July 28, 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 *ex parte* letter in further support of its request in this proceeding for certification of its Digital Transmission Content Protection technology ("DTCP"), and in opposition to the requests by Philips to impose conditions upon the licenses pursuant to which DTCP has long been offered. As DTLA has noted in prior filings, DTLA has signed agreements with more than 90 companies, including Philips, with respect to the implementation and use of DTCP. Philips recently has focused its objections on one particular provision of the DTCP agreements -- the covenant given by all licensees (including the DTLA's Founders) not to assert "Necessary Claims" against any other licensee -- in a vacuum, without considering the disruptive effect that changing this provision would have to the overall cost and risk structure of the agreements. Any change that affects costs, rights or liabilities cannot be undertaken without substantially altering the balance of obligations and privileges that these Adopters and Content Participants found acceptable in DTCP, and no such change could be undertaken without their assent. Indeed, there is no indication that any of the 90+ Adopters and Content Participants is willing to accept the changes that Philips seeks to foist upon them.

On its face, the DTLA reciprocal covenant not to sue meets the Commission requirement of reasonable and nondiscriminatory licensing:

- The covenant is extremely narrow. It applies to the licensee's IP claims and that are necessarily infringed only in connection with the use by other licensees of the DTCP Specification. It apples only with respect to DTCP itself, not to any technology underlying the interfaces over which DTCP-protected content is sent.

- The reciprocal covenant provision is non-exclusive, so has no impact on innovation in copy protection technology or on competition outside of the use of DTCP. Nothing in the DTCP license prevents any Adopter or Content Participant from licensing its patents on whatever terms it wishes in connection with any technology developed by that licensee (including in a complementary or competing content protection technology). Every Adopter and Content Participant has full incentive to create and license its own technology unhindered by the covenants in the DTCP licenses.

- The covenant limits the ability of any licensee to sue or to exact supracompetitive fees from other licensees. This reduces the litigation risk for all licensees, and lowers the cost of obtaining rights essential to compliance with the DTCP Specification under the license, to the benefit of all participants and, ultimately, consumers.

- Neither DTLA nor any of the 5C Companies obtains by virtue of this agreement any greater license or right with respect to any licensee's intellectual property rights. The reciprocal covenant extends precisely the same scope of covenant to all Adopters (including the 5C Companies) and all Content Participants.

- DTCP is an enabling technology, in that by adopting low-cost content protection, Adopters and content owners can compete for the sale of new and more compelling digital video products and services.

Notwithstanding, and solely for purposes of argument, DTLA will assume below that it must adopt the solutions proposed by Philips, in hopes of demonstrating to the Commission how the DTLA agreements are, in their current form, far more beneficial to its Adopters and to competition than the "remedial measures" that Philips recommends.

If the nonassertion covenant were eliminated, DTLA would have to change its agreements to permit any Adopter (including the DTLA Founders) or Content Participant to license its Necessary Claims. As a result:

1. DTLA Founders would likely charge patent and trade secret royalties against all Adopters and Content Participants, both to (i) ensure a reasonable commercial rate of return on the years of investment made by the five DTLA Founders in the DTCP

technology, and (ii) offset any potential claims that might be brought against the DTLA and its Founders. By way of example, typical patent license fees, such as those offered historically by IBM, are set at 1% per patent and typically go up to 5% applied against the wholesale or transfer price of the device. Each of the five DTLA companies would be entitled individually to seek such royalties and such other terms and conditions they consider appropriate in their respective licenses (such as defensive suspension provisions). Even at a flat rate of 50 cents per device (well below those typical rates), the cost of the license to the Adopters alone would be much steeper than the current cost-based fees charged by DTLA, which amount to only a few cents per device.

2. Any licensee could assert patent claims against any other licensee. As a result, every licensee would incur substantial costs just to evaluate the asserted patents of other licensees with respect to validity and infringement. No matter how frivolous such a claim might be, no licensee could risk willful infringement liability, and treble damages, by failing to obtain such an opinion. Obtaining such an opinion, for even a single patent, likely would cost more than the annual administrative fee currently charged by DTLA.

3. Every licensee would have to weigh the costs of litigating the patent claims of every other licensee against the costs of taking out a license. As a result, licensees may take out licenses for unnecessary patent claims, solely to avoid the costs, expense, and internal business disruption caused by litigation.

4. Once any licensee began to assert such claims, many licensees would be motivated to assert such claims as a defensive weapon.

The sum total of eliminating the nonasserts? A net loss to all, and a direct hit to consumers who ultimately would shoulder the higher costs. DTLA respectfully submits that in the case of DTCP, it is far more in the public interest to maintain its existing license terms than to disrupt its existing 90+ licensees and economically disadvantage consumers, by eliminating the nonassert license provision.

Upending the DTCP license structure simply makes no sense. More than 90 companies, including major consumer electronics and information technology giants, have deemed the better course to check their IP guns at the door, and accept low administrative fees without seeking royalties in return. These are sophisticated companies, who years ago – long before the broadcast flag was a twinkle in the Commission's eye – knowingly and willingly accepted the DTCP low cost/low risk license structure as sensible and completely appropriate for content protection technologies. Indeed, this Necessary Claims/nonassertion covenant license structure is the predominant model, not the exception, for many interface and content protection technologies that seek to enable competition based upon the devices and features that consumers want.

It would be arbitrary and capricious to effectively overrule the terms and conditions that more than 90 companies have accepted based upon the complaints of but one – and, at

that, one that has not even demonstrated that it owns a single patent that it could license if the rules were changed.

Finally, consider the following: If the DTLA were to substantially increase its royalties as suggested above (or, were to refuse to change its license terms in the way that Philips suggests), or even if only uncertainty and unknown risks hung over the DTCP license, what would the marketplace do? Is there any doubt but that significant numbers of DTCP licensees would move to adopt alternative technologies from among the other five (5) digital output technologies seeking Commission certification?

If the Commission accepts that as true, then the Commission must also accept that the current market is characterized by reasonable available substitutes and effective competition, and that DTCP does not possess, and cannot unlawfully exercise, anticompetitive power. Any manufacturer or content owner that dislikes DTCP's license terms can adopt any other output technology certified by the FCC. Such technologies already exist in the market, and manufacturers could start using them as output technologies for DTV content before July 2005. Indeed, if approved by the Commission, technologies offered by major innovators such as Microsoft, Thompson, RealNetworks, TiVo and others will provide effective competition to DTCP.

As such, the Commission has no reason to overturn or constrain the low cost/low risk DTCP licensing terms that have been so broadly accepted in the marketplace. DTLA therefore urges the Commission to certify DTCP and its reasonable and nondiscriminatory license, without conditions.

Respectfully submitted,

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