

**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
HOME RECORDING RIGHTS COALITION**

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Advances in communications technology empower individuals. The past three decades have given us the Internet, the vast choices made available by cable television, and devices that create new ways to experience audiovisual content. Each of these has had a lasting impact on our economy and quality of life precisely because they empower the individual. If the Commission were to reverse its course by permitting cable operators and copyright holders to dictate in minute detail how consumers can interact with the media they purchase, then cable services will become like the monopolistic telephone system: homogeneous and stagnant.

The Home Recording Rights Coalition (“HRRC”) works to protect the rights of consumers to use the devices they purchase to the fullest. HRRC respectfully submits these Reply Comments in response to alarming proposals by the National Cable and Telecommunications Association (“NCTA”) and the Motion Picture Association of America (“MPAA”) to increase cable operators’ control over the private use of legally purchased cable programming by repealing or severely weakening the encoding rules set forth at Subpart W of the Commission’s regulations, 47 C.F.R. § 76.1901 *et seq.* NCTA and MPAA have asked the

Commission to give them unfettered and minute control over the functionality of receiving devices through selectable output control, downresolution, redistribution control, and revocability. Bizarrely, the MPAA claims that giving this level of control to cable operators will “ensure that bidirectional MVPD devices are capable of offering consumers the benefits they seek.”¹ Up is down, says the MPAA, and consumers will benefit from cable operators’ ability to *disable* at will the devices and functions that consumers have already purchased. The Commission should reject this absurdity and continue its careful regulation of technological use restrictions.

I. Protecting Consumers’ Autonomy and Reasonable Expectations Is Key To A Successful Digital Television Transition.

In the 1980s, MPAA’s member studios fought bitterly to prevent television viewers from being able to choose when to view a broadcast program. The studios claimed that such a degree of active participation in the viewing experience, by using a VCR to choose the time and order of viewing, would mean a loss of revenue for the television and motion picture industry. Of course, as we now know, the ability to time-shift programming brought new depth to television viewing and ultimately multiplied the size and income of the studios. Empowering consumers to decide when, where, and on what devices they can view video programming is what has driven the advance of digital video and made the DTV transition worthwhile.

A large-scale transition to digital television requires public trust. The Commission, along with the Commerce Department and private industry, is working to ensure that consumers’ investments in analog televisions are protected and equipment is not unnecessarily rendered obsolete. The Commission has recognized the importance of preserving consumers’ trust and

¹ *Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of the Motion Picture Association of America, Inc. *et. al.* at 24 (Aug. 24, 2007) (emphasis added) (“MPAA Comments”).

expectations – especially the basic expectations that consumers can continue to receive the services for which they pay, and use all of the functionality of the devices that they own.²

With cable service now reaching 65 million U.S. homes,³ the motion picture and television industries have ample incentive to make their content available on this medium. Betraying consumers by allowing MVPDs to disable equipment already in consumers' homes poses a greater threat to an "orderly" DTV transition than continued Commission oversight of use-restriction protocols. To abolish encoding rules would be to punish early adopters of high-definition and digital receivers – consumers who, like the early purchasers of VCRs, are driving demand and creating economies that will benefit all of the industries involved. Abolishing or weakening the encoding rules would also set the stage for future consumer harm when an MVPD makes the unilateral decision to disable particular outputs or functions.

II. Encoding Rules Create Space for Innovation and Consumer Empowerment.

As part of the prior rulemaking on navigation devices, in 2003, the Commission adopted the encoding rules that were jointly proposed by the CE and cable industries.⁴ These rules allow cable devices to incorporate copy protection and use restriction technologies, but, with a single narrow exception, prohibit cable operators from encoding their programming so as to block the *viewing* of content for which consumers have paid. The encoding rules prohibit the use of downresolution for broadcast or basic subscription programming – in other words, programming

² "We also recognize consumers' expectations that their digital televisions and other equipment will work to their full capabilities, and the potential harm to the DTV transition if those expectations are frustrated. In particular, we are concerned that selectable output control would harm those 'early adopters' whose DTV equipment only has component analog inputs for high definition display, placing these consumers at risk of being completely shut off from the high-definition content they expect to receive." *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking ¶ 60 (Oct. 9, 2003) ("Second Report & Order").

³ NCTA Statistics, <http://ncta.com/ContentView.aspx?contentId=54>.

⁴ Second Report & Order ¶¶ 42-47, Appendix B.

that is distributed free over the air or that the consumer has already paid for as part of his or her subscription.⁵ The rules prohibit use of selectable output control entirely.⁶

The prior rulemaking took into account content owners' and cable operators' potential new business models. With respect to home recording cable operators can, today, bring a "fast track" petition for permission to use copy restrictions to support a particular business model.⁷ To date, cable operators and copyright holders have made use of this petition process exactly zero times.

The petition process, combined with Section 76.1904's carve-outs for video-on-demand and pay-per-view and the legal enforcement tools available to copyright holders, provides a floor of protection. More vitally, these encoding rules provide a ceiling on cable operators' control over device functionality so as to protect consumers' autonomy and their investment in cutting-edge equipment. Between this floor and ceiling lies ample space for both new business models and new features of navigation devices.

The current encoding rules apply on their face to all "commercial audiovisual content,"⁸ not merely to "content delivered to unidirectional cable devices" as MPAA, without a shred of support, now insinuates.⁹ Therefore, the rules can and do apply "as is" to bidirectional devices. Through the encoding rules, the Commission has created a space for innovation by both content producers and device manufacturers, and a space of guaranteed autonomy for consumers in their day-by-day interactions with free and purchased content. The Commission should not now

⁵ 76 C.F.R. § 76.1904(b)(i).

⁶ 76 C.F.R. § 76.1903.

⁷ 76 C.F.R. § 76.1905.

⁸ 76 C.F.R. § 76.1904(b)(i).

⁹ MPAA Comments at 5.

dismantle the ceiling on MVPD control based solely on the content industry's stale and unproven claims of commercial harm.

II. Comment on Specific Proposals.

A. The Commission Should Continue to Prohibit Use of Selectable Output Control.

Hundreds of thousands of early-adopter consumers purchased television displays that receive high definition content from a cable service only through high definition analog inputs. Whether because they use older television sets or because of lack of adequate support for early secure digital outputs, these consumers continue to rely on analog outputs. If a competitive market for two-way devices finally emerges, millions more consumers will invest in televisions and other devices that will use a variety of secure digital outputs, any one of which may be more or less "acceptable" to the content industry. Collectively, these consumers will make a multibillion-dollar commitment to new technologies.

Selectable output control – selective disabling of various output ports on a digital cable device on the MVPD's command – has the potential to betray both early adopters and future mainstream cable subscribers by cutting them off from content they have purchased. Many screens could literally go dark, with no recourse other than replacement of the HDTV television. Unlike the case of the broadcast DTV transition, there are likely to be *no add-on converters – subsidized or not* – that could cure an HDTV screen going dark, as the MPAA would consider these to be "circumvention" devices.

Neither MPAA's members nor NCTA's members have ever provided evidence that any particular output – whether analog or digital – has actually facilitated mass redistribution of content. The reason why "there has been no legislative solution to fix the problem of the so-

called ‘analog hole’¹⁰ is because there is no evidence of any problem that needs solving.¹¹ And while MPAA justifies its request by reference to the “analog hole,” both MPAA and NCTA have asked for the ability to shut off *protected digital* outputs as well.¹²

All of this suggests strongly that MPAA and NCTA’s real intention is to invoke selectable output control at will, for whatever strategic and exclusionary purpose that may be conceived. Indeed, MPAA specifically asks the Commission to “allow for the use of SOC functionality for *all* content that passes through bidirectional devices.”¹³

Allowing indiscriminate use of selectable output control would allow MVPDs to deny subscribers the functionality for which they pay, without any review of harms to the public interest. But neither group has put forth any evidence of a problem that triggering this technology would solve. They have merely once again asked the Commission to abdicate its oversight of the serious public interest concerns raised by the ability to shut off consumers’ video outputs.

B. The Commission Should Not Allow Indiscriminate Use of Downresolution or Redistribution Control.

NCTA and MPAA have also asked the Commission for full control over selective downgrading of the video resolution on particular outputs, and to apply redistribution control to all content, as they choose. The Commission should continue to reject these incursions on

¹⁰ MPAA Comments at 8.

¹¹ A Senate Judiciary Committee hearing in the last Congress failed to turn up any such evidence, and thus failed to generate any interest in addressing this subject via legislation. *The Analog Hole: Can Congress Protect Copyright and Promote Innovation?: Hearing Before the S. Comm. on the Judiciary*, S. Hrg. 109-539 (2006), available at Government Printing Office, Senate Judiciary Hearing Transcript, <http://a257.g.akamaitech.net/7/257/2422/15sep20061200/www.access.gpo.gov/congress/senate/pdf/109hrg/29573.pdf>.

¹² MPAA Comments at 9; *Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of the National Cable and Telecommunications Association at 58 (Aug. 24, 2007) (suggesting that cable operators be able to restrict signals to “designated” digital outputs).

¹³ MPAA Comments at 9 (emphasis added).

consumer autonomy for the same reasons. At a time when consumers are only beginning to appreciate the value of high definition content, downresolution of analog outputs would rob many consumers of the high definition value for which they pay – based on the mere, unproven speculation that someone, somewhere might record and redistribute high definition analog output. As is noted above, the Congress has found no evidence of redistribution through analog outputs – and neither NCTA nor MPAA presents any such evidence now. Ironically, the cable industry itself has forced many early high-definition subscribers to rely on analog outputs, by withholding approval are failing to fully support certain secure digital outputs. Without any showing of harm, there is no reason to reverse course now and allow downresolution at will.

No additional regulations are necessary with respect to redistribution control. Honest consumers, who pay for the service they receive, should be able to move over-the-air programming to as many devices as possible within their home or mobile systems. Congress has wisely refrained from allowing redistribution control. The Commission should not step in now to solve a nonexistent problem.

III. Conclusion.

MPAA and NCTA want the Commission to accept, contrary to all logic, that the ability to *take away* functionality from lawfully purchased devices will “enable viewers to use and interact with content in exciting new ways.”¹⁴ Absurdities like this are no basis for a change in policy. The Internet came to be only after telephone companies were required to give up control over end user devices connected to their networks. The home video and DVD markets, along with the amazing diversity of consumer video recording devices available today, were made possible by denying MPAA members’ requests for total control over time-shifting. Two-way cable service

¹⁴ MPAA Comments at 24.

will be no different. Neither NCTA nor MPAA has given any evidence that the current regulations are unworkable or have impeded the operation of the content industry. The Commission should preserve and maintain its encoding rules.

Respectfully submitted,

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