

formulation (which MPAA states is the result of a formatting change from the rules as proposed jointly by MPAA and the 5C companies) is not intentional, and that “...no outputs for computer add-in products should be allowed to expose unencrypted, compressed data over a User Accessible Bus, whether protected by an Authorized Digital Output Protection Technology or by a Robust Method.”³

The IT Coalition, opposing such a clarification, states that the Commission’s formulation was intentional and that it serves the interests of technology neutrality, innovation and the DTV transition.⁴ The IT Coalition asks the Commission to preserve Section 73.9006 as it currently reads, and clarify instead that “the requirement to protect compressed content that may be transferred across a user accessible bus...can be met using a Robust Method (through encryption, authentication, or other technological means), so that an ordinary user using generally available tools or equipment cannot access such content in a usable form.”⁵

Both MPAA and the IT Coalition raise important points. On the one hand, it is essential in an encryption-based regime, which is only as strong as the weakest link in the “chain of custody,” that content be encrypted at every user-accessible link – particularly those in user-accessible architectures. On the other hand, it is essential that the Commission’s rules not preclude innovation in non-encryption-based digital broadcast content protection technologies which may provide greater and more pervasive protection. For the reasons discussed below, Philips concurs with MPAA’s request for clarification of Section 73.9006, but suggests the Commission limit its application so as to prohibit the transfer of unencrypted, compressed data

³ *Id.* at 22.

⁴ Opposition to Petitions for Reconsideration of the Business Software Alliance and the Computer Systems Policy Project (together, the “IT Coalition”), MB 02-230, (Mar. 10, 2004) (“IT Coalition Opposition”) at 7.

⁵ *Id.*

over a User-Accessible Bus *only* by encryption-based digital broadcast content protection regimes.

The Commission's Broadcast Flag regime has been constructed largely within an encryption-centric technology framework – *i.e.*, it adopted, with important and significant competition, innovation and consumer safeguards advocated by Philips and others – the approach proposed by MPAA and the 5C companies, which relies upon an “unbroken chain” of control protection for Unscreened and Marked DTV content. Based upon the Broadcast Flag technology certifications filed in its Initial Certification Window, it is unlikely, at least in the nearer-term, that non-encryption-based technologies will be approved by the Commission for use with the Broadcast Flag.⁶ In short – when it comes to protecting DTV content with the Broadcast Flag, at least for now, encryption is the name of the game.

Given that reality, and as it would be under any circumstance, it is essential that manufacturers of both consumer electronics and IT devices shoulder the same regulatory burdens with respect to their obligations to preserve content protection within that “unbroken chain.” To impose a lesser obligation on one class of devices, particularly – as is the case here – for IT devices, which are much more susceptible to modification (via their open architecture) than CE devices – would result in two serious consequences. First, it would create a point of opportunity, effectively an “IT Hole,” through which otherwise-protected DTV content could seep out to the Internet for purposes of indiscriminate redistribution. Second, it would encourage the development of software that exploits that “point of opportunity” – the inevitable result of which would be that “hackable” IT devices, unlike more secure CE devices, gain a marketplace advantage. Philips respectfully submits that neither is an outcome that fosters the Commission's

⁶ Indeed, all of the technologies submitted for approval within the Commission's Initial Certification Window are encryption-based.

goals of protecting digital broadcast content from indiscriminate redistribution over the Internet, promoting a competitive and innovative marketplace, or speeding the transition to DTV.

Philips believes the MPAA's request for clarification – as narrowly applied to an encryption-based technology regime – is essential to avoiding the development of an “IT Hole,” as well as to ensuring that the marketplace is not skewed, by dint of government regulation, in favor of one manufacturing sector over another. However, the IT Coalition's concern that this rule not preclude the introduction of future, perhaps more advanced digital broadcast content protection technologies is merited. Philips therefore suggests that the Commission apply Section 73.9006 only to encryption-based digital broadcast content protection regimes. Under such an approach, future, non-encryption-based technologies approved by the Commission for use with the Broadcast Flag – which may render the use of encryption entirely unnecessary – would be permitted to employ alternative technologies for Robust Method transfers. Philips believes such an approach would ensure that DTV content is sufficiently protected using encryption-based technologies in the nearer-term, while not stifling future innovation in non-encryption-based alternatives.

II. GENESIS MICROCHIP ECHOES CONCERNS RAISED REPEATEDLY BY PHILIPS REGARDING THE NEED FOR TECHNOLOGIES SUBJECT TO A GOVERNMENT MANDATE TO BE LICENSED ON REASONABLE AND NON-DISCRIMINATORY TERMS

In Petitions for Reconsideration filed in both the Broadcast Flag and Plug and Play⁷ proceedings, Genesis Microchip Inc. (“Genesis”) expresses many of the same concerns raised repeatedly by Philips in this proceeding regarding the anticompetitive effects of privately-

⁷ *In the Matter of the Implementation of Section 304 of the Telecommunications Act of 1996, the Commercial Availability of Navigation Devices, PP Docket No. 00-67, CS Docket No. 97-80, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885 (2003) (“Plug and Play Second Report and Order”).*

licensed technologies that are subject to a government mandate.⁸ Specifically, Genesis – in the context of objecting to the incorporation of the DVI and HDMI⁹ specifications in the Commission’s Broadcast Flag and Plug and Play rules – claims that these technologies: (1) are not being licensed on reasonable and non-discriminatory terms and conditions; (2) require adopters to relinquish their own intellectual property rights (through “non-assert” provisions); and (3) do not disclose the relevant patents or necessary claims associated with the technology.¹⁰ Genesis (and the American Antitrust Association)¹¹ correctly note that privately-negotiated and controlled licenses, when taken out of the competitive marketplace and enshrined in government regulation, create enormous potential for anticompetitive harm, as well as delay in the implementation of DTV.¹²

Philips does not seek to address the specific remedies sought by Genesis, but rather to note that the issues of principle raised by Genesis very closely correspond to issues raised repeatedly by Philips in this proceeding and underscore the imperative of the Commission’s

⁸ See Comments of Philips Electronics North America Corporation, MB Docket No. 02-230 (Dec. 6, 2003) at 6, 22-23; Reply Comments of Philips Electronics North America Corporation, MB Docket No. 02-230 (Feb. 19, 2003) at 27-30; See also September 23, 2003 Letter from Lawrence R. Sidman, on behalf of Philips Electronics North America Corporation, to Marlene Dortch in MB Docket No. 02-230 at 4 and Appendix B, Section Z.3, “Licensing Terms for Authorized Technologies;” October 21, 2003 Letter from Thomas B. Patton of Philips Electronics North America Corporation to Chairman Michael K. Powell in MB Docket No. 02-230; October 22, 2003 Letter from Thomas B. Patton of Philips Electronics North America Corporation to Chairman Michael K. Powell in MB Docket No. 02-230 (“Philips October 22, 2003 Letter”).

⁹ HDMI is a consortium of 7 Founder companies, namely Hitachi, Matsushita Electric Inc., Philips, Silicon Image, Sony, Thomson and Toshiba. The HDMI license is administered by an agent, Silicon Image, via the HDMI Licensing, LLC.

¹⁰ See Petition for Reconsideration of Genesis Microchip, Inc., CS Docket 97-80 and PP Docket 00-67, (Dec. 29, 2003), (“Genesis Plug & Play Petition”) at 7-9; see also Petition for Reconsideration of Genesis Microchip, Inc., MB Docket 02-230, (Jan. 2, 2004) (“Genesis Broadcast Flag Petition”) at 1, n.3.

¹¹ See Comments in Support of Petitions for Reconsideration of Genesis Microchip, Inc. of the American Antitrust Association in CS Docket 97-80, PP Docket 00-67 and MB Docket 02-230, (Mar. 10, 2004) (“AAI Comments on Petitions”) at 2.

¹² AAI Comments on Petitions at 4.

coming to grips with the specific licensing terms and conditions that may be associated with any FCC-approved digital broadcast content protection technology, both in the context of its final selection rules (pursuant to the Broadcast Flag Further Notice) and the specific technology certifications evaluated under its Interim Process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing were served on the following individuals on March 22, 2004, by first-class mail, postage pre-paid:

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