

I. INTRODUCTION

With the introduction of “digitization” into television, the television industry arguably has undergone more change in the past 5 years than it did in the previous 50 years. Advancements such as digital video recorders, video-on-demand, HDTV, and Internet protocol television (“IPTV”) are rapidly changing the television landscape. And this transformation is only just beginning. As the Commission recognizes, while interactive technology in television programming is in the early stages of development, it is on the horizon.

TiVo applauds the Commission for recognizing that interactivity has the potential to have a positive impact on children’s programming and for seeking to tailor its rules to allow innovation to take root and flourish. TiVo respectfully submits these comments to assist the Commission in this regard.

II. DISCUSSION

The Commission has tentatively concluded that it should prohibit “interactivity” during children’s programming that connects viewers to commercial matter unless parents “opt in” to such services. At this nascent stage in the development of enhanced television, this tentative conclusion is overly broad and has potential to choke off innovation that could enhance children’s educational and informational programming. The Commission should instead adopt rules that carefully balance commercial limits in

more information about a product or service; and Telescoping Tags – a tag enabling an advertiser or network to direct the viewer to a long-form video promoting a product or program. After viewing the long-form video, the viewer is returned to the spot in the television program where he left off.

children's educational and informational programming with the Commission's goal of encouraging innovation in this rapidly evolving area.

A. **The Commission Should Refrain From Requiring "Opt In" Before The Benefits Of Interactivity Are Known Or Realized.**

The concept of "opting in" to "interactivity" on a subset of programming would place severe constraints on the development of interactive features. An "opt in" requirement would be incredibly complex for broadcasters and multichannel video programming distributors ("MVPD"). The broadcasters and MVPDs would need to segment advertisements by programming and then further segment advertisements by whether they have "interactivity" that connects viewers to commercial matter. For example, a McDonalds advertisement with interactive features that connect viewers to commercial matter could run at certain times but another version either without interactive elements or with non-commercial interactive features would have to run during children's programming. This is massive complexity for a nascent technology.

Very few people could be expected to "opt in" to "interactivity" when the benefits of interactivity have not yet had a chance to be known to or recognized by parents. Indeed, an "opt in" requirement at this early stage would likely prohibit the Commission's express goal "to ensure that parents and children benefit from broadcasters' use of digital technology to provide multiple broadcast streams and to permit broadcasters flexibility to explore the potential uses of the broadcast spectrum made possible by digital technology, including the use of website links in children's

programming.”³ TiVo suggests that the Commission should allow “interactivity” to develop before placing such operational demands on operators and allowing parents to evaluate the benefits of interactivity in children’s programming. If anything, the Commission may determine that it is preferable to provide parents with the ability to “opt out” of certain types of interactivity rather than imposing an “opt in” requirement.⁴

B. The Commission Should Distinguish Between Passive And Active Commercial Interruptions.

The Commission has not defined precisely what “interactivity” means in the context of children’s programming. Interactivity means different things to different people. The Commission appears to consider “the appearance of direct, interactive, links to commercial Internet sites” as “interactivity”.⁵ That is certainly one type of interactivity but there are many others. For example, some would consider using the telephone to vote for your favorite American Idol contestant as a form of “interactive” television. Another type of interactivity could be to use your remote control to automatically record a television program when watching a 30 second promotion for the upcoming program. Yet another form of interactivity could be to use your remote control to request further information about a particular topic. Further forms of interactivity

³ FNPR at para. 74.

⁴ It is important to note that imposing “opt in” requirements on nascent services impedes innovation. For example, the contextual search capabilities pioneered by Amazon.com and others would never have materialized if consumers had to “opt in” to the use of their purchasing data by commercial web sites. Consumers can effectively “opt out” of such interactivity by not allowing or deleting cookies placed on their computers by websites. It is vital for the Commission to refrain from regulating interactive elements before consumers have the opportunity to weigh the benefits and potential harms of such technology for themselves.

⁵ FNPR at paras. 53 and 71.

could include being able to start, stop or control live television either on a set-top box or a personal computer. Because different types of “interactivity” may have different effects on children’s programming, these different types of “interactivity” should not necessarily be treated the same way. Without understanding those different effects, it would be premature for the Commission to paint all types of “interactivity” with the same broad regulatory brush.

Under the Commission’s revised definition, “commercial matter” now includes promotions of television programs or video programming services other than children’s educational and informational programming. The purpose of this revision was to reduce the number of interruptions in children’s programming and encourage the promotion of educational and informational programming for children.⁶

TiVo believes that there is a fundamental distinction between active and passive interruptions to children’s programming. It is one thing to say that children should be shielded from commercial interruptions that they cannot avoid (i.e. passive), which traditionally has been the purpose and effect of the commercial limits. However, prohibiting the use of interactive technology to provide children with the “active” option to, for example, decipher clues while playing along in a “Blue’s Clues” mystery (which might be advertiser sponsored), is another thing entirely. In this latter case, the viewer has the option to ignore the interactive tag and continue watching the program uninterrupted. Given the critical distinction between active and passive interruptions,

⁶ Id. at para. 57.

TiVo urges the Commission to apply different requirements, if any, to active interactive enhancements than it does to passive commercial interruptions.

The Commission also seeks comment on the impact of commercial interactivity in terms of the statutory limits on commercial time. Again, TiVo sees a difference between passive and active interactivity. Viewers do not have to engage or watch active interactive elements; it is the viewer's choice to engage or not. As such, it is impractical and inappropriate to impute those interactive elements to the duration of commercial matter during a children's program.

C. **Interactive Elements Should Be Permitted For Promotions Relating To Children's Educational And Informational Programming.**

Under any rules adopted by the Commission, it is critical that children's programming be able to include any type of interactive elements, including Record Tags, Fast-Forward Tags, Telescoping Tags, and Lead Generation Tags, for promotions related to children's educational and informational programming. This use of interactivity would allow broadcasters and service providers to promote upcoming programs that qualify as children's educational and informational programming. It would also permit types of interactivity that enable a child to play a fun interactive quiz game related to educational or informational programming or a family to request educational and informational books and magazines. Use of interactivity for promotions related to children's educational and

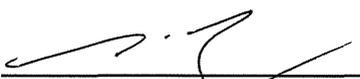
informational programming should be an express exception to any parental “opt in” requirement adopted by the Commission either now, or more appropriately, in the future.⁷

III. CONCLUSION

TiVo urges the Commission to exercise restraint in imposing restrictions on “interactivity” during children’s programming while enhanced television is in the early stages of development and the benefits and potential harms of such enhancements have not had a chance to materialize.

Respectfully submitted,

TIVO INC.

By: 

Matthew P. Zinn
Vice President, General Counsel and
Chief Privacy Officer
2160 Gold Street
Alviso, California 95002
(408) 519-9311

May 2, 2005

⁷ Id. at para. 56 (“some of the types of program interruptions currently excluded from the commercial limits may contain information valuable to children, such as promotion of upcoming educational programs or certain types of public service messages”).