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McDERMOTT, WILL & EMERY

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August 28, 2000

VIA ECFS

Ms. Magalie R. Salas
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

ORIGINAL

Re: **Written *Ex Parte* Presentations; In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment; PP Docket No. 00-67; In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; CS Docket No: 97-80**

Dear Ms. Salas:

This is to notify the Office of the Secretary that on August 28, 2000, on behalf of Circuit City Stores, Inc., Robert S. Schwartz of McDermott, Will & Emery delivered the attached written *ex parte* presentation to: Chairman Kennard, Commissioner Furchtgott-Roth, Commission Ness, Commissioner Powell, and Commissioner Tristani; William J. Friedman IV, Senior Legal Advisor to Commissioner Tristani, David Goodfriend, Legal Advisor to Commissioner Ness, Paul Jackson, Special Assistant to Commissioner Powell, Karen Edwards Onyeije, Legal Advisor to Chairman Kennard, Mark Schneider, Senior Legal Advisor to Commissioner Ness, and Helgi Walker, Senior Legal Advisor to Commissioner Furchtgott-Roth; Deborah Lathen, William Johnson, Deborah Klein, Steven Broeckkaert and Thomas Horan of the Cable Services Bureau; Robert Pepper, Amy Nathan and Jonathan Levy of the Office of Plans & Policy, and Dale Hatfield, Alan Stillwell and Bruce Franca of the Office of Engineering & Technology. Circuit City's written *ex parte* presentation responds to the Time Warner and Sony Pictures *ex parte* letters received by the Commission on August 23, 2000.

In accordance with Section 1.1206 of the Federal Communications Commission rules, this letter and the written presentation is being provided to your office. A copy of this notice has been delivered to the parties listed above.

Very truly yours,

/s/ Robert S. Schwartz

Robert S. Schwartz

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List A B C D E

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cc: Chairman Kennard
Commissioner Furchtgott-Roth
Commissioner Ness
Commissioner Powell
Commissioner Tristani
William J. Friedman IV
David Goodfriend
Paul Jackson
Karen Edwards Onyeije
Mark Schneider
Helgi Walker
Deborah Lathen
William Johnson
Deborah Klein
Steven Broeckaert
Thomas Horan
Robert Pepper
Amy Nathan
Jonathan Levy
Dale Hatfield
Alan Stillwell
Bruce Franca
Neal Goldberg – National Cable Television Association
Fritz Attaway – Motion Picture Association of America

Comment on Studio Ex Parte
Filings Re Licenses

In its *ex parte* filing of August 23, Circuit City said it would be illogical and anticompetitive for the Commission to approve a draft DFAST license, awarding content proprietors complete control over downstream HDTV transmission and home recording, based on allegations that such control is available to motion picture studios in existing contracts. We observed:

- Existing licenses between motion picture interests and cable distributors are not standard and are subject to periodic renegotiation. Any FCC recognition of the relevance of copy control technology to the DFAST license should not serve as an anticompetitive device to facilitate the imposition of common terms or restrictions on manufacturers, retailers or consumers.

Also on August 23, the Commission received two *ex parte* filings, by motion picture studio representatives, on the subject of such licenses. These filings recount that they are made pursuant to representations, on the subject of such licenses, made to Office of Plans and Policy staff by studio representatives on July 24 and 26. While only descriptions of such licenses, rather than the licenses themselves, **these filings confirm that the existing distribution contracts with cable operators do not remotely approach the restrictive scope of the DFAST license draft. They provide incontestable support for the Circuit City concern that the draft DFAST license would constitute an anticompetitive, bootstrap, industry-wide imposition of terms that do not, in fact, exist in present contracts.**

The August 22 letter on behalf of Time Warner, supporting representations made on July 24, indicates that certain language has been included in contracts signed by Time Warner "**since the fall of 1997.**" It notes that the contractual language "has evolved over time," but in any event apparently is limited to "**pay-per-view, near video on demand, and video on demand services.**" (Restrictions in the draft DFAST license are not limited to such services.) It admits that these contracts are **not** standard, in that "Warner Bros. has adapted its contractual language during the course of individual negotiations with various services" And, by implication, contracts signed prior to the fall of 1997 do not contain such restrictions, and it is unknown whether they would be accepted by the other parties.

The August 21 letter on behalf of Sony Pictures, supporting representations made on July 26, describes the terms only of those contracts that have been signed "**in the last two years.**" It also admits that the terms as to HDTV transmission and copy prevention **apply only to Pay-Per-View licenses.**

The Sony letter is straightforward in recounting that the Commission is now being asked to impose, through the draft DFAST license, terms that **have not been obtained in contractual negotiations to date.** It expressly admits that the "Pay Television" license, in effect through 2005, does **not** include such HDTV transmission or copy control provisions.

These filings provide graphic support for points made by Circuit City:

1. The terms of the draft DFAST license provide for proprietor control, over downstream devices attached to cable systems, far in excess of that contemplated in any existing contract.
2. Existing contracts differ from studio to studio and cable distributor to cable distributor. The common terms sought by MPAA through the DFAST license would erect nothing less than a cartel, imposed under color of Section 629, standardizing restraints at a level never approached in individual negotiations.
3. If the Commission is going to consider interpreting or changing its regulations so as to make copy control provisions admissible in the DFAST license, it should do so on the basis of a fully disclosed and complete DFAST license rather than a draft.
4. If the Commission is to decide that imposition of HDTV transmission restraints and copy control provisions, through the DFAST license, is acceptable, it should do so on some basis **other** than the claim -- now shown to be without foundation -- that the license merely tracks restraints that exist in present distribution contracts.