should modify its current certification process as applied to CSTDs to provide that CSTD authorizations will not become final until 60 days after the public notice of the application grant is published. This will give interested parties the right to seek reconsideration and bring any irregularities to the Commission's attention before the equipment is released to the marketplace.

^{19/} Freedom Electronics, *supra* 897 F. Supp. at 1459, n. 2, *citing* Subscription Television of Greater Washington v. Kaufmann, 606 F. Supp. 1540, 1543 (D.D.C. 1985).

^{20/} Navigation NPRM at ¶ 29.

^{21/} See statements of Fred Powers, General Patent Counsel for Scientific Atlanta as reported in "How Pirates Ride the 'Net,'" Cablevision Magazine (June 16, 1997) at 22.

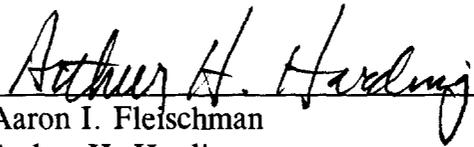
4. The Commission should adopt a presumption that entities shown to have any affiliation with any party which has engaged in unlawful theft of service activity within the past ten years may not obtain FCC authorization for any CSTD. There is absolutely no reason to expect manufacturers and distributors of equipment intended to facilitate theft of service to take any measures to ensure that their products are used only in an authorized manner. Nor is there any public benefit to be gained by cloaking the activities of such entities with the mantle of legitimacy.
5. The Commission should establish an expedited procedure to revoke an authorization where it can be demonstrated that the company or its agent has engaged in illicit theft of service or piracy activities. Such a procedure would be extremely useful in cases where the manufacturer or distributor of products intended to facilitate theft of service seeks the protection of bankruptcy laws to continue to sell contraband equipment on the grounds that the FCC has authorized the sale of that equipment.

Time Warner believes that the foregoing proposals can greatly assist both the Commission and private parties to ensure that the Commission's equipment authorization process is not inadvertently used to validate pirate equipment. The requirement to provide greater detail of the security features and marketing practices will provide a means to enable Commission staff to more carefully screen CSTD equipment authorization applications. Public scrutiny of applications after pre-grant, but before equipment can be sold in the stream of commerce, strikes an appropriate balance between the need to protect proprietary information and the need to ensure that the equipment authorization process is not misused by persons seeking to take advantage of minimal public disclosure to obtain approval for equipment that is manufactured for the pirate market. A 60 day delay between approval and marketing will not place a severe burden on legitimate equipment manufacturers or unduly delay their ability to bring new products to market in an expeditious fashion. However, the opportunity for public scrutiny of these applications following pre-grant can be expected to minimize the incidence of equipment authorizations being granted inadvertently for pirate equipment.

Wherefore, Time Warner respectfully requests that the Commission upgrade the equipment authorization process for CSTDs from notification to authorization and adopt the specific additional proposals advanced in these comments which are designed to maintain the integrity of the Commission's equipment authorization process and ensure that the process does not unintentionally allow equipment intended to facilitate theft of service to receive the imprimatur of the FCC.

Respectfully submitted,

TIME WARNER CABLE

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