

*A Partnership Including
Professional Corporations*
600 13th Street, N.W.
Washington, D.C. 20005-3096
202-756-8000
Facsimile 202-756-8087
<http://www.mwe.com>

Boston
Chicago
London
Los Angeles
Miami
Moscow
Orange County
New York
St. Petersburg
Silicon Valley
Vilnius
Washington, D.C.

MCDERMOTT, WILL & EMERY

Robert S. Schwartz
rschwartz@mwe.com
202-756-8081

September 3, 2003

VIA ECFS

Ms. Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

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

Dear Ms. Dortch:

On behalf of the Home Recording Rights Coalition, the undersigned hereby provides the attached document for the record in the above referenced Dockets. The document is a Declaration by Sean Wargo, of the Consumer Electronics Association, attesting to the following Market Research data:

- ◆ The number of consumer electronics DTV displays already owned by consumers or on retail shelves that rely exclusively on component video analog inputs for the receipt of HDTV from cable, satellite, or broadcast tuners is approximately 5.4 million. Of these, 4.5 million are classified as able to display full HDTV; most of the others can display content at greater than standard “DTV” resolution, and all can display at greater than “NTSC” resolution.
- ◆ Today, roughly one-third of all DTV receivers still rely exclusively on component video analog inputs to receive any content of greater than NTSC resolution from a cable, satellite, or broadcast set-top box or other product. While this percentage is declining (and should decline dramatically as a result of FCC action in these dockets), the annual sales figures are increasing sharply. Hence, it seems fair to say that several million additional consumers -- the DTV and HDTV pioneers -- will be in the position of relying exclusively on these inputs in order to enjoy the HDTV content for which they have paid in product and program acquisition costs.

The Declaration attached as Exhibit A confirms for the record HRRC's assertion in its comments and reply comments, and in its July 29, 2003 *ex parte* filing, that giving program providers the ability, on a program-by-program basis, to turn off or reduce the resolution of content passing through component video analog outputs would deny, to literally millions of HDTV pioneers, the benefits of several bargains that they made in good faith: the decision to acquire an HDTV display; the decision to acquire content from a provider offering HDTV services; and the decision to subscribe to particular HDTV programming channels, or to on-demand or per-view offerings. "Downresolution" or selective turnoff of high resolution analog interfaces could vitiate each of these investments through no fault of the consumer. Accordingly, HRRC urges the Commission to adopt the formulation presented with its July 29 *ex parte* comment, which is reproduced as Exhibit B.

This letter is being provided to your office in accordance with Section 1.1206 of the Federal Communications Commission rules. A copy of this letter has been delivered to the parties listed below.

Very truly yours,

Robert S. Schwartz
Robert S. Schwartz
Counsel

cc:

Kenneth Ferree
Rick Chessen
Bill Johnson
Susan Mort
Mike Perko
Paul Gallant
Catherine Bohigian
Anthony Dale
Stacy Robinson
Matt Brill
Jordan Goldstein
Johanna Mikes
Jane Mago
Amy Nathan
Robert Pepper
John Rogovin
Linda Kinney

attach/

Exhibit A

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

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

Declaration of Sean Wargo

I, Sean Wargo, do hereby declare as follows:

1. I am Director of Industry Analysis for the Consumer Electronics Association (CEA). CEA collects and aggregates market research information on a regular basis from a variety of sources. Its estimates are widely published, cited, and relied upon by several industries with an interest in home electronics.
2. According to current CEA market research, approximately 6.4 million consumer electronics Digital Television (DTV) displays (integrated sets and monitors) have been delivered to retailers for consumer acquisition as of August 1, 2003. Virtually all of these products contain component video analog interfaces for acquiring high resolution signals. Of these, approximately 85%, or 5.4 million sets, have *only* component video analog interfaces. Therefore, roughly 5.4 million consumers -- the first 5.4 million to buy DTV receivers -- have or shortly will have devices that must rely upon these component video analog interfaces as their only means to display HDTV (or standard DTV) content at a resolution greater than that of standard NTSC broadcasts.
3. Of the 6.4 million DTV displays marketed to date, approximately 87 %, or 5.56 million, are classified as capable of "HDTV" resolution. Of these, slightly more than 80% have only component video analog interfaces for acquiring DTV and HDTV signals. Therefore, roughly 4.5 million consumers -- the first 4.5 million to acquire HDTV-capable displays -- must rely on these component video analog interfaces to acquire *any* HD content from a cable, satellite, or broadcast set-top box. Most of the other 13% (840,000) are "EDTV" receivers, and depend upon component video analog interfaces in order to receive and display images with better than standard DTV image resolution from an HDTV signal received from a cable, satellite, or broadcast set-top box.
4. At present, roughly one-third of the DTV sets now being marketed still rely exclusively on component video analog interfaces to receive HD content from cable, satellite, and broadcast "set-top boxes." While this number will continue to decline, the annual sales

rate of DTV receivers -- projected at 4 million for 2003 -- will continue to increase. Therefore, it seems likely that for the near future several million additional consumers will be relying on component video analog inputs to acquire HDTV programming and to display it at resolution better than NTSC.

Respectfully submitted,

/s/ Sean Wargo

Sean Wargo
Director of Industry Analysis
Consumer Electronics Association
2500 Wilson Blvd.
Arlington, VA 22201-3834

Dated: September 3, 2003

Exhibit B

ENCODING RULES

**As proposed to the FCC
(not effective until adopted by the FCC)**

Cross Reference

§76.1211

Each multi-channel video programming distributor shall comply with the requirements of subpart W with respect to the services covered by that subpart.

Part 76, Subpart W

§76.1901 Applicability

- (a) Each multi-channel video programming distributor shall comply with the requirements of subpart W.
- (b) These rules shall not apply to distribution of any content over the Internet, nor to a multi-channel video programming distributor's operations via cable modem or DSL.
- (c) With respect to cable system operators, this subpart shall apply only to Cable Services. This subpart shall not apply to cable modem services, whether or not provided by a cable system operator or affiliate.

§76.1902 Definitions

“**Commercial Advertising Messages**” shall mean, with respect to any service, Program, or schedule or group of Programs, commercial advertising messages other than (a) advertising relating to such service itself or the programming contained therein, (b) interstitial programming relating to such service itself or the programming contained therein, or (c) any advertising which is displayed concurrently with the display of any part of such Program(s), including but not limited to “bugs,” “frames” and “banners.”

“**Commercial Audiovisual Content**” shall mean works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied, transmitted by a Covered Entity and that are (a) not created by the user of a Covered Product and (b) offered for transmission, either generally or on demand, to subscribers or purchasers or the public at large or otherwise for commercial purposes, not uniquely to an individual or a small, private group.

“Commercially-Adopted Access Control Method” shall mean any commercially-adopted access control method, such as CSS, Digicypher, Harmony, DBS and any other commercially-adopted access control technology, including digitally controlled analog scrambling systems, whether now or hereafter in commercial use.

“Copy Never” shall mean, with respect to Commercial Audiovisual Content, the Encoding of such content so as to signal that such content may not to be copied by a Covered Product.

“Copy One Generation” shall mean, with respect to Commercial Audiovisual Content, the Encoding of such content so as to permit a first generation of copies to be made by a Covered Product but not copies of such first generation of copies.

“Copy No More” shall mean, with respect to Commercial Audiovisual Content, the Encoding of such content so as to reflect that such content is a first generation copy of content Encoded as Copy One Generation and no further copies are permitted.

“Covered Product” shall mean a device used by consumers to access Commercial Audiovisual Content offered by a Covered Entity (excluding delivery via cable modem or the Internet); and any device to which Commercial Audiovisual Content so delivered from such Covered Product may be passed, directly or indirectly.

“Covered Entity” shall mean any entity that is subject to this subpart W.

“Defined Business Model” shall mean Video-on-Demand, Pay-Per View, Pay Television Transmission, Subscription-on-Demand, Non-Premium Subscription Television, Free Conditional Access Delivery and Unencrypted Broadcast Television.

“Encode” shall mean, in the transmission of Commercial Audiovisual Content, to pass, attach, embed, or otherwise apply to, associate with, or allow to persist in or remain associated with such content, data or information which when read or responded to in a Covered Device has the effect of preventing, pausing, or limiting copying, or constraining the resolution of a Program when output from the Covered Device.

“Encoding Rules” shall mean the requirements or prohibitions describing or limiting Encoding of audiovisual content as set forth in this Rule.

“Free Conditional Access Delivery” shall mean a delivery of a service, Program, or schedule or group of Programs via a Commercially-Adopted Access Control Method, where viewers are not charged any fee (other than government-mandated fees) for the reception or viewing of the programming contained therein, other than Unencrypted Broadcast Television.

“Non-Premium Subscription Television” shall mean a service, or schedule or group of Programs (which may be offered for sale together with other services, or schedule or group of Programs), for which subscribers are charged a subscription fee for the reception or viewing of the programming contained therein, other than Pay Television, Subscription-on-Demand and Unencrypted Broadcast Television. By way of example, “basic cable service” and “extended basic cable service” (other than Unencrypted Broadcast Television) are “Non-Premium Subscription Television.”

“Pay-Per-View” shall mean a delivery of a single Program or a specified group of Programs, as to which each such single Program is generally uninterrupted by Commercial Advertising Messages and for which recipients are charged a separate fee for each Program or specified group of Programs. The term “Pay-Per-View” shall also include delivery of a single Program as described above for which multiple start times are made available at time intervals which are less than the running time of such Program as a whole. If a given delivery qualifies both as Pay-Per-View and a Pay Television Transmission, then, for purposes of this Rule, such delivery shall be deemed Pay- Per-View rather than a Pay Television Transmission.

“Pay Television Transmission” shall mean a transmission of a service or schedule of Programs, as to which each individual Program is generally uninterrupted by Commercial Advertising Messages and for which service or schedule of Programs subscribing viewers are charged a periodic subscription fee, such as on a monthly basis, for the reception of such programming delivered by such service whether separately or together with other services or programming, during the specified viewing period covered by such fee. If a given delivery qualifies both as a Pay Television Transmission and Pay-Per-View, Video-on-Demand, or Subscription-on-Demand then, for purposes of this Rule, such delivery shall be deemed Pay-Per-View, Video-on-Demand or Subscription-on-Demand rather than a Pay Television Transmission.

“Program” shall mean any work of Commercial Audiovisual Content.

“Subscription-on-Demand” shall mean the delivery of a single Program or a specified group of Programs for which (i) a subscriber is able, at his or her discretion, to select the time for commencement of exhibition thereof; (ii) where each such single Program is generally uninterrupted by Commercial Advertising Messages; and (iii) for which Program or specified group of Programs subscribing viewers are charged a periodic subscription fee for the reception of programming delivered by such service during the specified viewing period covered by the fee. In the event a given delivery of a Program qualifies both as a Pay Television Transmission and Subscription-on-Demand, then for purposes of this Rule, such delivery shall be deemed Subscription-on- Demand rather than a Pay Television Transmission.

“Undefined Business Model” shall mean a business model that does not fall within the definition of a Defined Business Model.

“Unencrypted Broadcast Television” means any service, Program, or schedule or group of Programs, that is a further transmission of a broadcast transmission (i.e., an over-the-air transmission for reception by the general public using radio frequencies allocated for that purpose) that substantially simultaneously is made by a terrestrial television broadcast station located within the country or territory in which the entity further transmitting such broadcast transmission also is located, where such broadcast transmission is not subject to a Commercially-Adopted Access Control Method (e.g., is broadcast in the clear to members of the public receiving such broadcasts), regardless of whether such entity subjects such further transmission to an access control method.

“Video-on-Demand” shall mean a delivery of a single Program or a specified group of Programs for which (i) each such individual Program is generally uninterrupted by Commercial Advertising Messages; (ii) recipients are charged a separate fee for each such

single Program or specified group of Programs; and (iii) a recipient is able, at his or her discretion, to select the time for commencement of exhibition of such individual Program or specified group of Programs. In the event a delivery qualifies as both Video-on-Demand and a Pay Television Transmission, then for purposes of this Rule, such delivery shall be deemed Video-on-Demand.

§ 76.1903 Interface and Encoding Rules.

1. Rules As to Interfaces

A Covered Entity shall not attach or embed data or information with Commercial Audiovisual Content, or otherwise apply to, associate with, or allow such data to persist in or remain associated with such content, so as [\(i\) to prevent its output through any analog or digital output authorized or permitted under license, law or regulation governing such Covered Product, or \(ii\) to constrain the resolution of the image when output from such Covered Product.](#)

2. Encoding Rules for Defined Business Models

(a) Commercial Audiovisual Content delivered as Unencrypted Broadcast Television shall not be Encoded so as to prevent or limit copying thereof by Covered Products.

(b) Except for (i) a specific determination made by the Commission pursuant to a petition with respect to a Defined Business Model other than Unencrypted Broadcast Television; or (ii) an Undefined Business Model subject to the procedures set forth in this Section:

(A) Commercial Audiovisual Content shall not be Encoded so as to prevent or limit copying thereof except as follows:

(i) to prevent or limit copying of Video-on-Demand, Pay-Per-View, or Subscription-on-Demand transmissions, subject to the requirements of subsection 2(B); and

(ii) to prevent or limit copying, other than first generation of copies, of Pay Television Transmissions, Non-Premium Subscription Television, and Free Conditional Access Delivery transmissions; and

(B) With respect to any Commercial Audiovisual Content delivered or transmitted in the form of a Video-on-Demand, Pay-Per-View or Subscription-on-Demand transmission, a Covered Entity shall not Encode such content so as to prevent a Covered Product, without further authorization, from pausing such content up to 90 minutes from initial transmission by the Covered Entity (e.g., frame-by-frame, minute-by-minute, megabyte by megabyte, etc.).

(c) The Commission may by petition determine whether it would be in the public interest to allow within a Defined Business Model the Encoding of a service other than in accordance with the Encoding Rule set forth in subsections 2(b)(A) and 2(b)(B) applicable to such Defined Business Model.

(i) Petition

The Encoding Rules for Defined Business Models reflect the conventional methods for packaging programs in the MVPD market as of December 31, 2002, and are presumed to be the appropriate rules for Defined Business Models. A Covered Entity may by petition request approval from the Commission for delivering Commercial Audiovisual Content, other than

Unencrypted Broadcast Television, pursuant to a Defined Business Model other than as permitted by the Encoding Rules set forth in subsections 2(b)(A) and 2(b)(B). No such petition will be approved under the public interest test set forth below unless the service differs from services provided by any Covered Entity under the applicable Defined Business Model prior to December 31, 2002.

A petition to Encode a service within a Defined Business Model other than as permitted by the Encoding Rules set forth in subsections 2(b)(A) and 2(b)(B) shall describe:

- (1) The Defined Business Model, the service, and the proposed Encoding terms, including the use of Copy Never and Copy One Generation Encoding, and the Encoding of content with respect to “pause” (subsection 2(b)(B)).
- (2) The claimed benefit to consumers of the service, including, but not limited to, the availability of content in earlier release windows, more favorable terms, innovation or original programming;
- (3) The ways in which the service differs from services offered by any Covered Entity within the applicable Defined Business Model prior to December 31, 2002;
- (4) The effect on reasonable and customary expectations of consumers with respect to home recording;
- (5) All other pertinent facts and considerations relied on to support a determination that grant of the Petition would serve the public interest.

Factual allegations shall be supported by affidavit or declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(ii) Comment

The Commission shall give public notice of any such Petition.

Interested persons may submit comments or oppositions to the petition within thirty (30) days after the date of public notice of the filing of such petition. Comments or oppositions shall be served on the petitioner and on all persons listed in petitioner's certificate of service, and shall contain a detailed full statement of any facts or considerations relied on. Factual allegations shall be supported by affidavit or declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

The petitioner may file a reply to the comments or oppositions within ten (10) days after their submission, which shall be served on all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit or declaration, of any additional facts or considerations relied on. There shall be no further pleadings filed after petitioner's reply, unless authorized by the Commission.

(iii) Commission determination as to Encoding Rule for a new service within a Defined Business Model

(a) In an unrestricted proceeding, unless otherwise specified by the Commission, to determine whether Encoding other than in accordance with the Encoding Rule set forth in subsections 2(b)(A) and 2(b)(B) for the applicable Defined Business Model may be applied to a service within such Defined Business Model, the Covered Entity shall have the burden of proof to establish that the proposed change in Encoding is in the public interest. Within ninety (90) days after the Commission gives public notice of the filing of the original petition, the Commission shall determine whether a grant of the petition is in the public interest. In making such determination, the Commission shall take into account the following factors:

- (1) The benefit to consumers of the new service, including but not limited to earlier release windows, more favorable terms, innovation or original programming;
- (2) Ways in which the new service differs from services offered by any Covered Entity within the applicable Defined Business Model prior to December 31, 2002;
- (3) Reasonable and customary expectations of consumers with respect to home recording .

(b) The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate, but in no event shall such other procedures delay the process beyond the timeframe for Commission decision set forth in subsection 2(c)(iii).

(c) A petition may, upon request of the petitioner, be dismissed without prejudice as a matter of right prior to the adoption date of any final action taken by the Commission with respect to the petition. A petitioner's request for the return of a petition will be regarded as a request for dismissal.

(d) Complaint regarding a service not subject to petition.

In an instance in which a party entitled to be a Complainant has a substantial basis to believe and does believe in good faith that a service within a Defined Business Model has been launched without a petition as required by this Rule, such party may file a complaint pursuant to section 76.7 of the Commission's rules, and in appropriate circumstances the Commission shall rule upon the complaint within 90 days.

3. Encoding Rules for Undefined Business Models.

(a) Upon public notice and subject to requirements as set forth herein a Covered Entity may launch a program service pursuant to an Undefined Business Model. Subject to Commission review upon Complaint, the Covered Entity may initially Encode programs pursuant to such Undefined Business Model without regard to limitations set forth in subpart 76.1903(2).

- (1) Notice

Concurrent with the launch of an Undefined Business Model by a Covered Entity, the Covered Entity shall issue a press release to the PR Newswire so as to provide public notice of the Undefined Business Model, and the proposed Encoding terms. The notice shall provide a concise summary of the Commercial Audiovisual Content to be provided pursuant to the Undefined Business Model, and of the terms on which such content is to be available to consumers. Immediately upon request from a party entitled to be a Complainant, the Covered Entity shall make available information that indicates the proposed Encoding terms, including the use of Copy Never or Copy One Generation Encoding, and the Encoding of content with respect to “pause” (subsection 2(b)(B)).

(2) Complaint Process

A manufacturer of a Covered Product, a manufacturer for whom the product was manufactured, or a Covered Entity (“Complainant”) may file a complaint with the Commission objecting to application of Encoding as set forth in the notice.

(a) Pre-complaint resolution

Prior to initiating a complaint with the Commission under this section 3, the Complainant shall notify the Covered Entity that it may file a complaint under this section. The notice must be sufficiently detailed so that the Covered Entity can determine the specific nature of the potential complaint. The potential Complainant must allow a minimum of thirty (30) days from such notice before filing such complaint with the Commission. During this period the parties shall endeavor in good faith to resolve the issue(s) in dispute. If the parties fail to reach agreement within this 30 day period, Complainant may initiate a complaint in accordance with the procedures set forth herein.

(b) Complaint

Within two years of publication of a notice under 3(a)(1), a Complainant may file a complaint with the Commission objecting to application of the Encoding terms to the service at issue. Such complaint shall state with particularity the basis for objection to the Encoding terms.

- (i) The complaint shall contain the name and address of the complainant and the name and address of the Covered Entity.
- (ii) The complaint shall be accompanied by a certification of service on the named Covered Entity.
- (iii) The complaint shall set forth with specificity all information and argument relied upon. Specific factual allegations shall be supported by a declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.
- (iv) The complaint shall set forth attempts made by the Complainant to resolve its complaint pursuant to subsection (a).

The Commission shall give public notice of the filing of the complaint. Once the Commission has issued such public notice, any person otherwise entitled to be a Complainant

shall instead have the status of a person submitting comments under subsection (c) rather than a Complainant.

(c) Comments and Reply

Any person may submit comments regarding the complaint within thirty (30) days after the date of public notice by the Commission. Comments shall be served on the Complainant and the Covered Entity and on any persons listed in relevant certificates of service, and shall contain a detailed full statement of any facts or considerations relied on. Specific factual allegations shall be supported by a declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

The Covered Entity may file a Response to the Complaint and comments within twenty (20) days after the date that comments are due. Such Response shall be served on all persons who have filed complaints or comments and shall also contain a detailed full showing, supported by affidavit or declaration, of any additional facts or considerations relied on. Replies shall be due ten (10) days from the date for filing a Response.

There shall be no further pleadings filed, unless authorized by the Commission.

(3) Commission determination as to encoding terms for an Undefined Business Model

In an unrestricted proceeding, unless otherwise specified by the Commission, to determine whether Encoding terms as noticed may be applied to an Undefined Business Model, the Covered Entity shall have the burden of proof to establish that application of the Encoding terms in the Undefined Business Model is in the public interest. In making any such determination, the Commission shall take into account the following factors:

- (i) The benefit to consumers of the new service, including but not limited to earlier release windows, more favorable terms, innovation or original programming;
- (ii) Ways in which the new service differs from services offered by any Covered Entity prior to December 31, 2002;
- (iii) Reasonable and customary expectations of consumers with respect to home recording.

(4) Determination

(A) Within ninety (90) days of the Commission's public notice of the complaint, the Commission shall determine whether to approve the Encoding terms as noticed.

(B) The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate, but in no event shall such other procedures delay the process beyond the timeframe for Commission decision set forth herein.

(b) Complaint re a service not subject to notice.

In an instance in which a party entitled to be a Complainant has a substantial basis to believe and believes in good faith that a service pursuant to an Undefined Business Model has been launched without requisite notice, such party may file a complaint pursuant to section 76.7 of the Commission's rules, and in appropriate circumstances the Commission shall rule upon the complaint within 90 days.

4. Temporary Bona Fide Trials. The obligations and procedures as to Encoding Rules set forth in 2(b) and (c) and 3(a) and (b) do not apply in the case of a temporary bona fide trial of a service.

5. Certain Practices Not Prohibited. Nothing in this Rule shall be construed as prohibiting a Covered Entity from:

(a) encoding, storing or managing Commercial Audiovisual Content within its distribution system or within a Covered Product under the control of a Covered Entity's Commercially-Adopted Access Control Method, provided that the outcome for the consumer from the application of the Encoding Rules set out in sections 2(a) and (b) is unchanged thereby when such Commercial Audiovisual Content is released to consumer control, or

(b) causing, with respect to a specific Covered Product, the output of content from such product in a format as necessary to match the display format of another device connected to such product, including but not limited to providing for content conversion between widely-used formats for the transport, processing and display of audiovisual signals or data, such as between analog and digital formats and between PAL and NTSC or RGB and Y,Pb,Pr.