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**
	)	

REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

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April 28, 2003

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THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

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

I. Introduction and Summary

Cable compatibility is an important goal, and numerous parties have worked with the Commission for years to devise a technological solution that will best serve the public interest. In 2000, after lengthy negotiations involving the consumer electronics ("CE"), cable, and content industries, CableLabs announced to the Commission that it was making the POD-Host Interface License Agreement available for signature.[2] In 2002, however, CE manufacturers abandoned individual negotiations to implement the PHILA framework in order to begin their own

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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).

[2] *See* Letter from Richard R. Green, President & CEO, Cable Television Laboratories, Inc., to Magalie R. Salas, Secretary, FCC (Dec. 15, 2000).

discussions with cable MSOs. The Memorandum of Understanding ("MOU") that is the subject of these proceedings, including proposed Subpart W and the proposed DFAST license, is the result of those discussions. Despite the claims of the CE industry and cable MSOs, however, there was no need for them to leave the PHILA process. Efforts to achieve consensus in PHILA negotiations were making slow but certain progress, and no impassable barriers had been reached. The CE industry, for example, has been perfectly willing in the past to build devices for the satellite industry that contain the content protection options that were being requested by content providers in individual PHILA negotiations. Indeed, several CE companies have already announced that they have entered into PHILA licenses.[3] The departure of major cable MSOs and CE industry companies from the PHILA process was thus not an attempt to make progress where it had stalled; it was instead an attempt to circumvent the PHILA process to devise a solution that addressed only their own concerns and no others. The MOU is the result of that narrow vision. It proposes a regulation – Subpart W – and a draft license – the DFAST license – that contain woefully inadequate content protection and rules that would affirmatively harm content providers.

Fortunately for the Commission and for the DTV transition, however, proposed Subpart W is entirely unnecessary, and cable compatibility can be achieved without it. Indeed, cable compatibility *must* be achieved without proposed Subpart W, because proposed Subpart W is objectionable on numerous grounds. We respectfully submit that the Commission does not have jurisdiction to adopt proposed Subpart W. Nor is Subpart W justified by previous acts of Congress, or private agreements entered into by content providers. No convincing case has been made why Subpart W should be extended beyond the cable industry, a result that would harm

[3] PHILA currently has 14 signatories. *See* Press Release, CableLabs, Broadcom Corporation Signs Cable-Labs®' PHILA (Mar. 31, 2003), *available at* http://www.cablelabs.com/news/pr/2003/03_pr_PHILA_033103.html.

competition by bringing content protection to the lowest common denominator. Nor is any convincing rationale offered for the elimination of image constraint and output control as tools that system operators can use to protect their services. Proposed Subpart W should be rejected by the Commission as harmful and unnecessary.

While no Commission action has been requested on it, the proposed DFAST license also needs repair if it is to be implemented. The MPAA remains willing to work with the parties to amend the draft DFAST license to reach a compromise solution that all parties can agree to. The Commission must not preempt these negotiations by adopting proposed Subpart W and terminating content providers' rights to negotiate protection of their content.

II. Proposed Subpart W Is Not Necessary in Order to Achieve Cable Compatibility

A. Nothing in the Record Supports the Purported Need for Proposed Subpart W

The record is clear that proposed Subpart W is not necessary to achieving cable plug-and-play compatibility. Numerous other commenters agreed with the MPAA that cable compatibility can be achieved without proposed Subpart W.[4] Nothing in proposed Subpart W would make cable systems more compatible with DTV receivers or recording devices.

Nor were the supporters of the MOU able to draw any connection between Subpart W and cable compatibility. Instead, cable and CE commenters attempted to bootstrap an argument that the inclusion of content protection in the DFAST license requires Commission intervention to ensure that content protection is not abused by content providers.[5] Those commenters overlook the fact, however, that the cable and CE industries have developed the DFAST license,

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[4] *See* Comments of DirecTV, Inc. at 6, 10; Intel Corp. at 5; Public Knowledge/Consumers Union at 3-4; SBCA at 4; TiVo, Inc. at 8.

[5] *See, e.g.*, Comments of the Consumer Electronics Industry ("CE") at 10-11; Home Recording Rights Coalition ("HRRC") at 2.

not to satisfy the Commission's mandate on navigation devices and compatibility, but in order to allow cable MSOs to compete with other distributors for high-value content. Given that the DFAST license itself is not necessary for cable compatibility, the Commission's "right to attach" does not apply to the content protection provisions of that license. Nor should this come as any surprise. The Commission regularly encounters private licensing arrangements entered into by companies subject to Commission regulation, but the fact of such arrangements does not mean that the Commission must assume an oversight role over all such agreements. While the MPAA hopes that the DFAST license will eventually provide an adequate level of protection for the content of its member companies – and has suggested modifications to the draft license for that purpose – if the DFAST license falls short of that goal, the answer is not to penalize content providers with inappropriate restrictions.

The DFAST license is a crucially important piece of the DTV transition. The content protection options it offers are necessary to maintain the competitiveness of the cable industry. Conversely, for content providers, the content protection options offered by the license will determine how their content is protected in a vast number of devices. However, the interests of both sides receive sufficient protection through the balancing of interests that occurs in marketplace negotiations. As DirecTV commented, "[t]he subject of encoding rules can and should be addressed by truly consensual private agreements that impose technical standards that are acceptable to content providers, MVPDs and consumer electronics manufacturers – the outcome of which will be ultimately judged by the marketplace."[6] There is no need for the Commission to play an oversight role in these negotiations, and certainly no need to preempt the negotiations entirely with mandated encoding, image constraint, and output rules. Nothing in the

[6] *See* Comments of DirecTV at 6; *see also* Comments of SBCA at 5; TiVo at 9.

Communications Act nor in the Commission's prior rulings requires it to attempt to outperform the market in "achiev[ing] a balanced outcome for consumers" or to equalize the abilities of satellite and cable to compete for content.[7]

B. Subpart W Is Not Justified by Previous Acts of Congress or by the 5C Encoding Rules

Once again, the cable and CE commenters attempt to portray the MPAA members as having essentially already agreed to the Subpart W encoding rules.[8] However, the historical examples cited by the parties continue to be inapposite, for reasons that have been previously stated many times in these proceedings.

For example, several comments cite the encoding rules contained in the proposed Digital Video Recording Act ("DVRA") as justifying proposed Subpart W. The DVRA, however, would have been a comprehensive federal statute, including statutory remedies and penalties and access to federal courts, that would have governed the recording capability of all digital recording devices, including personal computers, and all relevant converters and interfaces. For example, the DVRA would have dealt with analog-to-digital and digital-to-analog-to-digital conversion.[9] Given that the cable and CE industries are not proposing such a comprehensive scheme here, it is inappropriate to strip the DVRA encoding rules from their context in a misguided effort to find dubious historical precedents for proposed Subpart W.

The Audio Home Recording Act ("AHRA") and Section 1201(k), also cited by numerous comments, were narrowly targeted statutes concerning particular technologies to address certain

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[7] Comments of CE at 14.

[8] *See* Comments of the National Cable & Telecommunications Association ("NCTA") at 9-10.

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

instances of market failure. In both instances, government intervention was necessary because the market failed to provide copyright owners any effective means of requiring technological protection of their works by license. Furthermore, both statutes dealt only with specific situations not at issue here. The AHRA, for example, applied only to a particular type of technology to protect audio works, and did not extend to PCs. In the context of legislation dealing with digital copying, Section 1201(k) applied to a specific analog technology, in an analog environment, to deal with analog copying. Section 1201(k) never purported to be a general statement of copyright protection policy; nor could it be, given the emergence of a new and vastly altered digital marketplace that has surpassed the technologies and behavior at issue in Section 1201(k), a marketplace that Congress was well aware of when it limited Section 1201(k)'s application to "a very specific situation involving the protection of analog television programming . . . and other audio-visual works in relation to recording capabilities of ordinary consumer analog video cassette recorders."[10]

Nor does the inclusion of encoding rules in the 5C license, also cited by several comments, support Commission-mandated encoding, output, and image constraint rules in this case. As we stated in our initial comments, the 5C license is limited to a single protection technology, and provides numerous benefits for content owners who sign on as content participants.[11] Some studios have found the balance of the benefits provided by the 5C license to outweigh the costs, which include the imposition of encoding rules for that one technology.[12]

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[10] H.R. Rep. No. 105-796, 105th Cong., 2d Sess. at 69 (Oct. 8, 1998).

[11] *See* Comments of MPAA at 8-9.

[12] HRRC notes that not all studios have signed on to the 5C license, but claims that "[n]o objection from the other studios to the 5C Encoding Rules is on record." Comments of HRRC at 4. This is needless pettifoggery. The other members of the MPAA have not agreed to the 5C license because, in their estimation, the benefits of the license in its totality as currently structured do not outweigh the costs, which *include the encoding rules*. Proposed Subpart W, of course, would impose costs without any offsetting benefits whatsoever.

The proposed Subpart W, by contrast, restricts all attempts at content protection on any device used to receive service from any MVPD, and provides no benefits whatsoever for content owners.[13]

Having failed to find any convincing historical precedent for the Commission's imposition of mandated encoding rules, the HRRC resorts to distorting the record. For example, the HRRC claims that at the "PHILA Hoedown" in June 2002, the MPAA did not "express[ ] any reservations to the Commission about the appropriateness of these '5C' encoding outcomes, as a reference benchmark, as governing limitations to balance the restraints required by such a license."[14] However, the MPAA actually voiced a strong objection to exactly the outcome proposed here, stating: "The broad imposition of encoding rules is unnecessary in a functioning marketplace where the best determinant is the marketplace itself. . . . [M]andating encoding rules would restrict marketplace innovation that could expand consumer choice."[15]

Similarly, the CE Industry argues that the mere citation of 5C's encoding rules and HRRC's comments concerning "consumer expectations" in the Commission's September 14, 2000 Declaratory Ruling created "parameters" that now require proposed Subpart W.[16] The Commission, however, established no such "parameters;" at most, it acknowledged the fact that, with respect to a single license, for a single technology, that provides substantial benefits to content owners, encoding rules existed, a fact which the MPAA has never denied. The

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[13] Even those portions of proposed Subpart W that have been borrowed from the 5C license have been substantially varied, for example in relation to the procedure for considering new business models.

[14] *See* Comments of HRRC at 5.

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

[16] *See* Comments of CE at 13; *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Further Notice of Proposed Rulemaking and Declaratory Ruling ("Declaratory Ruling"), FCC 00-341 ¶ 28 (rel. Sept. 18, 2000).

Commission went on to conclude that, contrary to HRRC's claims, the inclusion of protection technologies in navigation devices would not "lead to inevitable restrictions on consumers' ability to copy digital material," and in any event the Commission expressly noted that its "ruling is not based on this aspect of the record."[17]

C. The Commission Does Not Have Jurisdiction to Adopt Subpart W

Cable's and CE's claims that Sections 544a, 549, and 336(b)(4) and (5) confer jurisdiction to adopt encoding rules, prohibit limitations of outputs, or prohibit image constraint are incorrect.[18] Far from authorizing sweeping regulation of content protection, Congress explicitly found in Section 544a that "compatibility among televisions, video cassette recorders, and cable systems can be assured with narrow technical standards that mandate a minimum degree of common design and operation, leaving all features, functions, protocols, and other product and service options for selection through open competition in the market."[19] It further required the Commission in adopting regulations to "ensure that any standards or regulations developed under the authority of this section to ensure compatibility between televisions, video cassette recorders, and cable systems do not affect features, functions, protocols, and other product and service options" other than those that would allow consumers to use television receivers and VCRs in specified ways that are consistent with "providing effective protection against theft or unauthorized reception of cable service."[20] These narrow provisions do not authorize proposed Subpart W.

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[17] Declaratory Ruling at ¶ 28; *see also* Comments of Public Knowledge/Consumers Union at 7-8.

[18] *See* Comments of Comcast at 13-14; CE at 4; NCTA at 17.

[19] 47 U.S.C. § 544a(a)(4).

[20] *Id*. §§ 544a(c)(2)(D), (c)(1)(B).

Section 549 requires the Commission:

> to, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.

As noted above, nothing in proposed Subpart W is necessary to achieve the goal of Section 549. And insofar as proposed Subpart W is applied to satellite and other, non-cable distributors, the Commission has not engaged in the necessary "consultation with appropriate industry standard-setting organizations," since only the cable and CE industries were the source of this proposal.

Moreover, Section 549 expressly prohibits the Commission from prescribing regulations that "would jeopardize security of multichannel video programming and other services offered over multichannel video programming systems, or impede the legal rights of a provider of such services to prevent theft of service."[21] Yet the proposed Subpart W would forbid distributors from implementing protection technologies or options beyond a specified, minimal level, thus limiting their ability to prevent theft of view-only programming or other services. Section 549 plainly does not authorize – much less require – the Commission to *restrict* the nature or extent of services available to consumers at the request of only two of the many affected industry sectors. Indeed, such a restriction would be antithetical to Section 549's overall purpose: "fully competitive" markets for MVPDs and converter boxes.

Nor do Sections 336(b)(4) and (5) confer jurisdiction on the Commission to adopt proposed Subpart W. Section 336 generally, and the advanced television and public interest

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[21] 47 U.S.C. § 549(b).

mandates embodied in Sections 336(b)(4) and (b)(5) in particular, apply exclusively to free, over-the-air television broadcast stations, and not to conditional access subscription-based systems. Thus, in the Broadcast Flag proceeding, precisely because private negotiations did not produce a solution to the acknowledged risk of unauthorized redistribution of digital broadcast content, it is necessary and appropriate for the FCC to adopt a regulatory mechanism to do so. Here, however, the market has not failed; both content providers and distributors are fully capable of advancing their respective interests and protecting their rights through negotiations. Hence there is no need or justification for a government mandate concerning content protection. Thus, even assuming for purposes of argument that Section 336 is applicable outside the context of free, over-the-air television – which it is not – Subpart W is neither "necessary or appropriate to assure the quality of the signal used to provide [any] advanced television services," nor "necessary for the protection of the public interest, convenience, and necessity."[22]

Furthermore, in adopting a regulatory scheme that would cover all technological means of protecting copyrights for all delivery systems and all programs, proposed Subpart W would completely emasculate the ability of content providers to take steps to technologically protect their copyrighted works.[23] Unlike the regulations proposed in the Broadcast Flag proceeding, which govern only the manufacture and capabilities of certain devices, proposed Subpart W in effect prescribes what rights copyright owners should be allowed to assert in their own content. This raises troubling public policy and jurisdictional issues that the Commission simply need not consider in order to achieve the stated goal of cable compatibility.

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[22] 47 U.S.C. §§ 336(b)(4), (5).

[23] *See* Comments of National Music Publishers Association, *et al.* ("NMPA"), at 14; Public Knowledge/Consumers Union at 7-8 n.11.

III. Proposed Subpart W Unfairly Applies to All MVPDs

Proposed Subpart W would essentially make illegal all content protection for satellite and cable services, other than that specifically listed.[24] Cable and CE commenters have claimed that failure to extend the prohibitions of Subpart W to all MVPDs would lead content providers to provide premium content only to those MVPDs not bound by Subpart W, and would "be tantamount to the government granting non-cable MVPDs *de facto* exclusivity over certain premium digital content."[25] Cable and CE commenters, however, have provided no good reason why Subpart W must be adopted in the first place, let alone applied to other industries. The "playing field" between cable and satellite is already level: each side was free to devise licenses such as the PHILA that offer content protection options. Individual device manufacturers are not required to sign the PHILA. In light of this, the true purpose of proposed Subpart W appears to be, as satellite commenters have claimed, to prevent cable's competitors from offering better content protection options than the cable industry is willing to.[26] This is not a sufficient reason for the Commission to regulate the content protection offered by satellite or ISPs, however.

Again, several commenters rely on distortion where arguments fail. For example, the CE Industry claims that MPAA members have argued that "a *uniform approach* to copy protection [is] essential for the orderly licensing of content for MVPD distribution,"[27] and that distribution channels must be uniformly restricted in their ability to offer content protection.[28] However, the

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[24] *See* Comments of NMPA at 8-9.

[25] Comments of Comcast at 14; *see also* Comments of NCTA at 15-16.

[26] *See* Comments of SBCA at 4.

[27] *See* Comments of CE at 11; *see also* Comments of HRRC at 5 ("MPAA has adhered to the position that . . . navigation devices subject to copy protection rules inferior to those for other navigation devices *will not receive content*.").

[28] *See* Comments of NCTA at 12 (stating that the provisions of Proposed Subpart W "should not be read as restrictions on content available to consumers because content providers have indicated that, without them, the high

MPAA has never made this argument. While the MPAA has indeed stated that devices that do not protect copyrights *at all* may not receive high value content, that does not mean that all content protection must be mandated to a single scheme, for all platforms, and all programs and business models. Indeed, the MPAA has consistently stated in these proceedings that distributors and content providers should be allowed to determine the relative merits of *different* offers of copy protection in "a free and functioning marketplace."[29] Not all offers will be equal, and not all content providers will evaluate them in exactly the same way. While this may result in some premium content going exclusively to the "highest bidder" (as such "bid" is assessed by an individual content provider in its discretion), that is precisely what it means to have a free marketplace.

Nor is it the case, as the CE Industry implies, that content providers are "requiring disparate measures of copy protection from different industry segments."[30] None of the comments provide any evidence that content providers have *asked* for anything more from the cable industry than they have asked from other distributors. The fact that content providers have *received* offers of varying levels of content protection from the cable and satellite industries cannot seriously be argued to justify imposing the lowest common denominator across the board by government mandate.

While the parties portray the MOU as a comprehensive package "negotiated by the immediately affected parties,"[31] the MOU in fact directly impacts numerous other industries,

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value content to which they are applicable would never be made available to MVPDs for distribution to consumers").

[29] Letter from Fritz E. Attaway to W. Kenneth Ferree at Attachment p.1 (June 5, 2002).

[30] Comments of CE at 12.

[31] Comments of NCTA at 15.

many of which were excluded from the negotiations.[32] As several commenters noted, proposed Subpart W thus represents overreaching on the part of the cable industry to gain regulation of a competitor industry in the name of "cable compatibility." Indeed, the MOU does not envision the regulation only of satellite providers, but proposes extension of its provisions to Internet Service Providers as well,[33] in effect governing all provision of audiovisual content via nearly all distribution methods.[34] Proposed Subpart W is thus both substantively and procedurally unfair and overbroad.

IV. System Operators Must Be Allowed to Use All the Tools at Their Disposal to Manage Network Security

Ensuring the security of their programming services requires that system operators be given the greatest flexibility possible in designing content protection solutions. At a time when content protection challenges are legion, the Commission should not be limiting system operators' options.

As the NCTA notes, image constraint (also known as "down-resolution") is one of many possible solutions to the analog reconversion problem, and the best solution has yet to be determined.[35] Another possible solution is the gradual retirement of analog outputs. FCC

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[32] *See* Comments of SBCA at 2-3; TiVo at 7-8 & n.9.

[33] *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").

[34] Although over-the-air broadcast television and pre-recorded media would not be covered, in practice, most television receivers and most playback devices would be manufactured to be compatible with cable, satellite, or ISP services.

[35] *See* Comments of NCTA at 26-27.

foreclosure of one or more of the possible solutions to the analog reconversion problem is premature and unwarranted.

The cable commenters have stated that they are prepared to agree to allow the use of image constraint if the Commission determines that "permitting down-resolution of high-value digital content delivered over analog connectors is the *only* means of ensuring that such content will be made available to consumers."[36] This misstates the issue, however. Given the wealth of alternative possible solutions to the problem of legacy analog connections, including retirement of those connections, and the persistence of disagreement about which is best, there will likely never be a determination that use of image constraint is the "only means" of ensuring that high-value content is made available to consumers. Rather, in a system where a fully functional market is agreed to be the optimal arbiter of such disputes, the question is whether individual distributors and content providers should be allowed the option of image constraint. The cable and CE commenters have provided no compelling reason why they should not.[37] Nor have the cable and CE commenters provided any reason why, if image constraint is allowed for other high-value content, it should not be allowed for high-value over-the-air broadcast content. In fact, there is no basis for a distinction.

Output controls are another important tool in the arsenal of system operators. Without output controls, as DirecTV has noted, "a distributor's ability to respond properly if a given technology is compromised" is limited, creating an "untenable situation of 'hack one – hack

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[36] Comments of Comcast at 7.

[37] Futhermore, it is worth noting that all high-definition set-top boxes have standard definition outputs – meaning that such set-top boxes already have "down-resolution" capability. Proposed Subpart W would eliminate such outputs without any justification.

all.'"[38] Distributors should not be precluded by regulation from mitigating the risk of such an attack where possible.

Having no justification for limiting output controls, the CE Industry claims instead that the MPAA has already declared that "it will not seek the imposition of selectable output control in MVPD or other venues."[39] However, once again, the CE comments distort the record. The MPAA's statement on its face applied only to a particular scenario involving protected IEEE 1394 outputs, and did not address control of other outputs or of IEEE 1394 outputs in other situations: "MPAA and its member companies are not seeking in the 5C license or in the OpenCable PHILA context the ability to turn off the 1394/5C digital interconnect in favor of a DVI/HDCP interconnect through a selectable output control mechanism."[40]

It is apparent that the cable and CE industries oppose image constraint and output controls as content protection options. However, that partisan stance is not in itself a justification for Commission prohibition of these options. As others have noted, without the option for output controls, image constraint, and innovative new encoding rules, "service offerings, content protection and delivery quality" will "sink to a lowest common denominator solution."[41]

V. <u>Other Issues</u>

A number of other comments have raised issues with additional aspects of the MOU that should be addressed. Two comments have requested the Commission to ensure that "Digital

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[38] Comments of DirecTV at 7.

[39] Comments of CE at 18-19.

[40] Letter from Fritz E. Attaway to Chairman W.J. "Billy" Tauzin and Chairman Fred Upton at 1 (Mar. 20, 2002).

[41] *See* Comments of DirecTV at 7.

Cable-Ready" products are able to decode closed-captioning information.[42] The MPAA supports these comments. Other comments have noted with dismay that the cable compatibility regulations proposed by the MOU did not include the DTV tuner standard, and thus compliant devices will not be able to receive over-the-air ATSC broadcasts.[43] The MPAA supports these comments also. These proceedings should not be allowed to circumvent or supersede the currently pending DTV tuner proceeding.

One comment objects that the DFAST license would "amount to FCC approval and endorsement of watermarking."[44] This comment is mistaken, however; for one thing, no Commission action has been requested on the DFAST license.[45] Second, within the license itself, there is no actual or tacit approval of any watermark regime. Instead, the license provides only that Unidirectional Digital Cable Products and Licensed Components shall not "strip, interfere with, or obscure" a consensus watermark when one is created.[46] Nor is it the case that the obligation to take "commercially reasonable care" not to interfere with a consensus watermark could be interpreted to ban zooming, scaling, or compression.[47] The draft DFAST license specifically states that "zooming, scaling, [and] compression . . . shall not be deemed to strip, interfere with or obscure the Consensus Watermark."[48] Although the DFAST license has many problems (see below), the watermarking non-interference provisions are not among them.

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42 *See* Comments of Rick Baudisch; Telecommunications for the Deaf, Inc.

43 *See* Comments of National Association of Broadcasters and Association for Maximum Service Television, Inc.; Sinclair Broadcast Group Inc.

44 Comments of ATI Technologies, et al. at 10.

45 *See* Letter from Carl E. Vogel, President and CEO, Charter Communications, *et al.*, to Michael K. Powell, Chairman, FCC (Dec. 19, 2002), at 3.

46 *See, e.g.*, Draft DFAST license, Exh. B ¶ 2.5.1(2).

47 *See* Comments of ATI Technologies, et al., at 12.

48 Draft DFAST license, Exh. B ¶ 2.5.2(3).

At least one comment has suggested here, as have others in the Broadcast Flag proceeding, that content protection is entirely unnecessary for high-definition digital television programs due to the large file sizes of recordings of such programs, and the narrow bandwidth to most consumers' homes.[49] Such arguments are as false here as they are in the context of the Broadcast Flag. Trafficking in unauthorized, high-quality copies of copyrighted audiovisual content is widespread; currently, a standard-definition television program can be downloaded by an internet user with a broadband connection almost in real time. Furthermore, it is undisputed that a rapid advancement in compression technology and in the speed of internet connections is occurring that will only make the problem worse. Given current trends in compression technology improvement and home internet download speeds, within a few years high definition programming, like standard definition programming today, will be able to be downloaded in real time. Indeed, today, most unauthorized file sharing of music and audiovisual works takes place not with the content in its original form, but in compressed forms created by the consumers, such as MP-3 and DIVX. File sharing is not inhibited by the size of the original files, but rather is enabled when files are delivered without cryptographic or other protections. Content protection is thus a critical problem that any content distributor must face, and that is why the Commission must not limit the options distributors available to them in combating this threat.

VI. <u>The DFAST License Does Not Sufficiently Protect Content and Needs Improvement</u>

While proposed Subpart W has been the focus of these Reply Comments, given the request that the Commission adopt that regulation, the proposed DFAST license also needs improvement. As noted in our initial comments, several aspects of the proposed DFAST license must be amended, and we refer the Commission to the summary of our proposed changes

[49] *See* Comments of Public Knowledge/Consumers Union at 9-10.

contained therein.[50] Additionally, as with proposed Subpart W, the draft DFAST license's interference with content protection must also be considered. For example, the DFAST license purports to supersede the obligations in the 5C license to enforce authentication and revocation rules. Further, the DFAST license prohibits image constraint, removing the market's ability to determine whether image constraint is an appropriate solution.

The MPAA is willing to work with the parties to the MOU to reach agreement on a revised PHILA that will be mutually beneficial to all. The MPAA has met and continues to meet with CableLabs to discuss its proposed changes in detail.

[50] *See* Comments of MPAA at 13-15.

VII. Conclusion

Given the harm it would cause, and the complete lack of justification for it, proposed Subpart W must be rejected by the Commission. But the rejection of proposed Subpart W need not delay the goal of cable compatibility. As explained above, proposed Subpart W is entirely unnecessary to achieve that goal. The MPAA looks forward to working with the Commission and the parties to implement those regulations that are necessary, and arriving at a POD-Host Interface license that all parties can agree to.

Respectfully submitted,

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