

**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

**THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION'S  
OPPOSITION TO PETITIONS FOR RECONSIDERATION  
and  
NOTICE OF JOINT PROPOSAL FOR IMPROVED TESTING RULES**

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## SUMMARY

The issues raised by other commenters in their reconsideration petitions of the Commission's Plug and Play Order do not require any changes to the rules as adopted.

DirecTV objects to the exclusion of the Internet and other competing technologies from the encoding rules adopted by the Commission. The application of the encoding rules only to Multichannel Video Program Distributors ("MVPDs") was a practical recognition of the Commission's limited jurisdiction over the Internet and other competing distribution technologies. The cable and CE industries have committed to pursuing the application of such rules to all competing technologies for the distribution of video. In the meantime, MSOs and DBS are in the same position with respect to the application of the encoding rules to their core businesses. They must follow the same encoding rules and are both exposed to unregulated competition from the Internet and other technologies. Like its claim of inequality, DirecTV's challenge to the Commission's jurisdiction is also without merit.

DirecTV also objects to the agreed-upon role of CableLabs as being one (but not the exclusive) path for obtaining approval of new outputs or content protection technologies in UDCPs. DBS equipment is exempted from CableCARD requirements, and DBS can provide any output or content protection technologies in their boxes that they desire. CableLabs' output review for UDCPs protects cable networks. It does not define what technology DBS may or may not utilize for outputs, content protection, or set-top boxes. Rather than imposing a rule, the DBS industry is free to negotiate standards and specifications with the CE industry to include standards for satellite television on TV 1394 interfaces. CableLabs' review process does not prejudice DBS in any way.

Genesis Microchip has focused almost exclusively on its litigation with Silicon Image where it was found to have infringed DVI and HDMI patents. The inclusion of DVI (or HDMI) as a connector for cable operators' leased High Definition set-top boxes is a result of a marketplace choice made when selecting an uncompressed baseband digital interface. The agreed-upon rules require DVI inputs to be phased into HD digital cable ready DTVs in order to assure interoperability. There are procedures for adding other digital connectors, but removing DVI from the phase-in, as proposed by Genesis, would defeat interoperability between set-top boxes and DTVs.

Genesis' multiple patent arguments against DVI are without basis. The licensing terms are available and the marketplace seems to be working. Genesis' loss in litigation against Silicon Image has no bearing on the inclusion of DVI or HDMI in the UDCP rules. Genesis is also mistaken in its claim that the Commission failed in its statutory obligation to consult with "appropriate standard-setting organizations." The NPRM on which these rules are premised was the product of extensive consultation with and adoption of standards from ANSI standard-setting organizations.

Music's requests are premised on their mistaken claim that cable systems employ uniquely risky audio outputs. Granting Music interests' requests for rule changes would outlaw 30 million current, standard, lawful audio outputs including EchoStar (DBS) and Sirius (satellite radio) receivers. They would also prohibit any new business models from developing under the encoding rules. Music also calls for the deployment of an audio output tool that the music industry has yet to specifically discuss or develop. The rules as adopted do not prohibit Music from developing new copy protection technologies that would not frustrate the permitted copying of the audiovisual work of which the soundtrack is a part. Music owners' concerns over copying

or distribution of soundtracks need to be negotiated when they license the synchronization rights to the creators of audio-visual works, and they need to invest in the development of tools specific to that level of control. That necessary process cannot be shortcut at the FCC, and certainly not in the manner proposed. As to the performing rights organizations' request that they be allowed to hack DFAST, they are asking for the wrong relief in the wrong place. A lawful DFAST license is available royalty free, should they wish to monitor performances from a UDCP rather than a leased set-top box.

MPAA's proposal to amend the rules on the relationship between encoding and affiliation agreements is unnecessary and would create needless confusion.

Finally, we are pleased to report that NCTA and the CE industry have agreed on an improved testing procedure for UDCPs built upon the proposal in NCTA's Petition for Reconsideration. The Commission should adopt these jointly proposed rule changes.

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NOTICE OF JOINT PROPOSAL FOR IMPROVED TESTING RULES**

The National Cable & Telecommunications Association (“NCTA”), pursuant to Section 1.429 of the Commission’s Rules, 47 C.F.R. § 1.429, hereby files its opposition to petitions for reconsideration of the *Second Report & Order*<sup>1</sup> in the above-captioned proceeding submitted by DirecTV, Inc.; by Genesis Microchip, Inc. (“Genesis”); by the Motion Picture Association of America, Inc. (“MPAA”); jointly by the National Music Publishers’ Association, the American Society of Composers, Authors and Publishers, the Songwriters Guild of America and Broadcast

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<sup>1</sup> *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 97-80 and PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking (rel. Nov. 4, 2003), 2003 WL 22309173, 68 Fed. Reg. 66728 (Nov. 28, 2003) (“*Second R&O*”).

Music, Inc., (“Music Publishers”); and jointly by Broadcast Music, Inc and the American Society of Composers, Authors and Publishers (“Music Licensors”).<sup>2</sup>

**I. DirecTV’s Objections to Internet Exclusion, CableLabs’ Role, IEEE 1394, and Commission Jurisdiction Are Without Merit.**

DirecTV takes issue with the Commission’s exclusion of Internet distribution from the encoding rules, which it characterizes as an effort by the cable industry to saddle the DBS industry with obligations to protect content while leaving cable modem service exempt. However, the application of the encoding rules only to Multichannel Video Program Distributors (“MVPDs”) was a practical recognition of the Commission’s limited jurisdiction over the Internet and other competing distribution technologies.

The cable MSO-Consumer Electronics (“CE”) Manufacturers Memorandum Of Understanding (“MOU”) which gave rise to the FCC rules clearly commits the cable and CE parties to press for the application of laws that would “subject all MVPDs (including DBS), telephone and DSL providers, Internet and other competing technologies for the distribution of video to the same encoding rules.” The parties said they “will support a proposal for consensus encoding rules, as necessary, for implementation by Congress through legislation.” But because of the necessary delays that will occur in the course of achieving that end and because of the FCC’s limited jurisdiction, they recommended to the Commission that the proposed encoding rules apply only to MVPDs.<sup>3</sup> The Commission adopted that approach when it issued the

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<sup>2</sup> Petitions for reconsideration were filed on December 24 and 29, 2003. The Media Bureau extended the date to file oppositions to the petitions up to and including March 10, 2004. *Order*, DA 04-260 (Feb. 3, 2004)

<sup>3</sup> Memorandum of Understanding, (“MOU”) ¶¶ 1.5, 2.2, 2.4, 2.9, *available at Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Further Notice of Proposed Rulemaking, 18 FCC Rcd 518, 539-41 (2003) (“*FNPRM*”). “In the interests of reaching agreement, and recognizing that public policy changes to enact encoding rules and to eliminate selectable output control for digital delivery systems other than MVPDs may take an extended period of time, the Parties agree that this MOU is contingent on the enactment of encoding rules and elimination of selectable output controls for MVPDs only.” *Id.*, ¶ 2.2, 18 FCC Rcd at 540.

encoding rules. In the meantime, MSOs and DBS are in the same position with respect to the application of the encoding rules to their core businesses. They must follow the same encoding rules and both are exposed to unregulated competition from the Internet and other technologies.

DirecTV also objects to the role assigned to CableLabs in administering the DFAST license. NCTA has described in detail the qualifications of CableLabs and the crucial role it has played and must continue to play in the digital transition, as well as CableLabs' track record and demonstrated ability to fairly and expeditiously test and certify multiple types of equipment.<sup>4</sup> Moreover, DirecTV's criticism of CableLabs' role appears to be premised on a misunderstanding, repeated in its Comments on the Second Further Notice in this proceeding.<sup>5</sup>

DirecTV appears to believe that CableLabs' approval is required for new interfaces on *DirecTV's* set-top boxes.<sup>6</sup> In fact, CableLabs' role relates solely to UDCP devices that connect to cable networks and use the POD-Host interface under the DFAST license. The DFAST license defines only the mechanism for effectuating the POD-Host interface—an interface which has no applicability to DirecTV since the Commission exempted DBS from the separate security requirements in 1998. Moreover, the POD-Host Interface has no bearing on DirecTV's distribution of its services or operation of its uplink or proprietary set-top boxes. Indeed, Mr. Murdoch has revealed in his ability to be free from constraints on the manufacturing and sale of equipment to be used to access DirecTV's services. He has explained in detail DirecTV's ability to manufacture equipment in-house, and to dictate all specifications on DirecTV set-top boxes to

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<sup>4</sup> See, e.g., NCTA's Petition for Reconsideration or Clarification at 12-17 (filed December 29, 2003); Comments of NCTA at 7-11 (filed February 13, 2004).

<sup>5</sup> Petition for Reconsideration of DirecTV, Inc., at 7-8 (Filed Dec. 29, 2003); Further Comments of DirecTV, Inc., at 3 (filed Feb. 13, 2004).

<sup>6</sup> Further Comments at 10-11.

assure his ability to pursue competitive product launches.<sup>7</sup> He may build or contract for any outputs DirecTV desires. Accordingly, even if DirecTV's description of CableLabs' role were correct (which it is not), it would have no effect on the equipment DirecTV subscribers use to access its services. The only benefit accruing to DirecTV by limiting CableLabs' role in protecting the cable network and cable services from non-compliant or insecure devices would be to gain a leg up on competing cable operators whose customers access their services via UDCPs.

DirecTV also repeats its concern that it be involved in the bi-directional negotiations.<sup>8</sup> NCTA is pleased to report that DirecTV is directly involved.

DirecTV further requests that the Commission mandate that televisions with IEEE 1394 interfaces must support certain CEA-designated standards for satellite television. As explained above, the DBS industry is free to negotiate standards and specifications with the CE industry. Indeed, because DirecTV and EchoStar either write the specifications for their equipment or make the equipment themselves, they could easily conform their own set-top box connectors to whatever CE builds. But in either scenario, there is no reason to alter the technical standards for digital cable ready devices – devices which are already in the testing lab for verification.<sup>9</sup>

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<sup>7</sup> *Murdoch Outlines DirecTv's Future*, Satellite Business News (Dec. 31, 2003) (“Our main move is to have one box, which EchoStar has. One box which we will design, albeit with the best brains we can find from all these companies. And we will put that out to tender. And eventually, we'd like that box to become the same box that goes to Latin America, North America, and even other parts of the world, so we can get all the possible benefits of mass manufacturing . . . Our greatest worry is that there are about 120 different DirecTv boxes out in the market today. And we have to work through that with churn and things, so there's as few legacy boxes as possible in three or four years time. So, when we advertise a great new service, it may only be possible for that to come through one of these new boxes.”)

<sup>8</sup> Petition for Reconsideration of DirecTV, Inc. at 8-9.

<sup>9</sup> Letter from Neal Goldberg, NCTA to Marlene Dortch, FCC, Docket No. 97-80 (filed Jan. 21, 2004). *See also* 2004 Test Wave Schedule for CW18 – CW22 (Testing began in February and continues in five waves through the end of the year, listed at [http://www.opencable.com/downloads/2004\\_OC\\_CertSchedule.pdf](http://www.opencable.com/downloads/2004_OC_CertSchedule.pdf).)

Finally, in a footnote, DirecTV challenges the Commission’s jurisdiction under Section 629(b) to adopt the rules, alleging that the encoding rules actually prohibit it from providing secure content protection.<sup>10</sup> This argument is without merit. The Commission correctly concluded that it had jurisdiction to issue the encoding rules as part of the congressional mandates in Sections 624A and 629(b) of the Communications Act as well as other sections of the Act.<sup>11</sup> The Commission also noted that no party had argued that the encoding rules threatened security so as to be prohibited by Section 629(b).<sup>12</sup> DirecTV provides no additional arguments in its petition so there is no basis for reconsideration on this point. The Commission has the authority to adopt the rules.

## **II. Genesis Microchip’s Dissatisfaction with DVI and HDMI Have Been Addressed and Are More Related to its Unsuccessful Litigation With Silicon Image Than Public Policy Concerns Cognizable by the Commission**

Genesis Microchip raises a series of challenges that reflect its dissatisfaction with the outcome of marketplace dynamics or a misunderstanding of the MOU or both. At bottom, its concerns reflect its positions in private litigation with Silicon Image over patent issues regarding the DVI and HDMI connectors. The FCC is not the appropriate venue to resolve those issues.

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<sup>10</sup> DirecTV Recon at 2, note 5; 47 U.S.C. § 549(b).

<sup>11</sup> The Commission has considered and rejected myriad jurisdictional arguments finding ample statutory authority for adopting these and similar rules. *Second R&O*, ¶¶ 45-57. See 47 U.S.C. §§ 544A, 549. See also 47 U.S.C. §§ 151, 152(a), 154(i); 303(r); *Consumer Electronics Ass’n v. FCC*, 347 F.3d 291 (D.C. Cir. 2003); *Implementation of Section 304 of the telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket 97-80, Further Notice of Proposed Rulemaking and Declaratory Ruling, FCC 00-341, 15 FCC Rcd 18199, 18210 (2000) (FCC has jurisdiction to establish scope of copy protection in the POD and host).

<sup>12</sup> *Second R&O*, ¶ 53 (“not a single MVPD – including DBS providers whose system security would *theoretically* be threatened by the proposed rules – argued that the Commission is prohibited from adopting encoding rules under Section 629(b)”)(emphasis added). Although DirecTV’s argument may be an effort to show that “theoretically” its system security would be threatened, DirecTV does not provide any evidence or come close to making the required showing, that its system security *would* be subject to “serious or significant” danger, the showing necessary to invoke Section 629(b). *Second R&O*, ¶ 52, quoting *General Instrument, Corp. v. F.C.C.*, 213 F.3d 724, 731 (D.C. Cir. 2000).

First, Genesis challenges the inclusion of DVI (or HDMI) as a mandatory connector. Cable operators' leased High Definition set-top boxes (for which cable operators have already made purchase decisions) include, or will include, DVI outputs. This choice occurred through marketplace dynamics, without regulatory obligation. In order to promote interoperable retail devices that also provided a path for future innovation, the CE and cable industries agreed that DVI inputs would be phased into HD digital cable ready DTVs on the same schedule as ATSC tuners.<sup>13</sup> That way, cable operator leased boxes with DVI connectors would be interoperable with HD sets with DVI connectors. There is no required DVI interface for other UDCPs. There is no restriction against any other approved protected digital connector from being added to UDCPs.<sup>14</sup> On the other hand, replacing DVI in the rules now with "any" digital connector, as proposed by Genesis, would mean that there would be only accidental interoperability between set-top boxes and DTVs, defeating these efforts to build a nationally portable interoperable equipment market.

Genesis' real concern appears to be that when, some years ago, it was in a marketplace contest with Silicon Image to create an uncompressed baseband digital interface, DVI was judged to be well ahead of Genesis, and took the lead. Genesis then was embroiled in litigation to determine if it was infringing Silicon Image's DVI and HDMI patents. Although they settled their dispute with a DVI and HDMI license agreement, Genesis litigated the terms of their

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<sup>13</sup> MOU ¶¶ 3.6.1, 3.6.2, *available at FNPRM*, 18 FCC Rcd at 543-44.

<sup>14</sup> MOU ¶ 3.6.3, *available at FNPRM*, 18 FCC Rcd at 544 (for flexibility, future secure digital interfaces may be substituted for DVI or HDMI); NCTA Comments at 14-15 (filed February 13, 2004) (DFAST provides two methods for new output approval – CableLabs with FCC review or program suppliers' agreement). *See* DFAST License Agreement, Exhibit B (Compliance Rules) ¶ 2.4.4, *available at FNPRM*, 18 FCC Rcd at 593

agreement and lost.<sup>15</sup> But the marketplace reality and Genesis' losing litigation strategy are not cause to displace the use of DVI as a connector.

Genesis next invokes a cloud of patent arguments against DVI that are without basis. Genesis claims that the FCC was mistaken in its statements that DVI and HDMI are "widely available" and "freely offered on non-discriminatory terms."<sup>16</sup> As for DVI/HDCP and HDMI specifically, there is in fact a licensing scheme attached to each technology similar to DTCP. A license to the technology may be procured under a common patent pool license on an explicitly nondiscriminatory basis for a nominal fee.<sup>17</sup> Or, alternatively, the technology may be procured from the separate founders on fair, reasonable, and non-discriminatory terms.<sup>18</sup> The general HDMI technical specification is available free at [www.hdmi.org](http://www.hdmi.org). This public version of the specification is generally enabling, except for certain security information that may only be obtained under the offered license. No one has heretofore claimed that that procedure is unreasonable or discriminatory. Moreover, HDMI is only an option provided for in the rules, so no one is *required* to implement it on any given device.

The marketplace seems to be working. There is no indication that "the patent structure is or may be such as to indicate obstruction of the service to be provided under the technical

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<sup>15</sup> *Silicon Image, Inc. v. Genesis Microchip, Inc.*, 271 F.Supp.2d 840 (E.D.Va. 2003). In settling its litigation with Silicon Image, Genesis apparently agreed to pay royalties on DVI and HDMI products but, after opposition from Genesis' Board of Directors, Genesis sought "to undo that to which [Genesis' CEO ] had agreed." *Id.*, 271 F.Supp.2d at 879-80.

<sup>16</sup> The Commission heard and rejected Genesis Microchip's non-specific arguments on these points already. *Second R&O*, ¶ 25. The proper procedure for Genesis to follow if it feels it is the victim of discrimination is to file a complaint with the FCC (*Id.*, citing *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 6 FCC Rcd 7024, 7034 (1991)) not seek reconsideration based on non-specific allegations.

<sup>17</sup> The annual fee is \$15,000 and the royalty as low as \$0.09 per Licensed Product. See [www.hdmi.org](http://www.hdmi.org)

<sup>18</sup> Section 9.22.1 of the HDMI Adopters Agreement

standards promulgated by the Commission,” which is what the FCC’s last published Patent Policy seeks to address.<sup>19</sup>

Genesis next contends that the Commission failed in its statutory obligation to consult with “appropriate standard-setting organizations.” This claim is baseless. The NPRM on which these rules are premised was the product of extensive consultation with CEA, an ANSI standard setting organization. The rules incorporate standards published by SCTE, another ANSI standard setting organization.<sup>20</sup>

Genesis also takes issue with the public availability of Intellectual Property Rights (“IPR”) information. In fact, all relevant terms are publicly available. For 1394/DTCP see <http://www.dtcp.com/data/IPStatement07102001.pdf> for their general Policy Statement for users, and [http://dtcp.com/data/DTCP\\_Adopters\\_Agreement010730.PDF](http://dtcp.com/data/DTCP_Adopters_Agreement010730.PDF) for the Adopters Agreement. The license contains a fee schedule and a most favored nation clause. The license contains a reciprocal non-assertion agreement so that the licensee will not assert infringement claims against DTLA or other licensees for any necessary claims.

For the HDCP Adopters Agreement see <http://www.digital-cp.com/data/HDCPLicense061402b.pdf>. It is similar to the IPR information available for DTCP.

DFAST is royalty free on a per device basis; a one-time administrative fee of \$5,000 is charged. (Prior signatories to PHILA were credited the administrative fee). Other than the DFAST patent, no other patents are known to be required to implement the CableCARD-Host interface. In any event, the technology applicable to the CableCARD-Host interface is subject to

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<sup>19</sup> *Revised Patent Procedures*, 3 F.C.C. 2d 26 (1961).

<sup>20</sup> *See, e.g.*, 47 C.F.R. § 15.38 (incorporating by reference SCTE and ANSI/SCTE standards).

the ANSI-based SCTE IPR Rules, which require RAND treatment.<sup>21</sup> This is an ANSI-conformant IPR Policy. If a patented item is to be used in a standard, the patent holder must provide assurance in the form of a general disclaimer that it does not hold or intend to hold an invention that would be required for compliance with the proposed standard; or either an assurance that a license will be available without compensation or that a license will be available on RAND terms. If a patent holder does none of these, the standard cannot be adopted. Since all relevant information regarding IPR for UDCPs is publicly available, the disclosure rules proposed by Genesis are not required.<sup>22</sup>

Genesis' Petition seems to be based more on a private, highly-litigated patent concern between it and Silicon Image than anything relevant to the rules adopted in this proceeding. Genesis' continuing litigation provides no basis for revising the rules.

### **III. The Music Publishers and Music Licensors Have Misconstrued the Rules and Provide No Basis For any Revisions**

The Music Publishers (National Music Publishers Association, the American Society of Composers, Authors and Publishers, the Songwriters Guild of America and Broadcast Music, Inc.) have asked the Commission for rule changes that they claim will help protect music and audio channels against theft, but would in fact outlaw 30 million current, standard, lawful audio outputs; prohibit any new business models from developing under the encoding rules; and

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<sup>21</sup> Manual of Organization and Procedure for the Standards Program of the Engineering Committee, The Society of Cable Telecommunications Engineers (SCTE), Initial Approval: October 16, 2001, Revised 4/4/2003, ¶ 6.7.1, available at [http://www.scte.org/documents/pdf/operating\\_procedures.pdf](http://www.scte.org/documents/pdf/operating_procedures.pdf).

<sup>22</sup> ANSI Guidelines for Implementation of the Patent Policy also states that “any participant in the process - not just patent holder - is permitted to identify or disclose patents that may be required for the implementation of the standard. Generally, it is desirable to encourage disclosure of as much information as possible concerning the patent, including the identify of the patent holder, the patent’s number, and information regarding precisely how it may relate to the standard being developed.” “Similarly, a standards developer may wish to encourage participants to disclose the existence of pending U.S. patent applications relating to the standard under development.” ANSI Guidelines at ¶ III A, available at: <http://public.ansi.org/ansionline/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/PATPOL.DOC>

require the instant development of an audio output tool that the music industry has yet to specifically discuss or develop.

In evaluating Music Publishers' request, it is important to first understand where things stand. Today, there are about 30 million home audio and home theater systems with Sony/Philips Digital Interface ("S/PDIF") digital audio connectors. This is the standard way for carrying digital audio from a cable set-top box or DTV receiver to a home theater or audio system.<sup>23</sup>

Cable is not the only industry to use these connectors. On display at the Consumer Electronics Show, January 7-11, 2004, were EchoStar (DBS) and Sirius (satellite radio) receivers with S/PDIF connectors. In both the DTCP patent license and the broadcast flag rules, the music industry essentially preserved S/PDIF connectors by permitting Linear Pulse Code Modulated outputs ("Linear PCM") at the standard consumer implementation of 48 kHz and 16 bit sampling.<sup>24</sup> Linear PCM is the format used by CD and is easily compressed to MP3 format.

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<sup>23</sup> S/PDIF is a standard audio file transfer format developed jointly by the Sony and Phillips corporations. S/PDIF allows the transfer of digital audio signals from one device to another without having to be converted first to an analog format. Maintaining the viability of a digital signal prevents the quality of the signal from degrading when it is converted to analog. Outputs usually include RCA connector and optical connectors. See [http://www.webopedia.com/TERM/S/S\\_PDIF.html](http://www.webopedia.com/TERM/S/S_PDIF.html)

<sup>24</sup> The broadcast flag rules provide:

§ 73.9005 Compliance Requirements for Covered Demodulator Products: Audio.

Except as otherwise provided in §§ 73.9003(a) or 73.9004(a), Covered Demodulator Products shall not output the audio portions of Unscreened Content or of Marked Content in digital form except in compressed audio format (such as AC3) or in Linear PCM format in which the transmitted information is sampled at no more than 48 kHz and no more than 16 bits/sample. The requirements of this section shall become applicable on July 1, 2005.

The DTCP Compliance Rules for Audio ([http://www.dtcp.com/data/DTCP\\_Adopters\\_Agreement010730.PDF](http://www.dtcp.com/data/DTCP_Adopters_Agreement010730.PDF) at B-8) provide:

**4.6 Audio, Digital.** Except as otherwise provided in Section 4.4, Licensed Products shall not output the audio portions of Decrypted DT Data in digital form except in compressed audio format (such as AC3) or in Linear PCM format in which the transmitted information is sampled at no more than 48 kHz and no more than 16 bits. Adopter is cautioned and notified that the requirements relating to audio may be revised. [Section 4.4 allows output to DTCP-protected outputs according to the Specification.]

Although the sampling cap may appear to be a constraint, it is no more than a description of the standard consumer implementation for S/PDIF connectors. It provides CD quality audio with sampling more than sufficient to create the MP3 files with which the music industry is now struggling in peer-to-peer network file sharing. In short, even if the digital audio constraints from the DTCP license were applied to the “plug and play” rules, it would do nothing to prevent the capture and dissemination of MP3 music files that the music industry claims to be protecting.

What Music Publishers are actually asking for is a series of rule changes that would do nothing to address their professed concern but would nonetheless have drastic impact. The most ambitious request is for set of rule changes that would add a new compliance rule (output restriction) to the encoding rules.<sup>25</sup> The proposed rule change has three significant problems.

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<sup>25</sup> Music has asked for these changes:

**§76.1903 Interfaces**

(a) 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 to prevent its output through any analog or digital output authorized or permitted under license, law or regulation governing such Covered Product. This paragraph shall not apply to embedded copyright protection data or information present in or relevant to the sound recordings or musical works comprising the audio soundtrack of such Commercial Audiovisual Content.

(b) A Covered Product shall not make a copy of, playback or transmit in digital form any audio channel comprising Commercial Audiovisual Content except: (i) copies or transmission made in compliance with the applicable Defined Business Model where the copy or transmission is an integral part of an Encoded copy or Encoded transmission or (ii) playback from a Covered Product made in synchrony with the performance of the Commercial Audiovisual Content it has been Encoded with, as permitted by the Defined Business Model.

**§76.1904 Encoding Rules for Defined Business Models**

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(b) Except for a specific determination made by the Commission pursuant to a petition with respect to a Defined Business Model other than Unencrypted Broadcast Television, or an Undefined Business Model subject to the procedures set forth in §76.1906:

First, it would allow an as-yet-undefined signal to turn off S/PDIF outputs. Even if it were wise to disable 30 million home audio systems, no such tool exists.<sup>26</sup> The music industry has not invested in the research and development to create one, nor has it responded to the open invitation to come consult with industry bodies like CableLabs to develop such tools.<sup>27</sup> Second, it would prohibit the separate recording or playback of audio, even audio provided over digital cable music channels like DMX, which provide graphics screens to accompany the music. Third, by prohibiting any audio output except one bound to existing business models, it provides no vehicle for new business models or innovation. To illustrate, the proposed rule would prohibit audio on SVOD channels, because SVOD is not classified as an existing business model. This is an unwise proposal that would undo much of the work of the MOU.

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(1) 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 or Pay-Per-View transmissions, subject to the requirements of paragraph (b)(2) of this section; ~~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

(iii) to prevent or limit copying, transmission, or playback of the audio channel of Commercial Audiovisual Content not otherwise permitted by §76.1903.

<sup>26</sup> See, Jeff Kraus, “Plug’n’Play’n’Audio, CED, March 2004 <http://www.cedmagazine.com/ced/2004/0304/03cc.htm> (“Well, you can’t just enact a law telling people not to use their S/PDIF interfaces, because it can’t be enforced. You have to design a new interface that includes copy protection, and then force it into the product stream by means of standards, contracts and regulations. That’s what happened with the DTCP, HDCP and DFAST copy protection specifications. But there is no standard for digital audio copy protection. The music industry never invested in the effort to invent one. So even if the FCC adopted a requirement to copy-protect the digital audio output, there would be no way to implement it.”)

<sup>27</sup> NCTA last extended this offer in its Reply Comments filed April 28, 2003 at 38-39 (“Music interests can enter into the same standard arrangements [with CableLabs concerning new digital connectors] as have the many major manufacturers and technology companies who contribute to the OpenCable process.”) Discussions could also be in CPTWG, standards bodies, or at CableLabs under Exhibit B, Compliance Rules, § 2.4.4 in the DFAST Technology License Agreement: “CableLabs shall approve or disapprove digital outputs and/or content protection technologies on a reasonable and nondiscriminatory basis ...” *FNPRM*, 18 FCC Red at 593.

The “plug and play” agreement addresses ports used for the output of audiovisual works, because those are the ports for which the industries have developed actual tools to implement copy protection. If music rights owners wish to contract for DRM controls that are activated when a work is stripped from its video feed, they need to negotiate that when they license the copyright synchronization rights to the creators of audio-visual works, and develop the tools to implement that right. The rules do not prohibit other copy protection technologies that would not frustrate the permitted copying of the audiovisual work of which the soundtrack is a part.

In the last comment cycle, the music industry asked for and received assurances from the Commission that these rules would not prohibit the development of additional copy protection tools focused on the distribution of music.<sup>28</sup> Now Music Publishers dismiss those assurances as “disingenuous,”<sup>29</sup> and ask for another rule change that would explicitly provide that no standard that arises from this agreement can ever be a defense to copyright.<sup>30</sup> We recognize that copyright is an independent right, but that does not mean that compliance with any standard ever developed cannot be a defense to a copyright claim. The Copyright Act itself provides to the contrary, setting forth conditions for an exemption from liability for distributing material where the copyright management information has been removed or altered. 17 U.S.C. § 1202(e)(2). The Music Publishers’ proposal should be rejected.

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<sup>28</sup> *Second R&O*, ¶ 44.

<sup>29</sup> NMPA Petition for Reconsideration at 11.

<sup>30</sup> **§76.1901 Applicability**

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(d) Compliance with any standards set by the Commission or implemented as a consequence of these rules shall not constitute a defense to any claim brought under copyright law.

Broadcast Music, Inc. and the American Society of Composers, Authors and Publishers (the “Music Licensors”) separately ask for the unsupervised right to break DFAST encryption in order to monitor public performances and distribute royalties. Music Licensors do not decrypt cable operators’ conditional access systems today to monitor performances, but rely instead on copyright office filings and program guides. Music licensors do not have a right under the DMCA to defeat technological measures embedded in any copyrighted work. There is a process and forum to argue for such a right: since October 28, 2000, there have been periodic Copyright Office proceedings to grant rights to obtain an exemption from liability for circumventing encryption controls. The most recent proceeding concluded last year, but the right to hack DFAST was not granted to Music Licensors or to anyone else.<sup>31</sup>

The FCC cannot grant the relief requested. Perhaps recognizing this, Music Licensors also ask that the royalty required for them to obtain a DFAST license be reasonable. DFAST is a private agreement, but NCTA has previously provided it in the record in this proceeding, the Commission attached it to the *FNPRM* and CableLabs posted it on its website at <http://www.cablelabs.com/udcp/>. By its express terms it is royalty free, so the concerns of these petitioners have already been met.

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<sup>31</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 64 Fed. Reg. 66139 (Nov. 24, 1999) and 67 Fed. Reg. 63578 (Oct. 15, 2002); Final Rules, 65 Fed. Reg. 64556 (Oct. 27, 2000) and 68 Fed. Reg. 62011 (Oct. 28, 2003). The four exempted classes of works not subject to the DMCA’s anti-circumvention provisions are limited to certain Internet location compilations, certain damaged or obsolete computer programs, other obsolete or original-only programs and computer games, and certain ebooks. One commenter sought and was denied exemption for circumventing audiovisual and musical work access controls for “legitimate research projects.” Another commenter sought and was denied exemption for circumventing the Broadcast Flag for broadcast news monitoring.

#### **IV. MPAA's Proposed Revision to the Rules Is Unnecessary**

MPAA raises several issues, only one of which NCTA will address at this time. MPAA requests that Section 76.1908 of the rules be amended to state (again) that it does not abrogate “other laws, regulations, or licenses applicable to such encoding, storage or management....” NCTA does not dispute that the terms under which content may be distributed by cable operators are governed by affiliation agreements with programmers and FCC rules. The particular rule at issue already is premised on that concept with its language stating that “Nothing in this subpart shall be construed as prohibiting a Covered Entity from” encoding, storing or managing the content at issue. Combined with the Commission’s express acknowledgement of copyrights in the *Second R&O* (at ¶ 54), the relationship between this rule and affiliation agreements is clear and there is no need for the current rule to be reconsidered or revised.

In any event, the amendment suggested by MPAA would go beyond what the Commission recognized and carve up the rule to subject it to any other “license” or “regulations.” This would only create more confusion. The 5C license, for example, is already overdue for being conformed to the FCC’s encoding rules. And MPAA is already seeking changes in the broadcast flag rules which would convert the flag into a tool that would dictate all new transport methods for all MVPD systems and the architecture of all components of home domains.<sup>32</sup> The plug and play rules – which will provide so many benefits to consumers – should not be made subject to other, undefined “licenses.”

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<sup>32</sup> See Comments of MPAA in response to Further Notice at 11-13 (filed Feb. 13, 2004)

**V. Cable Operators and Consumer Electronics Manufacturers Have Agreed on a More Flexible UDCP Testing Arrangement and Rule Changes To Implement Them**

In NCTA's Petition for Reconsideration, we explained that testing performed at third-party labs must be performed in accordance with the test procedures of the Joint Test Suite agreed upon by the parties to the MOU and with an appropriate level of objectivity and expertise.

Under the procedures agreed upon by the parties to the MOU and adopted by the Commission in its rules, CableLabs provides independent Verification testing of digital TVs (DTVs) having a CableCARD interface that are built to conform to the requirements of Unidirectional Digital Cable Products (UDCPs) as defined in the FCC Rules for unidirectional "Plug & Play" products. The testing provided verifies that a product successfully passes each of the PICS identified in the Joint Test Suite Conformance Checklist: PICS Proforma for UDCPs ("PICS"). Testing is performed in accordance with the Acceptance Test Plan posted at [www.cablelabs.com/udcp](http://www.cablelabs.com/udcp) ("Consensus ATP") and the procedures set forth in Test Guidelines for Unidirectional Digital Cable Products. The PICS and ATP collectively are known as the Joint Test Suite ("JTS"). "Verified" means that the UDCP Verification Panel has determined that the model submitted satisfies the JTS. Verification testing may also be offered by an appropriately qualified independent laboratory. Once a Manufacturer has successfully completed Verification for one UDCP DTV product, subsequent UDCP models may be Self-Verified according to applicable procedures.

The Memorandum of Understanding and proposed Technical Regulations submitted by the cable and CE industries to the FCC on December 19, 2002, provided that Verification by an independent lab and Self-Verification by a previously Verified Manufacturer would be governed by the "Test Suite," defined as "the set of tests jointly developed and mutually agreed by

CableLabs and CEA.” A variation on this formulation was adopted by the FCC, which gave rise to the Petition for Reconsideration filed by NCTA in this proceeding.

CE Manufacturers expressed an interest in testing products against the PICS using a test plan that differs from the ATP. In some cases, it is contemplated that the test plan will utilize equipment or procedures that may be proprietary. The cable parties to the Memorandum of Understanding expressed the view that the ATP jointly developed and mutually agreed by CableLabs and CEA – the “consensus ATP” – should be the ATP used in all locations, and that it should evolve through consultation and mutual agreement.

In order to resolve this disagreement, the parties reached an understanding that combines private agreements with agreements to support changes to the FCC rules, in order to assure that equivalent testing arrangements are followed by CableLabs or an independent lab for Verification testing and by all interested manufacturers during Self-Verification. The Agreement between CEA and CableLabs and the accompanying recommended rule changes are both attached as Exhibit A hereto. NCTA and CEA are jointly recommending the adoption of these rule changes by the Commission.

This agreement and the proposed rules changes if adopted will facilitate the use of alternative, new, or proprietary test equipment and test plans that differ from the Consensus ATP. Independent labs performing Verification testing, and manufacturers performing self-verification testing, are authorized to utilize “an Equivalent ATP,” which produces identical pass/fail results for each of the PICS as are produced under the Consensus ATP jointly developed and mutually agreed by CableLabs and CEA. We propose that the Consensus ATP be referenced in the FCC rules as are the PICS. In the event of any dispute over the applicable results under an Equivalent ATP, the results under the Consensus ATP shall govern.

Arrangements are also made for consultation, audit, and remedies. Where necessary to protection of trade secrets and confidential information, such consultation may be under non-disclosure agreement with CableLabs. We urge the Commission to adopt these rule changes.

For clarification, although this agreement reflects mutual support for rule changes concerning the testing process, in its reconsideration petition NCTA also requested clarification of items concerning PSIP. NCTA continues to request these PSIP clarifications. It is our understanding that CEA does not oppose them. They were not included in the agreement because they did not pertain to testing.

### **CONCLUSION**

For the foregoing reasons, NCTA urges the Commission to deny the petitions for reconsideration filed by DirecTV, Genesis, MPAA, Music Publishers and Music Licensors to the extent described above, and adopt the testing rule changes set forth in Exhibit A.

Respectfully submitted,

**/s/ Daniel L. Brenner**

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March 10, 2004

## Exhibit A

### Agreement Concerning Equivalent ATPs February 20, 2004

#### Background

Cable Television Laboratories, Inc. (“CableLabs”) provides independent Verification testing of digital TVs (DTVs) having a CableCARD interface that are built to conform to the requirements of Unidirectional Digital Cable Products (UDCPs) as defined in the FCC Rules for unidirectional “Plug & Play” products. The testing provided verifies that a product successfully passes each of the PICS identified in the Joint Test Suite Conformance Checklist: PICS Proforma for UDCPs (“PICS”). Testing is performed in accordance with the Acceptance Test Plan posted at [www.cablelabs.com/udcp](http://www.cablelabs.com/udcp) (“ATP”) and the procedures set forth in Test Guidelines for Unidirectional Digital Cable Products. The PICS and ATP collectively are known as the Joint Test Suite (“JTS”). “Verified” means that the UDCP Verification Panel has determined that the model submitted satisfies the JTS.

Verification testing may also be offered by an appropriately qualified independent laboratory. Once a Manufacturer has successfully completed Verification for one UDCP DTV product, subsequent UDCP models may be Self-Verified according to applicable procedures.

The Memorandum of Understanding and proposed Technical Regulations submitted by the cable and CE industries to the FCC on December 19, 2002, provided that Verification by an independent lab and Self-Verification by a previously Verified Manufacturer would be governed by the “Test Suite,” defined as “the set of tests jointly developed and mutually agreed by CableLabs and CEA.” A variation on this formulation was adopted by the FCC, which is presently the subject of a Petition for Reconsideration filed by NCTA.

Manufacturers have expressed an interest in testing products against the PICS using a test plan that differs from the ATP. In some cases, it is contemplated that the test plan will utilize equipment or procedures that may be proprietary. The cable parties to the Memorandum of Understanding have expressed the view that the ATP jointly developed and mutually agreed by CableLabs and CEA should be the ATP used in all locations, and that it should evolve through consultation and mutual agreement.

In order to resolve this disagreement, the parties have reached an understanding that combines private agreements with agreements to support changes to the FCC rules, in order to assure that equivalent testing arrangements are followed by CableLabs or an independent lab for Verification testing, and by all interested manufacturers during Self-Verification.

## Agreement

Therefore, the undersigned agree that:

1. On or before February 6, 2004, CEA will present to CableLabs some sample variations in test equipment and test procedures with sufficient information and test results to demonstrate their equivalence to the ATP, which is the mutually agreed upon Baseline for test procedures.
2. CEA will support the companion agreement under which Manufacturers may test for conformity to the PICS with an Equivalent ATP, attached as Exhibit B.
3. The ATP shall be modified as indicated in Exhibit C.
4. Changes to the ATP shall continue to evolve through joint development and mutual agreement by CableLabs and CEA.
5. On or before March 10, 2004, CEA will support the rule changes sought in NCTA's Petition for Reconsideration filed December 29, 2003 in CS Docket No. 97-80, with the additional clarifications shown in the attachment to this agreement. The Parties will endeavor vigorously to obtain the support (or non-opposition) of associations and other groups for this Petition for Reconsideration. The Parties will cooperate in updating FCC rules to account for mutually-agreed upon changes in the JTS.
6. This agreement will become effective upon signature by CableLabs and CEA.

Cable Television Laboratories, Inc.

  

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Consumer Electronics Association

  

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## Proposed Rule Changes

The amendments to the regulations should be as follows:

### §15.38 Incorporations by Reference. \*\*\*

(c) The following materials are freely available from at least one of the following addresses: Cable Television Laboratories, Inc., 858 Coal Creek Circle, Louisville, Colorado, 80027, [www.cablelabs.com/udcp](http://www.cablelabs.com/udcp); or at Consumer Electronics Association, 2500 Wilson Blvd., Arlington, VA 22201, [http://www.ce.org/public\\_policy](http://www.ce.org/public_policy).

(1) Uni-Dir-PICS-I01-030903: “Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma,” 2003, IBR approved for §15.123.

(2) Uni-Dir-ATP-I02-040225: “Uni-Directional Receiving Device Acceptance Test Plan,” 2004, IBR approved for §15.123.

### §15.123 Labeling of Digital Cable Ready Products.

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(c) \*\*\*

(1) The manufacturer or importer shall have a sample of its first model of a unidirectional digital cable product tested to show compliance with the procedures set forth in Uni-Dir-PICS-I01-030903: “Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma” (incorporated by reference, see § 15.38) at a qualified test facility. If the model fails to comply, the manufacturer or importer shall have any modifications to the product to correct failures of the procedures in Uni-Dir-PICS-I01-030903: “Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma” (incorporated by reference, see § 15.38) retested at a qualified test facility and the product must comply with the applicable procedures in § 15.38 before the product or any related model may be labeled or marketed. If a the manufacturer or importer’s first unidirectional digital cable product is not a television, then that manufacturer or importer’s first model of a unidirectional digital cable product which is a television shall be tested pursuant to this subsection as though it were the first unidirectional digital cable product.

(2) A qualified test facility is a facility testing laboratory representing cable television system operators serving a majority of the cable television subscribers in the United States or an appropriately qualified independent laboratory with adequate equipment and competent personnel knowledgeable with respect to the standards referenced in paragraph (b) of this section concerning the procedures set forth in Uni-Dir-PICS-I01-030903: “Uni-

Directional Receiving Device: Conformance Checklist: PICS Proforma” (incorporated by reference, see § 15.38) and with Uni-Dir-ATP-I02-040225: “Uni-Directional Receiving Device Acceptance Test Plan,” 2004, (incorporated by reference, see § 15.38). For any independent testing laboratory to be qualified hereunder such laboratory must ensure that all its decisions are impartial and have a documented structure which safeguards impartiality of the operations of the testing laboratory. In addition, any independent testing laboratory qualified hereunder must not supply or design products of the type it tests, nor provide any other products or services that could compromise confidentiality, objectivity or impartiality of the testing laboratory’s testing process and decisions.

(3) Subsequent to the testing of its initial unidirectional digital cable product model, a manufacturer or importer is not required to have other models of unidirectional digital cable products tested at a qualified test facility for compliance with the procedures of Uni-Dir-PICS-I01-030903: “Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma” (incorporated by reference, see § 15.38) unless the first model tested was not a television, in which event the first television shall be tested as provided in § 15.123(c)(1). However, ~~¶~~The manufacturer or importer shall ensure that all subsequent models of unidirectional digital cable products comply with the procedures in the Uni-Dir-PICS-I01-030903: “Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma” (incorporated by reference, see § 15.38) and all other applicable rules and standards. The manufacturer or importer shall maintain records indicating such compliance in accordance with the verification procedure requirements in part 2, subpart J of this chapter. The manufacturer or importer shall further submit documentation verifying compliance with the procedures in the Uni-Dir-PICS-I01-030903: “Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma” (incorporated by reference, see § 15.38) to ~~a facility~~ the testing laboratory representing cable television system operators serving a majority of the cable television subscribers in the United States.

(4) Unidirectional digital cable product models must be tested for compliance with Uni-Dir-PICS-I01-030903: “Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma” (incorporated by reference, see § 15.38) in accordance with Uni-Dir-ATP-I02-040225: “Uni-Directional Receiving Device Acceptance Test Plan,” 2004, (incorporated by reference, see § 15.38) or an equivalent test procedure that produces identical pass/fail test results. In the event of any dispute over the applicable results under an equivalent test procedure, the results under Uni-Dir-ATP-I02-040225: “Uni-Directional Receiving Device Acceptance Test Plan,” 2004 shall govern.

## CERTIFICATE OF SERVICE

I, Judith A. Easterday, do hereby certify that a copy of the foregoing “National Cable & Telecommunications Association’s Opposition to Petitions for Reconsideration and Notice of Joint Proposal for Improved Testing Rules” was served by United States First Class Mail, postage prepaid, this 10<sup>th</sup> day of March 2004 on the following:

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