Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

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The Motion Picture Association of America, Inc. ("MPAA") hereby submits these Comments in response to the Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. Introduction

"Plug and play" compatibility of DTV receivers with cable systems will benefit both consumers and numerous industries: cable, satellite, Internet service providers, consumer electronics ("CE") manufacturers and retailers, and content providers. Content providers, in particular, will benefit from compatible systems that pass content securely and effortlessly within the personal digital network environment. That is why the MPAA has long sought a solution to the problem of cable compatibility, and is specifically why the MPAA has been working and continues to work diligently with CableLabs and others on the POD-Host Interface License Agreement ("PHILA").

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[1] *See* Further Notice of Proposed Rulemaking, FCC 03-3, C.S. Docket No. 97-80, P.P. Docket No. 00-67 (rel. Jan. 10, 2003).

On December 19, 2002, representatives of the cable and CE industries announced that they had reached a Memorandum of Understanding (the "MOU") that purported to solve the issue of "plug and play" compatibility.[2] The MOU was accompanied by a proposed license for the DFAST scrambling technology and by two proposed regulations for consideration by the Commission.

Several aspects of the cable-CE agreement constitute positive steps forward in resolving the remaining open issues in the PHILA. For example, the MPAA applauds the agreement of consumer electronics manufacturers to require the use of HDCP-protected DVI or HDMI interfaces on 720p and 1080i television sets. The MPAA also welcomes the agreement of cable operators to incorporate DTCP-protected IEEE 1394 outputs on MSO-supplied High-Definition set-top boxes. However, because of the continued availability of unprotected analog connections permitted under this agreement, the agreement fails to achieve meaningful protection of digital content.[3]

As the proposed DFAST license is a private agreement, cable and CE companies naturally do not request any Commission action on the license itself.[4] The MPAA will continue to engage the cable and CE industries in order to produce a license agreement that is acceptable to all concerned parties. The MPAA has specific suggestions for improvements to the text of the DFAST license, some of which are outlined in Section III below, that we will forward to CableLabs and upon request to the Commission as well.

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[2] Representatives from the MPAA met with representatives from the National Cable & Telecommunications Association on November 15, 2002, and specifically requested that they be allowed to attend the cable-CE negotiations. That request, however, was denied.

[3] While we acknowledge, and welcome, the agreement of both parties to include in the proposed DFAST license a requirement of 525P Macrovision signaling on analog component progressive video outputs, we note that digital recorders are not required by law or by this agreement to respond to such signaling.

[4] *See* Letter from Carl E. Vogel, President and CEO, Charter Communications, *et al.*, to Michael K. Powell,

The cable and CE industries do request Commission action, however, on two items: a proposed regulation requiring that unidirectional digital cable products meet certain compatibility and labeling requirements; and a proposed Subpart W to Part 76 of the Commission's rules, that would govern the use of content protection on cable and satellite systems.[5] The proposed compatibility and labeling regulation is largely unobjectionable, as it primarily affects only the two industries that are already parties to the MOU. The MPAA expresses no view on whether the proposed compatibility and labeling regulation should or should not be adopted.

The MPAA does have concerns, however, regarding the proposed Subpart W. As explained in greater detail below, we believe that Commission regulation in this area would be an unwarranted and damaging restriction on the competitive marketplace for content distribution, harming not only consumers, content providers, and distributors, but also cable operators and the members of the CE industry. Furthermore, unlike the case with over-the-air digital broadcast television, Commission regulation is entirely unnecessary in this case: cable "plug and play" compatibility can readily be achieved without this rider regulation, which in any event does nothing to ensure technical cable interoperability. As set forth below, proposed Subpart W must be rejected by the Commission.

Chairman, FCC (Dec. 19, 2002), at 3.

[5] The MOU titles its proposed regulation as "Encoding Rules." However, proposed Subpart W goes far beyond encoding rules as traditionally understood in the private licensing context. Rather than establishing baselines for encoding high-value content on a technology by technology basis as has typically been done in private license agreements, proposed Subpart W instead imposes a new set of rules (which are inconsistent with rules set forth in various, privately negotiated license agreements) that would apply to all technologies used to protect analog and digital outputs and all services delivered by an MVPD, regardless of the particular circumstances associated with a protection technology or a service. Moreover, Subpart W omits, and therefore may prohibit, the use of other tools such as image constraint, or "down-resolution" to protect high definition content delivered via an unprotected analog output.

II. Proposed Subpart W Is Harmful and Unnecessary

Rather than undertaking to develop the standards and licenses for the POD-Host interface itself, the Commission wisely elected to rely on the OpenCable project managed by CableLabs to develop the requisite standards and licenses through private negotiations with the affected industries. Despite this framework for proceeding on the basis of private negotiations to address cable-delivered services, however, the cable and CE industries are now requesting that the Commission adopt a regulation that would apply not only to these services, but would constrain directly competing services as well. This request for the regulation of competing services is inappropriate given the benefits of allowing private licensing discussions to determine the precise nature of the POD-Host interface.

Moreover, the proposed Subpart W is substantively objectionable. Subpart W would inhibit innovation and interfere with the market's ability to find innovative solutions to complex technical issues. It would preempt the valid workings of the emerging digital marketplace by mandating a single set of encoding rules for all content protection technologies and all distribution methods, for all time. It would interfere with or prohibit private efforts to deal with compromises of protection technologies, to deal with the problem of analog connections, and to develop new methods of delivering content to consumers and different business models capable of serving different consumer constituencies. And it would effectively prohibit protection of "High Definition"[6] content on cable, satellite, and possibly other distribution methods, because the agreement perpetuates the use of unprotected analog outputs for such content without a means for retirement of such outputs or constraint of the images transmitted over them. This

[6] In this document, the term "High Definition" is used as such term is defined by the Consumer Electronics Association, i.e., resolution of at least 720p or greater. This document also used the term "Enhanced Definition" as such term is defined by the CEA, i.e., resolution of at least 480p but less than 720p.

aspect of the agreement makes it impossible for content providers to require protection of High Definition content.[7]

Content providers have long suggested to the cable industry that any license governing cable set-top boxes needs to include sophisticated content protection, so that cable is not placed at a competitive disadvantage in attracting quality programming vis-à-vis competing services such as satellite.[8] Apparently as a result of pressure from the CE industry, however, rather than enabling robust and varied means of content protection in cable devices, the MOU and proposed Subpart W meets the challenge of the satellite industry by eliminating various content protection tools enabled in existing private licenses and by asking the FCC to bring the cable industry and its competitors to the lowest common denominator. The result would be to hobble the digital marketplace by restricting the use of sophisticated content protection by other distributors, and to impede the creation of new and beneficial consumer business models. Accordingly, the Commission should reject proposed Subpart W.

A. The Impact of Proposed Subpart W on Consumers, Content Providers, Small Cable Operators, and MVPDs Other Than Cable Operators

The Commission has previously declared that "[w]e have no wish to constrain or delay future innovations in service nor to blunt industry incentives to invest in new services."[9] Yet that is precisely the impact of proposed Subpart W. By imposing a "one size fits all" approach to content protection, proposed Subpart W would lock in all delivery of content to consumers to the

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[7] The agreement also perpetuates the use of unprotected analog outputs for so-called "Enhanced Definition" content without a means for retirement of such outputs. This aspect of the agreement makes it impossible for content providers to require protection of this content also.

[8] *See, e.g.*, Letter from Fritz E. Attaway, Senior Vice President of Government Relations, MPAA, to W. Kenneth Ferree, Chief, Media Bureau, Federal Communications Commission, June 5, 2002, at Attachment p. 1 (responding to "PHILA Hoedown" questions).

[9] Notice of Proposed Rulemaking, FCC 00-137, P.P. Docket No. 00-67, at ¶ 22 (rel. Apr. 14, 2000).

business models and technologies currently being employed by content providers and distributors.[10] In the future, new, early-window business models could, for example, conceivably offer recently released films to consumers in their homes, but such new business models can only be developed if content providers can be assured that access to content in such early release windows will not severely harm revenue streams from later distribution in other markets (e.g., because a three-day "rental" has been permanently archived or because a program has been redistributed to others who have not subscribed to the program service). Content owners may wish to make certain early-release content available only through digital connections that enable particular content protection features, rather than allow output of the content over all existing analog and digital outputs and destroy or devalue downstream markets. Under the proposed regulation, however, such business models would essentially be made illegal, as any model that restricted the flow of such early release content only to outputs that provide adequate protection would be barred. The result will be that new business models enabled by new technologies cannot be offered, and consumers will not be able to take advantage of new technologies and business models to access content in new ways.

This is not an instance where the market has failed, and where Commission involvement is necessary to remedy that failure. Unlike the situation with over-the-air digital broadcast television, content providers are fully able to protect their interests vis-à-vis cable programmers through licensing arrangements. Indeed, no one's interests are unprotected in the current market: consumers, satellite and cable operators, CE manufacturers, and content providers are all free to exercise their rights to buy or not buy, sell or not sell, and thus arrive at the optimal determination of the protection accorded to individual programs, facilitated by a rich variety of

[10] *See* (Proposed) Subpart W §§ 76.1903(2)(c), 76.1903(3)(a)(3) (replacing operation of market with Commission determination of whether content protection is in "public interest").

delivery mechanisms embodied in CE equipment. These private arrangements make FCC regulation of content protection in this instance unwarranted and would substitute regulation for the give and take operation of the marketplace, thus stifling innovation. While it is certainly understandable that cable operators would not want to be place themselves at a competitive disadvantage with satellite and other competing delivery mechanisms, parity is not properly achieved by limiting the options competitors may offer.

B. Proposed Subpart W's Unwarranted Restrictions

Proposed Subpart W contains three sets of restrictions on content providers: (1) it imposes a mandated set of encoding rules on all content transmitted by MVPDs; (2) it prevents content owners from having a say, in private negotiations, as to which outputs are used for their content – instead requiring that all content transmitted by MVPDs be made available on any output allowed by law, regulation, or license; and (3) it does not provide for retirement of unprotected component analog outputs or for the use of image constraints for such outputs to manage the risk for content delivery in legacy devices. Each of these elements would inflict harm not only on content providers, but on consumers and distributors, including cable distributors.

1. Encoding Rules

Where, as here, a private licensing mechanism for the protection of content exists, mandating encoding rules for all technologies and all circumstances for all time unduly restricts the ability of the marketplace to determine the rules that best satisfy the interests of participants with respect to the delivery of content.[11] In individual license negotiations a content provider

[11] This distinguishes the situation here from that of digital broadcast television, where no private content

may determine that the benefits afforded by a particular protection technology and its associated license terms are sufficient to justify agreement to a set of encoding rules. Proposed Subpart W is inconsistent with this approach: it imposes encoding rules and other restrictions on content protection, thus undermining marketplace solutions that balance the interests of all affected parties. Moreover, it deviates from rules already agreed to between content owners and technology licensors in the marketplace. Furthermore, unlike previous private arrangements, the proposed regulation goes far beyond approval of a single technology by a single content provider. Subpart W forces acceptance of encoding rules by all content providers with respect to all content protection technologies used by MVPDs, for all time. It would govern all outputs on all devices that receive content delivered via satellite, cable, and potentially the Internet.[12] And it does not even in return allow content providers any voice in the selection of the technologies that will be used to protect their content. Indeed, the proposed regulation forbids any restrictions on any output that has been approved under any license, even a license to which the content provider is not a party.

The fact that certain MPAA member companies have agreed to encoding rules for 5C, cited in the MOU as support for Subpart W, instead only serves to underscore the point just made. The 5C encoding rules are part of a carefully negotiated agreement which, in the estimation of the studios entering into that agreement, offered sufficient benefits and

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protection solution is possible. The existence of such a solution here makes regulatory action unnecessary and unwarranted.

[12] While at present the regulation would apply to all Multi-channel Video Programming Distributors, including both cable and satellite, the MOU specifically calls for expansion of these rules to all electronic content distribution mechanisms, including over the Internet. *See* MOU ¶ 2.2 (calling for parties to advocate "the observance of the same encoding rules as called for herein in all digital delivery systems, including Satellite and Internet systems"); *see also id.* ¶ 2.9 (maintaining field-of-use restriction until "appropriate regulations are . . . in effect that subject all MVPDs (including DBS), telephone and DSL providers, Internet and other competing technologies for the distribution of video to the same encoding rules").

protections.[13] The 5C encoding rules also apply to only one technology. If a new business model emerged that required more protection than a studio believed was possible with 5C, that studio is free to offer that business model to consumers using another technology.

Similarly, the mere fact that Section 1201(k) of the Copyright Act contains encoding rules does not justify adoption of Subpart W. Section 1201(k) neither relates to these proceedings nor establishes blanket authorization for all copy protection rules. As we have noted before, Section 1201(k) "was explicitly designed solely to deal with a specific *analog* technology, in an *analog* environment, in order to deal with *analog* copying."[14] The legislative history of Section 1201(k) confirms this understanding:

> The conferees emphasize that this provision is being included in the bill in order to deal with a very specific situation involving the protection of analog television programming and pre-recorded movies and other audio-visual works in relation to recording capabilities of ordinary consumer analog video cassette recorders.

H.R. Rep. No. 105-796, 105th Cong., 2d Sess. at 69 (Oct. 8, 1998). In contrast, the proposed regulation would prevent *any* form of copy protection from being used with any compliant product, except in a limited number of narrowly defined circumstances.

2. Output Rules

Subpart W would require content providers and MVPDs to allow the output of video content over any analog or digital output permitted by law, regardless of the underlying security and license terms associated with the technology protecting that output, and regardless of whether the content provider had ever agreed to deliver content via such an output. Not only

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[13] While it is true that two studios have agreed to the 5C encoding rules in the context of all the other aspects of the negotiated license terms, the five other studios who are members of the MPAA as yet have *not* agreed to those license terms or those encoding rules. That is a difference of opinion that is properly left to the market to sort out.

[14] Reply Comments of the Motion Picture Association of America, P.P. Docket No. 00-67 (filed June 8, 2000), at 9.

would this prohibit experimentation with new business models and protection technologies, as discussed above, it may well nullify or make illegal existing content license agreements that require use only of certain outputs – a result which would cause massive disruption in the marketplace. Moreover, proposed Subpart W does not allow for privately negotiated, flexible arrangements by which a system-wide hack of a technology protecting an output could be addressed. This is a fatal flaw, particularly given that the proposed regulation affords content owners no choice as to the outputs they must use to deliver their programming to consumers.

The proposed regulation also interferes with efforts to solve the problem of analog connections. For instance, one means of addressing the analog reconversion problem may be to retire analog connections in future private licensing agreements. The proposed regulation prohibits such efforts. The regulation prohibits any MVPD from attaching, embedding, or even allowing any data or information in transmitted content that "prevent[s] its output through any analog or digital output authorized or permitted under license, law or regulation governing such Covered Product." Until analog connections are banned by law or regulation, this provision would prevent private agreements to retire them.

Indeed, the requirement to permit delivery of content over all available outputs, combined with the failure of Subpart W to allow for retirement of unprotected component analog outputs or for "image constraint" as discussed below, means that Subpart W effectively vitiates the protection of High-Definition and Enhanced Definition content available today under private license agreements. This cannot be the correct way to spur the DTV transition.

3. Image Constraint

Subpart W specifically prohibits encoding unencrypted broadcast television signals "to constrain the resolution of the image when output from a Covered Product." This is

incompatible with the provision in proposed Broadcast Flag regulations that allows computer products to have unprotected DVI 1.0 outputs for display, but only under certain conditions.[15] (This provision was requested by some in the computer industry to allow for compatibility with a limited number of legacy computer products.) In addition, the discriminatory prohibition is unfair to licensors of High Definition content for over-the-air broadcasts. If image constraint is to be available to address unprotected analog outputs of any High Definition content, it should be available regardless of the delivery mechanism for such content.

Furthermore, Subpart W fails to make any provision allowing for the use of image constraint in any of the rules for defined business models.[16] It thus effectively eliminates image constraint as a means of addressing the legacy persistence of unprotected analog connections. As we have noted previously in this proceeding, image constraint is an important tool that may be necessary to address the problem of legacy devices with analog inputs.[17] It emerged as a possible solution from lengthy discussions with Open Cable. The problem stems from the fact that currently, there is no means of enforcing the limits on digital copying of Copy One Generation and Copy Never content over analog outputs. Immediately disabling analog outputs for such content, however, leads to the unpalatable result that some legacy devices would "go dark" when such content was received. As a compromise solution, some representatives from

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[15] *See* Comments of the Motion Picture Association of America, Inc., *et al.*, M.B. Docket No. 02-230 (filed Dec. 6, 2002), Attachment B §§ X.3(a)(7), X.4(a)(6). Sections X.3(a)(7) and X.4(a)(6) allow a compliant product that is incorporated into a personal computer to pass content that is or may be marked with the Broadcast Flag "to an unprotected output operating in a mode compatible with the Digital Visual Interface (DVI) Rev. 1.0 Specification as an image having the visual equivalent of no more than (a) 350,000 pixels per frame (e.g. an image with resolution of 720 x 480 pixels for a 4:3 (non-square pixel) aspect ratio) and (b) 30 frames per second."

[16] As a reminder, constrained High-Definition content is of a much higher quality than Standard Definition DTV content. Constrained High-Definition content is limited to 518,400 pixels per frame, whereas a DVD delivers only 345,600 pixels per frame.

[17] *See, e.g.*, Letter from Fritz E. Attaway, Senior Vice President of Government Relations, MPAA, to W. Kenneth Ferree, Chief, Media Bureau, Federal Communications Commission, June 5, 2002, at Attachment p. 2 (responding to "PHILA Hoedown" questions).

the CE industry proposed image constraint for protected Copy One Generation and Copy Never content, in order to ensure that legacy devices would remain functional for such content. By and large this solution applied to delivered content to High Definition displays that the CE industry was not offering at the time the Open Cable negotiations were occurring. As noted above, an alternative, and possibly concurrent, solution, is to steadily retire analog connections on consumer equipment.

The question is not whether all, or indeed any, content must be constrained. As the retirement option suggests, the MPAA is open to any alternative to image constraint that will limit the severe risks to high-resolution content associated with the continued use of unprotected digital and component analog video outputs. Rather, the question is whether content distributors and providers may be allowed to have the option of image constraint, leaving it to the market to determine whether that option is the best one or not. Subpart W seeks to avoid the market's verdict by prohibiting the option.

C. The Commission Lacks Jurisdiction to Adopt Proposed Subpart W

Finally, the Commission has no jurisdiction to adopt Subpart W. The adoption of regulations enforcing encoding rules, the imposition of obligations to use particular outputs, and the elimination of image constraint as an option necessarily limits and defines the property rights of copyright owners. As the MPAA stated three years ago, "[t]he Commission obviously cannot regulate what individual content providers may choose to put at risk, what risk, if any, is acceptable, or what price, terms, or conditions a content provider should pay, or assent to, for content protection."[18] Earlier this month, members of the House Judiciary Committee's

[18] Comments of the Motion Picture Association of America, P.P. Docket No. 00-67 (filed May 24, 2000), at 4.

Subcommittee on Courts, the Internet, and Intellectual Property noted that the question of what rights a copyright owner may assert is a question of copyright law that lies outside the Commission's jurisdiction. Those rights are governed by Title 17 of the U.S. Code, not Title 47.

Again, the situation here is not analogous to that presented by the proposed regulation mandating recognition of the Broadcast Flag, M.B. Docket No. 02-230. The regulation of content distribution mechanisms, as opposed to content owner rights, has long been held to be within the jurisdiction of the FCC.[19] The proposed Broadcast Flag regulation regulates digital broadcast television receivers and related equipment in order to preserve the viability of free, over-the-air broadcast television. It does so by mandating that DTV receivers and related equipment give effect to redistribution control when it is signaled. It imposes no restrictions whatever on when or by what method copyright owners may assert their rights.

III. The DFAST License Does Not Ensure Adequate Protection of Copyrighted Content Over Cable and Satellite Systems

As already noted, the DFAST license contains several promising steps forward in resolving some of the open issues remaining in the PHILA. However, the proposed DFAST license contains insufficient protections for copyrighted content. Thus, further work is needed. For example, the license contemplates an approval process for new protection technologies that fails to provide for any input or objection by content providers, the natural marketplace judges of the effectiveness of a content protection technology.[20] This procedure stands in stark contrast to that proposed by the MPAA with respect to the Broadcast Flag, where new content protection technologies would be evaluated under a marketplace approval test, and the Commission would

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[19] *See U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[20] *See* DFAST Technology License Agreement for Unidirectional Digital Cable Products, Exh. B §§ 2.4.4, 3.5.1(1).

only be called upon to determine if a technology "at least as effective" as those already on the list was unfairly being denied approval. The procedure proposed in the DFAST license is a recipe for the acceptance of weak protection technologies into consumer electronics devices, a development that will necessarily hinder the DTV transition.

The proposed DFAST license also has several other problems that must be remedied. As mentioned above, the MPAA has specific suggestions and changes to the text of the proposed license that it will provide to the parties and, if requested, to the Commission. We are hopeful that these issues can be resolved with further negotiations:

- The DFAST license, unlike the PHILA license, does not allow image constraint for High-Definition Controlled Content output over unprotected High-Definition analog outputs. The elimination of image constraint as a possibility may foreclose attempts to deal with the analog reconversion problem, a necessary component of digital high-definition content protection.

- The DFAST license requirements should be clarified to specify that temporary recordings of Copy Never content must be bound, that they are not subject to further temporary recording, and what the requirements for obliteration of the recording are.

- The DFAST license provisions for "moving" Copy One Generation content do not prohibit multiple "moves," thus potentially defeating the purpose of the Copy One Generation restriction.

- The DFAST license, as well as the PHILA license, must accommodate encryption across the POD-Host interface and downstream protection against unauthorized redistribution for content marked Copy Control Not Asserted, No Redistribution (e.g., retransmitted over-the-air digital broadcast television). Failure to do so will leave an unfortunate and unnecessary "DTV hole in the protection scheme for cable-delivered content.

- The DFAST license does not require generation of CGMS-A on analog outputs, including simultaneous up-converted SDTV signals and down-converted HDTV signals.

- The DFAST license, like the PHILA license, approves VGA RGB analog video outputs for use with Controlled Content, even though no copy protection and no standardized means of CGMS-A signaling exist for such outputs.

- Additional language must be inserted into the DFAST license to ensure that HDCP is fully engaged before content is passed over DVI or HDMI outputs.

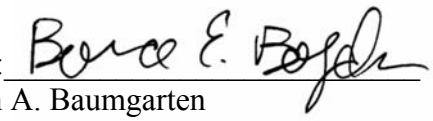
- The DFAST license has no compliance rule requiring processing of valid received system renewability messages by digital content protection technologies.

IV. Conclusion

The MPAA hopes that all of the remaining issues with the DFAST and PHILA licenses can be resolved and that a mutually beneficial solution to the cable compatibility problem can be arrived at by all of the parties. We support the Commission's involvement to encourage all parties to negotiate reasonably regarding this important component of the DTV transition. Adoption of the proposed regulation governing labeling and compatibility may be an important first step in the right direction. However, adoption of the proposed Subpart W would be a giant step in the wrong direction. The Commission must not allow the understandable pressure on all parties to reach a solution to force it to adopt an unnecessary and pernicious regulation that will benefit only a few, will stifle superior marketplace solutions, will restrict consumer choices, and will slow the progress of the DTV transition.

Respectfully submitted,

MOTION PICTURE ASSOCIATION OF AMERICA, INC.



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