

**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
Home Recording Rights Coalition**

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Throughout this “Plug & Play” proceeding, the Home Recording Rights Coalition has focused on the question: “To what extent may home-based consumer electronics and information technology products be constrained through the licensing of specifications under authority granted by the Congress to the FCC, and delegated to a private party?”¹ The Commission has drawn reasonable lines in issuing final regulations in its Report and Order of October 9, and where it has been unsure of a final answer the Commission has raised important questions in the accompanying Second Further Notice of Proposed Rulemaking.² The HRRC submitted its answers in Comments filed on February 13, 2004.³

¹ *In the Matter 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, PP Docket No. 00-67, Comments of the Home Recording Rights Coalition in Response to Further Notice of Proposed Rulemaking at 1 (Mar. 28, 2003).

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, Second Report and Order and Second Further Notice of Proposed Rulemaking (Rel. Oct. 9, 2003) (“Oct. 9, 2003 Second R & O and SFNPRM”).

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-

(continued...)

Some other parties, in their responses, as well as in petitions for reconsideration, appear to have endeavored to lead the Commission out of bounds by trying to persuade it to pursue various goals and agendas that are not related to, and in fact run counter to, Congress's objectives in instructing the Commission to assure the competitive availability of navigation devices, from manufacturers and retail vendors who are independent of Multi-Channel Video Programming Distributors. Some also apparently thought they spied an opening in the Commission's desire to receive further comments on the subject of downresolution. And some have swung for the fences, hoping to leverage some vague and theoretical possibility of Selectable Output Control – which is not allowed in the Commission's Encoding Rule regulations – to avoid *all* their other obligations to treat consumers in a fair and balanced manner. The HRRC is determined, as it has done for the last twenty-two years, to focus a spotlight on all such attempts. The HRRC urges the Commission to remain true to its core objective of advancing the interests of consumers, not parties motivated to gain economic advantage through efforts to move the field of play.

I. NO LOGICAL CASE HAS BEEN MADE FOR HDTV DOWNRESOLUTION AND A STRONG CASE HAS BEEN ESTABLISHED AGAINST IT.

While HRRC and other participants have advanced strong and essentially uncontradicted arguments that the practice of HDTV “downresolution” would deprive consumers of the benefits of a number of their good-faith bargains, it is the proponents of this practice who have provided the coffin nails. One learns from the latest round of filings that content originators and distributors who advocate downresolution (1) would deprive their oldest and most loyal customers of *any* viewing that is better than NTSC quality—the very consumers who have made

80, PP Docket No. 00-67, Home Recording Rights Coalition Comments on Further Notice of Proposed Rulemaking (Feb. 13, 2004) (“HRRC”).

the DTV revolution possible as hoped for by the Commission and the Congress, (2) cannot offer even farfetched rationales for inflicting downresolution on owners of fixed pixel displays, and (3) have given no or little thought to the way devices are actually connected in the home.

A. DirecTV Admits That For Many Consumer Products Downresolution Would Cause Screens To Go Dark.

HRRC has learned from DirecTV's support of downresolution as "consumer friendly"⁴ that in the case of devices owned by its oldest and presumably most loyal customers, downres'd viewers would not even receive the 1/4 pixel-count picture that MPAA anecdotally claims would look just as good as HDTV to most viewers. Instead, the component video interface would go entirely dark. Herewith a glimpse of DirecTV's consumer friendly world:

“[V]iewers owning those initial legacy units are instructed to and must physically switch television inputs to enjoy the program. (DIRECTV's current generation of HDTV set-top boxes now supports down-resolution via the high-definition analog outputs, so that the viewer is not required to switch television inputs in this fashion. Digital outputs are encrypted and not subject to down-resolution.)”⁵

DirecTV does candidly admit that “resolution may suffer somewhat for some consumers during the digital transition” but argues that this is a “small price to pay” for these consumers, so that their neighbors (arguably) will not have HDTV content withheld from the market.⁶ These consumers, however, did not pay a “small price” for the HDTV displays. Nor has DirecTV or any other content provider or distributor, to HRRC's knowledge, offered any refunds or discounts for downres'd programming that is viewable in HDTV in the house of a neighbor who pays the same rate for services but owns a display with a digital input.

In summary, DirecTV's contribution to the debate on downresolution and the DTV transition appears to be:

⁴ *In the Matter 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, PP Docket No. 00-67, Further Comments of DirecTV at 5 (Feb. 13, 2004) (“DirecTV”).

⁵ *Id.* at 7.

⁶ *Id.*

“As long as a threshold good quality picture is received by the customer, the Commission should not intervene to dictate picture resolution by regulatory fiat to a point where it ceases to become a business issue”⁷

Apparently, this means, for purposes of the DTV Transition, that a “good quality picture” is NTSC, and that consumers who pay for HDTV should have no rights or expectations so long as they can receive NTSC. This would seem to stand the entire transition on its head, along with the FCC’s role in it. We trust the Commission will insist on a consumer friendly future in which consumers will actually get what Congress intended when it started this process a decade ago of converting *to* HD, *from* NTSC.

B. Arguments In Favor Of Downresolution Are Contemptuous Of Consumers With Older HDTV Receivers And Entirely Ignore Those With Newer Ones.

The comments of the other parties who favor HDTV downresolution also contain the seeds of a conclusive case against its use. The anecdotal argument that HDTV downresolution would not actually harm viewing, oft-repeated but never proved, is based on:

- Assumptions that only the older HDTVs rely on component video inputs
- Assumptions that installers and consumers don’t know how to adjust these (initially very expensive) HDTV receivers
- Assumptions that consumers owning displays with DVI / HDMI or 1394 inputs are immune to the consequences of downres’ng the component video interface.

Taken together, the reliance on this suite of assumptions – all incorrect – is eloquent testimony that the rationale for HDTV downresolution is insubstantial, and actually argues against its use. As HRRC reported in its own February 13 Comments (at 5-6), the number of *fixed pixel* displays already distributed – as to which there can be no argument that “pixels get blurred” – that rely *exclusively* on component video interfaces is 360,000 and counting. While *most* fixed pixel displays on shelves today *do* have at least one digital interface as well, and virtually all will in the future, *this does not help the consumers who have purchased these displays already.*

⁷ *Id.* at 6.

Second, the assumption that the earlier HDTV CRT-based receivers – for which early adopters paid relatively high prices – will be maladjusted in consumer homes, so as to “lose” the pixels for whose receipt HDTV customers pay – is just that, an assumption. The proponents who argue that downresolution is “consumer friendly” have offered no data as to whether CRT-based sets are properly adjusted in consumers’ homes; nor have they formally differentiated their claims according to types of program material.⁸ Nor have they purported to test various brands of such sets, or even to have tested *one* set scientifically.⁹ The Commission should not strand the legitimate expectations and investments of its *six million* early HDTV adopters based on such self-serving and unsupported assumptions and arguments.

C. HDTV Downresolution Would Penalize Even Those Consumers Who Have Bought HDTV Receivers With Every Available Interface, Analog And Digital.

The last assumption of the “consumer friendly” advocates is that downresolution would not have an impact on consumers who own sets that have digital inputs. This assumption is, in the real world, demonstrably false as well. Even a consumer who makes sure to purchase an HD display with a DVI-HDCP or 1394-DTDP interface is likely to face a major problem whenever the HDTV content fed to the component video interface is “downres’d,” for the following reasons:

- Homes in which a state-of-the-art fixed pixel display can be afforded are likely also to have other digital and, ultimately, HD home network sources as well.
- Whereas a display might have more than one 1394 interface, most “DVI” or “HDMI” displays – by far the majority of state-of-the-art fixed pixel and CRT displays – have only a single DVI or HDMI input.
- If HDTV downresolution is accepted by the FCC for delivery of MVPD content, it seems certain to be insisted on by content providers who make their content available to other DVD delivery systems, such as discs and tapes.

⁸ The ability of *any* home HDTV receiver to demonstrate the difference between an NFL game shown in 1080i and one shown in “480 widescreen” is plain and noncontroversial.

⁹ By contrast, the multi-industry Copy Protection Working Group’s (“CPTWG’s”) Data Hiding Subgroup, in the late 1990’s, funded elaborate and carefully controlled and scientific tests of various “watermarking” technologies, explicitly for the purpose of avoiding any judgment based on uncontrolled observations.

- Therefore, the “savvy” consumer who assures himself or herself of buying a display with only DVI or HDMI (which cannot be downres’d and at present are the least likely targets for Selectable Output Control), plus the component analog input, is still presented a big problem when a program is downres’d – particularly when this occurs without warning. It would seem to be necessary to physically switch the interfaces, so as to rewire the home network, in order to match the “non-downres’d source” with the DVI or HDMI interface. ***How likely is it that the typical consumer, if even aware of the need to do this, will be able to do this, and if so would be willing or able to do this on a program-by-program basis?***¹⁰

Therefore, simply reading the arguments and observing the omissions of the proponents of HDTV downresolution, it appears that it would be not only the DirecTV customers who would have to become familiar with behind-the-set cable switching (in their case, in order to get any picture at all). To avoid the clear and unarguable effects of downresolution, even on state of the art displays that *do* have DVI or HDMI interfaces, *most* consumers would have to be manual cable switchers.¹¹ And, of course, even this will not help six million HDTV early adopters whose viewing *will* be degraded by downresolution, and who do not have *any* option available to avoid the loss of the HDTV content that they pay for.¹²

II. THE ARGUMENT FOR SELECTABLE OUTPUT CONTROL IS IN FACT AN ARGUMENT FOR DENYING OR DESTROYING CONSUMER PROTECTIONS THAT ARE WELL ESTABLISHED AND NECESSARY TO PUBLIC POLICY.

Although the Commission did not raise the issue of Selectable Output Control in its SFNPRM, it has entered from oblique angles due to the special nature of its appeal to content providers and distributors: In their hands, it can be used to ***nullify any consumer protection obligation that they have otherwise agreed to, or that the Commission has required.*** It is a particularly perverse weapon because it plays off of and exploits the very competition that the Congress required in Section 624 and 629 – instead of the Commission settling on a single, all-

¹⁰ The Congress and the Supreme Court have found that consumers cannot even be expected to manipulate an A/B switch, even via a familiar remote control, in order to select channels on a program-by-program basis. *See Turner Broadcasting v. FCC*, 520 U.S. 186, 220-21 (1997); Pub. L. 102-385.

¹¹ According to CEA industry statistics, approximately 1,320,000 flat panel displays have been shipped to date, with a dollar value of \$3.3 billion. In January, 2004, microdisplays (DLP, LCos, LCD) represented approximately 12% of rear projection displays by units, and 20% by dollars.

¹² The Commission should not overlook the fact that, in terms of consumer equity, making permanent the “downres” line between broadcast and conditional access programming seems backwards. Consumers can receive broadcast content for free if they wish. However, HDTV conditional access content is something for which they pay, but of which, on a program-by-program basis, they would be denied reception.

purpose home interface, the Commission has encouraged a home network architecture in which there may be competing technologies, some of which make allowances for the consumer home recording and networking expectations that are protected by the Encoding Rule regulations, and some of which do not. What Selectable Output Control would do is to allow a content provider or distributor simply to nullify the Encoding Rules, as well as the DFAST Compliance Rules and potentially the terms of other licenses, simply by *turning off those that make allowance for consumer home recording and networking expectations.*

A. The Commission Did Not Raise SOC In Its SFNPRM, But Content Providers And Distributors Raise It As A Means Of Subverting Balanced Regimes.

The Commission *neither* allowed Selectable Output Control in its Encoding Rule regulations *nor* invited questions about it in its SFNPRM. Yet, it emerges as a purported answer to an NCTA concern in this proceeding,¹³ and to an MPAA concern in the Broadcast Flag proceeding.¹⁴ This highlights something about its nature: It is an all-purpose “cure” for any consumer choice or freedom that may irk a content provider. If there is a consensus that “revocation” must be fairly limited to lost, cloned, or stolen certificates; fine. If the Commission has issued Encoding Rule regulations; OK. If an output technology has been negotiated for in license Compliance Rules, or has passed a “market” or “objective” process so as to be considered approved and available for consumer reliance; OK too. *All of these balanced outcomes can be reversed with the discretionary triggering of Selectable Output Control.* This explains but by no means justifies its appeal as an all-purpose palliative.

B. Selectable Output Control As A Tool Of Giant MVPDs Is No More Fair Or Palatable To Consumers Than It Is As A Tool Of Giant Movie Studios.

While most of HRRC’s discussion of this issue has been aimed at the motion picture industry, which had assured senior Members of Congress that they did not seek this weapon, it

¹³ *In the Matter 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, PP Docket No. 00-67, Comments of the National Cable & Telecommunications Association (Feb. 13, 2004).

¹⁴ *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, 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)

does not matter to a consumer whether he or she is SOC'd by a studio or an MVPD. The effect – confusion, disappointment, and likely anger – is the same. The Commission's bar on the use of SOC nullification should be based on its unfair effect on consumers, not on who requests it.

C. Arguments For Unilateral Decisions About “Withdrawal” Or “Retirement” Of Technologies Or Interfaces Are Just Attempts To Paint Selectable Output Control In A Different Shade.

Fenced in by the Commission's debarment of SOC in its Encoding Rule regulations, on the one hand, and the consensus for very careful and limited use of product retirement on the other, most answers to the Commission's questions about what the Commission called “revocation” have focused on consensus or independent regulatory decisions about continued uses of outputs and technologies, on a going-forward basis and involving a balancing of interests. Again, the Wild Card emerges when content providers or distributors seek the “flexibility” to make this decision on a “market” basis, and unilaterally. This is nothing more than yet another argument for SOC nullification, using different terminology. The Commission should be equally leery about allowing it.

III. THE ARGUMENTS FOR MERGING THIS PROCEEDING WITH THE BROADCAST FLAG REPRESENT ATTEMPTS TO UNDERMINE THE ORIGINAL PURPOSES OF BOTH PROCEEDINGS.

Several commenters have proposed simply merging the Plug & Play and Broadcast Flag proceedings, to better fit the external agendas that they bring to each. Others, such as the MPAA and the NCTA, nominally oppose such a merger, but nevertheless find rationales in one to avoid obligations in the other. HRRC opposes the general merger idea, as well as the more selective nullification that is discussed above.

The Commission's navigation device proceeding originated in two congressional directions to introduce user convenience and competition into a market that had been closed to consumer electronics and information technology manufacturers and retailers. To deal with questions about whether certain licensing impositions would be permissible on competitive entrants, it verged into considerations of copy protection provisions in licensing Compliance rules and in Encoding Rule regulations. By contrast, the Broadcast Flag proceeding arose from concerns over the use of devices that are *not* licensed for conditional access purposes, and the

central concern is the potential indiscriminate redistribution of content over the Internet. While the fallout from each of these two proceedings does land on some consumer electronics and information technology products, the proceedings are not the same, nor are their goals or rationales for regulation.

In this round of comments, some parties have attempted to capitalize on certain similarities or parallels. The Commission should be wary of all such self-interested efforts to blur distinctions and fuzz objectives, as they likely would result in unjustified impositions on consumers.

Respectfully submitted,

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