



NATIONAL CABLE TELEVISION ASSOCIATION

ORIGINAL

EX PARTE OR LATE FILED

DANIEL L. BRENNER
Senior Vice President, Legal &
Public Affairs

RECEIVED

MAR 1 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 28, 2001

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, D.C. 20554

**Re: Compatibility Between Cable Systems and Consumer Electronics
Equipment (PP Docket No. 00-67) and Commercial Availability of
Navigation Devices (CS Docket No. 97-80)**

Dear Chairman Powell:

I am writing in response to the February 12, 2001 letter sent to you by the Consumer Electronics Retailers Coalition ("CERC") purporting to respond to the letter sent to you by Dr. Richard R. Green, President and CEO of CableLabs. Dr. Green's letter was written on behalf of CableLabs and was of limited scope. Its sole purpose was to clear up some confusion about the CableLabs' DFAST license agreement (now called "PHILA") and, in particular, some of the claims regarding its copy protection provisions.

Dr. Green's letter explained why the inclusion of copy protection requirements in the PHILA would work to the ultimate benefit of cable customers. Consumers will be better off if they are able to obtain navigation devices which include copy protection capability. In the absence of such capability, content providers would likely withhold high-quality digital content from cable operators and, in turn, subscribers would be deprived of the ability to view those programs. These facts were before the Commission when it held in its September 18, 2000 Declaratory Ruling, that, consistent with the Commission's Navigation Device Rules, some measure of anti-copying encryption technology may be located within a host navigation device as required by PHILA.¹

¹ In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, CS Docket No. 97-80, FCC 00-341, Declaratory Ruling (released September 18, 2000) at ¶25.

No. of Copies rec'd 013
List A B C D E

Unfortunately, because CERC used the occasion of Dr. Green's letter to launch another of its periodic rants against the cable industry (barely addressing the merits of Dr. Green's letter), we believe a response is warranted. Rather than focusing solely on the narrow issue raised by Dr. Green, CERC's letter once again recycles misleading claims, to which NCTA has responded in other contexts, about "obstacles to market entry by CERC members." As we discuss below, CERC's primary concerns involve (1) appropriate copy protection requirements for high value digital content and (2) appropriate economic arrangements between retailers and cable operators to govern the commercial availability of digital set-top boxes. The Commission has wisely refrained from involving itself in these areas where the agency's jurisdiction is, at best, constrained; and it should reject CERC's invitation to do so in this case.

The basic thrust of the CERC letter is that the CableLabs' OpenCable effort has not produced a specification adequate to build host devices that will be comparable to set-top boxes provided by cable operators. That contention is a central issue in the Commission's proceeding looking into the status of the Navigation Devices market and NCTA has responded in detail to similar CERC charges raised in that proceeding.

As a general matter, however, it is important to make clear that the OpenCable specification has proven to be complete, as several manufacturers are currently building set-top boxes (and at least two manufacturers have constructed an integrated digital television receiver) that are designed to conform to the OpenCable specification. The features and capabilities outlined by OpenCable are designed to make the set-top attractive to a retail buyer and the interfaces necessary to connect to cable systems throughout North America are openly defined.

Furthermore, host devices built to OpenCable functional requirements are equivalent to leased boxes in terms of their technical capabilities. They are also equivalent in terms of the typical cable services they are capable of supporting, including digital video programming, and impulse pay-per-view. Indeed, manufacturers have the ability to include OpenCable capabilities as one of many features in their products, and they produce a compelling retail product with plenty of room for additional features and innovations (including proprietary ones).

As for the copy protection issue, contrary to the CERC claims, Dr. Green's letter correctly observed that the PHILA license concerns only the manufacturing of devices incorporating digital technology. Nevertheless, CERC cites the provisions regarding so-called "component analog" outputs and suggests that those provisions do not deal with digital technology (CERC letter at 5). That is not the case.

The only reason the PHILA copy protection provisions deal with component analog outputs is that those outputs transmit a high definition digital picture (albeit in analog) to viewing devices. In currently available digital TV receivers, consumer manufacturers have chosen to convert the digital signal to a high quality – and therefore

vulnerable – analog signal. A number of industries (including the motion picture and broadcast industries, as well as cable) have supported inclusion of a protected digital interface on all receivers. In this way content from any digital device (including satellite receivers, cable set-tops, or video games) could be displayed on the television receiver. But, in the absence of such a digital interface, component analog outputs may be used to deliver high-quality digital content, and, if so, they will be subject to the PHILA copy protection provisions. Therefore, as Dr. Green’s letter correctly states, those provisions concern only digital technology.

Similarly, CERC claims “that devices built to current OpenCable specifications *must* automatically shut off or degrade an image in response to a particular copy control signal.” (CERC letter at 5; emphasis in original). But CERC ignores the fact that, as Dr. Green wrote, without some affirmative action by the cable operator, on a program-by-program basis, these copy protection restrictions will not be applied. The option lies with the cable operator, based on his agreements with his program suppliers, to trigger the copy protection capability in the host devices. But, by themselves, the devices will not automatically affect images one way or another.

But even if CERC was satisfied on these two foregoing issues, it is clear from its letter that its members (with the notable exception of Best Buy which did not join the CERC letter) still would not order and sell OpenCable-compliant boxes because of the stark economics involved in such an endeavor. Retailers have discovered they cannot make a business out of selling set-top boxes because those devices would have to compete with boxes provided by a cable operator whose pricing is regulated by FCC rate rules and by statute.

As a general matter, the mark-up on competing cable operator-provided equipment is limited by rate regulation to 11.25%.² That regulation would apply to the “features-only” boxes even if operators were forced to provide set-top boxes without embedded security. CERC also is offended by the statutorily-encouraged equipment averaging rules which, according to CERC (at p.2), cable operators have applied to “grant[] to themselves subsidies for the distribution of navigation devices by ‘pooling’ consumer charges with those for obsolete analog devices.” And it expresses disappointment that operators “have not offered to make the subsidy pool available” to CERC members (id.).

² See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Report and Order, 8 FCC Rcd 5631, 5815-16(¶295, n.715)(1993).

NCTA has addressed these peculiar claims in its filings in Docket No. 97-80 (NCTA Comments at 22-25; NCTA Reply Comments at 22-24). We there pointed out that a number of retailers have been approached by equipment manufacturers offering to build OpenCable-compliant boxes, but retailers have refused those solicitations because they indicated they “needed a ‘business model’ that included revenues and profits greater than those available from the sale of stand-alone set-top boxes.”³

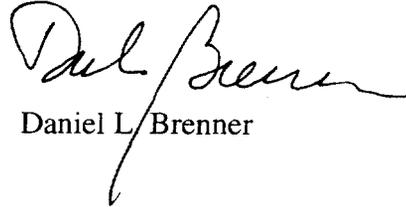
As the CERC letter quite rightly asks: “Could a retailer manage to offer a cellular phone for \$389 *when the identical phone, and terms of service, are available from the service operator for \$19.95?*” (CERC Letter at 2; emphasis in original). While the answer is no, the solution to that problem does not lie in somehow raising the prices cable operators must charge consumers to provide a nice price umbrella for retailers. Nor is the answer to force cable operators to enter into financial arrangements with retailers that they might not otherwise consider. Rather than intercede in private commercial disputes, the Commission should allow cable operators, manufacturers, and retailers to establish, through private negotiations, the structure and terms of business arrangements for the retail sale of cable navigation devices – as some retailers have already begun to do and as they voluntarily have done with cellular and satellite equipment in the past.

Some, like CERC, might assume it is appropriate, in occasional letters to the agency, to reargue issues that are being fully reviewed in proceedings pending before the Commission. While we always stand ready to address – and readdress – issues deemed important by the Commission, we do not believe it useful to engage in letter-to-letter combat every time CableLabs or others seek to provide the Commission with an informational update. But we do want the record to be accurate as the FCC reviews these matters.

³ See Motorola Comments in CS Docket No. 97-80, at 10. See also, “MSOs Tread Carefully Into Retail World: Retailers Want Piece of the Profits, Too,” Multichannel News, May 1, 2000, at 121; “Scientific Atlanta Readies for Retail of Set-Top Boxes,” The Atlanta Constitution, June 28, 2000, at E-1,9 (quoting statement of Wachovia Securities Industry analyst George Hunt that “[t]he first thing Circuit City wanted was a portion of the monthly cable bill”); “Bickering Delays Retail Debut of Set-Top Cable Boxes,” USA Today, July 25, 2000, at B-1 (quoting statement of RadioShack senior executive that “we believe that we deserve a piece of that [cable] revenue stream.”); “Pricing Quandary Slows Down Retail Set-Top’s Development,” Extra/Extra, Nov. 30, 2000, at 10 (noting that major consumer electronics retailers “want to follow the DBS and cell phone business model, where the product is subsidized and the retailers get a nice slice of the monthly revenue.”)

If you have any further questions, please do not hesitate to contact me.

Sincerely,



Daniel L. Brenner

Attachments

cc: Magalie R. Salas (for inclusion in PP Docket No. 00-67
and CS Docket No. 97-80)
Honorable Susan Ness
Honorable Gloria Tristani
Honorable Harold Furchtgott-Roth
Deborah Lathen, Chief, Cable Services Bureau
William Johnson, Deputy Chief, Cable Services Bureau
Deborah Klein, Division Chief, Consumer Protection & Competition Division
Bruce Franca, Acting Chief, Office of Engineering & Technology
Robert M. Pepper, Chief, Office of Plans & Policy
Jonathan Levy, Economist, Office of Plans & Policy
Amy Nathan, Senior Legal Counsel, Office of Plans & Policy