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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Implementation of Section 304 of the Telecommunications Act of 1996)	CS Docket No. 97-80
)	
Commercial Availability of Navigation Devices)	
)	
Compatibility Between Cable Systems and Consumer Electronics Equipment)	PP Docket No. 00-67
)	

**REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA,
INC., PARAMOUNT PICTURES CORPORATION, SONY PICTURES
ENTERTAINMENT INC., TWENTIETH CENTURY FOX FILM CORPORATION,
UNIVERSAL CITY STUDIOS, LLLP, THE WALT DISNEY COMPANY AND
WARNER BROS. ENTERTAINMENT, INC.**

Motion Picture Association of America, Inc. (“MPAA”) and its member companies Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, The Walt Disney Company and Warner Bros. Entertainment, Inc. hereby submit these reply comments in response to the Commission’s Third Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹

¹ See *In re Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Third Further Notice of Proposed Rulemaking (rel. June 29, 2007) (the “*Third Notice*”). MPAA submitted opening comments in this proceeding on August 24, 2007 (the “MPAA Comments”).

Introduction and Summary

In its opening comments in this proceeding, MPAA and its member companies stressed that high value programming will be made available for bidirectional navigation devices only if content is adequately protected from unauthorized copying and redistribution. MPAA urged the Commission to avoid any regulatory solution that would impede industry parties from continuing to negotiate directly as to the appropriate levels of content protection that should be embedded in digital devices.

MPAA believes that the sheer complexity of the technical issues involved in ensuring that adequate content protection is in place for bidirectional digital devices, as demonstrated by the record developed on this topic in this proceeding, should make the Commission wary of imposing any government-mandated outcome with respect to content protection issues. However, if the Commission determines that it must establish technical standards in order to make bidirectional navigation devices commercially available as directed by the Congress, MPAA urges the Commission to adopt standards that ensure that bidirectional navigation devices have all the technical capabilities necessary to protect high-value content from unauthorized reproduction and redistribution. The Commission should not endorse a plug and play solution that lacks these capabilities, which are fundamental to content providers' ability to supply high-value content at accessible prices to cable subscribers and, thus, critical for ensuring a successful digital transition.

The FCC can be confident that the marketplace will efficiently determine how content protection capabilities will be used. Marketplace forces will place strong pressures on both cable operators and program suppliers to provide consumers with video content on reasonable terms. Consumers will not pay for entertainment services that they find unduly restrictive, inconvenient or inappropriate. By voting with their dollars, consumers are in a

formidable position to prevent unnecessarily restrictive practices. If the Commission finds that the marketplace is unable to protect consumer interests, it can take appropriate measures at a later time. At this point in time, however, the Commission should not dictate business model winners and losers in the marketplace for bidirectional digital devices by approving a regulatory model that restricts the availability and use of content protection technologies. Instead, marketplace negotiations – as to what content protection capabilities are necessary and when they should be used – would better serve to calibrate consumer demands and interests while ensuring the availability of the protections necessary to facilitate the distribution of high-value content via cable systems.

I. CONTENT PROVIDERS’ ABILITY TO PROTECT AGAINST MISUSE AND UNAUTHORIZED DISTRIBUTION OF THEIR CONTENT MUST BE RESPECTED

A. Unless the Cable Industry Can Provide a Secure Platform From Which to Distribute Programming, High-Value Content Will Migrate to Alternative Technologies, Impeding the Digital Transition

Producers of costly, high-quality programming must be able to recoup their investments, and any regulatory regime that forces them to expose their movies and television shows to unacceptable risk of theft would threaten the entire economic model on which the content community relies. These simple realities appear to elude Public Knowledge and others who in their opening comments advance positions urging the Commission to adopt or extend “encoding rules” that proscribe important security functionalities.² Public Knowledge argues that, “absent an express delegation of power, the Commission lacks jurisdiction to mandate that technological protection measures be adopted

² See, e.g., Comments of Public Knowledge, *et. al*, at 4.

. . . .”³ Of course, if the FCC does not have jurisdiction to mandate the implementation of technologies or techniques, then surely it has no jurisdiction to prohibit use of those technologies or techniques. The Commission, moreover, lacks authority to prohibit the use of content protection technologies or techniques since, among other things, it may not diminish content owners’ rights under the Copyright Act.⁴ Public Knowledge further claims that the “[Consumer Electronics Association (“CEA”)] proposal is superior to the cable industry proposal in that it is more likely to lead to competition, lower prices, and more diverse and superior products.”⁵ Yet this position, like that of other CEA supporters, focuses entirely on hardware and fails to reflect an appreciation for what consumers want most from their multichannel video programming distributor (“MVPD”): *compelling content*. A regulatory regime, such as the one proposed by CEA, that diminishes the cable industry’s ability to provide consumers with access to the highest quality content would necessarily fail to serve the public interest.

Finally, Public Knowledge’s unsupported, and unsupportable, assertion that “content protection technologies are ineffective at preventing widespread copyright infringement” demonstrates the group’s failure to understand the content marketplace.⁶ While content protection technologies have not eliminated all infringement, they nonetheless

³ *Id.*

⁴ *Cf. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19, note 32 (1979) (holding that in a world where intellectual property “can be ‘consumed’ by many different people at the same time and without the creator’s knowledge, the ‘owner’ has no real way to demand reimbursement for the use of his property except through the copyright laws *and* an effective way to enforce those legal rights”) (emphasis in original) (internal citations omitted).

⁵ Public Knowledge Comments, at 2.

⁶ *Id.* at 4.

are highly effective, especially when it comes to establishing the bounds of authorized usage and, thus, appropriate behavior among honest people.

B. The FCC Should Support Selectable Output Control Capability in All Bidirectional Devices and Not Prohibit the Use of Selectable Output Control in Bidirectional Devices

Intel argues that the use of SOC generally should be prohibited, with the possible exception of “early window” content that is made available to cable systems prior to or contemporaneously with other distribution platforms.⁷ But by acknowledging that SOC may be appropriate for “early window” content, Intel necessarily concedes that all devices must be *capable* of providing SOC. Simply put, whatever the rules about usage might be, if the equipment is incapable of providing SOC, then such equipment can never implement SOC functionality. Further, Intel’s proposal also implicitly concedes that content owners cannot reasonably allow their most valuable programming (*e.g.*, “early window” content) to be distributed through insecure outputs. However, Intel would have the Commission, rather than the marketplace, determine which high-value content would be available to consumers. Intel would require any high-value content producer first to go to the Commission for “permission” to engage in “early window” distribution of its content.

MPAA submits that the FCC should not be the final arbiter of what content is made available to cable subscribers and should not undertake to pick which program distribution business models will be allowed to succeed and which will be declared failures. Those are functions of the marketplace and should not be FCC’s industrial policy decisions, as suggested by Intel. If the Commission prohibits the use of SOC functionality only with respect to content delivered over cable platforms, high-value content necessarily would

⁷ See Comments of Intel Corporation, at 8.

migrate to more secure distribution systems. That would distort competition in the marketplace for the sale of programming, weakening the cable industry. Enabling the marketplace, rather than regulations, to determine the use of SOC functionality will allow content providers to provide a greater selection of high-value content and business offerings to consumers, which, in turn, will support a speedier digital transition.

Use of SOC by bidirectional services should not lead to consumer confusion because bidirectional services have access to an interactive program guide. As a result, if certain content were not going to be made available to a viewer based on his or her CE equipment, the consumer's interactive program guide should contain no reference to the protected content. Thus, permitting SOC functionality to be used in bidirectional devices should not raise any of the concerns expressed by the Commission with respect to the use of SOC in the unidirectional context.

Intel states that SOC "should not be used to shut off a down stream technology simply because that technology does not fully support a particular business model when the technology does support a more restrictive alternative."⁸ MPAA believes that content marketing decisions should be left to content providers to determine in response to market forces (and not as the result of FCC regulation). Just as CE manufacturers would not expect governmental regulations to determine how their products should be marketed, content providers expect to have discretion, unfettered by unreasonable governmental regulations, to determine the usage model, level of protection, and other aspects of marketing their proprietary content.

⁸ *Id.* at 9.

In short, the marketplace should be trusted to ensure that SOC is used only when necessary. To make that possible, the Commission should: (i) support the inclusion of SOC capability, in the OpenCable (or any other) proposal, in all bidirectional digital receivers; and (ii) allow for the use of SOC functionality for all content that passes through bidirectional devices.

C. Content Providers Require a Platform That Provides Robust Protection and Consistent Presentation of Their Content

If the Commission decides to implement by regulation a plug and play solution, MPAA urges the Commission to refrain from approving DCR+ as currently proposed, for the reasons that follow. Although CEA in its comments adds detailed specifications, license amendments and regulations to its proposed DCR+ system,⁹ the DCR+ system still fails to adequately address content creators' reasonable concerns regarding content protection, presentation and interactivity. Regarding content protection, the CEA proposal does not include specifications for a redistribution control trigger, extended copy control information, SOC, or system renewability messaging carriage and processing. All of these content protection capabilities already are included in the OpenCable system.

Consistent presentation of new interactive content is needed to help drive the digital transition. If content producers are to create new experiences for consumers to run on these new distribution architectures – more than just linear movie and television show presentations – it is vital that the presentation engines reliably reproduce what is authored. For example, if the content producer were to include chapter search ability or viewing of director cuts, these capabilities would need to be consistently presented as the content

⁹ See Comments of the Consumer Electronics Association (“CEA”), at 6 and Appendices A, B, C.

producer, or author, intended (as is done for DVDs). The OpenCable system application platform defines one such standard to which interactive content can be reliably authored.

Industry standardization in such areas is desirable since there is a practical limit to the number of different platforms to which interactive content can be authored. The existence of multiple platforms accordingly multiplies the effort and expense of bringing these new experiences to consumers and holds back at least some new offerings that might be made. Non-standardized rendering environments would yield confusing experiences for consumers, depriving them of the newest and most exciting aspect of the TV experience.

The OpenCable system is available now for widespread deployment and affords content providers a ready means by which to develop and authorize (in conjunction with programmers and cable operators) new interactive features for the enjoyment of content. However, in the event the DCR+ platform proposal is amended to offer all the same (or superior) attributes as the OpenCable system, with respect to (i) content protection and (ii) a single content presentation standard to which interactive content can be reliably authored, MPAA and its member companies would diligently consider supporting the DCR+ platform.

II. CEA SHOULD NOT BE PERMITTED TO RENEGOTIATE CABLELABS' AGREEMENTS VIA FCC REGULATIONS

Through its submissions of its proposed versions of unidirectional DFAST, i-DFAST and OpenCable Platform (or O-ILA) licenses,¹⁰ the CE industry attempts to unilaterally establish cable set-top-box licenses with more favorable terms for itself, without having to negotiate or make any concessions in return. While the original DFAST license¹¹

¹⁰ See CEA Comments, at Appendices B-1, B-2 and B-3.

¹¹ CEA's proposed revisions to the DFAST license would have serious negative implications for content providers and many of those changes would diminish content

was negotiated directly between the cable and CE industries (with no input from content providers), both the CHILA and OpenCable Platform licenses are the results of years of painstaking bargaining that included input from content providers. Indeed, CEA attempts to unwind, in one broad sweep, the many content protection issues that have been worked out between CableLabs and MPAA in the CHILA¹² and OpenCable Platform¹³ licenses over years of negotiations.

owners' rights under the Copyrights Act, which the FCC does not have jurisdiction to do. As an example, CEA changed the wording of the Non-interference Watermark provision so that CE manufacturers only would be prohibited from marketing and distributing licensed products the *primary purpose* of which is to strip the watermark, and only to the extent that the controlled content in which the watermark is embedded already has been decrypted. *See* CEA Comments, Appendix B-1, at 26 (Section 2.5). If the "primary purpose" language were to become part of the license, the CE manufacturers would gain wider latitude to market products that actually do strip watermarks, so long as such products have other functions that arguably are more prevalent. Such a change is not only undesirable but, as with the other proposed changes, which would diminish content owners' rights under the Copyright Act, its adoption would be outside of the FCC's jurisdiction.

¹² The CHILA license has a number of negotiated provisions that are missing from CEA's i-DFAST proposal, including, for instance, (i) the section prohibiting disk cloning attacks for CPDO (*see* Section 3.6 of the CHILA Compliance Rules), a content protection technology that MPAA and CableLabs carefully negotiated; and (ii) the sunset of VGA outputs. *Compare* Section 2.2.2 of Exhibit A of the CHILA license with CEA Comments, Appendix B-2, at 24-25 (Section 2.2.2). In addition, the i-DFAST license is missing the RCT and SOC functionalities as well as a system renewability messaging mechanism that CableLabs intends to include in its revised version of the CHILA license. *See* MPAA Comments, at 10 and 13-14.

¹³ Again, CEA would make changes solely favorable to the CE industry without having to bargain or offer any concessions to other interested parties. For example, CEA proposes to increase from 30 to 60 days the amount of time that a third party beneficiary has to wait prior to seeking either injunctive relief or damages in the event of a violation of the license. *See* CEA Comments, Appendix B-3, at 8 (Section 9). MPAA had negotiated with CableLabs to lower the waiting period from 60 days to 30 days precisely because MPAA wanted its members to be able to seek judicial assistance more quickly in the event of unauthorized use of content. CEA also attempts to unilaterally grant to itself more favorable terms against CableLabs. Thus, CEA proposes to hold CableLabs to an indemnification obligation for liability arising from implementation of the OpenCable specifications. *See id.* at 6-7 (Section 5). *See*

By proposing that the Commission give blanket approval to these license revisions, CEA attempts to gain market advantages without having to negotiate with other interested parties. The FCC should decline CEA's invitation to accept and lock in these unilateral revisions, which would have the deleterious effect not only of immediately outlawing important functionalities, but also of cementing these licenses so that future revisions stemming from marketplace negotiations could not take place without the Commission's involvement. When private agreements become locked in by regulations, future marketplace negotiations are stymied and industry parties are prevented from adapting the licenses when necessary to account for changes that may prove to be appropriate over time. In short, the Commission should reject CEA's transparent attempt to provide the CE industry with benefits that it was unable to obtain in the marketplace.

III. DLNA SHOULD NOT APPROVE OUTPUTS OR CONTENT PROTECTION TECHNOLOGIES

CEA suggests that the Digital Living Network Alliance ("DLNA") should be permitted to approve outputs and content protection technologies.¹⁴ Both the Communications Act and the Commission, however, recognize that cable systems have a legitimate right to ensure that navigation devices do not harm cable system networks or

also OpenCable Implementer License Agreement, at Section 11.11 (available at www.CableLabs.org). CEA would give CE manufacturers additional time to cure material license breaches (from 30 days to 60 days), *see* CEA Comments, Appendix B-3, at 7 (Section 6.3), and CEA would delete the licensee's acknowledgement that cable operators have the right to deny services to any individual CableCards if controlled content is subject to unreasonable risk. *See* OpenCable Implementer License Agreement, at Section 11.11.

¹⁴ *See* Proposal for Bi-Directional Digital Cable Compatibility and Related Issues, Consumer Electronics Association, CS Docket No. 97-80, dated November 7, 2006 (the "CE Proposal"), at 8.

permit theft of service.¹⁵ Thus, DLNA, is not the appropriate party to evaluate whether outputs are capable of providing adequate security. Although cable systems and even MPAA participate in the DLNA standard-setting process in good faith, only a select few CE and information technology companies have voting rights.¹⁶ Since the cable and content industries bear the most risk of harm in the event of content theft, they should retain ultimate decision-making authority to approve content protection technologies and outputs.

In its comments, Sony suggests two alternative models for approving outputs and content protection technologies: (1) establish a new forum (such as a standards body) that provides open and fair participation by all interested parties, to which the Commission could delegate power to manage the approval of output and content protection technologies; or (2) keep CableLabs as the forum but require open and fair participation by all parties.¹⁷

MPAA does not believe that it would be appropriate to cede authority to approve outputs to a standards body, which does not necessarily have the expertise nor input from content providers to evaluate the potential for harm to cable service or theft of content. Similarly, MPAA believes that it would not be equitable to allow all parties to have the same level of participation in evaluating outputs and protection technologies, since not all parties face the same level of risk when it comes to theft of service and unauthorized use of content. Given

¹⁵ See 47 U.S.C. § 549(b); see also *In re Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC 03-225 (rel. October 9, 2003), at ¶ 50.

¹⁶ See MPAA Comments, at 19.

¹⁷ See Comments of Sony Electronics Inc., at 23-24. Sony posits that outputs should be judged on the “basis of their ability to protect against physical harm to the cable network and the theft of cable service.” *Id.*

that they face the most risk from unauthorized use of content, CableLabs and content providers remain in the best position to ensure effective security.

Given the chance, CableLabs' approval process set forth in the DFAST license is effective, as evidenced by the recent approval of DTCP-IP as an approved protected digital output.¹⁸ MPAA favors the CableLabs process because CableLabs historically has given significant weight to MPAA's input in approving content protection technologies and outputs.

IV. THE FCC SHOULD REJECT HOME NETWORKING PROPONENTS' SUGGESTION TO ADOPT RULES REQUIRING CABLE DEVICES TO INTERFACE WITH A DLNA GATEWAY DEVICE

Home Networking Proponents ("HNP") requests that cable devices be required to interface with a DLNA gateway device to deliver content and services to the DLNA network equivalent to those received by non-networked set-top boxes.¹⁹ HNP asks that "[a]t a minimum, this includes requiring cable operators to provide access to all of its linear and basic interactive TV services by way of a DLNA-compatible gateway device."²⁰ HNP's request, however, is inappropriate because the marketplace should determine which home networking interfaces ultimately should be selected for cable. Indeed, as demonstrated by the record in this proceeding, there are at least two other alternative home networking

¹⁸ See, e.g., Intel Comments, at 3; see also Letter to Marlene Dortch, Secretary, FCC, Re: Approval of DTCP-IP, from Seth D. Greenstein and Paul Glist, CS Docket No. 97-80 (dated August 22, 2007).

¹⁹ See Comments of Home Networking Proponents, at 3, 10.

²⁰ See *id.* at 10.

technologies that are available to consumers.²¹ Thus, the Commission should reject HNP's request that DLNA be selected as the home networking standard.

In any event, it would be premature for the Commission to choose DLNA over other potential home networking solutions because DLNA cannot guarantee that content will be protected across a home network. For one thing, DLNA has yet to articulate a definition for a home network. It is still unclear how many devices would be part of DLNA's proposed home network, and it is impossible to tell whether that network would be identity-based or location-based, and thus, who would be able to access the network. DLNA also has not yet devised compliance rules for its network (which would require, for example, respect for copy control signaling), or proximity controls (which would limit the distribution of the content to within the home). Moreover, DLNA currently has proposed no requirement to prevent content from being taken from one home network to another.

Ultimately, home networked products should not be able to access all content made available to cable networks without adequate protections in place. MPAA believes that these issues should be left to marketplace negotiations; they are simply not an appropriate subject for this FCC proceeding.

V. CABLELABS SHOULD CONTINUE TO TEST CE PRODUCTS

CableLabs should continue to maintain oversight over the testing of bidirectional digital devices. As discussed above, the cable industry and content providers are best-positioned to ensure that devices adequately protect against both harm to cable

²¹ See Comments of the High Definition Audio/Video Networking Alliance ("HANA"), at 3; Comments of 1394 Trade Association, at 3.

systems and theft of programming. Nonetheless, the CEA proposal would permit self-testing in lieu of formal testing and certification procedures based on objective criteria.²²

Historically, however, self -testing has not resulted in CE manufacturers' compliance with content protection obligations. Although CableLabs allows for self-certification, that process is available only to licensees who have demonstrated that they are consistently capable of building compliant products.²³ Cable companies have a fundamental interest in protecting content because their success depends on obtaining high-quality, high-value programming from content providers. Indeed, the National Cable & Telecommunications Association takes pains in its comments to acknowledge that "high-value content will only reach customers if cable systems remain secure. To be secure, cable systems and devices connected to those systems must include modern content protection tools that compare well with those provided by competing platforms" ²⁴ The CE industry does not have the same incentive – its business model is based upon proliferating devices within American homes. Content protections are not given equal priority. Thus, MPAA supports CableLabs retaining primary oversight over testing and certification for new bidirectional digital equipment.

VI. CONCLUSION

MPAA urges the Commission to rely on the invisible hand envisioned by Adam Smith, not the visible hand of government industrial policy. Thus, if the Commission determines that it must establish technical standards to fulfill its Congressional mandate, it

²² See CE Proposal, at 9-10.

²³ See CHILA license, at Exhibit A, Section 2.

²⁴ Comments of the National Cable & Telecommunications Association, at 18.

should ensure that bidirectional navigation devices have the capability of carrying out a wide variety of content protection options, but should allow the marketplace to determine when and how those capabilities are implemented. MPAA is confident that the market forces that operate among content providers, cable operators and cable subscribers will optimize consumer choice and serve the public interest far more effectively and efficiently than the heavy hand of government regulation. At the very least, the Commission should not assume market failure and should only step in if market forces fail to appropriately determine the terms and conditions on which audiovisual content is delivered to consumers through bidirectional cable navigation devices.

In particular, the Commission should reject Intel's suggestion that SOC functionality should be prohibited in bidirectional navigation devices; on the contrary, the Commission should support the inclusion of SOC capability in all bidirectional devices, and let the marketplace determine what restrictions on its use are most beneficial to consumers. Moreover, the FCC should refrain from endorsing the CEA proposal for the DCR+ platform, which, as currently constituted, fails to provide sufficient protection for high-quality content or a sufficient platform for consistent content presentation. Likewise, the Commission should not permit CEA unilaterally to renegotiate existing licensing agreements to provide benefits that the CE industry has been unable to obtain through marketplace negotiations. Nor would it be prudent to allow DLNA to have discretion over the approval of outputs or content protection technologies or to select a home networking solution in these proceedings. Finally, the FCC should continue to look to CableLabs to oversee the testing and certification of new devices.

Respectfully submitted,

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