



The American
Antitrust Institute

July 27, 2004

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Communication; Certification of Digital Output Protection Technologies and Recording Methods to be Used in Covered Demodulator Products; Certification of Digital Content Protection, LLC, MB Docket No. 04-61; Certification of 4C Entity, LLC, MB Docket No. 04-62; Certification of Digital Transmission Licensing Administrator, LLC, MB Docket 04-64; Digital Broadcast Content Protection, MB Docket No. 02-230.

Dear Ms. Dortch:

This letter clarifies and expands upon the views of the American Antitrust Institute (“AAI”) which the AAI had an opportunity to present at a meeting with FCC Staff on May 27, 2004 concerning the competitive implications of rules presently being considered in the *Broadcast Flag* proceeding and in connection with the approval of the interim content protection (“C-P”) certifications.

The FCC is contemplating including incumbent C-P technologies in its Rules and Regulations which, if practiced without a license, would infringe certain patent, copyright, and trade secrecy rights. The Commission has made clear its expectation that publicly offered C-P technologies “will be licensed on a reasonable and non-discriminatory [‘RAND’] basis.”¹ The licensing of intellectual property (“IP”) on RAND terms is generally considered to be pro-competitive.

¹ *Digital Broadcast Content Protection*, MB Docket No. 02-230, *Report and Order and Further Notice of Proposed Rulemaking* (rel. Nov. 4, 2003), at ¶55. See also Reply of 4C Entity, LLC, *In re: Digital Output Protection Technology And Recording Method Certifications*, MB Docket 04-62 (Apr. 16, 2004), at 10, n. 9 (the availability of broadcast equipment shall “not be prejudiced by unreasonable royalty or licensing policies of patent holders.”)

Consideration of licenses under the RAND criteria necessarily requires consideration of basic principles of competition policy, including those policies embodied in antitrust law. Failure to license on RAND terms and conditions raises the specter of anticompetitive market foreclosure and often reflects the exercise of market power to the detriment of the public. The approval of non-RAND licensing arrangements or monopolistic market structures can lead to serious anticompetitive consequences. Therefore, consideration of competition and antitrust policy is essential to the Commission's exercise of its duty to promote the public interest.

The AAI submits that the Commission has a public interest duty to perform a competitive analysis of the relevant markets using the tools of antitrust to determine whether the licenses for the incumbent C-P Specifications deviate from RAND terms and whether other competitive problems exist before approving the proposed technologies. The Commission, which has performed similar competitive analyses in many other contexts in the past, the Federal Trade Commission, and the DOJ's Antitrust Division, are all capable of performing the necessary analysis.

The AAI has objected to a number of the technology certifications on the grounds that the submitted licenses do not reflect RAND terms and conditions, will impair competition in technology, innovation, and downstream product markets, and are indicative of the anticompetitive exercise of market power. In particular, the AAI notes:

- The use of mandatory licensee IP non-assertion provisions in the absence of a patent pool open to all holders of essential intellectual property is highly inconsistent with ordinary licensing principles, if not wholly aberrational, and will harm competition in innovation markets by undermining the incentive to develop new and competing C-P technologies;
- The use of such non-assertion provisions will not lower consumer costs or enhance consumer welfare. If anything, they will encourage excluded owners of essential IP to remain outside of the license structure and charge licensing fees that exceed RAND terms and conditions. Further, licensees bound by such non-assertion provisions will lose the incentive to innovate in ways that can improve consumer welfare and truly lower costs. Finally, assertions that the proponent consortia are licensing at fees "below commercial rates" are both wholly unsupported in the record and reflect the existence of a dysfunctional marketplace;

- Provisions in proposed licenses that attempt to reserve for incumbent C-P technologies the right to approve competing C-P technologies, despite Commission approval, are unjustifiable and will create barriers to entry and undermine the development of competition in the technology marketplace;
- Licensees should be afforded due process rights when changes to a Specification or rules governing a technology are proposed, because changes that expand the scope of reciprocal licensing obligations or non-assertion provisions can further undermine innovation; Changes that affect downstream products can permit the incumbent technology licensors to leverage their control over C-P technologies into downstream product markets; and,
- Proprietary information reasonably necessary to be collected for license administration should be protected from competitive misuse by adequate measures.

The AAI is pleased to submit with this letter the attached report entitled, "Market Conditions and Licensing Practices in the Content Protection Industry." Based on the findings in its report, the AAI urges the government—the Commission, the FTC, or the Antitrust Division—to fully evaluate the competitive consequences of approving the interim certifications of the incumbent C-P firms before the Commission takes further action.

The principal conclusions from the report may summarized as follows:

1. A number of the proposed C-P technology licenses deviate from the RAND standard, are anticompetitive and, in fact, are aberrant and atypical technology licenses that evince the exercise of market power;
2. The relevant markets for C-P technologies have morphed into functionally distinct monopolies in which the joint licensing by the consortia which control them or cross-approval rights among them may well constitute concerted action in violation of Section 1 of the Sherman Act;
3. There exists substantial scope for the C-P monopolies to use their market power to stifle competition both in the market for potentially competing C-P technologies and in the retail market for flag-compliant consumer devices (which, upon Commission approval, will include broadcasting devices and apparatus); and,

4. Antitrust safeguards can feasibly be adopted as a pre-condition to approval of the certifications to ensure the availability of C-P technologies under RAND licensing terms and competitive conditions in the relevant markets; the potential anticompetitive harm from failing to do so greatly outweighs the costs of any delay that may arise due to the consideration of appropriate regulatory conditions.

We hope that the attached report will be helpful in the Commission's decision-making in these proceedings. Please do not hesitate to address any questions to Dr. Rubin at (202) 415-0616 or at JRubin@AntitrustInstitute.Org.

Sincerely,

/s/

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President, American Antitrust Institute

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