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	)	
	)	**PP Docket No. 00-67**
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE

1. Introduction and statement of interest.

The American Antitrust Institute ("AAI") submits these comments in connection with the Commission's *Second Further Notice of Proposed Rulemaking* ("*Cable Compatibility Second FNPRM*") in the above-captioned proceeding.[1] AAI is an independent research, education, and advocacy organization that supports a leading role for competition, as enforced by our antitrust laws, within the national and international economy. Background on the AAI may be found at www.antitrustinstitute.org, including participation in other matters involving the

[1] *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80 and PP Docket No. 00-67, *Second Report and Order and Second Further Notice of Proposed Rulemaking* (rel. Oct. 9, 2003). By *Order* (rel. Dec. 23, 2003) in this proceeding, the Commission extended the deadline for filing comments until February 13, 2004.

telecommunications and media industries.[2] We appreciate the opportunity to provide comments on the FCC's *Cable Compatibility Second FNPRM*.

The AAI's sole interest in this proceeding is to ensure that the Commission enhances consumer welfare to the greatest extent possible by minimizing competitive distortions in and among the consumer electronics, information technology, media, and related technology industries. The Commission's rulemaking in this docket, and in the *Broadcast Flag* proceeding,[3] will inevitably affect the competitive position of market participants in each of these industries. Therefore, in addition to the many technical and practical considerations facing the Commission in this area, the AAI urges the Commission to undertake a full analysis of the competitive effects of each of the numerous policy choices confronting it.

The AAI has filed comments of even date herewith in the *Broadcast Flag* proceeding which emphasize the potential for anticompetitive distortions that may result from the approval process for content protection technologies, the terms of licenses for particular technologies, and the administration of licenses. Those considerations, many of which are applicable to the DFAST regime, will not be repeated here. We do reiterate below, however, the need for consolidation of this proceeding with the *Broadcast Flag* proceeding and for a unified regime, the desirability of adopting functional criteria in connection with approval of new content protection or recording technologies, and the need for the Commission or an independent standards-setting organization to make initial approval determinations with respect to new content protection or recording technologies.

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[2]Funding comes to the AAI through contributions from a wide variety of sources. More than 70 separate sources each have contributed over $1,000. A full listing is available on request.

[3]*Digital Broadcast Content Protection*, MB Docket No. 02-230.

2. A unified regime applicable to all program delivery modalities should be adopted to minimize differentials due solely to the mode of program delivery.

The AAI supports a unified regime for the approval of content protection and recording technologies across all program delivery modalities. Accordingly, the AAI supports consolidation of the instant proceeding with the *Broadcast Flag* proceeding for the purpose of the establishment of guidelines, procedures, and regulations applicable to all digital content protection technologies.

In the absence of a unified regime, the Commission risks the incongruous result that device capability and interoperability will depend on the mode of program delivery. This outcome is easily illustrated by assuming that a new recording technology is approved for digital recordings under the broadcast flag regime, and is implemented in an integrated ATSC demodulator/recorder product. If the consumer wishes to make a recording of a permitted type of broadcast content, unless the recording technology is also approved under the DFAST license regime, such a recording may be made only when the content is delivered over-the-air and not when delivered via an MPVD. Obviously, the manufacturer of such a product would seek approval under both regimes. But it should be unnecessary to do so, and such a duplication of effort is inefficient. If a particular content protection or recording technology is satisfactory for the protection of digital content delivered over one modality, it should be satisfactory for *any* modality.

The important inquiry is the relationship of the technology to the *content* irrespective of the mode of delivery. Inter-modal competition will be distorted without a modality-neutral approach to technology approvals, which cannot be accomplished in the absence of a unified regime. Moreover, the same procedures and guidelines for the approval of broadcast flag

technologies[4] are also required in connection with the approval of new DFAST technologies, so consolidation is indicated both at the rulemaking stage and in the administration of the rules, as well.

3. Functional criteria should be adopted to avoid differential treatment of computers and consumer electronics and to encourage innovation.

The AAI strongly supports adopting functional criteria along the lines set forth in the joint Microsoft-HP letter[5] as the only means by which to mitigate the danger of at least three distinct potential anticompetitive effects.

First, as the letter makes clear, lack of flexibility in the scope of the definition of covered products or in the means by which content protection may be accomplished may, albeit unintentionally, discriminate against open-architecture computer-related products in favor of "closed" consumer electronics devices. Makers of computer-related equipment should not find themselves under a competitive disadvantage with respect to any mode of digital content distribution as a result of governmental rulemaking. Assuming that the Commission can satisfy itself that methods such as Digital Rights Management ("DRM") can sufficiently protect content so as to effectuate legitimate non-redistribution goals, every attempt should be made to fashion rules that are as broad as possible to encourage participation in the digital broadcasting market by as many industrial sectors as possible.

The second anticompetitive effect that can be mitigated by the adoption of functional

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[4]See *Comments of the American Antitrust Institute*, *Broadcast Flag Proceeding*, February 13, 2004.

[5]Letter from Paul H. Boyd, Microsoft Corporation, and David Issacs, Hewlett-Packard Corp., to Marlene Dortch, Secretary, FCC (Aug. 8, 2003).

criteria relates to innovation in content protection technology itself. Innovators whose products fall outside the purview of existing regulations are less likely to invest in new methods. Such a disincentive to innovate is inherently anticompetitive and welfare-reducing. Moreover, adoption of functional criteria will accommodate the policy adopted by the Commission in connection with software demodulators.[6]

Finally, promulgation of functional criteria serves to encourage convergence of CE and IT, while more narrowly drawn rules serve to forestall such convergence. The Commission should avoid even inadvertently retarding the clear trend evidenced in the Microsoft-HP letter and elsewhere toward greater use of computer-related products to capture, distribute, copy, and display high-value digital content. The interests of consumers should be promoted by rulemaking in this area, including receiving and displaying digital broadcast content, not hindered.

4. The Commission or an independent entity should make initial approval determinations for new content protection or recording technologies.

Closely related to both the need for a unified regime and functional criteria is the need for the Commission or an independent entity to make the initial determination of the approval of new content protection or recording technologies. Cable Television Laboratories, Inc. ("CableLabs") is not such an independent entity. Rather, it is a trade association which exists to further the interest of the cable community. Lacking the requisite independence to make impartial approval determinations which can have substantial competitive effects on multiple industrial sectors, CableLabs *a fortiori* lacks the qualifications to make approval determinations under a unified regime.

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[6] *Authorization and Use of Software Defined Radios*, 16 FCC Rcd 17373 (2001).

Initial approvals should be the responsibility of the Commission or a recognized external standards-setting body. The entity approving technologies for governmental endorsement should not have a stake in the outcome. Moreover, since initial adjudicators are responsible for creating and maintaining a record, for setting down procedural rules, and for determining the scope of due process rights, CableLab's inevitable lack of impartiality cannot be cured through the right of appeal to the Commission. As an interested party, CableLabs should stand on equal footing with consumer electronics manufacturers, program content providers, broadcasters, computer manufacturers, DBS operators, and all other interested parties before an impartial tribunal or decision-maker capable of administrating a unified approval process for all content protection and recording technologies.

Conclusion

Having undertaken to regulate in this area, it behooves the Commission to pay careful attention to the competitive consequences of its rulemaking, and to establish sufficient safeguards against inadvertent competitive distortions. The adoption of a modality-neutral unified regime and functional criteria represent appropriate steps toward minimizing such distortions, while the delegation of initial approval authority to CableLabs is inconsistent with the need for a fair, open, and competitively neutral process.

Respectfully submitted,

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