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August 25, 2000

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RECEIVED
AUG 28 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex-Parte* Presentation; In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment; PP Docket No. 00-67

Dear Ms. Salas:

This is to notify the Office of the Secretary that on August 23, 2000, the undersigned, accompanied by Jon Baumgarten of Proskauer Rose, LLP, counsel to MPAA, and Bill Check, Neil Goldberg and Andy Scott representing NCTA, made an oral ex parte presentation to Dr. Robert Pepper, Amy Nathan, Jonathan Levy, Dale Hatfield, Alan Stillwell, William Johnson, Deborah Klein, Steven Broeckaert.

In addition to points made in Comments and reply comments filed by MPAA on May 24, 2000 and June 8, 2000 respectively, Messrs. Attaway and Baumgarten responded to recent assertions that the absence of "encoding rules" in the DFAST license would result in all content passing through the POD/host interface being marked "copy never," thereby depriving consumers of the opportunity to "time shift." The following is a summary of those responsive statements.

The assertion that content owners will prevent copying of all content is purely fanciful and is contradicted both by the actual conduct of content owners and the realities of the marketplace. In negotiations over a potential Content Participant Agreement with the "5C" companies that have developed the DTCP copy management system, all of the major motion picture studios represented by MPAA have expressed a willingness contractually to provide for specific limitations on their use of DTCP, depending upon the particular class of content involved. As MPAA stated in Reply Comments file in June, "DTCP will not be used to prohibit most home recording. Home recording of retransmitted broadcast programs and single copies of basic and extended basic programs and pay television will not be inhibited by DTCP."

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In addition to such contractual restrictions on the use of specific copy management technologies as may be agreed upon by content owners in negotiations with the providers of such technologies, content owners' use of such technologies will also be subject to limitations imposed upon them by their program service customers who must be sensitive to the home recording practices of their subscribers.

There is absolutely no evidence that content owners will restrict copying of all content delivered through DFAST licensed devices, and there are strong business and marketplace reasons for their not doing so. And in any case, if concerns over the ability of consumers to time shift, in the future, would be justified, the DFAST license is not the place to look for a remedy. The DFAST license is a contract between CableLabs and its licensees that manufacture and distribute components used in the cable television industry. Content owners are not parties to that agreement. Accordingly, the DFAST license cannot restrict the behavior of nonparties to that license.

The DFAST license cannot control content owners who are not a party to the license, and even if it could, what is the Commission being asked to do in this proceeding? As MPAA has pointed out in its Comments and Reply Comments, the Commission's rules clearly permit the DFAST license to require the technical capability to permit content owners to exercise their exclusive rights provided by the Copyright Act. (In the Matter of Implementation of Section 304/Navigation Devices, FCC 97-80 at ¶63.) The Commission correctly concluded that high value content would not be made available to devices that did not have the capability to protect copyrights. But having the capability to restrict recording does not mean that it will be implemented in every instance. It will not.

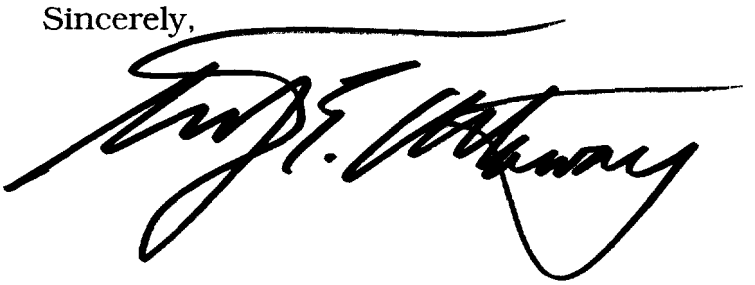
Allowing the DFAST license to require devices to have the technical capability to permit content owners, at their discretion, to exercise their exclusive rights is one thing. Determining what rights content owners should have is quite another. If, as it appears, the Commission is being asked to determine what rights content owners have – in effect, to amend the Copyright Act – this raises enormous policy and jurisdictional issues that require much more public debate and consideration than can take place at the eleventh hour of this proceeding.

As pointed out above, the determination of rights with respect to content is being worked out in voluntary, marketplace copy management technology

licenses such as 5C content protection agreement, and program licenses between owners and distribution services, as contemplated by the Copyright Act. There is no need for the Commission to step in and make these decisions on behalf of the parties, and every reason not to do so if the Commission's objective is to facilitate the deployment of DTV technology.

In accordance with Section 1.1206 of the Federal Communications Commission rules, this original and one copy are provided to your office. A copy of this notice is being delivered to the parties listed above.

Sincerely,



cc: R. Pepper
A. Nathan
J. Levy
D. Hatfield
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