

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

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

**Reply Comments Of
The Consumer Electronics Industry**

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The Consumer Electronics Association (“CEA”) and the Consumer Electronics Retailers Coalition (“CERC”) respectfully submit this Reply to Comments that were submitted in answer to the Commission’s Second Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹ In Comments and Reply Comments filed jointly on March 28,² and April 28,³ 2003, CEA and CERC (the “Consumer Electronics Parties”) supported the consumer electronics/cable “Plug & Play” framework on which the Commission requested comments. In separate comments filed on February 13, 2004, the Consumer Electronics Parties responded to the additional questions posed by the Commission in its SFNPRM.⁴ Now the Consumer Electronics Parties reply to others who commented on or before February 13.

¹ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Report and Order and Second Further Notice of Proposed Rulemaking (Rel. Oct. 9, 2003) (“SFNPRM”).

² *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Joint Comments of the Consumer Electronics Association and the Consumer Electronics Retailers Coalition in Response to Further Notice of Proposed Rulemaking (Mar. 28, 2003) (“Consumer Electronics Industry Comments”).

³ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Joint Reply Comments of the Consumer Electronics Association and the Consumer Electronics Retailers Coalition in Response to Further Notice of Proposed Rulemaking (Apr. 28, 2003) (“Consumer Electronics Industry Reply Comments”).

⁴ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of the Consumer Electronics Association in Response to Second Further Notice of

(continued...)

In its February 13 Comments, CEA observed that the Commission's concerns, as expressed in its SFNPRM questions, can be grouped in two major subject areas –

(1) *fairness to consumers* –

- FCC allowance of HDTV “downresolution”
- FCC allowance of product, technology, and interface revocation
- Additional pre-sale labeling obligations
- Obligations placed on 550 MHz cable systems

(2) *level playing field* –

- FCC determinations re standards for approval of new outputs
- FCC requirement of objective criteria for technological decision-making
- Who makes initial approval determinations

The Consumer Electronics Parties follow this classification system in replying to the other parties' comments.

I. OVERVIEW – FAIRNESS TO CONSUMER ISSUES.

The Consumer Electronics Parties conclude from the other February 13 comments that their resistance to HDTV Downresolution and other unilateral schemes by which consumer products and interfaces could be disabled or degraded is very well founded. Support for any such ideas is based on vague justifications for grants of enormous unilateral power, at great potential detriment to consumers and consumer welfare. The issues of pre-sale labeling and obligations on 550 MHz systems, by contrast, did not attract much interest; no change in existing regulations seems necessary.

Proposed Rulemaking (Feb. 13, 2004) (“Feb. 13, 2004 CEA Comments”) and Comments of the Consumer Electronics Retailers Coalition on Second Further Notice of Proposed Rulemaking (Feb. 13, 2004) (“Feb. 13, 2004 CERC Comments”).

II. OVERVIEW -- LEVEL PLAYING FIELD ISSUES.

These issues were posed in general terms in both the Broadcast Flag proceeding⁵ and Plug & Play proceeding, and attracted more comment in the latter forum. The Consumer Electronics Parties, in their review of these comments, did not see any persuasive argument for a revision of the Plug & Play regulations. Some commenters' proposals seemed to reflect more general agendas, unrelated to navigation device or Plug & Play issues. The Consumer Electronics Parties found these proposals to be both lacking in relevance and potentially destructive to the introduction of competition, at which this proceeding is aimed. We also continue to urge the Commission to resist proposals to merge this proceeding with the Broadcast Flag proceeding, as they originate from different policy and congressional objectives and focus on different services.

III. PROPONENTS OF HDTV DOWNRESOLUTION ARE TOO EASILY DISMISSIVE OF THE LEGITIMATE EXPECTATIONS OF LAW-ABIDING CONSUMERS.

The Consumer Electronics Parties are struck and concerned by how casually several commenters dismiss the unmistakable, inevitable, and unfair consequence that HDTV downresolution would bear for MOST present HDTV consumers – not only those with only component video inputs, but **also for consumers who own displays with digital interfaces as well**. This easy dismissal is based on the promulgation and acceptance of a number of fallacies that are easily identified and disposed of.

A. The Notion That HDTV Downresolution Will Not Really Harm Consumers Is Based On Obvious Fallacies.

A number of commenters have sought shelter in the anecdotal, apocryphal, and incorrect notion that HDTV downresolution will not harm consumers' viewing.⁶ Some move on to the

⁵ *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230.

⁶ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of The National Cable & Telecommunications Association ("NCTA") at 4-5 (Feb. 13, 2004) ("NCTA Comments"); Comments of The Motion Picture Association of America, Inc. Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, and The Walt Disney Company ("MPAA") at 5-7 (Feb. 13, 2004) ("MPAA Comments"); Comments of BellSouth Entertainment, LLC at 2-3 (Feb. 13, 2004) ("BellSouth Comments"); Comments of Time Warner, Inc. at 8 (Feb. 13, 2004) ("Time Warner Comments"); Further Comments of DirecTV Inc.

(continued...)

Orwellian argument that denying HDTV viewing is actually “good for” consumers in the long run. These arguments can most kindly be characterized as signifying a triumph of hope over experience:

- The claim of “no harm” is actually made only as to early “CRT” rear-projection models, and is actually based on only a single anecdote from a single test at a single retail store with pre-selected program material. Its source is a single letter, from a lawyer. (NCTA at 5 n.7)
- As the Declaration of Sean Wargo (attached to the HRRC Comments) showed, there are 360,000-and-counting state of the art flat panel and digital microdisplay DTVs (“Fixed Pixel Displays”) with only component video inputs, as to which the “no harm” claim has never been made. Fixed Pixel Displays, as the name implies, are devices with a specific number of individually addressed pixels (as opposed to scanning displays, like CRT direct or rear-projection displays). These 360,000-plus high-definition displays typically display 921,600 pixels (720p) from analog inputs.⁷
- The damage from downres would also apply to *most all* state of the art DTVs that *do have* digital interfaces, because the majority have *only one digital interface*, which may need to be connected to a component other than the STB.
- DirecTV’s “support” for downres actually shows that for many of its subscribers, the component video input will produce a *blank screen* and the customers will have to switch to the analog NTSC connection, to get an NTSC picture that is *worse than the standard definition digital picture that DirecTV delivers*.
- The fallacy of consumer electronics acceptance of downres due to 5C “adoption” is admitted by DirecTV (at 4-5), which correctly points out that its use is limited there to *secondary* interfaces, not the primary viewing interface.
- Any suggestion in NCTA’s comments that CE manufacturers somehow have embraced HDTV downresolution because they proposed a standard means of triggering it would be directly contrary to the record. A means of triggering of downresolution was unilaterally made a condition on the receipt of any license at all.⁸ CE (at 7-9) attempts to bargain for a “grace period” to ameliorate the effects on early adopters were rejected.

at 5-6 (Feb. 13, 2004) (“DirecTV Comments”) (although DirecTV does not go so far in making this claim as the other commenters).

⁷ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Home Recording Rights Coalition (“HRRC”) Comments On Further Notice of Proposed Rulemaking at Appendix A (Feb. 13, 2004) (“HRRC Comments”).

⁸ See Letter from Michael Petricone, Vice President, CEA, to Marlene H. Dortch, Office of the Secretary, FCC, CS Docket No. 97-80 at 2-5 (Oct. 23, 2003).

- The argument that downres will help “migrate” consumers to digital interfaces (MPAA at 7; NCTA at 5) conflicts with the “no harm” argument that downres will have its effect primarily on *those who already own* older sets. Thus, unless a consumer is unfairly damaged by downres there will be no incentive to “migrate to a newer set.”
- The argument that “consumers will complain” so the FCC can change its mind later conflicts with the argument that most consumers will migrate to digital interfaces (leaving only a minority of early adopters to complain).
- The argument that HDTV downresolution will have any effect whatsoever on Internet distribution of HDTV content is farfetched, lacks vital supporting facts, and seems outweighed by its *facilitation* of SD Internet distribution.
- The argument that downres will be “good” for consumers by promoting content distribution conflicts with the argument that the market will police its use, and suggests a conspiracy in restraint of trade.

The inescapable fact, as the consumer electronics parties review in more detail below, is that HDTV downresolution is designed to punish and intimidate law-abiding consumers whose only “transgression” was to become HDTV adopters. It will, indeed, punish them – though it is too late to intimidate them.

B. HDTV Downresolution Would Have A Severe Impact On Early Adopter Owners Of HDTV and DTV Receivers.

The Compliance Rules of the DFAST Technology License Agreement, as referred to in the NCTA Comments (at 3-4), define the imposition of “downresolution” as removing half the vertical and half the horizontal pixel information, resulting in a program with 1/4 the pixel information. DirecTV (at 5-7) categorizes this as “consumer-friendly” and “well-above ‘viewable’” and a “small price to pay” though admits that its own early STBs will not do even this, but will “go dark,” requiring a cable switch to NTSC; BellSouth (at 2-3) calls it “user-friendly” (though at lower resolution). MPAA, Time Warner, and NCTA all rely on anecdotal and unsupported assertions from MPAA’s lawyer (NCTA at 5 n.7), based on a single visit to a single retailer with perhaps a single piece of source material, that 6 million consumer receivers will not be able to tell the difference.

Common experience, in addition to simple math, seems at odds with this assertion. This past football season, HDTV owners across the country were in a position to compare, on adjacent channels, NFL games broadcast on CBS, in 1080i, with Fox’s “480 widescreen” NFL

broadcasts. To the knowledge of the Consumer Electronics Parties, nobody in the content or broadcast industries has claimed not to see any difference. Similarly, consumers every day have the ability to compare HDTV cable and satellite channels with “SD” channels that, except for aspect ratio, clearly illustrate the difference between HDTV and downres’d former HDTV programming.

How to explain the MPAA assertion, which is now blindly relied upon by other parties? It seems based on a purported retail environment with bright fluorescent lighting that is uncommon in homes, in which displays typically are adjusted to attract consumers via maximum brightness. On a CRT set, an adjustment for maximum brightness may lead to a “blooming” effect that softens effective picture resolution. Apparently, the “no harm” argument is based on viewing pre-selected software in such an environment.⁹ These arguments then *assume that consumers and custom and retail installers will not adjust the set’s brightness in a home environment*. In other words, even if one were to accept such an anecdotal argument based on pre-selected software and self-judgment, it is further based on an assumption that consumers and their installers are too lazy to make a one-time adjustment to their HDTV receiver, even though they have paid for HDTV receivers, converter boxes, and programming.¹⁰ This is only one of the ways in which the proponents of HDTV downresolution are fundamentally *dismissive* of consumers and their legitimate concerns and expectations.

C. HDTV Downresolution Would Have A Severe Impact On Consumers With State Of The Art HDTVs Without Digital Interfaces.

The Declaration of Sean Wargo (HRRRC Comments at Appendix A), CEA’s Director of Industry Analysis, established for the record that the 6 million DTV receivers that have *only* component video inputs include approximately 360,000 that are state of the art – either flat panel (Plasma or LCD) or digital microdisplay (DLP, LCD, LCos). Downresolution proponents do not contend that *these* consumer products – which generally are up to several times as expensive as

⁹ It is not clear whether any comparisons were side-by-side or done serially or, if side-by-side, the sets were comparably adjusted.

¹⁰ Proponents such as DirecTV (at 7) argue that consumers *should* be expected to physically switch their connectors *every time* they encounter a “downres’d” program, but apparently believe that consumers should *not* be expected to set up their sets, via a simple remote control adjustment, the first time they or an installer turn on a TV in their home.

CRT-based sets – would be immune to the effects of HDTV downresolution.¹¹ Nor can it be expected that these sets will wear out or be scheduled for replacement any time soon. There is simply no getting around the fact, even if one were to accept the anecdotal arguments about older sets:

- HDTV downresolution denies HDTV viewing on these displays.
- There is simply *no way* to avoid this, no matter how expensive the set.
- These consumers have done nothing wrong and not violated any law.
- At present, flat panel and digital micro-display sets account for about *one third* of DTV sales.

D. HDTV Downresolution Would Have A Severe Impact On Consumers With State Of The Art HDTVs With Digital Interfaces.

The FCC also asked about effects on DTV sets that *do* have digital interfaces. As the Consumer Electronics Parties pointed out in their March 10 Opposition to Petitions For Reconsideration (in the context of Selectable Output Control), viewing of these sets would *also* be defeated or severely disturbed, due to the real-world setup in consumers' homes.¹²

DVD players are available at present with both DVI and component video outputs, but these playback devices do not yet offer HD resolution. It seems a palpable possibility that if there is no actual copy protection solution to the analog hole, HD playback devices might have DVI / HDMI or 1394 interfaces, *but not HD component video interfaces*. Most DTV displays with a DVI or HDMI input have *only one* of them. In such case, a consumer will be obliged to use the DVI / HDMI input for the other source, *and to rely on the component video input to*

¹¹ Indeed, if proponents *did* make such a claim, it would be at odds with their only, convoluted rationale for any deterrent value to downres: that it deters recording for viewing on state-of-the-art sets that *can* tell the difference.

¹² *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Consumer Electronics Industry Opposition to Petitions for Reconsideration at 4-6 (Mar. 10, 2004) (“CE Opposition”).

*receive the output of the cable or satellite set-top box. This puts the consumer in the same fix as the consumer who has no DVI / HDMI input at all.*¹³ This conundrum demonstrates:

- As even several of the proponents admit, the only solution to the “analog hole” is *equitable copy protection*, so as to allow the same basic signaling abilities and Encoding Rules that apply to digital transports.
- *In the absence of an analog hole solution* HDTV downresolution must operate inequitably against *virtually all* DTV consumers, not just some of them.
- *In the presence of an analog hole solution* there is no purported rationale for HDTV downresolution.¹⁴

E. DirecTV’s Filing Demonstrates That HDTV Downresolution Would Have An Even More Severe Effect On DBS Customers, Who Would Have To Rely On NTSC-Quality Pictures.

In the course of DirecTV’s advocacy of HDTV downresolution, it admits an arresting fact: In the homes of purchasers of some DBS receivers, receipt of a “downres” trigger would *not* merely have the posited effect of removing 3/4 of the pixel information from the component video interface. It would *shut the component video interface down entirely*. DirecTV (at 7) candidly advises the Commission:

“[V]iewers owning those initial legacy units are instructed to and must physically switch television inputs to enjoy the program.”

As the Consumer Electronics Parties have noted here and in their Reconsideration Opposition filing (CE Opposition at 4-6, n.16), it is settled by statute, case law, and FCC doctrine that policy decisions can *not* be based on any such expected consumer behavior. Hence, the FCC must consider:

- If HDTV downresolution were to be implemented and triggered, owners of these DBS receivers would simply lose viewing of the HDTV programs that are subject to downresolution.

¹³ As the Consumer Electronics Parties note in the Opposition filing, it is settled statutory, Supreme Court, and FCC precedent that consumers can *not* be expected to switch inputs from program to program, *even if* such switching can be accomplished through a simple “A/B” switch. CE Opposition at 4-6 & n.16.

¹⁴ Time Warner, to its credit, explicitly recognizes that there would be no case for HDTV downresolution in the presence of such a solution (Time Warner at 8), which was the focus of the “ARDG.” The Consumer Electronics Parties have for several years expressed, and now repeat, their willingness to work cooperatively on legislation to achieve such a solution.

- Even if these consumers *could* be expected to manually switch around their connections whenever they encounter downres'd programming,¹⁵ DirecTV (at 7-8) admits that they would receive *neither* HDTV *nor* the “above ‘viewable’” downres'd picture. They would pay for HDTV and receive NTSC.

F. Proponents' Assumptions That Downresolution Would Be An Effective Tool Against Internet Distribution Are Unsupported And Easily Disproved.

There is a substantial record, compiled in this proceeding and in the “Broadcast Flag” proceeding, from which it can only be concluded that the effectiveness of HDTV downresolution as a copy protection or Internet distribution “tool” is likely to be zero. Its real rationale seems political and strategic, and its only effect on consumer choice can be to cause consumers *to regret purchase choices they have already made.*

1. Substantial evidence of record shows that compression that maintains HDTV quality would require unmanageable bandwidth.

While the proponent commenters cite news articles and anecdotes discussing progress in digital compression techniques, the record is devoid of any demonstration that techniques are available that reduce bandwidth to the extent feasible for exchange of HDTV-size files *while retaining HDTV viewing resolution.* There is ample record evidence that such distribution is not feasible in the absence of such compression. In other words, there is a difference between *compression* and *lossless compression.* **Therefore, this “interim solution” seems aimed at a problem that, if it will exist, will only exist sometime in the indefinite future.**

Moreover, content providers have admitted that most Internet distribution originates from leakages in the motion picture industry's own distribution chain. Any long-term solution to these problems would also likely extend beyond the life of an “interim” solution, making “downres” a tool that does not address or avoid the real problem.

2. Substantial evidence of record shows that HDTV downresolution in fact facilitates compression of content into a form that *can* be redistributed over the Internet.

¹⁵ The circumstance encountered here would be far more onerous than the simple “A/B switch” scenario considered by the Congress and ruled on by the Supreme Court. Here, the “downres” may occur sporadically and without warning, as opposed to the situation, discussed in the *Turner II* case and in legislation, in which a consumer would always know which channels are delivered by cable and which are delivered via antenna.

Whether “downres” operates by “throwing away” 3/4 of the pixels or replacing them with “dummy” pixels, it is incontrovertible that it must either *compress* the picture, or *facilitate* compression of the picture for Internet redistribution. Therefore, as many commenters have observed,¹⁶ the *major*, and perhaps *only* real world effect of HDTV downresolution would be *to facilitate the SD-quality Internet redistribution of content, to the extent home content may be the source for such redistribution.*¹⁷

3. It seems clear that HDTV downresolution is *not* aimed at affecting Internet redistribution at all; rather it is a strategic tool for political purposes.

In light of the above considerations, one would have to ask why otherwise rational content providers and distributors would support HDTV downresolution. The only sensible answer seems to be: (1) to try to influence the configuration of future devices by penalizing consumers who own present ones, and (2) to gain political leverage by holding law-abiding consumers hostage. These may be considered by some to be acceptable stratagems for private parties, but they should not be acceptable as rationales for FCC regulatory decisions.

G. Arguments That Downres Is Actually “Good For Consumers” Insult Consumers’ And The Commission’s Intelligence.

Despite the undeniable impositions and incapacitations imposed by HDTV downresolution, several commenters still insist that it is “user friendly” and / or “good” for consumers. This is (1) patronizing in the extreme, and (2) as voiced by MPAA, seems to be based on an assumed conspiracy to withhold content.

¹⁶ CEA Comments at 4; *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of Public Knowledge and Consumers Union at 3-5 (Feb. 13, 2004) (“The Consumer Groups Comments”).

¹⁷ The Home Recording Rights Coalition observed in its Dec. 6, 2002 Comments in the Broadcast Flag proceeding that broadband home Internet *upload* speeds are much, much slower than download speeds, making it unlikely that homes will be the source for *HDTV* redistributions of content in the foreseeable future.

1. MPAA's "good for consumers" argument either presupposes an industry-wide agreement to withhold content or is based on farfetched speculation.

MPAA argues (at 6):

"If image constraint capability is built into a device, it will not take anything away from a consumer that that consumer would otherwise receive. For example, image constraint capability would not rob a consumer of a 1080i display of a newly released hit motion picture, "Movie X." Rather, a ban on image constraint capability, if adopted, would rob the consumer of the ability to watch Movie X at all in an early-window time frame, because that consumer's cable or satellite device would not be secure enough to receive it."

How does MPAA know this? Look at all of the assumptions built into these three sentences:

- That the content provider *will* have Selectable Output Control power, so could decline to distribute the content on an *interface* basis.
- Alternatively, if the content provider does *not* have Selectable Output Control power, that it will decide to withhold the content from MVPD distribution entirely.¹⁸
- It seems plausible for MPAA, an association that owns no movie studio, to make a business prediction in either case only if (1) MPAA, as an association, has polled its members on this subject, which would raise obvious issues under the antitrust laws, or (2) one were to accept such unsupported and farfetched speculation as evidence.

2. Commenters who label HDTV downresolution as "good" for consumers presume a cost / benefit analysis that it is unlikely most consumers would make in their own interest.

As the Consumer Electronics Parties demonstrate above, if the "good for consumers" argument has any rationale, it is that in the absence of a downresolution regime, a content provider would *not provide some HDTV content to MVPDs at all*. (Ability to choose among outputs would presume Selectable Output Control, which is not allowed by the Encoding Rules and would, in any event, do as much or more harm to consumers.) In light of (1) the purported "interim" nature of HDTV downresolution while a copy protection solution is sought, and (2) the

¹⁸ MPAA seems to assume that withholding content from MVPD distribution – the avenue to 85% of its audience, and virtually 100% of its present audience for conditional access content – would be a natural consequence to avoid a remote and hypothetical risk.

inability to show that there is any imminent threat of propagation of HDTV bandwidth programming via the internet, it seems unlikely in the extreme that, in a free market, any program provider would make the choice to withhold its content from the market.¹⁹ But even if one did, *this would not help the “downres’d” HDTV owner to receive any additional HDTV programming.* (One assumes the programs would still be available in SD resolution.)

Therefore, it seems likely that *a consumer owning an HDTV receiver and looking at the threat from downresolution would not choose to endure it based on some hypothetical chance for his or her neighbor to receive additional programs in HDTV.*

IV. MOST PARTIES ARE PROPERLY WARY OF INTERFACE OR TECHNOLOGY REVOCATION.

There seems a strong consensus among most commenters – and *all* commenters with direct responsibility for manufacturing and selling products to consumers – that the revocation of technologies or interfaces should not go beyond the application lost, cloned, or stolen certificates, as is presently provided for in license agreements. Many parties also agree that measures such as withdrawal of the approval or the listing of an interface (which should not be called “revocation”) should be an extraordinary occurrence, requiring strong and independent oversight assuring that it occurs on a going-forward basis only *and* does not harm consumer investments.

A. The Consumer Electronics Parties Agree With Commenters Who Urge Recognition Of Consumer Interests And Investment, And Who Argue That Decisions Potentially Harming Consumers Should Be Taken Only By Product Manufacturers Or By Independent Entities, And Not Unilaterally By Content Providers Or Distributors.

- ATI suggests²⁰ that not even independent third parties should take such drastic decisions because “none of these parties invest in the development of technologies for the personal computer or consumer electronics industries nor are they the intended end consumers of digital television receiving devices. None of these parties are at risk monetarily if a technology is not approved or revoked. *** Revocation of a technology should never,

¹⁹ The Consumer Electronics Parties also note in passing that this example has nothing to do with UDCPs (although downres has no valid rationale for *any* means of program delivery).

²⁰ *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of ATI Technologies, Inc. at 2-3 (Feb. 13, 2004) (“ATI Comments”).

under any circumstances, be retroactive.” It also points out that even older chips tend not to disappear from the market; they instead migrate to a different range of products.

- Microsoft, Apple, HP and Dell,²¹ while favoring decision-making by the FCC or an independent authority, similarly point to customers’ expectations that UDCP products will have long useful lives, and the need to honor these expectations.
- Matsushita Electric Corporation of America²² notes that “revocation” is a separate issue from “delisting” a technology, and that even “delisting” must include a weighing of the “likely harm to manufacturers, retailers, and consumers if a given technology is removed from the list.” The Consumer Groups (at 10) make a similar point.

B. The Consumer Electronics Parties Disagree With NCTA’s Advocacy Of Selectable Output Control As A “Revocation” Or “Withdrawal” Tool.

DirecTV (at 12 – 13) argues for flexibility on a case-by-case basis, with decisions left to the “MVPD, consumer electronics and content industries.” MPAA, in a portion of its “Broadcast Flag” filing²³ that it incorporates by reference, proposes a process, drafted jointly with “5C” company representatives, that would be overseen by the Commission. NCTA, however, argues (at 18) that “[s]ome outputs may be so compromised that only a substantial response (such as turning off the insecure port through selectable output control) can address the compromise.”

The Consumer Electronics Parties voiced their comprehensive opposition to Selectable Output Control in their March 10 Opposition To Petitions For Reconsideration in this proceeding. In that Opposition, the Consumer Electronics Parties noted (at 4):

“Selectable Output Control” (“SOC”) is the discretionary triggering of instructions to a home device, via a code from the program’s originator or distributor, to turn off *any or all* home interfaces at the first point at which signals emerge from a navigation device, for transmission to a display or to another home network component. Such remote control over consumer home viewing (and recording) could be imposed without warning on a program-by-program basis and

²¹*In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of Microsoft, Apple, HP and Dell (“IT Industry Commenters”) at 13-14 (Feb. 13, 2004).

²²*In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments on Behalf of Matsushita Electric Corporation of America in Response to Second Further Notice of Proposed Rulemaking at 5 (Feb. 13, 2004) (“Panasonic”).

²³*In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Petition for Reconsideration of the Motion Picture Association of America, Inc. at 9-11 (Dec. 29, 2003).

entirely as a matter of content owner or distributor discretion. It could be imposed because, in the sole and unfettered judgment of the content provider or distributor, one interface seems more secure than another, or because the favored interface does not support home recording as protected by Encoding Rules.”

The Consumer Electronics Parties strongly oppose use of the unilateral tool of Selectable Output Control for *any* purpose. As discussed in this security context, amid the concerns about fairness to consumers, consumer expectations, and consumer reliance on the legitimate use of products they have lawfully acquired, advocacy of Selectable Output Control sticks out like the proverbial *sore thumb*. It has no place in the discussion of “revocation,” or of a *process* for “retiring” outputs from lists occurring in licenses or regulations. In this, or any, context, Selectable Output Control smacks of illicit self-help.

V. MANY OTHER PARTIES AGREE WITH THE CE PARTIES THAT LABELING REQUIREMENTS SHOULD REFLECT RATHER THAN FORCE MARKETPLACE DECISIONS.

Only one commenter, the Consumer Groups filing, supported the notion of fixed, pre-sale labels, and this support was so couched in qualifications and acknowledgments of pitfalls as to seem self-contradictory. Noting (at 7) that “[t]here is immense potential for consumers to be confused in the marketplace,” PK and CU then suggest a regime that, they candidly admit, may be apt to confuse consumers further.²⁴ They then pose mutually-contradictory justifications for risking such confusion:

- “[I]n an era in which an increasing percentage of consumer-electronics devices are sold online, providing complete information about these products prior to the sale is even more essential”²⁵
- “[I]f a consumer sees a label he or she doesn’t understand, the consumer can ask the salesman”²⁶

²⁴ “We recognize that some may object that a pre-sale labeling requirement, or any similar consumer-information measure of the sort we discuss here, may itself generate some degree of marketplace confusion and uncertainty.” Consumer Groups Comments at 8.

²⁵ *Id.*

²⁶ *Id.*

The Consumer Groups' struggle for a coherent rationale for providing a *fixed, government-issue label* may explain why *no other party advocated such a fixed, government regime for a dynamic and changing marketplace.*

- Microsoft, Apple, HP and Dell (at 16) noted, as did the Consumer Electronics parties in their respective comments, that “[m]anufacturers of Unidirectional Digital Cable Products will have every incentive to provide the consuming public, which is quite skeptical after years of delay in the deployment of these products, with as much information as possible about what consumers can and cannot expect from the products.”
- Panasonic (at 2) suggested that “the Commission should continue to support manufacturers and cable operators’ on-going efforts – which both have reported to the Commission – to develop and promote industry standards for nomenclature and labeling, and their use in marketing, promotion and advertising.”
- NCTA noted (at 6) that “NCTA has worked with cable operator representatives and CableLabs to complete a set of frequently asked questions that may be used by cable operator customer support representatives to inform cable customers of the capabilities of UDCPs, and provide consistent answers to anticipated queries consumers may have when calling their local cable operator help-desk for support. Additionally, the cable industry has partnered with the CE industry to develop a common logo that will facilitate consumer awareness of “Digital Cable Ready”(“DCR”) and “Interactive Digital Cable Ready” (iDCR”) devices.”
- Time Warner encouraged manufacturers and retailers to provide certain additional information (at 18 – 19) and said (at 19), “Time Warner itself has begun to work with retailers in certain markets on consumer education initiatives in connection with the roll-out of digital cable-ready sets and other UDCPs, and there are other ongoing efforts in this area throughout the cable industry. CE manufacturers should be formally enlisted into these cross-industry consumer education efforts as well – through product literature and trouble-shooting guides – since it is the functionalities and capabilities of their products that are at stake.

As CEA noted in its Comments, it has provided to the Commission, under separate cover, samples of ongoing joint education and promotion efforts of the sort referred to by NCTA and Time Warner. The Consumer Electronics Parties are also confident that, once aware of the nature of these educational and promotional efforts, and realizing that they reflect enlightened self-interest, PK and CU will also realize that the acknowledged downsides of government-mandated text would outweigh any benefit. In any event, as things now stand, theirs was the only comment to suggest that the Commission should go in that direction.

VI. THIS PROCEEDING SHOULD NOT BE A SPRINGBOARD FOR AGENDAS NOT INCLUDED IN THE CONGRESS'S DIRECTION TO THE COMMISSION AND NOT RELEVANT TO OPENING A COMPETITIVE MARKET FOR NAVIGATION DEVICES; NOR SHOULD IT BE MERGED WITH THE BROADCAST FLAG PROCEEDING.

The Commission received some suggestions from commenters aimed at furthering more general policy agendas, but which, in the view of the Consumer Electronics Parties, would not be appropriately engrafted onto this proceeding. The Commission should not confuse the complicated-enough process of introducing competition into a market that has been closed for decades by reaching out and trying to hammer in extraneous agendas.

A. Requiring Involvement Of Standards Bodies In Marketing Decisions Would Chill Innovation And The Introduction Of Products To Markets.

The American Antitrust Institute suggests²⁷ without limitation that “[i]nitial approvals should be the responsibility of the Commission or a recognized external standards-setting body.” Genesis Microchip²⁸ goes further, suggesting that “[a]ll new DTV technologies should be approved by ANSI-accredited or open standards-setting organizations that report to a Federal Advisory Committee.” As the Consumer Electronics Parties discussed at 19 – 21 of their Opposition To Petitions For Reconsideration, this sentiment reflects a basic misunderstanding of difference between a “specification” and a “standard,” a lack of appreciation of the role played by each in the innovation process, and a failure to understand that standards organizations are responsible neither for innovation nor for its commercialization. Although CEA is both a due process standards organization and a proponent of reliance of standards, the Consumer Electronics Parties pointed out in their Broadcast Flag Reconsideration Opposition²⁹ that the adoption of such an extreme agenda would “bring the DTV transition to a screeching halt.”

²⁷*In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of the American Antitrust Institute at 6 (Feb. 13, 2004).

²⁸*In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of Genesis Microchip, Inc. at 4-5 (Feb. 13, 2004).

²⁹*In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Consumer Electronics Industry Opposition to Petitions for Reconsideration at 7 (Mar. 10, 2004).

B. While Interoperability Between MVPD Systems And Competitive Devices Is Both Vital And Achievable, Requiring Interoperability Between Content Protection Technologies Is Neither.

The Consumer Group parties (PK and CU) suggest (at 6) that the Commission should take this opportunity to require that “new content-protection technologies must be interoperable with other approved technologies.” The effect of such a rule would be to *cut down* on, rather than spur, competitive entry. It would give a huge, perhaps insurmountable, advantage to those technologies that were approved first. Microsoft, Apple, HP and Dell (at 14) urge the Commission to move in the other direction, and to allow for “architectural flexibility in the development of Unidirectional Digital Cable Products.”

While seeing no need to modify the FCC rules at this time, the Consumer Electronics Parties agree that considerations of competitive entry should trump those of content protection measure uniformity. While proposals grounded in enhanced “interoperability” among secondary measures, such as content protection, are often well-motivated, they should be judged by the well-known caution, “be careful what you ask for.” Depending on which existing measure is taken as the reference, the result could be either a domain in which *all* copy protection measures support home recording, or a domain in which *none* do.³⁰

C. This Proceeding Need Not And Should Not Be Merged With The Broadcast Flag Proceeding.

In their respective February 13 Comments, the Consumer Electronics Parties warned that the congressional and policy origins of this proceeding are specific and unique, and it should not be merged in any important respect with the Broadcast Flag proceeding, which has very different origins and directions. The Consumer Electronics Parties are not persuaded by those commenters who urge the Commission to go in such a direction. AAI and Genesis urge such a combination as incident to their agendas, which the Consumer Electronics Parties criticize above, for unified and centralized administration of the intellectual property marketplace. Other commenters resist such a direction, for various reasons:

³⁰ As the Consumer Electronics Parties note in their Broadcast Flag Reply Comments of this date, no parties to that proceeding seem willing to risk having a single “PDNE” be defined by the FCC or anyone else.

- NCTA argues (at 20) that MVPD content should receive greater substantive protection than broadcast content; technology approved for use in this proceeding should be deemed suitable for Broadcast Flag use, but the converse is not true.
- The Consumer Group parties argue (at 10) that the MVPD environment is fundamentally different from the broadcasting environment and includes considerations that are “wholly absent” with respect to broadcasting.

The Consumer Electronics Parties conclude that, while a degree of cross-referencing has become necessary and appropriate given (1) the Commission’s exploration of some questions on a common procedural schedule, and (2) the fact that some devices, such as UDCPs, ultimately will encounter, and hence will require consistency in, both regulatory schemes as applied to these products, no case has been made for merging these proceedings. The services involved, and the origins and goals of these proceedings, differ too much.

VII. CONCLUSION – THE COMMISSION SHOULD STAY THE COURSE.

The Consumer Electronics Parties believe the FCC, in its October 9 Order, has done a good job of adhering to the task that Congress has given it. The Commission should avoid the distractions and diversions that have been offered, and should avoid taking back from consumers with one hand, via HDTV downresolution and Selectable Output Control, the utility of the new products whose entry it is facilitating with the other.

Respectfully submitted,

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