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 In Response To Further Notice Of Proposed Rulemaking

April 28, 2003

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In its March 28 comments in these dockets, HRRC summarized its view of the documents on which the Commission has asked comment:

> While HRRC prefers outcomes that place maximum trust in the fairness and reasonableness of most consumers, it recognizes, in the copy protection provisions of the "Plug & Play" recommendations, a balanced approach consistent with prior public and private sector outcomes on these issues. Acceptance of this approach would be in line with prevailing public and private sector policy to date. Rejection of such balance would be grossly out of step, and would be a debacle for American consumers.[1]

The comments received by the Commission on the "copy protection" and home viewing expectation issues of most immediate concern to the HRRC illustrate the balanced nature of the outcome on which comments were sought. Some parties disclaim the need for *any* such constraint; others claim the right to impose such constraints on others as an absolute property right, not to be trifled with. Having, in its own comments, laid out the history of the public policy

[1] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices,* CS Docket No. 97-80, *Compatibility Between Cable Systems and Consumer Electronics Equipment,* PP Docket No. 00-67, Further Notice of Proposed Rulemaking (Rel. January 10, 2003), Comments Of The Home Recording Rights Coalition at 10 (March 28, 2003.

copyright debate and negotiations in the United States that have produced the balance of which the proposed Encoding Rules are emblematic, HRRC in these Reply comments addresses the comments of those who have focused on particular Compliance Rule / Encoding Rule outcomes.

I. HRRC Is Sympathetic To But Not Persuaded By Those Who Seek No Or Fewer Constraints On Consumer Practices.

For most of its first decade, until digital recording technology emerged, the HRRC took an absolutist view toward any officially sanctioned constraints on home recording devices and media. With the advent of digital audio and video recording came additional technical issues and legal uncertainties, and reluctance by content providers, in the absence of some means of copy protection, to provide marketing support for new formats. When asked by lawmakers to discuss balanced outcomes with members of the content community, the HRRC said it would evaluate proposals subject to three basic tests:

(1) Is technology advanced or held back?

(2) Does the consumer get his or her fair share of the benefits from any advance?

(3) Does the outcome provide for greater legal certainty, or for more uncertainty, in the marketplace?

A. The Balance Of Compliance And Encoding Rules Is The Best Available Outcome For Those Favoring Consumer Freedom And Flexibility In Home Use Of Devices.

In its March 28 comments, HRRC traced the history of the discussions with content providers leading to the draft "DVRA" of 1996, Section 1201(k) of the DMCA of 1998, the "Encoding Rules" of the "5C" license, and last year's discussions, involving CableLabs, the motion picture industry, the consumer electronics industry, and the FCC staff, of what the FCC could do to cut the Gordian Knot that was the draft "DFAST" license. During these discussions it became clear to all that only a balanced regime, applicable to all MVPD platforms for content at the same level of distribution, could break this deadlock that had helped freeze market entry for several years. It became clear that a balanced package, of the sort on which the Commission has now asked comment, was the only "place" left to go.

Given HRRC's origins, history, and policy positions, HRRC is sympathetic with those who argue that if there were uniformly less "protection" for content providers than these Encoding Rules allow, or even no protection at all, content would still flow into the market, and consumers would enjoy a greater measure of flexibility. ***HRRC does not believe, however, that the rejection or***

modification of these Encoding Rules would lead to such a result, or to any result that would favor consumers. Rather, rejection would lead to years of further stalemate, ultimately resulting in the *same* proposals being made to the *same* Commission, in some new procedural guise.

The problem with the argument, laid out in the comments of Public Knowledge and Consumers Union,[2] that "Encoding Rules," and the copy protection constraints that they recognize, are not necessary is that it ignores the fact that in the inter-related licenses of content, formats, and devices in the digital age, *Compliance and Robustness Rules* are a fact of life. ***If the Encoding Rules were rejected, the Compliance and Robustness rules not only would remain; they would be made much more unfavorable to consumers in any license offered by CableLabs because DBS providers would be -- or could be forced or importuned by content providers to be -- offering the same unfavorable provisions in their licenses to device manufacturers.*** The reality is that these device manufacturers cannot make a device to receive *either* DBS or cable service without such a license.

There is no prospect, at this juncture, for the Compliance and Robustness rule impositions to be removed comprehensively. In the DBS context, the licenses from content providers set the parameters for the license from the content distributor to the device manufacturer. In the cable context, content providers license content distributors, which license the cable MSOs that control CableLabs, which licenses the device manufacturer entrants. The Commission has *already ruled* in these dockets that CableLabs *may* include "some measure of copy protection" in this license under existing regulations.[3] The only way to ameliorate any such measure is to challenge a *specific provision* via petition to the FCC. If the license does not contain any Encoding Rules, such a petition to the FCC would have to challenge the *absence* of a specific provision.

Therefore, it is simply too late in the game to complain that Encoding Rules must exist or that Compliance Rules do exist. ***The only question admissibly before the Commission is how best any compliance and robustness rules in an MVPD license[4] may be tempered to achieve other than a one-sided, dictated outcome for content providers whose licensing authority has been***

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[2] Comments of Public Knowledge and Consumers Union (PK-CU), March 28, 2003, p. 6.

[3] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices,* CS Docket No. 97-80, Further Notice of Proposed Rulemaking And Declaratory Ruling, 15 FCC Rcd 18199 (Rel. Sept. 18, 2000) ("Declaratory Ruling"), par. 28.

[4] As the parties to the December 19 letter noted, the DFAST license itself is not before the Commission and is not presently the subject of any petition. The proper way to view the Encoding Rules, then, is as ameliorating the effect of MVPD license compliance rules, some of which (re cable) have been the subject of prior direct filings with the Commission, and some of which (re DBS) have been comprehensively referenced to the Commission by those discussing the ones that have been filed.

augmented by regulated entry to these device markets and the requirement that all entrant devices be specifically licensed.[5]

B. The Compliance And Encoding Rules On Which Comment Has Been Sought Provide For A Balanced Outcome That Preserves Settled Consumer Expectations.

The more specific criticisms voiced by those who believe the balance of Compliance and Robustness rules is too restrictive of consumers do not persuade HRRC that, aside from the open question of "downresolution," any change should be made by the Commission.

By far the biggest areas of concern for consumer advocates have been with respect to "downresolution" and "selectable output control." The latter is properly banned, in all cases, by the Encoding Rules. The former, except with respect to content originating as free terrestrial broadcasts, is left as an open issue to be decided by the Commission without any joint recommendation by the cable and consumer electronics parties.

Some commenters understandably misconstrue the silence of the Encoding Rules on downresolution in contexts other than free terrestrial broadcast as allowing it. The parties to the December 19 letter to the Commission said explicitly that it should not be so taken, and the Commission confirmed this in the FNPRM. On the merits, HRRC agrees thoroughly with all the commenters -- ATI *et al*,[6] PK-CU, CEA / CERC,[7] -- that inveighed against downresolution. HRRC's reasons were set forth at length in its own comments, and are discussed further below, in reply to the commenters who favor it.

Other criticisms of the compliance / encoding balance were:

- ATI *et al* (pp 7 - 10) and Intel, separately (p. 12), object to the "bona fide trial" provision or want it to be time-limited. They want the Commission to prescribe, in advance, the technical criteria by which new technologies can be approved under the DFAST license, even though CableLabs decisions in these respects may be appealed to the Commission. They would also like *any* potential vendor to be able or propose a new technology an a basis that may

[5] License is necessary because MVPDs are supported by federal and state law in requiring that access devices, if not provided exclusively by the service provider, be specifically licensed. As the Commission has the authority to oversee competitive entry pursuant to Sections 624A and 629, it is to the Commission that petitions over license restraints on *any* MVPD access device would lie. *See, e.g.*, Declaratory Ruling, pars. 29 and 31.

[6] Comments of ATI Technologies, Inc., Dell Computer Corporation, Hewlett-Packard Company, Intel Corporation, Microsoft Corporation, and NEC Corporation (March 28, 2003) ("ATI *et al*"), p. 6.

[7] Comments Of The Consumer Electronics Association And The Consumer Electronics Retailers Coalition ("CEA / CERC"), (March 28, 2003), pp. 19 - 20.

be appealed. Otherwise, except for particular concerns over interpretation of robustness rules, these PC-industry comments seem supportive of the balance that was struck.

HRRC's view is that the Commission, as a result of provisions in these documents and otherwise, has ample authority to deal with any problem that would emerge through abuse of discretion by MSOs, re trials, or by CableLabs, re changes. As the history recited by HRRC in its March 28 comments reflects, the basis for the Compliance and the Encoding Rules lies with agreements made over a decade-long period by the motion picture industry, which licenses its content to both cable and DBS MVPDs. The provisions over which concern is expressed by these information technology industry commenters give room, in the Encoding Rules, for initiative by these cable and satellite programming distributors. The "change" provisions in the Compliance rules afford to the cable industry the residual control over change management that satellite MVPDs already enjoy. Like other provisions, they do not leave unfettered initiative with device manufacturers to the extent that HRRC and others may find desirable. They do, however, represent a fair bargain that satisfies HRRC's test for acceptable balanced provisions.

- Public Knowledge and Consumers Union (pp. 17-18) suggest a label, "Protected From Unauthorized Copying by 5C Technologies," or some more general labeling scheme warning consumers before they purchase devices.

HRRC believes that the former idea is objectionable on several bases, including accuracy. 5C technology is not, in fact, the only digital interface technology that has been or can be approved by CableLabs,[8] and 5C would not be used by recording devices, which would also be under Compliance rule-based obligations. More generalized labels would also likely be confusing, especially in the context of multi-purpose devices. The outcome of these rules is that, in most cases, consumers *can* make copies in accordance with reasonable and customary practices. To the extent they cannot, the inability is tied to the *programming window* rather than to the device -- so a device that is limited in copying a particular program when delivered by one service is likely to be able to copy it when it has moved to another. Consumers are already aware, for example, that movies released on DVD cannot be copied, whereas the same movie, delivered on a cable channel, can be copied.

- TiVo (pp. 8 - 9) objects to the 90-minute window for making temporary copies of material, such as Video On Demand, that is coded "copy never." TiVo urges that a TiVo-type "DVR" should be exempt because it is "not a 'recording device' in the classical sense, since it does not allow physical

[8] Indeed, the "DVI" interface is protected by "HDCP" which, unlike 5C, does not provide for home recording under any circumstance, even when it is allowed by the Compliance and Encoding Rules.

removal and transport of the content," so should allow indefinite "caching" for all levels of programming windows. TiVo argues more generally that "[c]opy protection and copyright issues should be negotiated by private agreements taking into account the rights of content owners and the 'fair use' rights of consumers to ensure products and services that meet the legitimate expectations of consumers," and that the Commission should not acknowledge "business models" with respect to copy protection.

In any "state of nature," HRRC would endorse TiVo's ideals and arguments. However, they run counter to the history of the past decade, in which encoding rules based on release windows have offered common ground for the sorts of agreements that TiVo advocates. More specifically, they run counter to the history of this proceeding, in which the Commission has already ruled that some measure of copy protection may be demanded from a device maker as a very condition of the right to attach to an MVPD service.

As to the nature of an embedded hard-drive DVR, HRRC agrees that special provisions are necessary in order to recognize the novel characteristics of such a recording device and its customary and evolving uses by consumers, but is satisfied that the Compliance, Robustness, and Encoding rules do, in fact, make account for these. They provide that for content coded for "one generation" copying, the recorded copy may be "moved" to another medium for archival or other purposes. (This is of particular importance in the case of a recording made initially on a hard drive embedded in a set-top box that is rented from an MVPD and must some day be returned.) The 90-minute recording exception for "copy never" content -- typically PPV or VOD material that is available at will, or several times in a day -- is also designed for the convenience of the owner of such a product. If the consumer, as TiVo suggests, wishes to use the recording facility to keep the product indefinitely (*i.e.*, for a period of time that extends beyond the time necessary for viewing in an interrupted sitting), he or she need only wait until the same program is available in the next, "one generation" window, typically through a subscription channel also offered by the same MVPD. Then it may be copied and kept indefinitely on the recorder that copied it, or moved to another.[9]

- DirecTV (p. 6) suggests that the Encoding Rules do not recognize "fair use" and would restrict it from offering programs at all (p. 9, *e.g.*, "NFL Sunday Ticket") if they could not be classified as "business models."

As HRRC discussed in its March 28 comments, the balance struck by compliance / encoding rules, in MVPD licenses and governing law or regulation, cannot, and is not intended to, track the varied and shifting outcomes of litigation

[9] Storing one-generation material indefinitely, and the basic "move" provision are not controversial in these comments insofar as material initially recorded on TiVo-type DVRs is concerned.

over fair use practices, but can and must reflect reasonable consumer values and expectations. In this case, the Encoding Rules do not pertain at all to the ability to offer programming, only to how such programming may be coded for copy protection purposes. In any case *not* governed by a "Defined Business Model," this is initially up to the MVPD. DirecTV does not indicate how the rights or expectations of its consumers would be injured by the Encoding Rules in any material way.

- Starz complains that its programming service, which apparently combines elements of "on demand" and "subscription" services, should be in the "one generation" category rather than in the "copy never" category.

HRRC is heartened that a programmer would wish to apply a *less* restrictive status to its programs, but is also concerned. The Starz comments reflect an understanding that the Encoding Rules would leave Starz free to apply a less restrictive status than it is entitled to use. Starz's concern, therefore, clearly is that because a more restrictive status is *available,* Starz will be *forced* by content providers, *via contract,* to apply it. This confirms that, where content providers sit atop a chain of MVPD distribution contracts; and device manufacturers, as a condition of their right to attach to the MVPD service, *must* accept the outcomes negotiated by them; there is no "state of nature" allowing for unfettered freedom of contract. ***HRRC would prefer that Starz get its way. But the main protection for consumers lies in the balance that was negotiated in the encoding rules for MVPD programming.*** Under these rules, Starz would have the opportunity to petition to change the Encoding Rule for programs distributed under the business model in question.

II. Content Owner Objections To The Compliance And Encoding Rules Should Not Result In Any Changes To Them.

HRRC does not take as warm a view of the merits of content provider objections to the compliance / encoding balance, but recognizes that these content interests clearly have a stake in these outcomes. However, ***HRRC believes that the compliance and encoding rule outcomes already reflect the views, initiatives, requirements, and demands of content providers more than they do those of any other interest.***

A. Both The Compliance And The Encoding Rules Are The Inevitable Consequence Of Outcomes Of FCC Rulings Sought By These Content Owners.

The history reviewed in the HRRC March 28 comments, and the history of the FCC's oversight of device attachment, allow for no viable outcome for the DTV transition, consumer expectations, and the establishment of a competitive market other than approval of the balance achieved in the Compliance and Encoding provisions on which the FCC has asked comment:

- Without Encoding Rules, the DFAST license so arduously negotiated by the parties is a dead letter.

- To implement the balance of the measures resolved by the parties, many of which are noncontroversial, the FCC would have to resort to more specific regulation, over the objection of the parties involved.

- Device manufacturers and others who believe that PHILA provisions violate existing FCC regulations would have to petition the Commission separately as to each provision that is objected to, and as to each provision (*e.g., encoding rules*) that is *not* present.[10]

The question before the Commission, therefore, is whether in enforcing congressional mandates that clearly were intended to empower consumers it will by regulation oversee the imposition of unprecedented consumer burdens, instead. Nothing in the content provider objections filed in these dockets, as to substance or jurisdiction, supports such a result.

B. Objections On The Basis Of Substantive Outcome Are Not Well Founded.

A review of the most comprehensive objections to the balance struck by the Compliance, Robustness, and Encoding rules shows these objections, in fact, to be marginal, and for the most part *not really aimed* at the substance of these provisions.

- Selectable Output Control. The justifications advanced for this practice, which MPAA previously disclaimed in a letter to congressional leaders,[11] are not really substantive, as no commenter wants openly to admit to the real bases for its appeal -- (1) to drive secure recordable digital interfaces off the market, or, (2) as an inducement to attract content away from MVPD distribution channels that refuse to offer this "tool" to content providers. Rather, it is couched as a means of "revocation" of particular insecure devices, which it is not,[12] or of "retirement of outputs," which it also is not,[13] an

[10] Both the motion picture interests and the cable interests assert that encoding rules provisions cannot viably be implemented or enforced, as to content third party beneficiaries, within the four corners of "PHILA" or "DFAST." The September 2002 "Model PHILA" filed in Docket 97-80 by CEA contains a rough and summary encoding rule provision, but the only available remedy would be admittedly drastic -- a denial of all technical protections of which the third party beneficiaries might otherwise claim the benefit.

[11] Letter to Hon. Billy Tauzin, March 20, 2002. As quoted in Mr. Attaway's September 6, 2002, letter to Mr. Ferree: 'MPAA and its member companies are not seeking in the 5C license or in the OpenCable PHILA context the ability to turn off the 1394/5C digital interconnect in favor of a DVI/HDCP interconnect through a selectable output control mechanism.'

[12] "Revocation" pertains to particular "keys" that allow devices to authenticate themselves to secure systems or to decrypt content; it has nothing to do with coding a program so as not to travel over a particular interface path.

impediment to "new business models,"[14] which it is not, and, as a general euphemism, an "elimination of tools."[15]

- Downresolution. This practice is also falsely painted as a "security" measure, which it clearly is not. As HRRC and other commenters have pointed out, downresolution actually is a *necessary first step* in any attempt to redistribute content over the Internet. Again, the real motive is more oblique -- to discourage reliance on particular interfaces by making them unreliable in the hands of consumers. In this case, the practice is unsupportable because more than four million consumers already rely on the "component video" interface to which downresolution would apply, and have *no other avenue* for the display of HDTV content through the expensive products in which they have invested.

  In this case, MPAA[16] and NCTA[17] point to a facially similar provision in the "5C" license. MPAA claims that a ban in these Encoding Rules would upset the balance that was struck there. This is clearly not the case. The 5C context applies only to content that *already* has entered a secure digital home network. As to content already in such a network, either a display with a digital interface is available, to which "downres" does not apply, or the consumer relies on another interface for the display. In either case, the 5C "downres" provision (aimed at only secondary devices, such as a video recorder or analog-to-digital converter) does not address the interface relied upon for consumer viewing. By contrast, the intended effect of downresolution in the context of a set-top box connected to a display that has *only* a component video interface would be on the consumer's *primary viewing experience*. Thus, in the case of primary MPVD distribution for viewing, as opposed to secondary distribution in a 5C network,[18] the effect is to deny HDTV viewing to the consumer -- even though the consumer has purchased an HD-capable display, has obtained an HD-capable set-top box, and pays for HDTV content. This untoward punishment of consumers who have invested in the HDTV transition is reason enough for the Commission to apply the downresolution ban to all content, not just content originating as a free, terrestrial broadcast.

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[13] *See* Comments of the Motion Picture Association of America, Inc. ("MPAA") (March 28, 2003) pp. 7, 10. The "retirement" of outputs would involve not making them available for connection by consumers, so consumers could not plan to rely on them. By contrast, SOC assumes that consumers *will* connect these interfaces and *will* invest in other products and programming services that purport to provide content, but nevertheless, content owners may turn these interfaces off without warning. This is why proponents are so reluctant to defend this practice in any straightforward manner.

[14] MPAA Comments, p. 6

[15] MPAA Comments, p. 5.

[16] MPAA Comments, p. 3, n. 5.

[17] Comments of the National Cable And Telecommunications Association (March 28, 2003), pp. 23-34.

[18] HRRC notes that Intel, a "5C" member, joined in the ATI *et al* Comments that endorse the ban on downresolution in the context of MVPD Encoding Rules.

MPAA (at 10-11) also seeks to justify downresolution generally by pointing to a facially similar, but very narrow provision in the regulations that it proposed to the Commission in connection with the separate, controversial NPRM concerning the "broadcast flag." MPAA suggests that this provision was requested by "some" in the computer industry to enable compatibility with existing products. By contrast, the intended effect of downresolution in the context of a set-top box connected to a display that has *only* a component video interface would be on the consumer's *primary viewing equipment*. Thus, in the case of primary MPVD distribution for viewing, as opposed to the limited context of computer monitors that are purchased and used incidentally (to be generous) for the viewing of broadcast television content, the effect of a generic downresolution requirement is to deny HDTV viewing to the consumer.

- Analog Hole, CGMS-A On Analog Outputs, Broadcast Flag. MPAA rather suddenly adds to its list of concerns -- heretofore not expressed in FCC staff discussions of DFAST -- that the Compliance and Robustness rules are deficient, in that they fail to address MPAA's "analog hole" and "broadcast flag" agendas. It could not be clearer that these issues are raised *strategically*, rather than substantively, as they have little to do with the MVPD content distribution matters on which the Commission has labored for so long, but have everything to do with two other MPAA agendas, one before the FCC and one that MPAA hopes to present to the Congress. Simply, MPAA does not want anything else to "move" until it has extracted maximum leverage.

  The entire rationale for the "broadcast flag" undertaking was that some additional measure was necessary to address, in the context of free, terrestrial broadcasts whose reception does not require a conditional access license, the subject of redistribution controls that *are* addressed in MVPD licenses. Such controls are, for broadcast content distributed via cable or satellite, available in the 5C license. MPAA's initial effort re the "broadcast flag" was to try to force the 5C group to extend this license to cover additional product functions that do not involve 5C technology -- indeed, the MPAA and its members argued to the FCC that the 5C licensors have the power to extend their coverage *beyond* MVPD programming entering systems controlled by their technology.[19] The DFAST Compliance and Robustness rules already require that redistribution be addressed, in covered products, to the same degree that

[19] *See, e.g.*, Ex Parte Presentation In CS Docket No. 97-80, The Walt Disney Company, Nov. 8, 2001: "The remaining five studios [that have not already signed the 5C license] are in accord with the principal terms of the agreement, but have declined to enter into an agreement with the 5C companies unless that agreement protects broadcast content." The filing indicated that the lawyers for the five studios do not share the antitrust concerns raised by the 5C companies about such an extension; *See also,* Letter to Chairman Powell from Daniel G. Swanson, on behalf of Jack Valenti, January 11, 2002.

the broadcast flag proposals do. The issue is brought up here manifestly for leverage alone.

Similarly, the "analog hole" agenda extends well beyond MVPD products or licenses that govern them. The real problem facing use of "CGMS-A," a "watermark," or any other status marking technology that might provide a solution for "analog reconversion" issues is that all possible downstream devices, some unlicensed and unrelated to broadcast or MVPD services, must be under some mandate to read and respond to the status marks. MPAA's new comments, complaining of an absence of a requirement to generate CGMS-A, can be read only in the context of such a legislative agenda. If MPAA and others do succeed in obtaining passage of such a mandate, the DFAST license could always be revised to require generation of CGMS-A. Under such circumstances, HRRC has no reason to believe such a requirement would be controversial. Indeed, the "change" procedures would allow such a requirement to be added at any time in which, based on progress in the ARDG, it may appear that this or another status marking solution may be desirable. If supported by a consensus, this outcome would also seem noncontroversial. ***There is no need to hold up the emergence of a competitive market as further leverage, and the Commission should not be party to efforts to do so.***

- "Multiple Moves, "Binding." MPAA requests one more "clarification" -- that first generation copies should not be "moved" from device to device more than once. As is indicated above, HRRC understands that the "move" concept, imported from the 5C license, was never controversial. There is no reason to be concerned over additional "moves" so long as only one copy remains available to the consumer. The 5C license expressly permits such additional moves.[20] MPAA also attacks comprehensive requirements for the "binding" of content, apparently seeking such "binding" even in the case of an embedded hard drive that cannot be removed from a product.

- Change Process. MPAA further seeks to distance itself from its acceptance of 5C encoding rules, its members' acceptance of 5C encoding rules, and its prior praise to the Commission of the 5C encoding rules in deliberations leading to the September, 2000 "Declaratory Ruling" and in the Hoedown sessions, by now pointing out that the 5C encoding rules apply only to 5C, and that its members should be free to adopt a new "business model" that circumvents the rules and consumer protections they had agreed to. This argument either is a declaration that MPAA members never did really intend to be bound by their agreements to live by encoding rules or to support secure digital interfaces, or it is yet another flavor of arguing for Selectable Output Control by another name. MPAA makes no comment whatsoever about the Encoding Rule provisions allowing its members or their licensees to establish

[20] *See* Adopter Agreement Exhibit B Part 2 Section 3, page B-12.

new business models -- apparently because this process does not apply to SOC and downresolution, and these techniques are really the *only* areas in which MPAA has any substantive objection to the Encoding Rules.

C. Objections On The Basis Of "Freedom Of Contract" And Irrelevance To Interoperability Are Inapposite And Incorrect.

Without any real, substantive basis for complaint -- other than strategic objections based on its own legislative and regulatory agenda, and finding new ways to say "SOC" and "downres" -- the MPAA, joined by the music publishers, falls back on a generalized "freedom of contract" argument: "[U]nlike the case with over-the-air digital broadcast television, Commission regulation is entirely unnecessary in this case: cable 'plug and play' compatibility can readily be achieved without this rider regulation, which in any event does nothing to ensure technical cable interoperability."

This view is wrong both generally and specifically. Specifically, the meaning of "interoperability" includes the reliable functioning of interfaces and devices when connected to each other through those interfaces. SOC and downresolution are anathema to interoperability; no home network in which they may be triggered can be said to be interoperable. So the encoding rules are not irrelevant to interoperability, they are *essential* to interoperability. If they did nothing else, the Encoding Rules would be necessary to protect consumers against these impositions, made mandatory in a license overseen by the Commission.

More generally, the MPAA argument is simply another version of the "state of nature" argument of those who oppose *any* constraint on consumer use of MVPD devices. The MPAA could have proceeded via suit under copyright law and/or by legislative initiative, if it did not believe that achieving a balanced result was a proper goal of the regulatory regime overseen by the Commission. Instead, recognizing -- as it still does -- that the Commission, under a congressional mandate, "wisely elected to rely on the OpenCable project managed by CableLabs to develop the requisite standards and licenses,"[21] the MPAA and its members participated at every stage of Commission oversight and deliberation over the issues raised, and over the nature of the DFAST license -- which it now cautions is strictly "private" -- itself. Having successfully obtained the Declaratory Ruling statement, however, that federally backed conditional access regulation may include "some measure" of copy protection, MPAA seeks to "cut off the jam" before "some measure" can be defined in the same set of regulations.

In HRRC's 22 years since an injunction was sought against the sale of the first video recorder, we have never seen as one-sided a result as would obtain if content providers were given absolute, unchecked, untempered power to dictate the designs and capabilities of consumer devices. In the many cases, laws, and

[21] MPAA Comments, p. 4.

licenses that have touched this subject, the courts have never decreed this, the Congress has never provided for it, and no license has ever granted it. The Commission would be granting truly unprecedented power were it to tilt and distort its own regulations in this manner.

D. Objections To The Commission's Jurisdiction Are Baseless.

In the absence of any real, substantive claim (and curbed by the many pages devoted to affirming the Commission's jurisdiction in another proceeding this year), MPAA makes a brief, conclusory pass at claiming that the Commission lacks jurisdiction to temper compliance rules with encoding rules. There is no real basis for this claim. As the history reviewed in depth in the CEA / CERC comments makes clear, Congress could not have been more explicit in instructing the Commission in 1992 and 1996, and the Commission has established a framework that assumes that at some point it will rule, in the context of its regulations, on the appropriateness of particular provisions with respect to copy protection.

The only argument advanced as to why the Commission should *not* have jurisdiction is that content owners' property is copyrighted. Device owners' products are patented, trademarked, and copyrighted as well, yet they must comply with FCC regulations. The MPAA does not attack the encoding rules on First Amendment grounds because it knows full well that the Commission has jurisdiction over a huge variety of copyrighted programming. Nor did the MPAA raise jurisdictional objections when it made threats with respect to which devices would receive content under a DFAST license. There is no appreciable difference between the regulated status of MPVD "navigation devices," under section 629, and the regulated status of MVPD programming in general. Sections 624 and 629 commanded the Commission to establish specific rules to *assure,* via its regulations, a competitive market for these devices, and this is what the Commission has done, and is doing, in its regulations.

III. The Satellite MVPDs Do Not Have Any Valid Basis For Objecting To The Compliance Or Encoding Rules.

It is understandable that non-cable MVPDs would express concerns over not having been involved in the final cable / consumer electronics negotiations that led to the filing of the December 19 letter. Their practices and contracts with content providers, however, have been a continual point of reference in discussions for the last several years, and they have had several publicly noticed opportunities to help shape the Commission's process.

A. Over The Last Several Years The Non-Cable MVPDs Have Been Aware That They Are Covered By Section 629 And That Their Practices Were Of Central Relevance To MVPD Issues Being Debated At The Commission, And Have Had Many Opportunities To Help Shape The Process.

As the CEA / CERC comments recount, it has been clear since 1998 that non-cable MVPDs are covered by Section 629, and excused only from the requirement to provide separate security modules. They must also have been aware that their particular compliance rule practices have been longstanding points of reference in Commission filings and discussions for the last several years. These discussions occurred in the context of filings in public FCC dockets, several of which were pursuant to publicly noticed proceedings.

Moreover, content providers and device manufacturers who are in close privity of contract with these MVPDs were active participants in these FCC proceedings. So, it can hardly be said that as the Commission brought issues governing copy protection and MVPD licenses to a head over the last several years, the SBCA and DirecTV had no opportunity to advise the Commission of their views. Even the filings in answer to "Hoedown" questions on the subject of the DFAST license, though posed in invitation-only meetings,[22] were placed on the public record in Docket No. 97-80. They could have been the subject of *ex parte* meetings and filings at any subsequent time.

The Commission and its staff were aware of the cable / consumer electronics discussions for most of their duration. At no point was it thought necessary to inject other MVPDs into the resolution of the issues in question, just as the injection of other interested parties -- retailers, content providers, IT manufacturers -- would have upset the bilateral nature of the discussions. These other parties, however, have participated actively in the Commission proceedings and discussions leading up to this point of resolution. DBS interests have chosen not to do so.

B. The Non-Cable MVPDs Do Not Voice Any Real, Substantive Objection To The Encoding Rules.

Even though they chose not to participate in the relevant prior activities in these dockets, any substantive points raised now by a non-cable MVPD should be worthy of attention. As in the case of the information technology industry commenters, however, the concerns as actually expressed relate more to not having been at the table than to any real, substantive issue that ought to cause the

[22] HRRC understands that the invitations were issued by FCC staff and included motion picture industry representatives.

Commission to refrain from giving expeditious approval to the items on which it has requested comment.

The objections made by SBCA are of the "in principle" and "state of nature" variety, rather than substantive. SBCA urges a "collective market-based solution"[23] but fails to offer any real, substantive alternative to the contents of the Encoding Rules on which comment has been requested.

- SBCA (p. 3) and DirecTV (p. 4) incorrectly characterize the MOU, and the proposed regulations, as properly concerning only cable "compatibility" and "cable-ready digital televisions" rather than also embracing the competitive availability of devices for *any* service offered by *any* MVPD.

- SBCA, like DirecTV, incorrectly expresses (pp. 4-6) a belief that (presumably the Encoding Rules) would "impose business models." The Encoding Rules do nothing of the sort. ***No specific objection to any Encoding Rule outcome is offered in the SBCA comments.*** Nor is any DBS provider affected at all by the obligation on cable MVPDs to support the 1394 interface. Nor is any competitor given the right to "publicly oppose new offerings" -- only a change in copy protection status for an existing business model may be opposed. Even in such case, the MVPD has a right to a "bona fide trial" without providing advance notice to competitors.

- DirecTV suggests (p. 5) that MSOs have excluded "themselves" by failing to cover services delivered by cable modem. Cable and DSL modems to not provide channelized services of the sort that MVPDs do, nor do they deliver HDTV, nor can they, in real time, in any proximate future. Unlike the case of DBS providers, the Commission has not ruled that they are subject to regulation under Section 629.

- SBCA euphemistically (pp. 4-5) refers, again apparently to the Encoding Rules, to the MOU as imposing "a lower cable standard, instead of raising the standards and quality of cable to those of the best MVPD -- the DBS industry." As it has no substantive antecedent, apparently this is a reference to the Encoding Rule provisions to the extent they ban SOC and downresolution. In HRRC's view, such impositions are hardly a "standard of quality" -- but it is understandable that an industry association dealing directly with the public would not want to be more direct in this regard. Indeed, DirecTV suggests the contrary when it complains (p. 6, also

[23] Satellite Broadcasting and Communications Association Comments, p. 2.

incorrectly) that the Encoding Rules do not adequately take "fair use" rights into account.[24]

- DirecTV does complain (also p. 6) of the potential for "unlimited copying and distribution" of analog formats -- apparently an argument in favor of downresolution. It complains that the "encoding rules fail to address or govern format conversion … to protect the rights of content owners." It is not clear what right is being addressed here. DirecTV, like MPAA, attempts to dress Selectable Output Control as a type of device-specific turn-off mechanism, which, as we discuss above, it is not. The comments further on that page (7) show a fundamental *misunderstanding* of the very purpose and function of Encoding Rules, as they claim that ***"it is not appropriate for 'copy never' content to be transmitted over those interfaces and the MVPD should be permitted to disable those outputs."*** (emphasis supplied) HRRC believes this to be a misunderstanding, as it is safe to assume that DirecTV would like its customers to be able to *view* content, even though it may be encoded as "copy never."

  DirecTV goes on to make what apparently is its *real* argument for Selectable Output Control and downresolution: "If DBS providers lose the ability to use selectable output controls as a copy protection mechanism, while other sources of digital content distribution, such as DVDs or cable modem service, retain it, it would give an unfair advantage to these providers." So, the real objection is not that the Encoding Rules cover too much; it is that they cover too *few* services. ***That Encoding Rules should cover, equally, the services of MVPD providers with comparable windows is exactly the same argument made by the cable operators in insisting that they will only offer the DFAST license subject to encoding rules that cover all MVPDs.*** So, DirecTV does in fact accept the main principle behind these Encoding Rules. The additional concern re DVDs and cable (or, indeed, DSL) modems is inapposite, because neither offers the channelized MVPD program services, in direct competition with each other, that cable and DBS do, nor is either an MVPD subject to this proceeding.

The striking thing about the SBCA and DirecTV comments is that they do not address any other specific Encoding Rule outcomes. The reason is clear: the Encoding Rules in all other respects reflect the balanced copy protection outcomes that have been negotiated over the past decade, and on the merits have been accepted by the content providers that supply programming to both cable and satellite providers. As in the case of the content owner comments, the only

[24] The simultaneous suggestions that the Encoding Rules should continue to make available the "tools" and "best quality" represented by SOC and downresolution, yet do not adequately address "fair use," are indications that these Comments are strategic rather than substantive in nature. This is understandable in the case of a competitive service.

real objections are strategic, based on broader industry considerations, or are based on additional ways to dress up Selectable Output Control and downresolution as security measures rather than impositions on consumers.

IV. Conclusion -- Approval And Implementation Of The Items On Which Comment Has Been Requested Is Strongly In The Interest Of Consumers.

Those who criticize the Encoding Rules because they would prefer no copy protection constraints on consumers are criticizing the very part of this "package" that protects consumers. Those who criticize them from other points of view are expressing essentially strategic rather than substantive concerns. The Congress and the Commission have come too far toward achieving competitive availability through a balanced outcome to turn back now. The Commission should act to grant expeditious approval to the matters on which it has asked comment, and should extend the bar on imposing "downresolution" on consumers to all MVPD programming.

Respectfully submitted,

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