

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

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 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**

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The Motion Picture Association of America, Inc. (“MPAA”), 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 hereby submit these Reply Comments in response to the Commission’s Second Further Notice of Proposed Rulemaking.¹

INTRODUCTION AND SUMMARY

Many of the issues relevant to this proceeding are discussed in greater detail in our Reply Comments being filed contemporaneously in the related Broadcast Flag FNPRM proceeding.²

¹ See Second Report and Order and Second Further Notice of Proposed Rulemaking, *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment*, C.S. Docket No. 97-80, P.P. Docket No. 00-67, FCC 03-225 (rel. Oct. 9, 2003) (“Plug & Play Order”).

² See Report and Order and Further Notice of Proposed Rulemaking, *Digital Broadcast Content Protection*, MB Docket No. 02-230, FCC 03-273 (rel. Nov. 4, 2003) (“Broadcast Flag Order”).

For the reasons stated below, and in our filings in the Broadcast Flag proceeding, the MPAA *et al.* recommend that CableLabs remain as the initial arbiter of DFAST authorizations for digital output and recording technologies, and that it use the three marketplace criteria and the “at least as effective” criterion for reaching its decisions. Should CableLabs wish to consider a “functional criterion,” it should consider the criterion attached to our Broadcast Flag Reply Comments and attached here at the Addendum.

The Commission should refrain, however, from adopting any rule prohibiting the use of image constraint with non-broadcast-television content. Image constraint is an important means of making devices more secure by closing the analog hole for high-definition content while simultaneously allowing consumers with legacy equipment to continue enjoying that content. Its use may allow the consideration of potential new business models that otherwise would not have environments secure enough for their development. Furthermore, based on the record in this proceeding to date, there is no evidence that image constraint would have any impact other than encouraging the use of digital connections. That is, there is no evidence that a real legacy of HDTV sets exists with only high-definition analog inputs on which the difference between unconstrained 1080i content and constrained and upconverted 1080i content would be noticeable. The Commission should therefore continue to permit the use of this important content protection option.

I. Marketplace Standards and the “At Least As Effective Test” Should Apply to DFAST Authorization of Digital Output and Recording Technologies

For the reasons given in our initial comments in this proceeding together with our comments and concurrent reply comments in connection with the Broadcast Flag FNPRM,

CableLabs – as Licensor under the DFAST license agreement³ – should be the initial arbiter of DFAST authorizations for digital output and recording technologies, and should apply the marketplace criteria and related “at least as effective” criterion that we have described in our Broadcast Flag submissions. These criteria are reliable, objective, capable of impartial administration by the DFAST Licensor, and fair; and will provide far more guidance to manufacturers, CableLabs, and the Commission than the indefinite proposals advanced by others. *See* Comments of the MPAA *et al.* (“MPAA *et al.*”) at 2-4; Comments of the MPAA *et al.* in response to the FNPRM in MB Docket No. 02-230, at 3-4 (filed Feb. 13, 2004) (hereafter “MPAA Flag FNPRM Comments”); Reply Comments of the MPAA *et al.* in response to the FNPRM in MB Docket No. 02-230, at 3-5 (“MPAA Flag FNPRM Reply Comments”) (attached hereto as an Addendum). Additionally, these criteria do not provide any single industry with a “gatekeeping” role. *See* MPAA Flag FNPRM Reply Comments at 5. (The Reply Comments in the Addendum at 16-17 are also pertinent to the Commission’s inquiries pertaining to the “delisting” of technologies.)

II. If There Is Reason to Explore Additional “Functional Criteria,” a Model Developed by MPAA Should Be Considered

If CableLabs desires to consider “functional criteria” in addition to the “marketplace criteria,” it should consider the detailed functional criteria that we attached to our concurrent submission to the Commission in connection with the Broadcast Flag FNPRM. *See* Appendix B

³ Several other commentators agreed that CableLabs should be the initial arbiter, subject to FCC review as provided in that license agreement. *See, e.g.*, Comments of the Consumer Electronics Association (“CEA”) at 13; Comments of Philips Electronics North America Corp. (“Philips”) at 3-4. Although a few commentators objected that this would have undue impact on non-cable parties (*e.g.*, Comments of DirecTV, Inc. (“DirecTV”) at 10-11; Comments of EchoStar Satellite LLC (“EchoStar”) at 4-5), no persuasive reason was given for inserting another body into this private license agreement, especially in light of the Commission’s oversight and review, the limited role of CableLabs in approving the output and recording technologies of only unidirectional cable television products, CableLabs’ expertise in that realm, and CableLabs’ other responsibilities under that agreement.

to the Addendum, discussed at pages 5-8 of the Addendum. These functional criteria include, among other things, a critical “localization” component that is notably absent from other proposals, yet is needed to effectively deal with the problem of unauthorized redistribution in the context of both the cable franchise system and its individual household subscription base. Of course, consideration of these criteria would have to take into account particular adjustments to accommodate the need for copy control functionality and management of copy control information that pertain to DFAST Controlled Content.⁴ For example, proposed technologies should securely bind copy control information to the content, and provide reasonable and affirmative means for the secure carriage, detection, remarking of, and authorized response to that information, and for moving and deleting copies where appropriate.⁵

III. The Commission Should Not Adopt a Rule Prohibiting Image Constraint of Non-Broadcast Television Content

In its Second FNRPM, the Commission requested comment on “whether the Commission should prohibit the activation by MVPDs of down-resolution for non-broadcast MVPD programming content.” Several parties, including the MPAA and member studios, have filed comments strongly opposing any restriction on image constraint, or “down-resolution” as it is sometimes called. *See* BellSouth at 2-3; DirecTV at 3; Echostar at 3-4; NCTA at 2; TW at 8.

Image constraint makes devices more secure by dealing with the analog hole in a manner that does not terminate the flow of content over high-definition analog outputs altogether;

⁴ In general, these adjustments would be additive to both the technical requirements of the DFAST license and the redistribution controls factors of the Broadcast Flag model. We note that some adjustments in procedural matters pertaining to such criteria *as well as aspects of the Marketplace Criteria discussed above*, would also be appropriate to reflect the participation of appropriate MVPDs.

⁵ For example, content owners have recognized the possibility of “pausing” – by recording – even “Copy Never” television material for viewing, and “moving” copies of already recorded “Copy Once” television material to other recorders, subject to deletion of the initial copy in a manner that is compatible with such “pause” or “move” purpose.

indeed, the constrained image is still of very good quality. With image constraint content providers will be better able to consider new and innovative business models, such as early-release-window content, as unprotected high-definition analog outputs will not thwart such innovation. It is thus with good reason that some have described image constraint as a “consumer-friendly” content protection solution. *See* DirecTV at 5. Image constraint has already been introduced and is in use in the marketplace, with no evident turmoil. *See* DirecTV at 4-5; TW at 10. Furthermore, as DirecTV has noted, “[a]ssuring content providers that their high-value content will be protected is an extremely important step in encouraging the proliferation of such content in the MVPD marketplace.” DirecTV at 3.

Despite the promise of image constraint, some of the filed comments continue to criticize it as non-useful and harmful. *See* CEA at 4; HRRC at 3. CEA, for example, claims that image constraint neither “controls home recording [nor] keeps content from the Internet.” CEA at 4. CEA and HRRC miss the fundamental point, however, that while image constraint does not prevent the redistribution of standard definition content, it undeniably makes it harder to redistribute a *high-definition* program. Image constraint thus effectively closes the analog hole for full-resolution recordings of 1080i and 720p content.

CEA and HRRC further claim that image constraint will have no effect on consumer behavior because most consumers have already purchased sets with component analog inputs. CEA at 4; HRRC at 3. CEA and HRRC claim that 6 million households have “HDTV-ready” receivers whose only high-definition inputs are component analog, and that three-quarters of the receivers currently on the market have secure digital interfaces. *See* CEA at 4; HRRC at 5. With respect to these claims, the MPAA is not aware of, and neither CEA nor any other party has ever identified, a real legacy of HDTV sets with only high-definition analog inputs for which there is

a noticeable difference between a constrained 1920 by 1080 image which has been upconverted for display, and a 1920 by 1080 image which has never been so constrained.⁶ Thus, based on the empirical evidence that we have been able to adduce to date, consumers with legacy high-definition displays will not be able to distinguish constrained images from unconstrained images, because high-definition displays with only analog inputs will not fully resolve 1080i content. Indeed, even the CEA claims that what really matters is not whether there is an observable difference, but whether consumers are “receiv[ing] the full capabilities delivered with their purchases – whether or not the programs and the displays reach the full theoretical capabilities of each specification.” *Id.* at 5. Even if that is the correct measure, however, as the MPAA has commented in the past, the image constraint requirement allows both legacy and future HDTV owners to enjoy the full capabilities of their respective displays. *See* Letter from Bruce E. Boyden, Proskauer Rose LLP, to Marlene H. Dortch, Secretary, FCC at 2 (May 7, 2003).

CERC claims that the full resolution issue can be “easily refuted by comparing the CBS NFL 1080i telecasts with Fox’s ‘480 widescreen,’ or an HBO HDTV presentation with a DVD of the same movie.” CERC at 2 n.3. However, this response glosses over the fact that constrained 1080i content is a higher resolution than 480i or DVD-quality content; CERC is thus making a misleading point. The correct comparison is a constrained 1920 by 1080 image to an unconstrained 1920 by 1080 image.

Additionally, the CEA and the HRRC are mistaken that there remains no consumer behavior that image constraint could plausibly affect. For those recordings made with legacy

⁶ The CE industry has in the past claimed that the legacy HDTV sets in question *scan* at high-definition resolution. The important issue, however, is whether an image on the screen of such a set appears to the viewer to be high-definition. Furthermore, it is important to note for the purpose of any proposed demonstrations that the question is not whether an image at 525p resolution appears as sharp as an image at 1080i resolution, but whether a 1080i image that has been constrained and then upconverted to 1080i resolution appears as sharp on legacy HDTV sets as an image that has not been constrained.

HDTV equipment over constrained component analog outputs, such recordings will not be as desirable in the future when compared to 1080i recordings made with a compliant product and displayed in full 1080i resolution. Consumers will thus be dissuaded from locating and downloading the lower-resolution copy from an unauthorized file trafficking network. Consumers with both high-definition analog and protected digital connectors on their receivers will be motivated to use the protected digital connections, further reducing the probability of unauthorized redistribution. Meanwhile, without the artificial support created by the analog hole, the market for high-definition analog connections will eventually evaporate. The alternative is that high-definition analog outputs never fade away, and are never protected, and as a result, if new, early-release-window business models are developed in the future, consumers with such unprotected outputs may not be able to receive content under those business models because their receivers are too insecure. *See* DirecTV at 7-8; Echostar at 3; NCTA at 4; TW at 8-9. The Commission must reject this outcome.

Contrary to the impression created by some comments, the use of image constraint would not be without limits. Image constraint cannot be imposed unilaterally by a single party, for example. Rather, it can only occur through an agreement between a technology provider, a device manufacturer, a content provider, and a content distributor. Distributors and manufacturers will be wary of taking any actions that would greatly upset their customers, and will therefore achieve a “difficult balancing of interests” in their private negotiations with content providers. Plug & Play Order ¶ 60; *see also* TW at 7 (“Having made . . . a strong commitment to the new features and capabilities of digital content production, programming and distribution, Time Warner has ample incentive to ensure that viewers are able to enjoy those new features and capabilities.”). So as to encourage innovation in the provision of new business

models, these licensing negotiations should be allowed to proceed unimpeded by regulatory review. *See* DirecTV at 6; NCTA at 4.

Furthermore, there is no attempt underway, as some have claimed, to “drive consumers toward purchase of products that the MPAA would also like the chance to turn off unilaterally,” namely, through selectable output control. CEA at 5. First, the MPAA has only requested that the *capability* for selectable output control be required in Plug & Play devices; the actual use of that capability, however, would require petitions or waivers (as the Commission has explicitly acknowledged could be appropriate, *see* Plug & Play Order ¶ 61), or a rule permitting selectable output control in limited, specific circumstances involving intellectual property claims. *See* MPAA Flag FNPRM Comments at 6 n.5. Second, it is improbable that content providers could “unilaterally” invoke selectable output control, even if it was not subject to Commission regulation; MVPDs, for one, would most likely have a say in the circumstances in which selectable output control is invoked over their systems. The assertion that image constraint is merely a stalking horse for generalized selectable output control is thus inappropriate and misleading.

Finally, DirecTV proposes that if the Commission rejects the arguments made here and elsewhere and prohibits image constraint, then “it should ensure to the extent possible that all MVPDs and all other video delivery mechanisms, such as the Internet and recorded media distribution, are subject to the same restriction(s).” DirecTV at 9. Such a rule, however, would go far beyond the Commission’s request for comments in this proceeding on “whether the Commission should prohibit the activation by MVPDs of down-resolution for non-broadcast MVPD programming content,” Plug & Play Order ¶ 82, and would involve resolution of a number of jurisdictional and policy issues that thus far have not drawn substantial comment. The

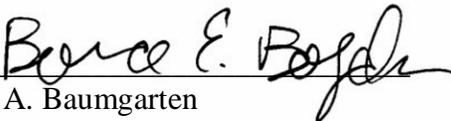
Commission does not have the record at this time to draft such a sweeping prohibition. Should the Commission be persuaded by DirecTV's suggestion, it should instead initiate a Third FNPRM on that question so that comments from the public may be collected on the issues raised by the regulation of content protection in a wide variety of distribution channels extending beyond MVPDs.

CONCLUSION

For all of the reasons stated above, the MPAA and other parties joining these Reply Comments respectfully request that CableLabs be designated as the initial arbiter of DFAST authorizations for digital output and recording technologies, using the three marketplace criteria and the "at least as effective" criterion, or failing that, the "functional criterion" attached in the Addendum. The Commission should not adopt any rule prohibiting the use of image constraint with non-broadcast-television content.

Respectfully submitted,

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