

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Digital Broadcast Copy Protection)	MB Docket No. 02-230
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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
IN SUPPORT OF THE PETITIONS FOR RECONSIDERATION
OF GENESIS MICROCHIP, INC.**

The American Antitrust Institute (“AAI”) submits these comments in connection with the Petitions for Reconsideration filed by Genesis Microchip, Inc. in the above-captioned proceedings.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

¹*Petition for Reconsideration of Genesis Microchip, Inc.*, (filed Jan. 2, 2004), of *Digital Broadcast Content Protection*, MB Docket No. 02-230 (hereinafter, “*Broadcast Flag*”), *Report and Order and Further Notice of Proposed Rulemaking* (rel. Nov. 4, 2003), and *Petition for Reconsideration of Genesis Microchip, Inc.*, filed Dec. 29, 2003, of *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, (hereinafter, “*Plug-and-Play*”), *Second Report and Order and Second Notice of Proposed Rulemaking*, (rel. Oct. 9, 2003).

and international economy. Background on the AAI may be found at www.antitrustinstitute.org, including participation in other matters involving the telecommunications and media industries.²

In its *Comments* to the FCC in the *Broadcast Flag* proceeding,³ the AAI urged the Commission in connection with its approval of content protection technologies to proceed with caution when considering adoption of technological specifications that are not the result of fair and open deliberations by recognized standards-setting bodies. In particular, the AAI recommended that the Commission establish mechanisms that would prohibit technology licenses which fail to identify the patents being licensed, if any, the owners of those patents, or the necessary claims involved in implementing the relevant specification. If the intellectual property underlying the specifications is not subject to disclosure, there can be no basis on which to evaluate what is being licensed, or to adjudge the legitimacy of joint licensing arrangements. Moreover, overly broad “non-assert” clauses or patent “grantbacks” put at risk the intellectual property of those adopters whose activities are innovation intensive in closely related technologies. Without the disclosure of the patents being licensed, there is no way to evaluate such risks.

The measures recommended by the AAI include independent license administration, the establishment of a mechanism for resolving disputes over the terms of the licenses, and prohibitions against non-transparent licenses, overly restrictive compliance rules, and overly broad and onerous non-assert or grantback provisions.

²Funding 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*Comments of American Antitrust Institute to the Report and Order and Further Notice of Proposed Rulemaking, Broadcast Flag*, MB Docket No. 02-230 (filed Feb. 13, 2004).

Newly adopted provisions of the *Broadcast Flag* regulations provide for the use the Digital Visual Interface ("DVI") Specification Revision 1.0, licensed by the private Digital Display Working Group,⁴ and new cable *Plug-and-Play* regulations require that cable operators provide digital set-top boxes by July 1, 2005 that include either a DVI output or its next-generation incarnation, a High Definition Multimedia Interface ("HDMI"), licensed by the private HDMI Licensing, LLC.⁵ These technologies, and others that the Commission has been or will be asked to incorporate into its regulations, are not "industry standards," and are not the product of regular standards-setting activities, which would have been subjected to a reasonably well-understood antitrust framework. Instead, these technologies are the result of the activities of informal "working groups." The fact that technology that is only available through license agreements that lack of transparency and contain objectionable terms have penetrated the market to some extent does not evidence any broad acceptance of such arrangements so much as it reflects the market power of the content providers who make their product available only to manufacturers and others who adopt technologies favored by them.

Because it is largely the consequence of the market power of one or more groups of industry participants, such market penetration should not be confused with a fully competitive, market determined outcome. As the product of private choices, these arrangements, while sub-optimal, are subject to correction by market forces. Their incorporation into FCC regulations, however, insulates them against such forces. When heavy-handed business practices are enshrined in the mantle of governmental regulation, it leads to unacceptably anticompetitive consequences. The wholesale importation of such practices

⁴47 C.F.R. §73.9003(a)(7) and 47 C.F.R. §73.9004(a)(6).

⁵47 C.F.R. §76.640(b)(4).

into governmental regulations nullifies any likelihood that market forces will correct such behavior, and solidifies the market power of the parties that have promoted or supported the technology in the first place.

The emerging framework for working groups composed of industry segments, outside of the traditional standards framework, developing what will become *de jure* multi-industry standards once they are blessed by the FCC, raises substantial questions that competition policy has not yet addressed. Unless these questions are addressed in a coherent way by the Commission, the implementation of DTV will likely be delayed by conflicts and skewed by actions that do not reflect the efficiencies of a well-functioning market.

Genesis Microchip, Inc. raises serious concerns about the incorporation of the DVI and HDMI specifications into *Broadcast Flag* and *Plug-and-Play* regulations on the grounds that, *inter alia*, such regulations require the use of private specifications that do not disclose the relevant patents or necessary claims, require adopters to relinquish rights to intellectual property to an un-assessable extent, and adopt technologies that have not benefitted from the safeguards adhered to by recognized standards-setting authorities. Its concerns appear to be well-founded and reflect the competitive dangers which the AAI has attempted to emphasize. Although the merits of the specific litigation between Genesis Microchip, Inc. and the purveyors of the DVI technology are not known to the AAI, if the controversy arose because of the non-standard nature of the DVI license, it behooves the Commission to refrain from mandating technologies that adopt such a licensing regime until the licensing terms can be fully vetted to ensure that they are transparent and fair to all interested parties.

Respectfully submitted,

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