July 27, 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:

The Digital Transmission Licensing Administrator LLC ("DTLA") submits this response to the *ex parte* presentation and comments submitted in this proceeding on July 2 and 20, 2004, by Philips Electronics. Philips asks the Commission to impose upon DTLA several specific conditions that would change fundamental aspects of the license terms to DTLA's Digital Transmission Content Protection technology ("DTCP"), a technology that has been on the market for more than five years, and has been implemented in millions of devices in many countries.

It is critical that the Commission appreciate, first, the extremely serious impact of what Philips asks it to do. Philips seeks to overturn a low price/low risk licensing model that has been willingly accepted by more than 90 licensees – including Philips itself. These licensees have made business decisions to implement or employ DTCP based on their clear advance understanding of both the license provisions and the acceptable costs and risks implicated by those license terms. If, as Philips suggests, the alternative license model it now seeks to impose on DTLA is the "antonym" of the current DTLA license provisions, then the Commission will be imposing on DTLA's Adopters and Content Participants the opposite of the bargain that they have willingly accepted and knowingly relied upon. **The conditions that Philips seeks in the DTCP agreements would foist on DTCP Adopters and Content Participants costs and risks that they never bargained for and, indeed, specifically bargained to avoid -- with no perceptible benefit to them in return.**

In short, without providing the Commission any assurance that any other licensees would find such new conditions to be acceptable, or any evidence that any licensees or consumers actually would benefit from those new conditions, Philips is asking the Commission to create an unwanted and unwarranted regulatory disruption to the existing marketplace. It is indeed notable in these respects that no other Adopter or Content Participant has joined Philips's Opposition in this proceeding.[1]

Having petitioned the Commission to create such serious marketplace disruptions for the DTLA (and for the Adopters, who are Philips's competitors), one at least would expect Philips to support its positions with mountains of hard proof of actual harm, sufficient to outweigh the demonstrable marketplace benefits of the DTCP agreements and the desires of DTLA's 90+ licensees. Yet in support of its strident accusations, Philips produces only sophistry -- arguments that proceed from erroneous assumptions to hypothetical apprehensions. There is no rigorous analysis of the issues, and no factual evidence on the merits. Indeed, Philips fails to submit a shred of evidence that DTLA licensing policies have imposed any actual injury on the paramount interests of consumers, or even on Philips's own products or interests.

To the contrary, the most basic assumptions underlying Philips's argument – the bottom row in its house of cards – are completely without factual basis:

- **There is no uniform definition of what specific license terms are or are not "reasonable and nondiscriminatory."**
- **Standards organizations generally provide that the terms and condition of licenses are to be determined by negotiations among private parties – and are not to be prescribed by the organization itself.**
- **No standards organization cited by Philips, and none to our knowledge, prohibits the use of a licensee non-assertion covenant in a "reasonable and nondiscriminatory" license.**
- **Thus, Philips wrongly attempts to equate "reasonable and nondiscriminatory" -- "RAND" in their filings – as meaning "royalty-bearing" when, in fact, reasonable and nondiscriminatory can be based on non-asserts.**

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[1] Despite filing an "Opposition" to Commission certification of DTCP in this proceeding, Philips now relents and suggests that it does not actually oppose Commission authorization in this proceeding of DTCP as an authorized digital output technology for Unscreened and Marked Content. Notwithstanding, Philips well knows that the conditions it asks the Commission to impose upon DTLA, and its 90+ Adopters and Content Participants, would overturn fundamental structural elements of the DTCP agreements, and inevitably would increase the costs and risks of licensing DTCP.

Thus, Philips is asking the Commission to do what every standards organization has, for sound reasons, consistently refused to do – to define particular terms and conditions that are and are not "reasonable and nondiscriminatory." The Commission, to date, has undertaken to regulate with respect to the Broadcast Flag to the minimum extent possible. Pursuant to those regulations, DTLA has established that its agreements are made available at low cost to all persons that are similarly situated and, therefore, that its agreements are "reasonable and demonstrably free of unfair discrimination." Absent concrete demonstrations of harm to competition, or a clamoring of licensees to compel a change in license terms, the Commission should not depart from this sound policy.

Philips's latest concoction – a meretricious comparison of DTLA to the Microsoft antitrust case – relies on a similarly superficial recitation of the facts and the law. Indeed, Philips's argument relies on an apples-to-oranges comparison of completely different technologies, licensing terms, market factors and business practices.

As an initial matter, the *Microsoft* case in no way supports a general principle that nonassertion covenants are anticompetitive. Whether a particular license term renders a license anticompetitive requires a fact-intensive inquiry conducted under the rule of reason.[2] The facts that would inform a rule of reason examination of the license terms offered by Microsoft for the Windows operating system and the much narrower non-assertion covenant in the DTLA agreements are simply not comparable.

Nevertheless, even a forced comparison of the Microsoft and DTCP licenses reveals fundamental differences that are dispositive for purposes of the rule of reason:

(1) Microsoft unlawfully wielded market power against its competitors. After district and appeals court proceedings in the United States, and lengthy administrative proceedings in Europe,[3] Microsoft was found to have exercised anticompetitive monopoly power by unlawfully

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[2] *See, infra,* at 15; DTLA Reply Supporting Certification of DTCP at 28. *See also, United States v. Microsoft,* in which the United States Court of Appeals for the District of Columbia Circuit applied rule of reason analysis to determine the claims of unlawful tying. 252 F.3d 34 (D.C. Cir. 2001). It naturally follows that compliance with the Final Judgment also would be analyzed under the rule of reason. Thus, in the document submitted by Philips as Appendix 2 to its July 20, 2004, ex parte submission, it is notable the United States government did not state that the non-assertion covenant in the license to the Microsoft Window operating system was *per se* unlawful and, hence, would be reviewed under rule of reason analysis. Joint Status Report on Microsoft's Compliance with the Final Judgments, *United States v. Microsoft Corp.*, Civil Action No. 98-1232 (CKK) at 4 (July 9, 2004), available online at http://www.usdoj.gov/atr/cases/f204500/204560.htm

[3] Appendix A to Philips's July 20, 2004, *ex parte*, is a recommendation by the Japan Fair Trade Commission that, if contested by Microsoft, could result in administrative hearings. *See,* http://www2.jftc.go.jp/e-page/press/2004/july/040713.pdf Notably, the complaining parties in that proceeding did not contend, and the JFTC did not suggest, that non-assertion covenants are generically anticompetitive; rather the allegation is that the *particular* covenant in the Microsoft

(continued…)

tying a license to its Internet Explorer browser application software to the license to its Windows operating system. For more than a decade, Microsoft consistently has sustained against all other competitors extraordinarily high market share (estimated between 70 and 95 percent) in the operating system market, a market defined by the courts as a mature market with no meaningful competitors and characterized by high barriers to entry.[4]

(2) OS is a technology which essentially controls PC business. As an operating system, Windows is a basic platform with an extensive range of features, functions and technologies, with which all application software must interface in order to have access to the desktop PC-compatible computer market. The Windows software continues to materially expand, such that each generation of Windows OS incorporates in it substantially new functionality that could have been offered in stand-alone add-on products from Microsoft competitors.

(3) Microsoft licenses Windows as an extremely profitable enterprise.[5]

(4) The scope of Microsoft's non-assert is extremely broad. Moreover, the scope of the specific non-assertion covenant complained about in the Microsoft license was not limited to "necessary" or "essential" claims. Most importantly, the use of that license as the instrument of unlawful tying was proved to harm competition. Therefore, as a result of the court's finding of antitrust violation, Microsoft was required in the Final Judgment to materially reform the terms of the Windows operating system license in multiple respects; and the Department of Justice

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Windows, in light of Microsoft's 95 percent market share in Japan, and its tying of the Windows license to other media and browser components, is unlawful. Although recommendations pursuant to Japanese laws are not precedential or even persuasive authority for purposes of this proceeding, it also should be noted that the position taken by the JFTC is not the position of the Department of Justice in the Joint Status Report

[4] One of the most important and difficult steps in rule of reason analysis is determining the "relevant market" being analyzed. Philips sidesteps that analysis by attempting to confine the relevant market to only DTCP itself. Not even the courts in the Microsoft litigation defined the relevant market so narrowly as the "Windows" market, but clearly recognized that the market would include available alternatives for the PC platform -- even if they were not interoperable with Microsoft Windows itself, did not contain all the same features, run all the same software, and perform all the same functions. Here, six alternative and competing digital output protection technologies seek certification from the Commission, and others may seek certification in the future (including Philips's own OCPS technology). Thus, unlike the Microsoft case, any market for digital output protection technologies is a new and emerging market characterized by ample competition and low barriers to entry. *See*, Section II.A, *infra*, at 12.

[5] *See* Jonathan Krim, "Microsoft Announces Payouts to Investors, First Step Valued at $32 Billion," The Washington Post at A1 (July 21, 2004), available online at http://www.washingtonpost.com/wp-dyn/articles/A232-2004Jul20.html

therefore is considering whether the facts justify further restrictions on the scope of the nonassertion covenant.[6]

The facts pertaining to the DTLA covenant stand in stark contrast:

(1) DTCP is a content protection technology that is ancillary to the fundamental system and application elements of consumer electronics or information technology devices..

(2) DTCP is but one of many content protection technologies competing in a segment of the overall market for new digital video products. All of these technologies are offered by technologically proficient companies with well-established track records in the marketplace.

(3) Barriers to entry are low, with Commission certification significantly easing entry by any competitor into the marketplace. Similarly, approval of a technology by CableLabs (either under the PHILA, within the 180-day period provided for in the DFAST license or by appeal to the Commission) enables competition among technologies.

(4) DTLA has made specific and enforceable commitments to its Adopters in the Adopter Agreement, such that DTLA cannot materially expand the scope of the DTCP technology.[7] The DTCP license is designed as a low-cost option whose fees are based on the cost of licensing, maintenance and development of the technology.. Importantly, unlike the Microsoft covenant, the non-assertion covenant in the DTCP agreements is narrowly limited to only "Necessary Claims," *i.e.,* those claims that are necessarily infringed by the use of the elements of the Specification that are unique to DTCP. [8]

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[6] In fact, in the July 2004 Joint Status Report, the Department of Justice indicated it had not determined its position as to whether the nonassertion covenant in the Windows license, applied retroactively, comported with the requirement of the Final Judgments that Microsoft must license the 20 largest OEMs "pursuant to uniform license agreements with uniform terms and conditions." Joint Status Report on Microsoft's Compliance with the Final Judgments, *United States v. Microsoft Corp.*, at 4.

[7] *See* DTLA Adopter Agreement §3.3.

[8] The licensed "Necessary Claims" in the DTCP agreements, in brief, are limited to those patent claims owned or controlled by the 5C Companies that must be infringed to make a product that complies with the protocols and cryptographic algorithms, packet formats and data structures disclosed in the DTCP Specification. The license grant further extends to all copyright and trade secret rights owned or controlled by the 5C Companies embodied in the Specification for DTCP. "Necessary Claims" specifically excludes related elements that are not part of DTCP itself, such as the methods used to compress audiovisual content that is protected using DTCP (*e.g.,* MPEG-2) and interface protocols over which DTCP-protected content may traverse (*e.g.,* IEEE 1394, USB and Internet Protocol). *See* Adopter Agreement ¶¶ 1.22 and 5.2; Content Participant Agreement, definition of "Necessary Claims" at 7, and ¶ 2.1.

DTLA respectfully submits it would be arbitrary and capricious for the Commission to restrict or impose conditions on the reasonable and nondiscriminatory licensing terms offered by DTLA, upon mere accusations -- without any hard evidence concerning the scope of the market, the existence of market power, a showing of anticompetitive behavior or any antitrust injury to competition, and without a rigorous analysis of these facts under rule of reason precedents.

As shown below, the license terms for DTCP have been widely accepted in the marketplace because they are reasonable and demonstrably free of unfair discrimination. The DTCP agreements therefore fully comply with the Commission requirement in this proceeding that licenses to certified technologies be made available on reasonable and nondiscriminatory terms.

I. THE DTCP AGREEMENTS ARE REASONABLE AND NON-DISCRIMINATORY, IN ACCORDANCE WITH COMMISSION REQUIREMENTS AND PRECEDENTS.

DTLA in its Reply Supporting Certification of DTCP in this proceeding ("DTLA Reply") set forth in detail the arguments why its agreements fully comply with the Commission requirement of reasonable and nondiscriminatory licensing. DTLA Reply at 10-13. Several of the most pertinent arguments from that Reply are summarized below.

A. Reasonable and Non-Discriminatory Agreements Can Use Reciprocal Covenants Not to Assert Necessary Claims.

Philips's argument first proceeds from the fallacious presumption that somewhere there is an explicit definition of "reasonable and nondiscriminatory" licensing that always enables licensees to charge royalties against all other licensees, and flatly excludes the use of licensee covenants not to assert IP rights against fellow licensees. In fact, Philips has not pointed to such a definition because it does not exist. There is no single prescription for crafting license terms that are "reasonable and nondiscriminatory."

- Due process standards organizations decline to define the term to require specific license terms, and instead leave such decisions to the marketplace. As an ANSI counsel recently described in a presentation to the American Intellectual Property Law Association: "ANSI's position is that a one-size-fits-all approach will eliminate necessary flexibility to devise individual patent policies that best accommodate the objectives of the standards-setting project and the consensus of its participants."[9]

[9] "IPR and Standards," presentation by Amy A. Marasco, ANSI Vice President and General Counsel, to AIPLA, October 30, 2003, *available online at* http://public.ansi.org/ansionline/Documents/News%20and%20Publications/Speeches/PatentsAIPLA10-03.pdf. Of course, DTCP is a technology specification – *not* a standard.

- Standards organizations explicitly leave the specifics of any particular licensing terms are left to the marketplace and the parties themselves.[10] For example:

  - The ISO/IEC Directives Part 1 (Fourth Edition 2001) state:

    "2.14.2 t. If the proposal is accepted on technical grounds, the originator shall ask any holder of such identified patent rights for a statement that the holder would be willing to negotiate worldwide licences under his rights with applicants throughout the world on reasonable and non-discriminatory terms and conditions. **Such negotiations are left to the parties concerned and are performed outside ISO and/or IEC.**"

  - The ANSI "Guidelines for Implementation of the ANSI Patent Policy," ANSI at III-B (March 2003) provide:

    "It should be reiterated that **the determination of specific license terms and conditions, and the evaluation of whether such license terms and conditions are reasonable and demonstrably free of unfair discrimination, are not matters that are properly the subject of discussion or debate at a development meeting. Such matters should be determined only by the prospective parties to each license** or, if necessary, by an appeal challenging whether compliance with the Patent Policy has been achieved."

- Commission precedents also provide no uniform definition of "reasonable and nondiscriminatory." To the extent the Commission has commented on this term in the past, "reasonable" has been equated with reasonable costs; and "nondiscriminatory" – i.e., "demonstrably free of unfair discrimination" – has meant that the same terms are offered to all similarly situated entities.[11]

Indeed, each of the patent policies cited in the Philips July 2, 2004, ex parte at 2 n. 6, merely states the requirement that where patents essential to the standard are owned by proponents or members, they should either waive their right to assert such patents or commit to license those patents on reasonable terms demonstrably free of unfair discrimination.

Thus, the most basic element of Philips's arguments – that a reciprocal covenant not to assert necessary claims against other licensees is the "antonym" of reasonable and non-discriminatory licensing – is not true. **There is no authority for Philips's proposition that "reasonable and nondiscriminatory" license terms exclude licensee non-assertion covenants.** A license with non-assertion covenants can be reasonable and non-discriminatory, just as a license that permits royalty-bearing reciprocal licensing can be unreasonable and nondiscriminatory. The determination of what license terms are "reasonable and

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[10] See DTLA Reply at 14-16.

[11] See DTLA Reply at 17-21.

nondiscriminatory" are, and should be, left to the marketplace or the courts, and can only be adequately made in context of the agreement as a whole, and a full factual record, balancing the benefits of the license against its obligations.[12]

Ultimately, then, Philips wrongly suggests it is "only" asking that licenses "comply with well-established Commission policy, reflected in the practices of standard setting bodies …." Philips July 2 *Ex Parte* at 2. To the contrary, Philips is asking this Commission to depart sharply from established standard setting bodies' policy of refusing to dictate whether particular license terms, out of context, are or are not "reasonable and nondiscriminatory." In keeping with such established policies, the Commission should reject Philips's proposals, and should determine that the non-assertion covenant in the DTCP license does not, per se, conflict with the requirement to offer licenses on reasonable terms demonstrably free of unfair discrimination. Indeed, such a policy is wholly consistent with the Commission philosophy, reflected in the policies of standard setting bodies, the Commission patent policy, and the Broadcast Flag regulations themselves, to impose sufficient, but minimal, regulatory requirements and to otherwise allow the marketplace to flourish.

B. <u>The DTLA Agreements Are Reasonable and Non-Discriminatory.</u>

When DTLA began offering licenses to its technology more than five years ago, DTLA recognized that the role of DTCP, like any content protection technology, is to enable consumers to receive content and services that otherwise would be unavailable to them, and that the opportunity from opening these new digital markets would be enabled more effectively by making DTCP readily available at low cost, and imposing a minimum of obligations upon licensees. However, the cost of content protection technology cannot readily be passed on to the consumer. Thus, DTLA adopted a license structure, common to content protection technologies, that seeks to minimize the license costs for Adopters, Content Participants and consumers. Under this structure:

- DTLA makes the DTCP Specification available on the basis of the costs to develop, maintain, administer and license the DTCP technology.
- The license to the DTCP Specification includes all Necessary Claims to IP rights underlying the Specification that are owned or controlled by DTLA and its the Founders.
- Having based the DTCP license fees on cost recovery, the resulting fees therefore are not the type of marketplace patent and IP royalties that the 5C Companies

[12] Philips's July 2 *ex parte,* at 4 n. 14, incorrectly cites a case in which the court of appeals remanded for further fact-finding as to the reasonableness of a particular flat rate, applied to dissimilar parties, where the regulation specifically required that rates should produce revenues that match, as closely as practicable, the costs to serve each class or individual consumer. *Alabama Electric Cooperative, Inc. v. Federal Energy Regulatory Comm'n,* 684 F.2d 20 (D.C. Cir. 1982). Despite the differences in the standard, and the differences in facts, even that court did not, as Philips seems to suggest, find that the single rate was per se unreasonable.

ordinarily would charge for an IP license alone. As a result, fees to implement or use DTCP are low, and can be further reduced as costs decline over time.

- It would be unfair for DTLA to permit licensees to claim intellectual property royalties against DTLA and other licensees, when DTLA itself is not claiming such royalties. Similarly, because the licensees incur no costs from the operation of DTLA, there is no reason for licensees to seek any cost-based compensation from DTCP users.

For these reasons, the DTCP agreements require all Adopters (including the 5C Companies) and Content Participants to not assert Necessary Claims against any other licensee. DTLA could have chosen another licensing model, whereby both DTLA and its licensees could claim commercial IP royalties against one another; however, such a model would inevitably have resulted in higher license fees, higher risks of IP disputes and litigation, and higher administrative costs for all licensees. The success of DTCP clearly indicates that, for this type of technology, DTLA and its Adopters have made a better choice using the existing licensing model.

C. The Covenant Not to Assert Necessary Claims is Narrow, Reasonable and Non-Discriminatory.

The non-assertion provision is extremely narrow, and is subject to essential safeguards, including:

- Every Adopter knows the scope of the covenant before acceding to it. The covenant is based on the Specification, and every Adopter can evaluate the full version of the Specification (including even Highly Confidential Information) before activating the agreement and becoming subject to the covenant.

- The scope of the covenant is limited to Necessary Claims, a term defined in the agreements to narrowly include only intellectual property claims that are necessarily infringed by use of the DTCP-specific elements of the Specification.

- "Necessary Claims" does not include other elements that are not specific to DTCP itself. For example, it does not include any intellectual property rights in MPEG-2, or in the interfaces for IEEE-1394, USB, Ethernet, 802.11, etc. Therefore, mapping DTCP to other interfaces does not change the scope of "Necessary Claims or the covenant.

- The non-assertion covenant does not impede innovation. Every licensee remains free to use or license its intellectual property rights for any technology other than that disclosed in the DTCP Specification, including technologies that compete with or complement DTCP.

- Because the scope of the covenant is determined by Necessary Claims in the Specification, the license terms that constrain the scope of permissible changes to the Specification likewise limit the scope of the covenant.

- While the covenant demonstrably has benefited licensees by reducing the risks and costs of using DTCP, over the five years in which DTCP has been available for license no one has come forward with evidence of any negative impact from the covenant. Not one licensee or potential licensee ever has identified a single patent that it contends has been subject to the covenant.

Notably, DTLA voluntarily created these terms beginning in 1998 – long before anyone considered the possibility of a "broadcast flag" – out of its desire to promote introduction of networked digital home entertainment products by protecting digitally-delivered content. Without any contemplated involvement by a government entity, or any regulatory obligation to engage in reasonable and nondiscriminatory licensing, DTLA has expended extraordinary efforts to ensure fair treatment of its licensees.[13]

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[13] In response to DTLA's Reply, Philips now agrees that DTLA is not a "patent pool." *See* DTLA Reply at 32-34. But rather than concede that it also is inappropriate to apply to DTCP the antitrust scrutiny usually accorded to patent pools, Philips leaps to the unfounded conclusion that an even higher degree of scrutiny should be applied. To explain again, what DTLA offers is a license to a Specification that enables Adopters to implement a technology that the DTLA Founders jointly created. Each of the Founders possesses an interest in that Specification as an independent licensable product. Each of the Founders also holds joint and individual interests in intellectual property necessary to implement the Specification in products or to invoke the use of DTCP; and, inasmuch as the Founders are among the largest patent holders in the relevant fields of cryptography, the Founders each believe that they own patents that are necessary to the Specification. Therefore, as an appurtenance to the license to use the Specification, DTLA grants to those who license the Specification rights to the Necessary Claims (including patent, copyright and trade secret rights) implicated by the use of the Founders' intellectual property underlying the Specification. A license to the Specification alone would potentially expose licensees to IP claims by the Founders; yet, a license to the Necessary Claims alone would not enable Adopters to manufacture DTCP-compliant products.

Such business arrangements are not per se unlawful, and are evaluated under the rule of reason, not the type of "strict scrutiny" Philips suggests:

> "Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. The Agencies focus on only those factors, and undertake only that factual inquiry, necessary to make a sound determination of the overall competitive effect of the relevant agreement. Ordinarily, however, no one factor is dispositive in the analysis.
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> "The Agencies' analysis begins with an examination of the nature of the relevant agreement. As part of this examination, the Agencies ask about the business purpose of the agreement and examine whether the agreement, if already in operation, has caused anticompetitive harm. In some cases, the nature of the agreement and the absence of market power together may demonstrate the absence of anticompetitive harm."

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In summary, DTLA has employed a licensing model for the DTCP Specification that results in low costs and reduced litigation risks for all licensees. All classes of licensees pay the same fees and knowingly assume the same obligations. All licensees enjoy the same benefits. Thus, the DTCP agreements fully comport with the Commission requirement that agreements for the DTCP technology be reasonable and demonstrably free of unfair discrimination.

Philips demonstrates a fundamental misunderstanding of the nature of unfair discrimination and antitrust law by contending that the covenant discriminates against those licensees who may have intellectual property that is subject to the covenant.[14] First, Philips ignores the procompetitive purposes served by the covenant in promoting competition in the primary market for devices that incorporate DTCP. The covenant is one of several elements that are essential to the balanced low-cost structure of the DTCP license. By providing a readily-available and inexpensive content protection technology, DTLA helps enable competition in the primary market in which its licensees compete – digital video products and services that promote home networking. Conversely, the covenant is non-exclusive, and does not prevent any licensee from using its own intellectual property to develop its own technologies that compete against or complement DTCP. Thus, in the words of the antitrust lawyer who has represented Philips over the last decade before the Department of Justice and the International Trade Commission, on balance a royalty-free non-assertion covenant can be pro-competitive "because, among other reasons, each licensee has a reciprocal obligation to provide access to the system thereby opening the market for the benefit of each licensee, and the licensee grant is limited to the system defined by the license and does not extend to other licensing activities."[15]

Second, "nondiscriminatory" means, as the Commission and all standard setting bodies hold, "demonstrably free of *unfair* discrimination." Almost any license will contain provisions that have a disparate impact upon similarly situated parties. A $1.00 per device royalty certainly affects the maker of a $100 product differently than the maker of a $3,000 product; and a license that provides for volume discounts favors large purchasers over small purchasers. Yet, because

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Antitrust Guidelines for Collaboration among Competitors, Federal Trade Commission and U.S. Department of Justice, at 5 (April 2000).

[14] To DTLA's knowledge, again, this is a null set, as no licensee (including Philips) or potential licensee ever has identified any patent or other right subject to the covenant. Thus, to paraphrase Philips's arguments to the Commission, little could be more unreasonable than to overturn a licensing structure willingly accepted by more than 90 companies, where Philips has not identified any actual patent that has been subjected to the covenant.

[15] Garrard R. Beeney, "Pro-Competitive Aspects of Intellectual Property Pools: A Proposal for Safe Harbor Provisions," submitted to U.S. DOJ Antitrust Division and Federal Trade Commission Joint Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, April 17, 2002, available online at http://www.ftc.gov/opp/intellect/020417garrardrbeeney.pdf

the license terms remain the same for all similarly situated parties, such licenses are demonstrably free of unfair discrimination. That is equally true for the DTCP license, where the same terms are offered to each type of licensee.

Third, Philips overlooks the central principle that antitrust law protects *competition,* not individual competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Batke v. Casey's Gen. Stores,*64 F.3d 340, 344 (8th Cir. 1995); *Drach v. American Kennel Club*, 1995-1 Trade Cas. (CCH:) ¶ 71,011 (9th Cir. 1995); *Tennessee Truckstop, Inc. v. NTS, Inc.,* 875 F.2d 86, 88 (6th Cir. 1989). The covenant in the DTLA license does not adversely affect competition in any manner. It does not raise prices, or restrict output, or deter the creation of competing protection systems. To the contrary, the structure of the DTLA Adopter Agreement and Content Participant Agreement is pro-competitive because it helps open the market for competition in digital home networked devices and lowers the costs of DTCP for all who use or benefit from the technology (including costs to consumers).

Fourth, by arguing that the covenant is somehow "confiscatory," Philips ignores that it is also receiving a benefit from the covenant. The covenant is given by all licensees to all licensees. Thus, Philips receives value from every other licensee – all of whom are sophisticated technology companies that also may have, and may continue to acquire, very substantial intellectual property assets, and all of whom knowingly and willingly have signed on to the covenant. If Philips did not believe that this was a bargain worth making, then it should not have signed a license with DTLA. If Philips does not believe this is a bargain worth making with respect to content protected by the Broadcast Flag, Philips can adopt any of the other digital output protection technologies that will be certified by the Commission.

Thus, Philips's assertions amount, in sum and substance, to an indefensible argument that licensees (who incur no administrative costs) should be permitted to charge commercial royalties against the DTLA Founders and all other Adopters, even though DTLA itself charges only administrative fees. The ability that Philips seeks for licensees to seek profit-based royalty returns on the DTCP technology, would be manifestly unfair – inasmuch as the 5C Companies that developed DTCP only seek (at most) to recover ongoing administrative costs.

II. THE PHILIPS ARGUMENTS ARE BASED ON FALLACIOUS ASSUMPTIONS AND A COMPLETE ABSENCE OF FACTUAL PROOF.

A. Philips Presents No Evidence of "Market Power."

Philips alleges that Commission approval of DTCP would create a government-bestowed monopoly, and asserts that DTLA possesses "market power." "Market power" typically is defined as the ability of any competitor to obtain and sustain supracompetitive pricing, or to depress output, for a substantial period of time.[16] Of course, such an allegation hardly seems

[16] *Antitrust Guidelines for the Licensing of Intellectual Property*, U.S. Department of Justice and Federal Trade Commission ("IP Guidelines") § 2.2 (1995). "Market power can be exercised in other economic dimensions, such as quality, service, and the development of new or improved goods and processes. It is assumed in this definition that all competitive dimensions (continued…)

pertinent to a Specification license based on cost recovery rather than market rate royalties; and a monopolist's motive can hardly be squared with DTLA's repeated calls for the Commission to approve the maximum number of technologies for the benefit of all marketplace participants.[17]

Even if relevant, an assessment of market power must proceed from facts that define the relevant market; survey available actual and potential competitors; evaluate the ease of new entry into the marketplace; and consider the impact of such actual and likely competition on the ability of a market participant to maintain above-market pricing or to limit output. Yet, while freely throwing about accusations of "market power," Philips has presented no evidence whatsoever on any of the basic and essential factual issues.

The reason, quite simply, is that the facts belie Philips's claims. Any serious analysis of market power would have to consider these facts, which Philips conveniently seems to ignore:

As an initial matter of law, a "market" is not defined nearly as narrowly as Philips suggests. A "market" consists of the licensed technology and its close substitutes—"that is, the technologies or goods that are close enough substitutes significantly to constrain the exercise of market power with respect to the intellectual property that is licensed." IP Guidelines at 3.3. Thus, the relevant market is not only the narrow discrete market for protecting compressed content over a link between two different protection systems.[18]

To the contrary, to determine the relevant market, one must evaluate whether a consumer would be able to respond to the exercise of market power by acquiring an alternative technology. "Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level," *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 218 (D.C. Cir. 1986), the relevant market must include all products "reasonably interchangeable by consumers for the same purposes." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). Thus, even if DTCP possessed high market share today, it could not exercise market power for the following reasons:

- **<u>Effective Current Competition</u>**. Six competitors have submitted digital output protection technologies for certification by the Commission, including **Thomson**

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are held constant except the ones in which market power is being exercised; that a seller is able to charge higher prices for a higher-quality product does not alone indicate market power." Id. at n. 10.

[17] *See, e.g.,* Comments of DTLA, *In the Matter of Digital Broadcast Content Protection,* Docket MB 02-230; Reply Comments of DTLA, *In the Matter of Digital Broadcast Content Protection,* Docket MB 02-230; Letter from DTLA to Chairman Michael Powell, October 23, 2003.

[18] If Philips's argument were correct, then Philips and H-P too would be monopolists wielding market power over the only protection technology for the +R and +RW recording format – a format whose patents are also largely owned by Philips.

("SmartRight"), **Microsoft** (Windows Media DRM), **RealNetworks** (Helix DRM), **TiVo** (TiVoGuard) and **Digital Content Protection LLC** (HDCP).

- Link protection competes against, and coexists with, "end-to-end" systems such as SmartRight, WMDRM or Helix, point to terminal systems such as HDCP, and self-contained systems such as PVRs or PVRs with internal DVD recorders, that can be physically integrated in a single box. Any of these alternatives provides an economically meaningful substitute for link connections between separate components.

- All of the above technology developers have earned well-deserved and reputations for building robust and effective protection technologies.

- SmartRight has the support of numerous technology companies and manufacturers. Thomson is one of the world's largest manufacturers of television receivers and source devices (such as satellite and cable set top boxes), and possesses a significant share of the domestic market for DTV devices. SmartRight proponents even include companies among the 5C Companies.

- **Ability to Leverage Success in Other Markets**. Several of these technologies already are well-established in particular market segments.

  - Microsoft's WMDRM and RealNetworks's Helix DRM already are being used to protect motion picture programming delivered, on demand, over the Internet and broadband to the PC. As the PC increasingly becomes the "home media center," and PC-based technologies migrate to consumer set top box platforms, these technologies will be able to capitalize on their current trusted place on the PC platform.

  - Competitors can gain a foothold on satellite set top boxes, and can seek approval for use with cable systems under the PHILA and the procedures in the DFAST license.

  - TiVo is among the most popular and innovative consumer technologies, and rapidly is growing in popularity (and in imitators among cable and satellite services. Consumer desire to incorporate such PVR functionality enhances the leverage of TiVo and other PVR manufacturers to interoperate with and adopt their protection systems.

- **Certification Accelerates New Entry Competition.** Approval by the Commission acts as a springboard for entry by any new competitor in the field of content protection.

  - Commission certification of effective content protection, coupled with the notoriety and attention that certification can afford any new entrant, guarantees any new entrant serious consideration as a marketplace competitor.

- Marketplace demand for interoperability among content protection technologies further enables any entrant to gain a foothold on existing and future platforms.

- **Innovation Provides Competition.** DRM technologies for digital TV are still in their infancy. As DRM technologies offer greater flexibility for consumers, content owners, implementers and broadcast services, the marketplace will have additional motivations to migrate toward technologies with capabilities beyond those of DTCP.

In these respects, it is most relevant for the Commission to ask how the marketplace would respond if DTCP were not available for use with Unscreened and Marked Content. The answer, DTLA submits, is that the market would promptly begin implementing one or more of these alternative technologies.

All of these factors demonstrate the reality of robust competition today and additional competition into the future, based on the ability of these competitors to respond to technological change and platform convergence, the existence of alternatives to link protection, the ease of new entry, and the beneficial impact of Commission certification on new entrants. These and other factors effectively constrain DTLA or any single competitor from the exercise of "market power."

B. The DTLA License Terms More than Satisfy Rule of Reason Analysis.

As DTLA explained in its Reply Supporting Certification of DTCP ("DTLA Reply"), the pro-competitive nature of the DTCP license terms is evaluated under, and amply satisfies, the rule of reason. The rule of reason requires a fact-specific and fact-intensive inquiry as to whether under marketplace conditions, and in light of the justifications for and potential for procompetitive effects, any anticompetitive impact from a particular license term is likely to outweigh the license's procompetitive benefits.

The DTCP agreements follow a well-established and commonly-used model for content protection technologies, including the CSS encryption used to protect DVDs, HDCP, CPRM and others.[19] This model, based on cost recovery rather than commercial royalties, minimizes the cost of content protection for consumers and reduces the risk for licensees of litigation or excessive royalty costs. All implementers and users obtain a low-cost technology solution, on reasonable terms administered in a fair, transparent and nondiscriminatory manner.

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[19] The HDMI interface format also uses this same necessary claims/reciprocal covenants licensing model. As DTLA noted in its Reply, Philips is a licensor of the HDMI format and, hence, offers any necessary intellectual property it owns in that format subject to a reciprocal nonassertion covenant. Philips also disclosed that another content protection agreement in which it participates as licensor, CPS for BD-RE, includes the reciprocal nonassertion covenant that it herein opposes. Philips Opposition at 19 n. 52.

Antitrust principles and precedents generally regard collaborations among competitors that involve the joint licensing of intellectual property as pro-competitive.[20] The particular agreement model used by DTLA narrowly defines the scope of "necessary" patent claims being granted for the purpose of implementing the technical specification of that particular protection technology, and requires in return that the signatory agree not to assert any of its "necessary" patent claims, within that scope, against any other signatory (here, the Adopters that implement the DTCP technology and the Content Participants that invoke its use). This system creates a "safety zone" in which all who wish to use a low-cost technology effectively check their guns at the door, and lower the risk for all other licensees who wish to trigger or implement the protection system. The owners of many technologies – and hundreds of licensees – have deemed this approach an appropriate one for digital video copy protection and related technologies, because it is sensible and pro-competitive.

The same Adopter Agreement is offered on a nondiscriminatory basis to all Adopters. The agreement grants Adopters the right to use the Specification, and any "Necessary Claims," trade secret and copyright rights owned or controlled by the 5C Companies, as needed to implement the DTCP Specification. Hence, the agreement assures Adopters the rights that they need and that are owned or controlled by the 5C Companies to implement the Specification -- no more, but no less.

Importantly, all Adopters have the right to review the full Specification for DTCP (including all implementations and all confidential trade secret information) before undertaking the nonassertion covenant. Thus, every Adopter has the right and opportunity to fully understand the scope of the covenant before giving it.

DTLA is aware of no antitrust law precedent that holds that reciprocal covenants not to sue are inherently anticompetitive.[21] In the context of patent pools (which this is not), which are

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[20] *See* U.S. Department of Justice and Federal Trade Commission, Antitrust Guidelines for the Use of Intellectual Property, §§ 2.0, 3.4 (April 6, 1995) (hereinafter "IP Guidelines"), and § 5.5 ("These arrangements may provide procompetitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation. By promoting the dissemination of technology, cross-licensing and pooling arrangements are often procompetitive.").

[21] Philips's citations to the Microsoft license are consistent with DTLA's central point: **whether a particular license term is pro-competitive is to be determined under the rule of reason by considering all applicable facts and circumstances.** It should come as no surprise that a licensee covenant not to assert IP rights would be closely examined by the Department of Justice, where the licensor long has held market power in the relevant market, where barriers to entry have been found to be high, and where the licensor has been found, after trial and appeal, to have unlawfully tied the license in question to licenses of other discrete products. Thus, none of the proceedings with respect to the Microsoft licenses stand for the proposition that reciprocal non-assertion covenants are anticompetitive; and, none of the anticompetitive factors present in the Microsoft case is true with respect to DTLA.

judged according to a rule of reason analysis (as this agreement would be), the Department of Justice identifies certain important factors for "grantbacks" of patent rights. These factors – that they are limited to essential claims, do not inhibit the assertion of IP rights in other technologies, are applied to all similarly situated parties, and that the licensor obtains no greater rights than other licensees – all are satisfied by the reciprocal covenant not to sue in the DTCP agreements. *See* DTLA Reply at 38-40.

The reciprocal covenant in the DTCP agreements does not inhibit competition. Requiring licensees to provide identical access to their intellectual property even without a royalty creates no disincentive to innovate. Adopters continue to have incentives to innovate, and retain full right and ability to innovate and to license their intellectual creations in competing content protection technologies or in any field of use. Every DTCP Adopter and Content Participant obtains the full benefit of this provision and of its impact on the overall structure and cost of the DTCP agreements. By reducing the risk of litigation to all, the restrictive covenant is an integral part of a structure that reduces the cost of the DTCP agreement, and thereby facilitates competition among product manufacturers based upon product features. Therefore, the restrictive covenant is procompetitive and beneficial to consumers.

Under the rule of reason analysis, if the pro-competitive benefits of the license outweighs any purportedly anti-competitive impact, the license provision -- in this case, the non-assert covenant -- raises no issue under antitrust law. For all the reasons given above, the DTLA believes that the benefits brought to Adopters and consumers by its non-assert provision make the DTCP license terms pro-competitive, as well as reasonable and nondiscriminatory.

III. THE CONDITIONS THAT PHILIPS SEEKS TO IMPOSE ON DTLA ARE UNWARRANTED.

In its July 2, 2004, *ex parte* submission, Philips asked the Commission to [Expand intro here]

A. Philips's Patent Disclosure Proposal is Unwarranted, Exclusionary, Inappropriate, and Creates Unnecessary Risk and Expense.

Borrowing concepts from the operation of patent pools, Philips erroneously conceives of a necessity for DTLA to identify patents that must be infringed in order to use the proposed technology. *See* Philips July 2, 2004, *ex parte* submission at Appendix A. As DTLA has demonstrated in the past, there is no reason for the Commission to require patent disclosure.

First, patent disclosure is unnecessary in a license agreement that relies upon the Necessary Claims formulation. The question most often asked by licensees is how they may have assurance that they have obtained from the licensor all rights needed to implement the product or system. These licensee concerns cannot be assuaged by a list of patents that may be under-inclusive. The DTCP license approach alleviates that concern, by assuring licensees that they have obtained all rights possessed by DTLA and the Founders in Necessary Claims.

Second, a patent disclosure requirement is inappropriate where, like DTCP, a license is being offered based on the Specification. The disclosure concept is appropriate for patent pools, where licensors seek royalty fees based on the purported value of their patents. In such circumstances, licensees need to be able to ascertain whether the royalties being charged are reasonable in light of the strength, coverage and number of the licensed patents, and whether the royalties can be lowered because some or all of the patents are subject to existing cross-licenses. Such is not the case here. A patent license alone does not enable anyone to use DTCP; the license to the Specification is necessary and, indeed, is primary. Moreover, the value of the patents or the reasonableness of a royalty is irrelevant because the DTCP license is geared to recovery of costs, not the value of the underlying patent rights.

Third, requiring disclosure of patents creates unnecessary risks and expense for licensors. A patent owner that is over-inclusive, and incorrectly includes on its list patents that later are deemed by a court to not be infringed by use of the technology, runs a serious risk of being sued for and being found liable for patent misuse by tying a license to necessary patent claims to unnecessary patents. And, under the doctrine of patent misuse, the licensor could be deemed unable to enforce any of its licensed patents during the period before the misuse had been purged. In light of these legal and economic risks, and despite Philips's suggestion that no independent expert analysis be obtained, any patent owner would be ill advised not to obtain an independent analysis. Even if a patent owner determined to assume such risks, the burden on the patent owners to undertake the analysis themselves could be time-consuming and expensive. For companies such as the 5C Companies, which for many years have been among the 20 largest recipients of United States patents, scores of patents would need to be considered. Moreover, large corporations typically have discrete divisions, each with their own research and development capabilities, that will each obtain patents in fields such as cryptography, and thus each company would need to examine each division's patent assets. Furthermore, this examination would not be a one-time effort, inasmuch as major companies acquire new patents on an ongoing basis.

Finally, such a proposal is potentially exclusionary. Protection systems can be based upon copyright rights, trade secrets and legal protections (such as the Digital Millennium Copyright Act) and need not rely on patents for protection. This was the case until fairly recently for the CSS technology used ubiquitously to protect DVD video discs.

Therefore, the Commission should reject Philips's "patent disclosure" proposal.

B. Requiring Interoperability with All Approved Technologies Could Prejudice Consumers and DTLA's Content Participants.

As DTLA previously has observed, interoperability generally is desirable for consumers and technology companies, and DTLA has worked directly and assiduously with any technology company that wishes its content protection systems to interoperate with DTCP. Notwithstanding, compelling all content protection systems certified by the Commission to be interoperable with each other (as Philips suggests) is unrealistic and, in the case of DTCP, would lead to unintended and undesirable consequences.

This is not, as Philips suggests, merely a "licensing issue."[22] There are, of course, technical issues that Philips ignores, inasmuch as interoperability generally must be accomplished by dedicated engineering work, not administrative fiat. There are also design issues, inasmuch as some technologies, like HDCP, can be interoperable upstream only, but not downstream. And, there are business model issues, in that some technology purveyors may actually prefer to market a closed system that effectively protects content, but yet the owner of the technology believes it will achieve greater marketplace success by making its products non-interoperable with other products. Although DTLA does not fall into this latter category, we see no reason as a matter of policy why the Commission should decide that companies should not have the right to pursue whatever business model makes sense in the marketplace.

In the case of DTCP, in addition to the technical and design issues described above and in our prior filings, DTLA faces a dilemma created in some measure by the Commission's adoption of robustness rules that are lower than those in the majority of content protection licenses of which DTLA members are aware. As the Commission knows, the MPAA and other content owners oppose the level of robustness adopted in Commission regulations, and have petitioned the Commission for reconsideration on that subject. As a result of the difference between the levels of robustness in the broadcast flag regulation and in licenses for devices that handle earlier window content, motion picture studios may not consider devices built to the level of robustness in Commission regulations sufficiently protective of their higher value content.

DTCP protects Unscreened and Marked Content using a setting that defines the level of protection to be accorded to the content, but does not define the source of that content (as broadcast, premium cable, etc.). Unscreened and Marked Content must be protected under the DTCP agreements as "EPN," which requires that the content be encrypted, but permits the content to be freely copied and re-copied in protected form. However, EPN is not a setting that is unique to Unscreened and Marked Content. EPN can be applied to any content, including premium cable programs or even pay per view. Our Content Participants have recognized that there may be situations where such EPN settings would be highly desirable, such as the introduction of a new cable series that could benefit from the "word of mouth" advertising value of copies passed among consumers.

If the Commission certifies technologies for broadcast flag use that require only the lower level of robustness, and requires DTLA to make its technology interoperable with all certified systems, then content owners may no longer be willing to encode higher value content as EPN. As a result, consumers will lose the right to more flexibly enjoy their home-recorded content, and content owners may lose a valuable marketing tool. DTLA understands that this would be an unintended consequence of Commission action, but it is no less real in effect. We respectfully suggest that the Commission should also wish to avoid harming consumer interests in home recording – particularly where the inherent marketplace benefits will stimulate interoperability, and make it unnecessary to require interoperability by regulation.

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[22] Nor is this, as Philips suggests, a case of "licensor veto."

C. **The Change Provisions of the DTCP Agreements, Limited to Non-Material Changes, Pose No Risk to Any Licensee's Technological Innovations.**

DTLA, frankly, is incredulous at the Philips flapdoodle suggesting that DTLA, through the change provisions in its agreements or through the non-asserts, can somehow swallow up innovative technologies created by any licensee. As the Commission well knows, most technology licenses impose no limitations on the ability of the licensor to enhance or expand its technology. DTLA, on the other hand, took the opposite approach. In 1998, to encourage its licensees to adopt DTCP (and thereby help to kick-start the incipient market demand for digital video home networked products), DTLA self-imposed strict limits upon changes that could be made to DTCP. Under the express terms of Section 3.3 of the Adopter Agreement, mandatory changes to the DTCP Specifications are narrow in scope, and are limited to non-material changes, corrections and clarifications. It is difficult for DTLA to imagine how any Specification change could somehow usurp a third party's technology, and yet be non-material.

Mapping DTCP to other interface protocols, such as DTLA has done for USB, MOST, Internet Protocol and Bluetooth, involves serious effort in order to ensure seamless operation of DTCP over those protocols, but does not involve material changes to DTCP itself.[23] Whether a car travels a country road or a superhighway, the car remains the same. Whether DTCP works over USB or Internet Protocol, the essential elements of DTCP remain the same. The differences tend to reside in the settings of the protocol itself, not in DTCP. Indeed, that is among the reasons why DTLA's Content Participants explicitly understood and agreed that mapping DTCP to interface protocols that were inherently local in nature would not be considered either "material" or "adverse." Content Participant Agreement § 3.7(a) at 14.

DTCP-IP localization is perhaps a prime example of how changes made by DTLA are not material changes. The essential elements of localization basically exploit facilities extant in the Internet Protocol, and do not involve changes to DTCP itself. For example, the "Time To Live" packet in the IP header (which for content, such as email, intended to traverse the Internet is generally set to a high number such as 255) is set to 3 so that data cannot pass through more than three routers before being discarded. The "Round Trip Time" test for communication between devices in the Internet Protocol is to be set for 7 ms or less. Other changes generally establish how often the RTT test and authentication and key exchange are to be performed. These and other elements were provided in notice to DTLA Adopters in June 2004, and generally are described in the *ex parte* submissions by DTLA in this proceeding dated July 20 and July 22, 2004.

The other change provision to which Philips refers, that enables changes to the DTCP Compliance Rules where "necessary to ensure and maintain content protection," would not permit any of the horribles that Philips parades in its July 2 *ex parte*. First, changes to the Compliance Rules do not alter the Specification itself. Inasmuch as the nonassertion covenant is defined by the Specification and not the Compliance Rules, Philips's argument lacks any merit. Second, contrary to Philips's argument, changes to the Compliance Rules may offer an Adopter

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[23] Again, recall that the definition of "Necessary Claims" specifically excludes any intellectual property rights in the interface protocols themselves. *See, supra,* p. 4 n. 5.

an opportunity to license its technologies to other Adopters, rather than to "surrender" their technologies. If, for example, the Compliance Rules permit secure transmissions or recordings of data protected with DTCP using particular protection technologies, any Adopter that wished to make such devices would have to obtain licenses from the third parties that owned those technologies. Third, the Adopter Agreement provides Adopters with specific assurance that DTLA shall not make any revisions to the Compliance Rules that would materially increase the cost or complexity of implementations of Licensed Products. The exception to this provision -- that DTLA can make changes to the Compliance Rules where "*necessary* to ensure and maintain content protection" – is an important safeguard provision that would enable DTLA to respond to an emergency flaw or attack that could be easily remedied through a change to the Compliance Rules. It has never been invoked by DTLA.

Adopters receive advance notice of every Specification change and any material Compliance Rule change, before they are finalized by DTLA. Adopters have the ability to ask questions, to comment, to suggest alternatives, and so forth. Notably, no Adopter has objected to any change proposed by DTLA – including the changes made in connection with DTCP-IP, and DTLA has responded to and satisfied any questions that have been posed by Adopters. Changes to Compliance Rules take effect no sooner than 12 months after becoming final. Specification changes take effect no sooner than 18 months after becoming final.

Philips's complaint about the purported absence of a dispute resolution mechanism for Adopters is equally meritless. Every Adopter has the right to enforce the terms of the Adopter Agreement if DTLA has undertaken Specification or Compliance Rules changes exceeding the scope of permissible changes. However, DTLA has not provided for arbitration in its Adopter Agreement. It would be unfair to DTLA and to other Adopters if certain Adopters, many of whom are competitors of the DTLA Founders, were to use arbitration to tie up the maintenance and development of DTCP, while such Adopters proceeded to market their own competitive technologies. Thus, DTLA provided its Adopters with sufficient legal means to enforce their rights under the Adopter Agreement, but not the interim step of arbitration.

In sum, DTLA is not asking its Adopters, or the Commission, merely to "trust us." DTLA has made explicit and enforceable promises to its Adopters concerning the nature of any mandatory changes that may be made to the DTCP Specification and Compliance Rules. What Philips is asking the Commission is the opposite -- that the Commission should regulate DTLA and should not trust DTLA to follow its own agreements. Though Philips may prefer pre-emptive arbitration to enforcement in a court of law, that alone cannot justify regulation of license terms that are otherwise reasonable and nondiscriminatory.

IV. CONCLUSION

DTLA appreciates that Philips has decided that its Opposition to certification of DTCP should not actually be viewed as an "opposition." However, the Commission should appreciate that the basic changes Philips seeks to impose on DTLA's licensing structure, particularly with respect to the non-assertion covenant, are so fundamental in nature that it is tantamount to opposing certification of DTCP.

Philips, as a DTCP Adopter, signed the Adopter Agreement and agreed to its terms. Now Philips alone wants the Commission:

- to adopt specific definitions of what is, or is not "reasonable and nondiscriminatory," when the policy of every standard setting organization allows license terms to be determined through marketplace negotiation.

- to rewrite the DTLA Adopter Agreement, in a way that indisputably would foist upon the other 90+ Adopters costs and risks that they specifically had avoided under the DTCP license structure.

- to effectively relax the DTCP Robustness Rules in a way that could deny consumers greater recording flexibility for non-broadcast content.

- to competitively disadvantage DTCP and DTLA by delaying through arbitration proposed changes that would develop and improve DTCP.

- and to do all this

  - based on unfounded hypothetical fears of what DTLA might do, if it violated the terms of its own agreements,

  - without any evidence underpinning its vague allegations of "market power" or even a defensible definition of the "market," and

  - without any showing whatsoever as to how Philips, as an Adopter, has incurred any harm from the DTLA agreement terms or, indeed, has done anything other than profit from the manufacture of products that incorporate DTCP.

The Commission's NPRM and regulations provide that licensors of certified technologies must represent that they are offering licenses to their technologies on reasonable terms that are demonstrably free of unfair discrimination. The Commission need not, and should not, impose any further conditions upon any licensee that can make this representation. DTLA in its Certification, its Reply to the Certification, and through its *ex parte* submissions in this docket have demonstrated that its licenses amply meet this standard. In the absence of any factual evidence of harm to competition or consumers, DTLA respectfully submits that it would be arbitrary and capricious, and an abuse of administrative discretion, for the Commission to oppose or impose conditions upon certification of DTCP based on Philips's unsupported and fallacious assertions.

Wherefore, DTLA respectfully requests that the Commission certify DTCP as an authorized digital output protection technology for Unscreened and Marked Content.

Respectfully submitted,

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