



National Cable & Telecommunications Association
25 Massachusetts Avenue, NW – Suite 100
Washington, DC 20001
(202) 222-2300

www.ncta.com

Neal M. Goldberg
Vice President and General Counsel

(202) 222-2445
(202) 222-2446 Fax

November 30, 2015

Ms. Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: Notice of Ex Parte Presentation, MB Docket 15-64

Dear Ms. Dortch:

As reported in our ex parte notice of November 23, 2015, AT&T/DIRECTV and the National Cable & Telecommunications Association (NCTA) committed to gather additional information in response to a request by the Media Bureau for more information on the recordability of MVPD programming.

As previously documented in the DSTAC Report and in Comments, the DLNA VidiPath spec provides a recordable DTCP-IP output, so that a retail DVR can record programming (if marked eligible for recording) received by VidiPath. RVU servers similarly provide a recordable DTCP-IP output, with copy control information set in accordance with content agreements.¹ Cable operators also offer download-to-go for mobile devices and provide recordability via cloud-based DVRs that are programmable from retail devices.

In VidiPath, the MVPD typically encodes the programming indicating if it is eligible for recording, for example by marking programming in a linear stream as “copy one generation.” Certified retail VidiPath client devices have not yet been introduced to the market, but we can envision at least the following methods for a retail VidiPath device to make use of a VidiPath recordable output using device-specific techniques chosen by the manufacturer.

- To record the current program to the retail device, the user could press a record button on the retail device (or remote control) and the retail device would record the current program.

¹ Public Notice, *Media Bureau Seeks Comment on DSTAC Report*, DA 15-982 (Aug. 31, 2015), Working Group 4 Report at 142-43 and Working Group 2 Report at 18; NCTA Reply Comments at 11-12; and AT&T Comments at 10 n 25.

- To schedule recordings from a retail device, the user could pick a program from a retail manufacturer's guide. At the appropriate time, the retail VidiPath device would send events to the MVPD VidiPath app directing it to tune the channel, and the retail device would then record the program at the desired program start and end times.
- The user could also pick a program from a retail manufacturer's app running on the retail device, then the retail device would send events to the MVPD app to create the recording to the MVPD local or cloud storage.

The retail manufacturer must do the development work for such guide apps and recorders.

There are several options for a retail guide to obtain information concerning the appropriate channels and times for recording:

- A manufacturer may purchase guide data from commercial providers such as Rovi and Tribune Media Service. This is how TiVo obtains guide data.
- The commercial providers of guide data also provide MVPD channel map information, eliminating the need for devices such as CableCARDS to resolve the wide variety of means by which channel map information is conveyed on networks.
- Other providers may also emerge as potential sources for available data, similar to the web sites nextguide.tv, gowatchit.tv, or yidio.com, which a device could be programmed to query.

In RVU, the techniques are similar. A retail device may make use of an RVU recordable output using device-specific techniques chosen by the manufacturer. The manufacturer may, for example, include an app to turn on the client device, tune the source using a SHEF (Set-top Box HTTP Extended Protocol) command, verify that it is on the right channel by checking the currently tuned channel, and record on the client at the desired program start and end times. The client manufacturer must do the development work for such a recorder.²

There are some specific patent issues that may arise as retail manufacturers develop local DVRs and local guides for driving them. Developing these devices and guides increases the exposure of device manufacturers to patent suits from a very small set of litigious players. TiVo is a very aggressive patent litigator³ and patent licensing fees account for a major portion of

² This was described in detail, including links to the specific commands and protocols that developers would use, by Nathan Zerbe of DIRECTV in a face-to-face meeting of WG4 held on June 19, 2015, the slides for which are posted in this Docket.

³ See, e.g., *TiVo v. ReplayTV and SONICBlu* (4-02-cv-00365 CAND January 23, 2002), *TiVo v. Echostar* (2-04-cv-00001 TXED January 5, 2004), *TiVo v. AT&T* (2-09-cv-00259 TXED August 26, 2009, Microsoft intervening), *TiVo v. Verizon* (2-09-cv-00257 TXED August 26, 2009), *TiVo v. Cisco and Time Warner Cable* (2-12-cv-00311 TXED June 4, 2012), *TiVo v. Samsung* (2-15-cv-01503 TXED September 8, 2015).

TiVo's overall revenue.⁴ Indeed, some observers have noted that TiVo is seeking to “preserve its lucrative patent business” by increasing manufacturer exposure to its patent claims.⁵ Rovi (Gemstar) and OpenTV/Nagra are also aggressive patent litigators for guides and enhanced television (ETV).

A device that uses a local DVR and a guide is commonly sued for patent infringement. These patent actions help to explain why no sizable companies other than TiVo have built retail DVRs. By contrast, utilizing apps enables more device competition by helping to insulate manufacturers from such patent claims. The service provider (which is typically already licensed) creates the guide and/or the DVR. The retail device or Smart TV manufacturer simply builds a device with a general-purpose app platform and moots such patent licensing requirements. TiVo chose not to participate as DLNA developed app-based home networking techniques that can reduce such patent exposure, pressing instead for an AllVid approach that would increase patent exposure. By eliminating any application code, AllVid forces the retail manufacturer to implement the DVR functionality locally, which TiVo regularly treats as an infringement on TiVo patents.

If you have any further questions, please contact me.

Respectfully submitted,

/s/ Neal M. Goldberg

Neal M. Goldberg

cc:

Scott Jordan
Alison Neplokh
William Lake
Steven Broeckaert
Michelle Carey
Lyle Elder
Mary Beth Murphy
Nancy Murphy
Brendan Murray
Susan Singer
Antonio Sweet
David Waterman
Stacy Fuller
Alex Starr

⁴ See, e.g., Janko Roettgers, *TiVo Files Patent Infringement Lawsuit Against Samsung*, VARIETY (Sep. 8, 2015) (settlements totaling more than \$1.6 billion).

⁵ See, e.g., Jacob Kastrenakes, *TiVo is trying to preserve its lucrative patent business by suing Samsung*, THE VERGE (Sep. 8, 2015), <http://www.theverge.com/2015/9/8/9284091/tivo-samsung-dvr-patent-lawsuit>.