Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Certification of Digital Output Protection Technologies and Recording Methods to be Used in Covered Demodulator Products	)	**MB Docket No. 04-61**
	)	
Certification of Digital Content Protection, LLC	)	

OPPOSITION OF THE AMERICAN ANTITRUST INSTITUTE

The American Antitrust Institute ("AAI") submits this opposition to the Certification of Digital Content Protection, LLC ("DCP") for approval of High-Bandwidth Digital Content Protection ("HDCP") as an approved digital output protection technology.[1] These comments discuss the interests of AAI in this proceeding, the interim criteria for approval of content protection ("CP") technologies adopted by the Commission which promote competitive markets,[2] and the reasons the AAI believes that in its current form the *DCP Certification* for HDCP is inappropriate for use with Covered Demodulator Products because it fails to fulfill these pro-competitive criteria.

The Interests of the AAI

The AAI is an independent research, education, and advocacy organization that supports a leading role for competition, as enforced by our antitrust laws and embodied in the

[1] *Certification of Digital Content Protection, LLC for Approval of its High-Bandwidth Digital Content Protection as an Approved Digital Output Protection Technology* ("*DCP Certification*"), Docket No. MB 04-61 (filed Mar. 1, 2004).

[2] 47 C.F.R. §73.9008(d)

public interest mandate of the Commission, within the national and international economy. Background on the AAI may be found at www.antitrustinstitute.org, including participation in other matters involving the telecommunications and media industries.[3]

Among the explicit goals of the Commission in this proceeding is the desire to "foster innovation and marketplace competition."[4] The factors the Commission may consider upon undertaking a full review of a certification include its technological features,[5] the applicable licensing terms,[6] the effect of the proposed technology on consumers' use and enjoyment of unencrypted digital terrestrial broadcast content,[7] and any other relevant factors the Commission determines warrant consideration.[8] Several of the explicit interim criteria bear directly on the development and maintenance of competition in the market for content protection technologies (hereinafter, the "CPT market") and the markets for consumer electronics and information technology products (hereinafter, the "CE and IT markets"). The AAI believes that other factors not explicitly recited in the interim Rule also bear on promoting competition in these markets.

Interim Approval Factors that Promote Competition

With respect to the CPT market, competition can and should be promoted through

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[3]Funding comes to the AAI through contributions from a wide variety of sources, including several that may have an interest in aspects of these proceedings. More than 70 separate sources each have contributed over $1,000. A full listing is available on request.

[4]*Digital Broadcast Content Protection* (hereinafter, "*Broadcast Flag*"), *Report and Order and Further Notice of Proposed Rulemaking,* MB Docket No. 02-230 (rel. Nov. 4, 2003), at ¶43.

[5]47 C.F.R. §73.9008(d)(1).

[6]47 C.F.R. §73.9008(d)(2).

[7]47 C.F.R. §73.9008(d)(3).

[8]47 C.F.R. §73.9008(d)(4).

innovation and interoperability. License terms that dampen incentives of adopters to innovate, such as broad intellectual property ("IP") non-assertion provisions that do not fairly compensate adopters for innovations made to existing technologies, should be disfavored. Proponents of CP technologies must be required to specify the IP conveyed through any proposed license.[9] Similarly, licenses seeking royalties for invalid or unenforceable IP rights raise serious anticompetitive concerns.[10] Moreover, compliance rules that lock consumers in to products that employ only one "family" or "class" of CP technologies should not be approved.

With respect to the CE and IT markets, interoperability plays a key role in preventing bottlenecks between content producers and CE and IT products and in preventing CP technology owners from obtaining artificial control over the entry of products that employ competitive CP technologies. Compliance rules that reserve control over interoperability undermine the Commission's desire to foster competition, particularly where such CP technologies enjoy a first-mover advantage by virtue of having been approved by content producers and/or other CP owners and having thereby obtained a presence in the CE and IT markets prior to commencement of the *Broadcast Flag* proceeding.

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[9]Disclosure of IP is important in its own right to facilitate innovation, but is particularly important where reciprocal IP obligations are contained in the license. For a firm with a valuable IP portfolio, no meaningful evaluation of the risks associated with entering into such reciprocal obligations can be undertaken when the license simply conveys the rights to all "necessary claims" without specifying the patent, copyright, or trade secrecy material on which these claims are based. The major studios agree: "The Commission should also require that, as the American Antitrust Institute proposed, 'all putative licensors of governmentally approved technology should, as a threshold matter, be required to identify any and all patents, copyrights, or trade secrets they deem necessary to the technology being licensed.'" *Reply Comments of the Motion Picture Association of America, Inc., et al.*, to the *Further Notice of Proposed Rulemaking ("FNPRM"), Broadcast Flag Proceeding* (filed Mar. 15, 2004), at 13, quoting *Comments of the American Antitrust Institute* to the *FNPRM, Broadcast Flag Proceeding* (filed Feb. 13, 2004), at 6.

[10]See, *e.g., U.S. v. Pilkington plc*, 1994-2 Trade Cas. (CCH) ¶70,842 (D.Ariz., 1994) (consent decree resolving antitrust suit against exclusive licenses premised on expired patents).

In addition, license terms that require the disclosure by adopters of competitively sensitive information to CP technology owners who are also existing or potential competitors in the adjacent CE and IT markets must be reasonably related to the purposes of the license and accompanied by sufficient safeguards to protect the confidentiality of such information. Moreover, licensors must not have an overly-broad scope to change the license terms or technological features and thereby impose unreasonable costs or competitive disadvantages on participants in these adjacent markets. All of the foregoing bears directly on the prospects for competition in the CPT, CE, and IT markets.

Before turning to a discussion of the specifics of the *DCP Certification*, certain statements of DCP deserve a response. DCP states that it "does not believe as a matter of principle that the government should be involved in reviewing private license agreements," and that all matters that bear on issues other than robustness and compliance rules "should in all instances be a matter of private contract left to market participants."[11] Similarly, "DCP does not believe that the Commission should approve or disapprove technologies on the basis of the terms on which they may or may not be offered to third parties, and certainly not on the basis of terms and conditions not directly related to content protection (*i.e.*, compliance and robustness)."[12]

The Commission's pro-competitive goals cannot be achieved without the evaluation of criteria unrelated to proposed compliance and robustness rules. Among the most critical of these criteria are provisions that relate to the "necessary claims" licensing structure "developed long before the commencement of the Broadcast Flag proceedings or even the

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[11] *DCP Certification*, at 10, fn. 2.

[12] *Id.*

industry discussion in the Broadcast Protection Discussion Group."[13] Rather than supporting a "hands-off" approach to the necessary claim licensing structure, the first-mover advantages of HDCP (and other CP technologies) described by DCP strongly recommend *in favor* of a careful analysis of this aspect of the *DCP Certification*. Present market conditions, and those prior to the commencement of the *Broadcast Flag* proceeding, cannot be characterized as competitive, and the numerosity of existing licensees for HDCP does not equate to a "market determined" outcome.

In the parlance of antitrust jurisprudence, inputs without substitutes that are necessary to compete in a market are known as "essential facilities." Market power in the antitrust literature has often been described as the power to increase prices or lower output beyond their competitive levels. But, just as often, it has been described as the power to exclude competition, and it is in this latter sense that an essential facility conveys or preserves market power. It is well settled that the mere possession of market power, without more, is not unlawful. The approval of private contractual arrangements that serve to perpetuate market power is, however, inconsistent with the Commission's goal of fostering innovation and marketplace competition. To the extent that any particular licensing structure serves to perpetuate market power already acquired, the Commission can and should disapprove of such a structure if it seriously wishes to attain its pro-competitive goals.[14]

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[13] *Id.*, at 14.

[14] Similarly, any claimed ubiquity of the "essential claims" approach to IP licensing among other CP licensors (or even in other industries—a claim which the AAI does not accept), would not mean that such a structure is competitively neutral. In the CPT market, the essential facilities characteristics of the technologies have imparted sufficient market power to enable licensors to adopt a "take-it-or-leave-it" approach in which they refuse to negotiate with potential adopters. In other markets, to the extent it exists, the essential claims approach need not be the result of market power, but rather due to the economies of avoiding search and (continued...)

The *DCP Certification* Does Not Satisfy Pro-Competitive Criteria

The *DCP Certification* proposes IP licenses that do not disclose the IP purported to be conveyed and impose broad non-assertion obligations on adopters.[15] For the reasons given above, this arrangement dampens innovation, impedes the analysis of the validity of the licenses, and imposes undue risks on adopters with IP assets of their own, and, as a result, discriminates between adopters that are imitators and those that are innovators. The cumulative character of innovation is well-known. Under the DCP terms, adopters are prohibited from building upon the existing version of the HDCP technology.

Requiring DCP to disclose the source of its necessary claims would not impose an undue burden. For example, the Certification of Victor Company of Japan, Limited ("JVC") for Approval of its "D-VHS" Format as a Digital Content Protection Technology and Recording Method to be Used in Covered Demodulator Products[16] includes an exhibit listing the 10 major U.S. patents it owns that are necessary for implementation of the technology. Other filers have also committed to disclosing the identity of the IP being licensed.

A reciprocal obligation that ensures reasonable and non-discriminatory ("RAND")

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[14](...continued)
analysis costs which may outweigh the value of the products or services involved. Given the huge economic value of the markets affected by this proceeding, however, search and other costs involved in ensuring full disclosure of licensed IP are likely to be heavily outweighed by the economic benefits of enhanced incentives to innovate, increased competition, and by the share of the U.S. economy affected by the Commission's decisions.

[15]*DCP Certification, Exhibit 2,* §§2.1, 2.2, 2.3, and *Exhibit 3*, §§2.1, 2.2, 2.3.

[16]*Certification of Digital Output Protection Technologies and Recording Methods to be Used in Covered Demodulator Products, D-VHS Technology,* MB Docket No. 04-68 (filed Mar. 1, 2004), at App. A.

compensation for innovations[17] is self-evidently more pro-competitive than are reciprocal non-assertion obligations. Under the DCP licenses, adopters are effectively prevented from developing innovations that substitute for necessary claims. Such innovations cannot be licensed to others on RAND terms, and since the specific IP is not identified, innovator-adopters do not have an opportunity to "opt-out" of licensing any specific IP for which a substitute has been developed. Under these conditions, any innovation to the HDCP technology can only be made by DCP, or its founder, Intel Corporation, a limitation which DCP admits: "Competition among participants is therefore based on innovation with respect to product functions and features and *not on the underlying technology that is needed for participation and interoperability in the system* (in this case, the HDCP source and display)."[18]

The proposed DCP licenses also reserve the right to the licensor to make changes to the license terms or technology that "do not materially increase the cost or complexity of implementation of the HDCP specification."[19] This change provision is overly broad; The judgment as to what constitutes a material increase in cost or complexity to participants in the CE and IT markets should not be left to the discretion of DCP. Changes other than minor corrections or modifications of the existing technology should, at a minimum, require review by the Commission.

The *DCP Certification* apparently contemplates the use of HDCP for purposes other

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[17]See, *e.g.*, *Philips/Hewlett-Packard Vidi Recordable DVD Protection System Broadcast Flag Certification*, MB Docket No. 04-60 (filed Mar. 1, 2004), §7.3(4).

[18]*DCP Certification*, at 13 [emphasis supplied].

[19]*Id.*, at 14.

than protection of DVI and HDMI high-bandwidth links.[20] To stimulate innovation to the greatest possible extent, the right of any market participant—not solely DCP or Intel—to develop any such new applications for HDCP, which should then be submitted to the Commission for approval, should be clarified. The rights of adopters in this regard are limited to the extent that compliance with the proposed HDCP specification requires the use of the DVI or HDMI protocols.

Conclusion

For the reasons stated, the AAI respectfully opposes the *DCP Certification* until and unless it is modified to satisfy the pro-competitive criteria discussed above.

Respectfully submitted,

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[20]"HDCP itself, however, is not, connector dependent." *Id.,* at 10.