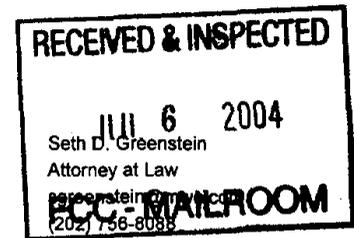


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June 30, 2004

Ms. Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, D.C. 20554

Re: Ex Parte Presentations in Docket MB 04-64, In the Matter of Digital Output Protection Technology and Recording Method Certifications: Digital Transmission Content Protection

Dear Ms. Dortch:

This is to notify the office of the Secretary that on June 29, 2004, Jeffrey Lawrence of Intel Corporation, Bruce Turnbull of the law firm of Weil, Gotshal & Manges representing Matsushita Electric Industrial Co., Ltd., Joel Wiginton of Sony Electronics, Michael Ayers of Toshiba America Corporation and the undersigned representing Hitachi, Ltd., held *ex parte* meetings with the following:

Office of Chairman Michael Powell

Jonathan Cody and Bethany Smocer

Office of Commissioner Kathryn Abernathy

Stacy Robinson Fuller and Matthew Benz

Office of Commissioner Jonathan Adelstein

Johanna Mikes Shelton

Office of Commissioner Michael Copps

Jordan Goldstein and Maggie Sklar

Office of Commissioner Kevin Martin

Catherine Bohigian and Irene Zaki

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Ms. Catherine H. Dortch
June 30, 2004
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The meeting covered matters set forth in the Certification and Reply submitted by Digital Transmission Licensing Administrator in the above-captioned proceeding, and in the materials submitted herewith, specifically relating to a description of the structure and provisions of the agreements by which DTLA licenses the DTCP Specification and Necessary Claims to intellectual property rights in such Specification, and the reasons why the agreements are reasonable and nondiscriminatory.

In accordance with Section 1.1206 of the Commission rules, this original and one copy are being provided to your office, and a copy of this notice (without attachments) is being delivered by mail to those named below.

Very truly yours,



Seth D. Greenstein

Enclosure

CC: Catherine Bohigian
Jonathan Cody
Stacy Robinson Fuller
Jordan Goldstein
Johanna Mikes Shelton

The 5C License Framework and Terms are Pro-Competitive

DTCP licenses follow a well-established model that minimizes the cost of content protection for consumers and reduces the risk of litigation or excessive royalty costs for all licensees. All licensees obtain a low-cost technology solution, on reasonable terms, administered in a fair and nondiscriminatory manner. This model has been adopted by DVD CCA (for CSS), 4C Entity (for CPRM), Digital Content Protection LLC (for HDCP) and others. Key points about the 5C license agreements include:

DTCP is licensed on an open and nondiscriminatory basis. The Adopter Agreement and Content Participant Agreement are posted publicly to the DTLA website, as are non-confidential versions of the DTCP Specifications. The licenses are offered on the same terms and conditions to all similarly-situated parties. Any more favorable terms that may be agreed to in a later license will be extended to all prior licensees.

Content owners need not license DTCP to protect their content. Under the DTLA “IP Statement” posted on the DTLA website, any content owner can use or require use of DTCP without license or fee, if it follows the Encoding Rules.

DTLA licenses a Specification; it is not a “patent pool.” The 5C Companies created a Specification for a protection technology. That technology implicates certain patent, trade secret and copyright rights owned by the 5C Companies. Therefore, the DTLA licenses grant all IP rights owned or controlled by the 5C Companies that are necessary for the use of the Specification in implementing DTCP – but only those necessary rights. Licensees neither obtain nor are required to accept any other IP rights.

License fees are based on the costs of administration, technology development, maintenance and key generation, and are not typical commercial royalty rates. DTLA believes costs for content protection should be as low as possible, since consumers will not willingly pay extra for it. To make such low fees possible, DTLA has adopted a license model and terms that help to limit the risks and costs to DTLA and its licensees.

The narrow, nondiscriminatory covenant not to sue. As an essential part of the license model, all licensees covenant, on a non-exclusive basis, not to sue any other licensee under any IP rights that they own or control that are necessary for the use of the DTCP Specification. The covenant is no broader than the license grant from DTLA.

The covenant not to sue does not impede innovation. Licensees remain free to exploit their own IP for any and all other purposes, on whatever license terms they prefer. For example, any Adopter can use IP subject to the covenant to create technologies that compete with DTCP, or that are proprietary add-ons to DTCP, and any Adopter retains the right to license such IP at commercial rates to all DTCP licensees – including the 5C Companies. Thus, the covenant is not anticompetitive; indeed, one could readily argue that the covenant provides incentives to create competing technologies.

The covenant not to sue is appropriate. Since DTLA does not charge commercial rates, it would be unfair for a licensee to leverage DTLA’s license as a means to obtain

commercial royalties on DTCP. The covenant thus reduces the cost of the technology for all licensees by reducing the risk of inflated royalties or lawsuits.

Licensees know the scope of the covenant before agreeing to it. Any Adopter can evaluate the confidential elements of the Specification before activating the agreement and, so, will understand the scope of the Specification before assuming any obligations under the covenant. Notwithstanding, over the five years that DTLA has licensed DTCP, no licensee has identified any IP that they contend was subject to the covenant.

Satisfying the objectors would significantly increase licensee costs. If licensees could obtain from DTCP a commercial rate of return on their IP, DTLA would have to do the same. Having an independent expert identify and evaluate the 5C companies' patents would cost several millions of dollars over the life of the license, which further would have to be passed on in the license rates. Both of these changes would significantly raise the cost of the license and the risks to the licensees -- but would not grant the licensees any greater rights or benefits than they currently receive under the DTLA agreements.

Mandatory changes to the Specification are narrow in scope and, per the express terms of the licenses, are limited to non-material changes, corrections and clarifications.

Changes benefit Adopters and Consumers. Almost all changes to date resulted from mapping DTCP to additional protocols, starting with IEEE 1394 and progressing to USB, MOST, Op-iLink, DTCP-IP and Bluetooth. Other changes have accommodated the capabilities of new technologies (e.g., PVRs) and are pro-consumer. Such changes further benefit Adopters and consumers by ensuring that their investments in DTCP-enabled devices will not prematurely be rendered obsolete.

Specification changes do not affect the scope of either DTCP or the covenant. DTCP works the same way on every interface; and the scope of the covenant does not extend any IP rights in the interfaces to which DTCP is mapped.

DTLA has no unfair advance knowledge. Those who develop technology know first what that technology is going to be; that is the nature of innovation and inherently fair. Notwithstanding, before any change is made to the Specification, DTLA gives Adopters the right to review and comment on the draft change. Content Participants can object to any change that would materially and adversely affect the protections afforded by DTCP or their rights under the agreement. Moreover, mandatory specification changes are not required to be implemented until a minimum of 18 months after becoming final.

There is no "first mover advantage." Even in the initial round of certifications, several digital output protection technologies have been proposed by well-established CE and IT technology leaders. Given the desire for interoperability across home networks, and the convergence of CE and IT cable-ready and satellite receiving products, all of these technologies can both compete effectively against one another and coexist. Nothing impedes additional entrants and technologies from seeking Commission certification in the future. Rapid Commission approval of multiple technologies now and into the future can provide a springboard for new market entry and further ensure robust competition.



Digital Transmission
Licensing Administrator

DTCP: Pro-Competitive Licensing Strategy for Broadcast Flag

June 29, 2004

Overview

- The DTLA license follows a well-accepted structure that benefits adopters, content owners and consumers by minimizing license costs.
- Licenses for DTCP are offered on reasonable and nondiscriminatory terms that provide for meaningful Adopter input and limit future changes by DTLA.
- More than 90 licensees have agreed to these license terms for DTCP; hundreds more accept the same structure for other content protection technologies.

DTLA Philosophy

- Content protection is most effective when reasonable and balanced
 - Provides incentives for studios
 - “Keep honest people honest”
 - Encoding Rules secure reasonable consumer expectations
- But, consumers are not willing to pay extra for content protection

DTLA Philosophy

Therefore:

- DTLA makes DTCP available to all at low cost and shared low risk.
- License fees support development and administration, are not a “profit center.”

DTCP Basics

- Jointly-developed technology Specification
- Protects digital entertainment content traversing home and personal networks
- Available for several popular interfaces (including 1394, USB, 802.11, Ethernet)
- Can interoperate with other output and recording protection technologies

Structure of DTCP Agreement

- DTLA licenses the DTCP Specification to Adopters; Content Participants receive license to protect content with DTCP
- Administration Fee, small per key fee
 - DTLA does NOT charge commercial royalty rates
 - Pricing options for small and large Adopters
 - Fees may be lowered if costs decrease

Structure of DTCP Agreement

- DTLA grants licenses to Necessary Claims
- Licensees covenant not to sue other licensees on their Necessary Claims
- License from DTLA and covenant from licensees have the same, narrow scope
- “Necessary Claims” are IP rights necessarily infringed by use of the Specification
 - Narrowly drawn, explicitly excludes technologies not specific to DTCP itself (e.g., MPEG, 1394, USB)

Structure of DTCP Agreement

- Why include the Licensee covenant?
 - Eliminates risk of IP litigation from other DTCP licensees
 - Minimizes unanticipated costs for all licensees
 - Unfair if Licensees could charge commercial royalty rates when DTLA charges cost recovery fees for its (and the 5C companies') DTCP technology

Structure of DTCP Agreement

- No prejudice from the Licensee covenant
 - Nondiscriminatory and narrow
 - Licensee has right to evaluate the Specification, and understand any potential effect of the covenant, before agreeing to it
 - No licensee has identified any actual affected necessary claim

Structure of DTCP Agreement

- DTLA cannot make material mandatory Specification changes (§ 3.3)
 - Can map DTCP to other Interfaces
 - Optional changes have been beneficial, and are voluntary
- Licensees Participate in Change Process
 - Adopters have right to comment and propose amendments to any draft Specification change
 - Content Participants may object if change has a material and adverse effect on protection

FCC Interest – Promoting Competition

- Approval of many technologies enables marketplace competition
- Six proposed technologies for output protection
 - DTCP, HDCP, Microsoft, RealNetworks, Thomson and TiVo
 - All effective marketplace competitors
 - Well-positioned for “convergent” CE/IT devices

Scope of License Review

- Technologies are to be licensed on a reasonable and non-discriminatory basis.
 - Report and Order ¶¶ 53, 55
- No single, standard definition
- Typically, in FCC precedents:
 - “Reasonable” means reasonable cost
 - “Nondiscriminatory” means making the same terms available to all similarly situated parties

DTLA Agreements are Reasonable

- Minimize cost of license
 - Cost recovery, not higher commercial royalty
 - Good faith efforts to reduce fees if costs drop
- Minimize IP risks
 - “Necessary claims” from all Adopters, including 5C companies, and Content Participants
 - Avoids costly litigation, patent identification or defensive review

DTLA Agreements are Reasonable

- No Impact on Innovation
 - License and Covenant narrowly circumscribed to “Necessary Claims”
 - Freedom to use IP for other purposes
 - Complementary technologies
 - Competitive technologies
 - Adopters review full DTCP Specification before accepting Covenant obligations

DTLA Agreements are Nondiscriminatory

- All licensees, including the 5C Companies, in each class receive same license terms
 - Including Adopter, Content Participant, Reseller, Tester agreements
 - Any beneficial terms from subsequent agreements will be offered to all earlier adopters

DTCP is One of Many Competing Technologies

- Already six capable competitors
 - Proven track records
 - Established distribution networks
 - Well positioned for CE, IT and convergent products
- Low barriers to new entry
 - FCC Certification eases new entry
 - Use of technology for early-window content (cable, satellite, Internet) eases entry for broadcast protection
 - Interoperability promotes competition
- Robust Competition means No Market Power

Myth of “First Mover Advantage”

- Early stages of a rapidly-changing field
 - Robust competition
 - Ease of entry
 - Improvement in DRM technologies
- FCC should not penalize innovators for being “first”
 - Would create disincentives for inter-industry cooperation and future innovation

Covenants Do Not Deter Innovation

- Licensees remain free to exploit their IP for complementary, or even competing, technologies

Covenants are Not Discriminatory

- Licensees knowingly accept DTCP license and covenant obligations
- All Licensees obtain the same freedom from IP risk, and have the same obligations

DTCP Covenant was Accepted in DFAST License

- Covenant Not “Rejected” in DFAST
 - DFAST license expressly requires use of DTCP for passing Controlled Content over any 1394 output
 - PHILA similarly permits use of DTCP over any digital output for passing Controlled Content
 - No company raised any complaint about the DTLA license in Plug and Play

Covenant Benefits

- Low Costs and Risks, Enabled by the Covenant, Benefit Consumers
 - Minimal impact on cost of devices
 - Licensees do not have to absorb high costs for content protections (for which consumers will not willingly pay extra)
- Covenant is a standard feature in numerous content protection licenses

Licensees Lose if License is Changed

- Cannot retroactively change 90+ licenses
- Changing the DTCP License would foist higher costs and greater risks on all other licensees
 - Costs of evaluating and licensing own portfolio
 - Costs of evaluating, licensing or defending against licensee IP claims
 - Commercial royalty charges by DTLA
- Offering Adopters a “choice” between a Covenant and Royalty is illusory

Context for Philips' Contentions

- Of more than 90 licensees, only Philips complains to the Commission
- Philips has shown no actual harm resulting from the Covenant (though DTCP has been licensed for 5+ years)
- Philips is a licensor in technology licenses (e.g., for the HDMI interface) that contain such a Covenant as the only option
- Philips argues a lack of competition to DTCP, but did not submit its own link digital output protection technology, OCPS, which it did submit to BPDG

Requiring Interoperability is Bad Policy

- Interoperability may not be technically possible, or may not be desired by a technology proponent of a closed system
- Downstream interoperability could impair the value of the technology
 - E.g., HDCP is point-to-terminus technology
 - Linking to less robust downstream technology eliminates competitive advantages of the upstream technology
- For DTCP, could deter the use of “EPN” encoding for earlier window content

Forced Interoperability is Unnecessary

- The marketplace will drive interoperability
- DTLA works assiduously to facilitate approval for interoperable systems
 - DTLA has never rejected any request to interoperate with downstream technologies
 - Four have been approved, three more in process

Unfounded Concerns with Change Management

- Any mandatory changes to the Specification (the DTCP technology itself) will not be material
- Mapping DTCP to other interfaces does not change DTCP, just as a car remains the same on a superhighway or country road

Unfounded Concerns with Change Management

- Adopters have a right to comment and raise objections to any proposed Specification change
 - “Implementers Forum” to explain and discuss proposed changes
 - No Adopter ever has objected to a DTLA proposed change
 - Any comments received were addressed to the Adopter’s satisfaction before a change became final
 - Minimum comment period is 30 days
 - Specification Changes take effect no sooner than 18 months later

Unfounded Concerns with Change Management

- Changes made to the Compliance Rules will not materially increase the cost or complexity of implementing DTCP
 - Changes have benefited Adopters -- enabling interaction with PVRs, redundant server copies, etc.
 - Narrow exception (necessity to preserve integrity of protections offered by DTCP) enables response to technological threats, but has never been used

Unfounded Concerns with Change Management

- Changes to the Specification will not materially and adversely affect Content Participant rights
 - Necessary to ensure protection for existing content on future devices
- DTLA assured Adopters that, despite Change Management, porting DTCP to common interfaces could easily be accomplished

Differences in Rights Underlie Different Processes

- Content Participants' right to oppose changes (vs. Adopter comment and objection) reflects ability to respond to unacceptable changes
 - Adopters that object to license changes can cease, within 18 months, further implementation of DTCP
 - 5C companies are also Adopters, so have powerful incentives not to make changes that would harm Adopter interests
 - By contrast, even if Content Participants stop using DTCP, all content already in the market would remain exposed forever when played on future devices that incorporate the objectionable change

Fair Treatment for All Adopters

- “Lead time” is inherent – those who develop the technology know of it first – but is minimal
- Advance notice to Adopters of proposed changes
- Adopter input into draft proposal
- No change is implemented by anyone, including Founders, until after the Specification is finalized
- 18 month minimum implementation period

Competition Among License Terms Promotes Choice

- DTCP licenses are reasonable and nondiscriminatory
- Philips notes that other agreements, such as SmartRight, Vidi, Microsoft WMDRM, have provisions that Philips prefers
- If the market agrees, those technologies should succeed
- No need for FCC to homogenize all license terms and approaches