

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of: |) | |
| |) | |
| Implementation of Section 304 of the |) | CS Docket No. 97-80 |
| Telecommunications Act of 1996 |) | |
| |) | |
| Commercial Availability of Navigation Devices |) | |
| |) | |

**FURTHER NOTICE OF PROPOSED RULE MAKING
AND DECLARATORY RULING**

Adopted: September 14, 2000

Released: September 18, 2000

Comment Date: November 15, 2000

Reply Comment Date: December 18, 2000

By the Commission: Commissioner Tristani issuing a statement.

I. INTRODUCTION

1. This Further Notice of Proposed Rulemaking (“*Notice*”) and Declaratory Ruling (“*Order*”) addresses two separate, but related, matters regarding the Commission’s navigation devices rules.¹ The navigation devices rules were adopted to implement Section 629 of the Communications Act. They are designed to assure the commercial availability from retail outlets of equipment used to access service from multichannel video programming systems. In adopting these rules, the Commission indicated that it would monitor the development of the commercial availability of navigation devices and on reconsideration stated that it would commence a proceeding in the year 2000 to review the effectiveness of the rules and consider any necessary changes. In this proceeding, we undertake that review. In addition, questions have been raised as to whether certain of the mechanisms being developed by the cable television industry relating to the copying of digital video programming comply with the existing rules. We address those issues in the form of a declaratory ruling in this proceeding.

II. FURTHER NOTICE OF PROPOSED RULEMAKING

2. Section 629 of the Communications Act requires that the Commission adopt regulations to assure the commercial availability of navigation devices.² The purpose of Section 629 and the rules adopted thereunder is to assure consumers the opportunity to purchase navigation devices from sources

¹ Section 76.1201(c) defines navigation devices as “converter boxes, interactive equipment, and other equipment used by consumers within their premises to receive multichannel video programming and other services offered over multichannel video programming systems.” 47 C.F.R. § 76.1201(c).

² 47 U.S.C. § 549.

other than their MVPD service provider. Section 629 of the Communications Act instructs the Commission to:

adopt regulations to assure the commercial availability, to consumers . . . of . . . equipment used . . . to access, multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.³

In addition, Section 629 provides that the Commission "shall not prescribe regulations . . . which would jeopardize security of . . . services offered over multichannel video programming systems, or impede the legal rights of a provider of such services to prevent theft of service."⁴

3. In *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report and Order ("*Navigation Devices Order*"),⁵ the Commission adopted rules to implement Section 629. In the *Navigation Devices Order* and the *Reconsideration Order*, the Commission expressed its intention to monitor developments to evaluate whether progress was being made toward the goals of Section 629, and, if necessary, to take further action to ensure a competitive marketplace and consumer choice in navigation devices.⁶ The Commission expressed its intention to undertake a review of the navigation devices rules in the year 2000. In this *Notice*, we seek comment regarding market developments to determine if the objectives of Section 629 are being fulfilled or whether further Commission action is warranted.

4. The decisions made and rules adopted in the *Navigation Devices Order* include the following:

- (1) Section 629 covers not just equipment used to receive video programming, but also equipment used to access other services offered over multichannel video programming systems. Such equipment includes televisions, VCRs, cable set-top boxes, personal computers, program guide equipment, and cable modems;
- (2) Subscribers have the right to attach any compatible navigation device to a multichannel video programming system;
- (3) Service providers are prohibited from taking actions which would prevent navigation devices that do not perform conditional access functions from being made available by retailers, manufacturers, or other unaffiliated vendors;
- (4) MVPDs must separate out conditional access or security functions from other functions by July 1, 2000 and make available modular security components, also called PODs;
- (5) After January 1, 2005, MVPDs shall not provide new navigation devices that have security and non-security functions combined;
- (6) MVPDs must provide information sufficient to permit the manufacture, retail sale, and operation of devices for their systems; and
- (7) MVPDs can take the actions necessary to protect their operations from technical harm and theft of service.⁷

³47 U.S.C. § 549(a).

⁴47 U.S.C. § 549(b).

⁵ 13 FCC Rcd 14775 (1998).

⁶ *Id.* at 14782.

⁷ *Navigation Devices Order*, 13 FCC Rcd at 14778-79.

Subsequently, on reconsideration, the Commission determined that deferring application of the separate security requirement for equipment employing only an analog security mechanism would more expeditiously achieve the goals of Section 629.⁸ In the *Reconsideration Order*, the Commission indicated that it would assess the state of the market in the year 2000 once separate security modules were available. The Commission's navigation devices rules were recently upheld by the United States Court of Appeals for the District of Columbia Circuit.⁹

5. Section 76.1204 required MVPDs to make available by July 1, 2000 conditional access or security devices separated out from other functions of the navigation devices used with their distribution systems. These modular security components, also called point of deployment modules ("PODs"), permit MVPDs to retain conditional access functions under their own control while permitting other functions to be incorporated into devices available for retail purchase.¹⁰

6. The separation of security functions from the other functions required the development of an interface specification between host devices and PODs. The cable industry, through CableLabs, made a commitment to undertake this development through the OpenCable project. The intention was that the results of OpenCable should lead to standardization, design, and production of PODs and permit the design, production, and distribution of the associated host devices for retail sale.¹¹ The eight cable operators involved in the CableLabs project were required to submit semiannual progress reports to the Commission detailing their efforts and the efforts of CableLabs to assure the commercial availability, to consumers of equipment used to access MVPD programming and other services offered by such systems.

7. Reports were submitted on July 7, 1999, January 7, 2000 and July 7, 2000. The July 2000 Report stated that cable operators met the July 1, 2000 deadline to have digital separate security modules available for customers, and also made available "build-to" specifications that would allow manufacturers of retailer-supplied boxes to manufacture and market host devices.¹² The Status Report also noted that no retailer has placed an order for digital set-top boxes that will accommodate the digital modules.¹³ In response, the Consumer Electronics Retailers Coalition ("CERC") states that by focusing only on its obligation to produce PODs, the cable industry failed to provide technical specifications for interactive and non-interactive OpenCable host devices in time to support competitive entry by July 1, 2000.¹⁴

8. In response, NCTA states that it has published technical specifications for interactive and non-interactive host devices.¹⁵ NCTA contends that, for reasons unrelated to technical specifications,

⁸ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Order on Reconsideration, 14 FCC Rcd 7596 (1999) ("*Reconsideration Order*").

⁹ *See General Instrument Corporation v. FCC*, 213 F.3d 724 (D.C. Cir. 2000).

¹⁰ 47 C.F.R. § 76.1204.

¹¹ *Navigation Devices Order*, 13 FCC Rcd at 14806.

¹² July 7, 2000 Status Report at 7.

¹³ *Id.*

¹⁴ CERC Response to Status Report at 2. CERC states that as of August 2, 2000 there is still no interactive specification available. *Id.* at 5.

¹⁵ Letter dated August 15, 2000 from Robert Sachs to the Hon. William J. Tauzin at 1.

retailers have refused to place orders for navigation devices compatible with digital PODs.¹⁶ NCTA asserts that retailers are attempting to extract a portion of cable operators' revenues from subscribers' use of retailer-supplied navigation devices to access cable operators' services.¹⁷

9. *Development of OpenCable Specifications.* The Commission observed that the rules implemented to achieve the goals of Section 629 were "premised on the assumption that commercial interests, fueled by consumer demand, will agree on specifications for digital navigation devices to be submitted to standard-setting organizations, or that common interfaces will emerge that become widely accepted."¹⁸ The Commission expressed concern that a voluntary standards development encompassing the goals of Section 629, such as OpenCable, must provide an opportunity for a range of interests to participate.¹⁹ We seek comment on whether the efforts of CableLabs to develop an interface standard have achieved the desired result, and whether entities outside of the membership of CableLabs have been able to effectively participate in the process. We seek comment on whether the specifications provided by CableLabs allow consumer electronics manufacturers to build a navigation device that provides consumers a viable alternative to the equipment provided by their service provider. In addition, we also seek comment on whether there are further steps the Commission should undertake to ensure compliance with Section 629 and achieve the statutory objective of commercial availability of navigation devices.

10. *Integrated Boxes.* In the *Navigation Devices Order*, the Commission concluded that MVPDs' continued ability to provide integrated equipment combining both security and non-security functions would likely interfere with the statutory mandate of commercial availability.²⁰ Accordingly, the Commission adopted Section 76.1204(a)(1), which prohibits MVPDs from selling or leasing new integrated equipment after January 1, 2005.²¹ That date was chosen to minimize the economic impact of the prohibition on manufacturers and MVPDs by allowing them sufficient time to respond to equipment modifications and a changed market.²²

11. On reconsideration, in response to requests that an earlier date be established, the Commission declined to change the 2005 date, stating however that it would review the mechanics of the phase-out of integrated boxes as part of its review of the state of the consumer retail market to be undertaken in the year 2000.²³ In particular, the Commission stated it would consider whether acceleration of the phase-out date is appropriate.²⁴ One option that the Commission specifically mentioned was moving

¹⁶ *Id.* at 2.

¹⁷ *Id.*; see Paul Davidson, *Bickering Delays Retail Debut of Set-Top Cable Boxes*, USA TODAY, July 25, 2000, at B1.

¹⁸ *Navigation Devices Order*, 13 FCC Rcd at 14781.

¹⁹ *Id.* at 14823.

²⁰ *Id.* at 14799.

²¹ 47 C.F.R. §76.1204(a)(1) provides, "Commencing on January 1, 2005, no multichannel video programming distributor. . . shall place into service new navigation devices for sale, lease, or use that perform both conditional access and other functions in a single integrated device."

²² *Navigation Devices Order*, 13 FCC Rcd at 14803.

²³ *Reconsideration Order*, 14 FCC Rcd at 7612.

²⁴ *Id.*

the date from the year 2005 to 2003.²⁵ Accordingly, we seek comment on the extent of the effect operator provision of integrated equipment has had on achieving a competitive market for commercially available navigation devices. We seek comment on whether the 2005 date for the phase-out of integrated boxes remains appropriate. Alternatively, we seek comment on whether it would be satisfactory to permit MVPD or retail distribution of integrated boxes after January 1, 2005 if integrated boxes are also commercially available or for other reasons necessary to further the objectives of Section 629. In addition, we seek comment on the considerations that factor into a decision regarding the date of the phase-out of integrated boxes. For example, would an earlier or later date create incentives for the development of a commercial market for navigation devices? We also seek comment on the economic impact an earlier or later date would have on manufacturers and on MVPDs. In this regard, we believe the following information would be beneficial to the Commission's analysis: (1) the number of integrated boxes that MVPDs have deployed to customers to date; (2) the number of integrated boxes MVPDs expect to be deployed in 2003; (3) the number of orders MVPDs and retailers have made for non-integrated equipment; and (4) the number of orders for integrated boxes MVPDs have placed since the release of the *Reconsideration Order* and (5) the total cost differential (including manufacturing, marketing, research and development, and distribution costs), if any, between an integrated box and a host/POD combination.

12. *Obstacles to Commercial Availability.* CERC asserts that there are currently no host devices available at retail.²⁶ In contrast, we note that a retail market for cable modems is developing in certain regions of the country.²⁷ We seek comment on this apparent disparity. Circuit City also contends that, without significant changes, incentives for development of a retail market do not exist. We seek comment on any obstacles or barriers preventing or deterring the development of a retail market for navigation devices. We note that cable systems are in development that utilize technology outside that of traditional cable architecture. We seek comment on the impact of such systems on the commercial availability of navigation devices.

13. *Other Factors.* In addition to the specific requests for comments set forth above, we also request comments regarding other factors that commenters believe may be impeding or affecting achievement of the goals of Section 629. For example, recent articles indicate that retail availability of equipment has been slowed by market participants' failure to achieve mutually beneficial business arrangements.²⁸ We seek comment as to what additional actions, if any, the Commission should initiate to achieve the statutory objective of competition in the navigation devices market.

III. DECLARATORY RULING

A. BACKGROUND

14. In various proceedings before the Commission parties have raised concerns regarding alleged violations by cable operators of the existing navigation devices rules. The claimed violation, most fundamentally, is that whereas the rules require a separation of conditional access or security functions from other functions performed by navigation devices, cable operators are insisting on inclusion of copy protection encryption and decryption in both separated security modules and in the associated host devices

²⁵ *Id.*

²⁶ Response of the Consumer Electronic Retailers Coalition to the July 7, 2000 Cable Industry Status Report at 1-2.

²⁷ See *Bringing Broadband to Retail*, Cable Modem Information Network (December 1999) (www.cable-modem.net/features/dec99/story1.html).

²⁸ See *supra* n. 17 and accompanying text (discussing delay in retail market of host devices).

that perform the other navigation functions. These concerns have been raised in response to our *Compatibility Between Cable Systems and Consumer Electronics Equipment*, Notice of Proposed Rulemaking,²⁹ in response to the cable industry's status reports in this Docket,³⁰ and in response to a number of navigation devices waiver requests filed by cable operators.³¹ Because it is important that the uncertainty regarding this issue be resolved so that progress in the development of a retail market for navigation devices continue, we address these questions, on our own motion, in the form of a declaratory ruling.³²

15. As the transition from analog-based technology to digital-based technology continues, equipment manufactures and retailers, programming creators and distributors, and consumers will benefit from the myriad advantages offered by digital content. Arriving in tandem with these digital advantages, however, are significant questions related to access to, and appropriate use of, digital content. The Commission, pursuant to Section 629, has addressed a number of the questions associated with access to digital content in the *Navigation Devices Order* and the rules implemented thereunder. Another issue, adequate protection against unauthorized use of digital content, gives rise to this declaratory ruling. Unlike the analog context, digital technology affords users the ability to make an unlimited number of virtually perfect copies of digital content. Also unlike the analog context, copyright holders of digital content possess the ability to prevent misuse of copy protected material through methods not previously available. Through the use of contractual licensing requiring consumer electronics manufacturers to install certain copy protection technology in their equipment in exchange for access to desirable digital content, copyright holders will be able to control, through the insertion of coded instructions in the digital stream, whether such equipment will allow consumers to make one copy, unlimited copies, or prohibit copying altogether of digital content received from an MVPD. It is the first generation of this licensing and technology and its relation to the Commission's navigation devices rules that we address here.

16. In enacting the Digital Millennium Copyright Act,³³ Congress prohibited the act of

²⁹ 15 FCC Rcd 8776, 8784 (2000) (“*Compatibility NPRM*”). In the *Compatibility NPRM*, the Commission sought comment on whether there were any unresolved POD technology licensing issues related to copy protection. The *Compatibility NPRM* noted concerns raised by Circuit City that the draft CableLabs license for utilization of DFAST scrambling technology in POD modules imposes certain obligations on the competitive host device that, according to Circuit City, should be imposed only on the POD module itself. *Compatibility NPRM*, 15 FCC Rcd at 8754. We sought comment on whether the terms of the draft license are consistent with our rules and on appropriate regulatory action, if any, with respect to copy protection technology licensing. *Id.* at 8787-85. We incorporate into the record in this proceeding the comments and reply comments submitted in the *Compatibility NPRM* proceeding.

³⁰ Response of Consumer Electronics Retailers Coalition to the July 7, 2000 Cable Industry Status Report in CS Docket 97-80, August 2, 2000; Circuit City *ex parte* filings of July 30, 1999 and February 2, 2000 in CS Docket 97-80.

³¹ See *e.g.*, Opposition of Circuit City Stores, Inc. in CSR 5558-Z (Application of Insight Communications Requesting Relief from 47 C.F.R. §76.1204(a)(1)).

³² See 47 C.F.R. § 1.2.

³³ The World Intellectual Property Treaty (“WIPO Treaty”) provides that contracting states “shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty. . . .” *Universal City Studios, Inc. v. Reimerdes*, 2000 WL 1160678 (S.D.N.Y. 2000). Adoption of the WIPO Treaty necessitated that Congress adapt the law of copyright to the digital age. *Id.* The Digital Millennium Copyright Act (“DMCA”) was the culmination of this effort.

circumventing a technological protection measure put in place by a copyright holder to control access to a copyrighted work.³⁴ It is through the “Dynamic Feedback Arrangement Scrambling Technique” (“DFAST”) license and other copy protection licensing efforts that content providers are attempting to incorporate such technological protection measures in consumer electronic equipment, such as commercially available navigation devices. To date, various industry segments have been unable to reach resolution on key issues. Without resolution of these issues, manufacturers cannot produce digital consumer electronic equipment such as digital cable-ready television sets, VCRs, and commercially available cable set-top boxes that will access high quality digital content. It is important that these issues be resolved in a timely manner or the transition to digital-based technology could be delayed.

17. The issue arises here because of the intellectual property rights that the developer of a “host device” (*e.g.*, a consumer television receiver or set-top box) must acquire before proceeding to manufacture and sell these devices. The concerns raised focus on the DFAST license³⁵ pursuant to which equipment manufacturers acquire rights from Cable Television Laboratories, Inc. (“CableLabs”).³⁶ We note that DFAST is by no means the only copy protection technology that has been developed or is in development. For example, Sony, Matsushita, Intel, Toshiba and Hitachi developed the Digital Transmission Content Protection Specification (the “5C technology”) which affords a high degree of protection for copyrighted commercial entertainment content transmitted over high-speed bi-directional digital interfaces.³⁷ Although it is possible to obtain a 5C license and various entities have done so, there are issues associated with 5C that remain unresolved. Without a 5C license, high quality digital content cannot exit a digital component, such as a cable set-top box for transmission to a digital television receiver or digital VCR. Of relevance to this proceeding is the fact that the draft DFAST license mandates, in addition to the DFAST technology, the use of the 5C technology.

B. POSITIONS OF THE PARTIES

18. Circuit City and other commenters assert that the draft DFAST license, in purporting to impose copy protection constraints on consumer electronics (“CE”) and information technology (“IT”) host devices directly violates Sections 76.1204(c) and 76.1202 of the Commission’s navigation devices rules.³⁸

³⁴ See DMCA, 17 U.S.C. § 1201(a)(1).

³⁵ DFAST technology is used in conjunction with the POD and host device to provide security and to facilitate copy protection of high quality content. An encrypted digital signal is transmitted through a cable system to the host device using propriety conditional access techniques. NCTA Comments at 17. The signal goes from the host to the POD across the interface in encrypted form. The POD will decrypt the signal using its proprietary conditional access technique and send the signal back across the interface to the host. To ensure that the decrypted signal cannot be intercepted as it crosses the interface between the POD and the host, the signal is reencrypted in the POD before being sent back to the host. Part of this reencryption process involves use of DFAST technology. Once in the host, the signal is decrypted. The decryption process also involves DFAST technology. As a result, DFAST technology resides in both the POD and host device. *Id.*

³⁶ We note that, while it primarily focuses on issues raised with respect to the DFAST license, our analysis is applicable to other forms of copy protection licensing and technology.

³⁷ 5C License Administrator Comments at 2.

³⁸ Circuit City Comments at 16; Phillips Comments at 8; Thomson Comments at 7-8 CEA Comments at 16; 5C Digital Transmission License Administrator Comments (“5C”) at 9 (“tends to agree” with Circuit City); Home Recording Rights Coalition (“HRCC”) Comments at 17. Section 76.1204(c) of the Commission’s rules provides that:

No multichannel video programming distributor shall by contract, agreement,

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Circuit City argues that if the DFAST copy protection functions performed by OpenCable host devices are determined to serve “conditional access” or “security” functions, the OpenCable specification would clearly violate the Commission’s navigation devices rules.³⁹ Circuit City contends that the purpose of the Commission’s regulations was to allow POD modules to provide authorization for, and enable receipt of service, while prohibiting host devices from doing so.

19. Commenters taking a contrary view urge the Commission to take no action that would preclude the use of digital POD modules and host devices to facilitate the implementation of copyright protection technologies.⁴⁰ NCTA asserts that DFAST technology will serve a copy protection and control function and is not subject to the “separation” requirements of the Commission’s navigation device rules.⁴¹ Commenters note that the copy protection and security provisions at issue are critical to ensuring that content providers will supply high quality programming necessary to further the digital transition.⁴² Commenters assert that it is essential that copy protection technology be required in both the digital POD and the digital POD module interface in host devices.⁴³

20. Time Warner states that the Commission’s authority to permit copy protection is consistent with Section 76.1204(c) of the Commission’s rules, which does not prohibit the use of contracts, agreements, patent rights, or intellectual property rights to prevent the retail availability of navigation devices that would override copy protection instructions.⁴⁴ Time Warner also argues that the language of Section 629(b) of the Communications Act expressly allows DFAST licenses to be located in host devices.⁴⁵ Time Warner asserts that if the Commission were to restrict any requirement that host devices

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patent, intellectual property right or otherwise preclude the addition of features or functions to the equipment made available pursuant to this section that are not designed, intended or function to defeat the conditional access controls of such devices or to provide unauthorized access to service.

47 C.F.R. § 76.1204(c). Section 76.1202 provides:

No multichannel video programming distributor shall by contract, agreement, patent right, intellectual property right or otherwise prevent navigation devices that do not perform conditional access or security functions from being made available to subscribers from retailers, manufacturers, or other vendors that are unaffiliated with such owner or operator, subject to Section 76.1209 [theft of service].

47 C.F.R. § 76.1202.

³⁹ Circuit City Comments at 18.

⁴⁰ Fox Comments at 5; MPAA Comments at 4.

⁴¹ NCTA Comments at 5; MPAA Comments at 7.

⁴² NCTA Comments at 14; Time Warner Comments at 10; Viacom Comments at 2; ABC, Inc., CBS, Broadcasting, Inc., News Corporation, and National Broadcasting Company, Inc. (“Networks”) Comments at 1; MPAA Comments at 3; Metro-Goldwyn Mayer Studios Inc. Comments at 1.

⁴³ NCTA Comments at 16-17; MPAA Comments at 6.

⁴⁴ Time Warner Comments at 12.

⁴⁵ Time Warner Comments at 10. Section 629(b) states:

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manufactured to work with digital PODS must comply with copy protection protocols, the Commission would be impeding the rights of MVPDs to prevent theft of service.⁴⁶ It maintains that Section 76.1209 of the Commission's rules provides additional support for content providers seeking protection against unauthorized copying.⁴⁷

21. Circuit City further asserts that the right to make such devices available includes the right of consumers to attach and use them on the network, except, according to Section 76.1201, ". . . where electronic or physical harm would be caused by the attachment or operation of such devices or such devices may be used to assist or are intended or designed to assist in the unauthorized reception of service."⁴⁸ In addition, Circuit City argues that Section 76.1203 spells out the limits on contractual constraints, even when they involve instances of harm to the network or security.⁴⁹ Circuit City cites language in the *Navigation Devices Order* that states that "[t]hese standards shall . . . not [be used] as a means to unreasonably restrict the use of navigation devices obtained from a source other than the MVPD."⁵⁰

22. Commenters note that the law has recognized that copy protection should not prevent consumers from making fair use of certain content through limited copying, or viewing such content as it is delivered.⁵¹ They note that copy protection, which allows a fair use exception, is distinct from conditional

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The Commission shall not prescribe regulations under subsection (a) which would jeopardize security of multichannel video programming and other services offered over multichannel video programming systems, or *impede the legal rights of a provider of such services to prevent theft of services.*

47 U.S.C. § 549 (emphasis Time Warner).

⁴⁶ Time Warner Comments at 10.

⁴⁷ *Id.* Section 76.1209 states that no provision of the rules shall be construed "to authorize or justify any use, manufacture or importation of equipment that would violate . . . any . . . provision of law intended to preclude the unauthorized reception of multichannel video programming service." 47 C.F.R. § 1209.

⁴⁸ Circuit City Comments at 17, citing 47 C.F.R. § 76.1201.

⁴⁹ Section 76.1203 provides that:

A multichannel video programming distributor may restrict the attachment or use of navigation devices with its system in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices that assist or are intended or designed to assist in the unauthorized receipt of service. Such restrictions may be accomplished by publishing and providing to subscribers standards and descriptions of devices that may not be used with or attached to its system. Such standards shall foreclose the attachment or use only of such devices as raise reasonable and legitimate concerns of electronic or physical harm or theft of service..."

47 C.F.R. § 76.1203.

⁵⁰ Circuit City Comments at 17, citing *Navigation Devices Order*, 13 FCC Rcd at 14789.

⁵¹ HRCC Reply Comments, citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("Betamax") (Recording programs for later viewing in the privacy of the user's home is a noncommercial use permitted under the fair use doctrine).

access, which does not.⁵² Conversely, other commenters contend that the *Betamax* decision concerned only certain limited-purpose, private home recordings of free, unencrypted, over-the-air broadcast television programs in an analog environment.⁵³ They argue that the facts of the *Betamax* decision bear no resemblance to today's marketplace or to the damage of unconstrained digital copying.⁵⁴ Time Warner notes that copy protection is not synonymous with an outright ban on copying, but rather merely allows the content provider to limit authorized copying in the digital context.⁵⁵

23. As support for the position that the DFAST license does not violate the navigation devices rules, commenters cite language from the *Navigation Devices Order* which states that “copy protection systems and devices that impose a limited measure of data encryption control over the types of devices that may record (or receive) video content would not be subject to the [security] separation requirement.”⁵⁶ NCTA contends that if there were no copy control requirements placed on the host, once the signal is descrambled in the POD, it would be available for unauthorized copying or retransmission to unauthorized viewers.⁵⁷ Commenters note that the Commission acknowledged as much in its *Navigation Devices Order*, where it stated, “[I]f digital content passes across an interface—whether between a television receiver and a set top box, a POD security module and a host device (*e.g.*, a set top box or a television receiver), or some other interface—that content is susceptible to copying if the interface is unprotected.”⁵⁸

24. Circuit City asserts that NCTA misconstrues the copy protection language from the *Navigation Devices Order* by not reading it in its entirety.⁵⁹ Circuit City maintains that the entire

⁵² HRCC Reply Comments at 5.

⁵³ Motion Picture Association of America, Inc. Reply Comments (“MPAA”) at 10.

⁵⁴ MPAA Reply Comments at 10.

⁵⁵ Time Warner Reply Comments at 11.

⁵⁶ NCTA Comments at 21, citing *Navigation Devices Order*, 13 FCC Rcd. at 14800. *See also* Time Warner Comments at 14; Viacom Comments at 5-6; MPAA Comments at 7.

⁵⁷ NCTA Comments at 21-22.

⁵⁸ Viacom Comments at 6, Networks Comments at 2, NCTA Reply Comments at 17, citing *Navigation Devices Order*, 13 FCC Rcd at 14800. NCTA submits that even if the DFAST license terms were inconsistent with the Commission's navigation device rules, the Commission should waive any navigation device rule inconsistent with the DFAST license. NCTA Comments at 23.

⁵⁹ Circuit City Reply Comments at 8. In its entirety, the paragraph at issue provides:

As discussed above, many types of navigation devices are now being, or will in the future be, attached to multichannel video programming distribution systems. A number of different entities in the communications stream and a number of types of security, access control, or data encryption systems are involved. The security separation required by the rules adopted herein is applicable to access controls directly applied by the MVPD to authenticate subscribers' identification. It would not, for example, be applicable to encrypted telephone or internet data used to protect the privacy of the communications or to digital authentication of financial transactions regardless of the use of such devices with multichannel video programming distribution systems. Access controls included in hardware for the purpose of allowing subscribers to exclude communications would not be included even though they perform a type of conditional access function. “Copy protection” systems and devices that impose a limited measure of data encryption control over the types of devices that may record (or receive) video content would not be subject to the separation requirement. “Software” based encryption

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discussion draws a delineation between the types of conditional access that are reserved to the POD device, and may be protected through restrictions on the host, and the forms of copy protection, which rely on milder encryption and authentication techniques, which do not implicate system security and may thus be incorporated into the host.⁶⁰ The Commission, Circuit City argues, has given approval only to imposition of contractual limitations necessary to protect system security and subscriber authentication, and not to other measures.

C. DISCUSSION

25. We address the narrow question of whether the inclusion of some measure of copy protection within a host device violates the separation requirement of the Commission's navigation devices rules. As discussed below, we find that it does not. Circuit City contends that the navigation devices rules preclude any copy protection encryption system located within a host device. Further, Circuit City argues that to the extent some copy protection might be permitted, that the DFAST license terms were adopted without appropriate input from equipment manufacturers and retailers and, as imposed, exceed whatever restrictions on fair use copying that might reasonably be permitted.

26. Section 76.1201 of the Commission's rules creates a right to connect navigation devices to multichannel video programming distribution systems.⁶¹ This right, however, does not include the right to attach devices that would cause electronic or physical harm or where "such devices may be used to assist or are intended or designed to assist in the unauthorized receipt of service."⁶² Operating in parallel with this provision, Section 76.1203 indicates that a service provider may restrict the attachment or use of navigation devices intended to assist in the unauthorized receipt of service. MVPDs utilizing devices to perform conditional access functions are required to make available equipment "that incorporates only the conditional access functions of such devices."⁶³ Conditional access devices made available pursuant to this section shall incorporate a commonly used interface within the industry or an interface that conforms to appropriate technical standards promulgated by a national standards organization.⁶⁴ Further, no MVPD shall "by contract, agreement, patent, intellectual property right or otherwise preclude the addition of features or functions to the equipment made available pursuant to this section that are not designed, intended or function to defeat the conditional access controls of such devices or to provide unauthorized access to service."⁶⁵

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should generally be separable from the hardware that runs it and thus would not have to be changed based on the rules adopted. Equipment needed for specifically addressed communication, such as for example modems for the receipt of "internet protocol" telephony could retain integrated in the hardware sufficient address information to permit them to function.

Navigation Devices Order, 13 FCC Rcd at 14800.

⁶⁰ Circuit City Reply Comments at 8; HRCC Reply Comments at 3-4.

⁶¹ 47 C.F.R. § 76.1201.

⁶² 47 C.F.R. § 76.1203.

⁶³ 47 C.F.R. § 76.1204(a)(1).

⁶⁴ 47 C.F.R. § 76.1204(b).

⁶⁵ 47 C.F.R. § 76.1204(c).

27. Copy protection for digital video content in its current formulations and in a very broad sense, involves techniques of encoding content as it crosses interfaces and of establishing two-way communications paths and protocols across these interfaces so that video content is only released after the receiving device is queried by the sending device and confirms that it is an eligible content recipient. Navigation devices can be manufactured, sold, and connected to MVPDs that do not support copy-protected product. However, a host device, not part of the copyright protection system, could not "navigate" through the full complement of cable content to the extent digital cable content is itself subject to copy protection requirements as a consequence of a contractual relationship between cable operators and suppliers of cable video content. If these devices are intended for reception of this type of product, the manufacturer must adhere to the copy protection protocols which involve in part obtaining access to certain intellectual property rights which are needed to make the copy protection system function and to which are appended certain contractual requirements. Most fundamentally the host device manufacturer must agree not to defeat or assist others in defeating the copyright protection systems. The contractual provisions are intended to ensure that the reception device in question does not defeat the copy protection system and is manufactured in a sufficiently robust fashion so that others cannot easily defeat the system. In the cable television context, these rights are available from CableLabs. The CableLabs designed interface includes an encryption and copy protection control system on the output side of the interface, which makes use of the DFAST scrambling technology. It is the restrictions attached to a preliminary version of the DFAST license agreement about which Circuit City has raised concerns.

28. Section 629 of the Communications Act requires that the Commission's navigation devices rules accomplish two goals: (1) to assure the commercial availability of navigation devices; and (2) to adequately safeguard the cable operators' signal security. Our decision today is consistent with both of these goals. In the *Navigation Devices Order*, the Commission noted that a number of different types of security, access control, or data encryption systems were involved and specifically stated that "[c]opy protection systems and devices that impose a limited measure of data encryption control over the types of devices that may record (or receive) video content would not be subject to the separation requirement."⁶⁶ As the *Navigation Devices Order* specifically states, including some copy protection technology in both the POD module and host device to bridge a gap where digital data would otherwise be available "in the clear" and accessible for digital copying would not necessarily violate the rules. Some measure of anti-copying encryption is, we believe, consistent with the intent of the rules, notwithstanding that the rules would otherwise require that all conditional access controls take place in the security control module. In this regard, the record indicates that content providers are seeking copy protection licensing terms that limit consumers to making a single copy of some high quality digital content, that is not otherwise subject to additional restrictions (such as is the case with pay-per-view or video-on-demand programming).⁶⁷ We note that commenters assert that consumers have certain settled expectations regarding home copying of

⁶⁶ 13 FCC Rcd at 14800 (internal quotation marks omitted). This language derives from Section 76.1209 which provides that no provision of the rules shall be construed "to authorize or justify any use, manufacture or importation of equipment that would violate . . . any . . . provision of law intended to preclude the unauthorized reception of multichannel video programming service." 47 C.F.R. § 76.1209.

⁶⁷ In this regard, we note that MPAA has stated that the 5C technology will not be used to prohibit most home recording.

Home recording of retransmitted broadcast programs and single copies of basic and extended basic programs and pay television will not be inhibited by [5C].
Home recording of pay-per-view and video-on-demand will be subject to the copyright owner's permission.

MPAA Reply at 8.

both broadcast and cable programming that would be undercut by these licenses.⁶⁸ Based on the record in this proceeding, no evidence has been presented that the evolving copy protection licenses and technology discussed herein would preclude reasonable home recording of such content.⁶⁹ It should be noted, however, that our ruling is not based on this aspect of the record; we cite such evidence simply to rebut the notion that our ruling will lead to inevitable restrictions on consumers' ability to copy digital material.

29. We decline to resolve the question of the nature and scope of any copy protection systems or rights. Circuit City and others have raised the concern that the draft agreement, governing the DFAST Specification, at least in its preliminary form, exceeds the allowable limits. For example, it is suggested that the host device manufacturer could be precluded from facilitating even that degree of copying that comes within copyright law "fair use" copying allowances.⁷⁰ Other examples of suggested overreaching include a provision in the license that "The Licensed Product [host device] not output POD-CP Data, or pass POD-CP Data to any output, in High Definition Analog Form unless the output shall be constrained to no more than 600 lines of vertical resolution." At this time, we take no position on the specific terms contained in the draft DFAST license. While our ruling herein clarifies that the inclusion of some amount of copy protection within a host device does not automatically violate the separation requirement of the navigation devices rules, we do not intend this declaratory ruling to signal that any terms or technology associated with such licenses and designated as necessary for copy protection purposes are consistent with our rules. We believe, however, that such issues are best resolved if specific concerns involving finalized licenses that implicate our navigation devices rules are presented to the Commission.⁷¹

30. Circuit City also expresses concern that the DFAST license and technology does not impact MSO devices, which are permitted to integrate security within the host device until 2005.⁷² As such, Circuit City maintains that use of the DFAST license to impose copy protection constraints would apply to CE and IT, but not MSO devices. Circuit City submits that any action taken by the Commission regarding copy protection should apply to all navigation devices. In the alternative, Circuit City argues that, if the Commission decides to allow the DFAST license, it should delay the effectiveness of such license until January 1, 2002 and accelerate the date on which MSOs are prohibited from deploying integrated navigation devices to January 1, 2002.⁷³

⁶⁸ HRRC Comments at 5-6.

⁶⁹ MPAA states that there is no evidence "that content owners will restrict the copying of all content delivered through DFAST licensed devices and there are strong business and marketplace reasons" for not doing so. MPAA *ex parte* presentation 2 (Aug. 25, 2000).

⁷⁰ *Betamax*, 464 U.S. 417 (1984); *but see Universal City Studios, Inc. v. Reimerdes*, 2000 WL 1160678 (S.D.N.Y. 2000) (finding that *Betamax* decision involved a construction of the Copyright Act that was overruled by the later enactment of the Digital Millennium Copyright Act ("DMCA") to the extent of any inconsistency between the *Betamax* decision and the DMCA). In this regard, HRRC states that "It is not unlawful and certainly not criminal for a consumer to make a copy of a copyrighted work in the privacy of his or her home. Fair use exists to address only unauthorized recordings. Unlike the entertainment industry, the law recognizes this distinction. The Commission should not criminalize such conduct." HRRC Reply at 5(footnote omitted). We note that nothing in our decision today is intended to alter "fair use" under copyright law.

⁷¹ Parties may present such concerns pursuant to Section 76.7 of the Commission's rules, 47 C.F.R. § 76.7. The Commission will review only those terms of DFAST licenses that a complainant alleges violate a specific navigation devices rule.

⁷² Circuit City Comments at 19; HRCC Comments at 13.

⁷³ Circuit City Comments at 20; CERC Reply Comments at 10.

31. The record in this proceeding is insufficient to enable us to make any conclusions regarding Circuit City's assertions. Anecdotal evidence supplied to the Commission suggests that at least some content providers require the same level of copy protection, or will require the same level of copy protection upon the termination of existing licenses, with regard to MSO-provided devices as they do commercially available devices.⁷⁴ Should additional evidence indicate that content providers are requiring disparate measures of copy protection from different industry segments, the Commission will take appropriate action. We, therefore, decline Circuit City's request to defer the effectiveness of the DFAST licenses. We seek comment on the advisability of accelerating the 2005 integrated equipment deadline in the Further Notice of Proposed Rulemaking set forth above.

32. While our decision today will not resolve all of the copy protection issues that will arise in the transition to digital-based technology, we intend the guidance imparted herein to resolve the basic controversy regarding the permissibility, under our navigation devices rules, of the incorporation of copy protection measures into commercially available navigation devices. With this controversy resolved, we expect industry participants to promptly finalize negotiations in order to bring to fruition the goals established by Congress in Section 629. Accordingly, we request the eight multiple system operators that are involved in CableLabs, or CableLabs on their behalf, to submit within 30 days of release of this *Order* a report on the status of the DFAST license, including a final version of a completed DFAST license agreement.

B. Procedural Matters

33. *Ex Parte Status of Proceeding.* Subject to the provisions of 47 C.F.R. § 1.1203 concerning "Sunshine Period" prohibitions, this proceeding is exempt from *ex parte* restraints and disclosure requirements, pursuant to 47 C.F.R. § 1.1204(b)(1).

34. *Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act (RFA),⁷⁵ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA), contained in Appendix A, of the possible significant economic impact on small entities by the policies and rules proposed in this *Further Notice of Proposed Rulemaking*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*.

35. *Initial Paperwork Reduction Act Analysis.* This *Notice* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the same time as other comments on this *Notice*; OMB comments are due 60 days from date of publication of this *Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and

⁷⁴ See, e.g., Sony Pictures Entertainment August 21, 2000 *ex parte* presentation at 1-2; Time Warner Inc. August 22, 2000 *ex parte* presentation at 1-2.

⁷⁵ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

36. *Filing of Comments and Reply Comments.* Pursuant to Sections 1.415, 1.419, and 1.430 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, 1.430, interested parties may file comments on or before November 15, 2000, and reply comments on or before December 18, 2000. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

37. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

38. Parties who choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554.

39. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Thomas Horan, Cable Services Bureau, Federal Communications Commission, The Portals, 445 Twelfth Street, S.W., Room 4-A817, Washington, D.C. 20554. Such a submission should be on a 3.5-inch diskette formatted in an IBM-compatible format using Word for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, in this case **CS Docket No. 97-80**, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase, "Disk Copy – Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th street, N.W., Washington, D.C. 20036.

40. Comments and reply comments will be available for public inspection during regular business hours in the Reference Information Center (Room CY-A257) of the Federal Communications Commission, The Portals, 445 Twelfth Street, S.W., Washington, D.C. 20554. Copies of comments and reply comments will also be available through the Commission's duplicating contractor, International Transcription Service, Inc. (ITS, Inc.), 1231 20th Street, N.W., Washington, D.C. 20036, (202) 857-3800, TTY (202) 293-8810.

41. Alternative formats (computer diskette, large print, audiocassette and Braille) are available to persons with disabilities by contacting the Consumer Information Bureau, Consumer Education Office, at (202) 418-2514, TTY (202) 418-2555, or at fccinfo@fcc.gov. The *Notice* can also be downloaded at www.fcc.gov/df/.

IV. ORDERING CLAUSES

42. **IT IS HEREBY ORDERED** that pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 C.F.R. §§ 154(i) and 154(j), Section 5(d) of the

Administrative Procedure Act, 5 U.S.C. § 554(e), and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, this declaratory ruling of the Commission's navigation devices rules **IS ADOPTED** and the Commission's navigation devices rules **ARE CLARIFIED** to the extent set forth herein.

43. **IT IS FURTHER ORDERED** that, pursuant to Sections 4(i), 303(r), and 629 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 549, **NOTICE IS HEREBY GIVEN** of the proposals described in this Notice of Proposed Rulemaking.

44. **IT IS FURTHER ORDERED** that the Commission's Consumer Information Bureau, Reference Information Center, **SHALL SEND** a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act (RFA),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Further Notice of Proposed Rulemaking* (“*Notice*”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. See 5 U.S.C. § 603(a). In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register. See *id.*

2. *Need for, and Objectives of, the Proposed Rules:* The navigation devices rules were adopted to implement Section 629 of the Communications Act. They are designed to assure the commercial availability from retail outlets of equipment used to access service from multichannel video programming systems. In adopting these rules, the Commission indicated that it would monitor the development of the commercial availability of navigation devices and on reconsideration stated that it would commence a proceeding in the year 2000 to review the effectiveness of the rules and consider any necessary changes. In this proceeding, we undertake that review. This *Notice* is designed to seek comment on the Commission’s navigation devices rules and to elicit comment on whether any changes to the current rules are necessary in order to promote commercial availability.

3. *Legal Basis:* Authority for this proposed rulemaking is contained in Sections 4(i), 303(r), and 629 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 549.

4. *Description and Estimate of Small Entities to Which the Proposed Rules Will Apply:* The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.² The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”³ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁴ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵ A small business concern is

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² 5 U.S.C. § 603(b)(3).

³ *Id.* § 601(6).

⁴ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the FRA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

⁵ 15 U.S.C. § 632.

one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁶ Nationwide, as of 1992, there were approximately 275,801 small organizations.⁷

5. Rules adopted in this proceeding could apply to manufacturers of DTV equipment, including television receivers, set-top boxes and "point of deployment" modules. Distributors of this equipment, including retailers of consumer electronics equipment and, in the case of "point of deployment" modules, cable operators, would also be affected.

6. *Cable Systems:* The SBA has developed a definition of small entity for cable and other pay television services, which includes all such companies generating \$11 million or less in revenue annually.⁸ This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less than \$11 million in revenue that were in operation for at least one year at the end of 1992.⁹

7. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.¹⁰ Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.¹¹ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions and rules proposed in this *Notice*.

8. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."¹² The Commission has determined that there are 66,690,000

⁶ *Id.* § 632.

⁷ U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1992 ECONOMIC CENSUS, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

⁸ 13 C.F.R. 121.201, SIC Code 4841.

⁹ U.S. Census Bureau, 1992 Economic Census, 1992 Census of Transportation, Communications and Utilities at Firm Size 1-123.

¹⁰ 47 C.F.R. §76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995), 60 FR 10534.

¹¹ Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

¹² 47 U.S.C. §543(m)(2).

subscribers in the United States. Therefore, we found that an operator serving fewer than 666,900 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.¹³ Based on available data, we find that the number of cable operators serving 666,900 subscribers or less totals 1,450.¹⁴ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

9. *Small Manufacturers:* The SBA has developed definitions of small entity for manufacturers of household audio and video equipment (SIC 3651) and for radio and television broadcasting and communications equipment (SIC 3663). In each case, the definition includes all such companies employing 750 or fewer employees.

10. *Electronic Equipment Manufacturers:* The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment. Therefore, we will utilize the SBA definition of manufacturers of Radio and Television Broadcasting and Communications Equipment.¹⁵ According to the SBA's regulations, a TV equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.¹⁶ Census Bureau data indicates that there are 858 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would be classified as small entities.¹⁷ The Census Bureau category is very broad, and specific figures are not available as to how many of these firms are exclusive manufacturers of television equipment or how many are independently owned and operated. We conclude that there are approximately 778 small manufacturers of radio and television equipment.

11. *Electronic Household/Consumer Equipment:* The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment used by consumers, as compared to industrial use by television licensees and related businesses. Therefore, we will utilize the SBA definition applicable to manufacturers of Household Audio and Visual Equipment. According to the SBA's regulations, a household audio and visual equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.¹⁸ Census Bureau data indicates that there are 410 U.S. firms that manufacture radio and television broadcasting and communications equipment, and

¹³ 47 C.F.R. §76.1403(b).

¹⁴ Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

¹⁵ This category excludes establishments primarily engaged in the manufacturing of household audio and visual equipment, which is categorized, as SIC 3651. See *infra* for SIC 3651 data.

¹⁶ 13 C.F.R. §121.201, (SIC) Code 3663.

¹⁷ U.S. Dept. of Commerce, 1992 Census of Transportation, Communications and Utilities, Table 1D, (issued May 1995), SIC category 3663.

¹⁸ 13 C.F.R. §121.201, (SIC) Code 3651.

that 386 of these firms have fewer than 500 employees and would be classified as small entities.¹⁹ The remaining 24 firms have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. Furthermore, the Census Bureau category is very broad, and specific figures are not available as to how many of these firms are exclusive manufacturers of television equipment for consumers or how many are independently owned and operated. We conclude that there are approximately 386 small manufacturers of television equipment for consumer/household use, but in any event, no more than 410 are small entities.

12. *Computer Manufacturers:* The Commission has not developed a definition of small entities applicable to computer manufacturers. Therefore, we will utilize the SBA definition of Electronic Computers. According to SBA regulations, a computer manufacturer must have 1,000 or fewer employees in order to qualify as a small entity.²⁰ Census Bureau data indicates that there are 716 firms that manufacture electronic computers and of those, 659 have fewer than 500 employees and qualify as small entities.²¹ The remaining 57 firms have 500 or more employees; however, we are unable to determine how many of those have fewer than 1,000 employees and therefore also qualify as small entities under the SBA definition. We conclude that there are approximately 659 small computer manufacturers.

13. *Small Retailers:* The Commission has not developed a definition of small entities applicable to retail sellers of navigation devices. Therefore, we will utilize the SBA definition. The 1992 Bureau of the Census data indicate: there were 9,663 U.S. firms classified as Radio, Television, and Consumer Electronic Stores (SIC 5731), and that 9,385 of these firms had \$4.999 million or less in annual receipts and 9,473 of these firms had \$7.499 million or less in annual receipts.²² Consequently, we tentatively conclude that there are approximately 9,663 such small retailers that may be affected by the decisions and rules proposed in this *Notice*.

14. *Reporting, Recordkeeping, and Other Compliance Requirements:* At this time, it is not expected that the proposed actions will require any additional recordkeeping or compliance requirements. We seek comment on whether others perceive a need for extensive recordkeeping.

15. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:* The RFA,²³ requires an agency to describe any significant alternatives that it has

¹⁹ U.S. Small Business Administration 1995 Economic Census Industry and Enterprise Report, Table 3, SIC Code 3651, (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

²⁰ 13 C.F.R. §121.201, (SIC) Code 3571.

²¹ U.S. Small Business Administration 1995 Economic Census Industry and Enterprise Report, Table 3, SIC Code 3571, (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

²² U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, SIC 7812, (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration)(SBA 1992 Census Report). The Census data does not include a category for \$6.5 million therefore, we have reported the closest increment below and above the \$6.5 million threshold. There is a difference of 88 firms between the \$4.999 and \$7.499 million annual receipt categories. It is possible that these 88 firms could have annual receipts of \$6.5 million or less and therefore, would be classified as small businesses.

²³ See 5 U.S.C. § 603.

considered in reaching its proposed approach, which may include the following four alternatives, among others: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

16. Parties have requested that we consider accelerating the date on which the prohibition of integrated devices goes into effect. We have sought comment on this issue and will examine the effect on businesses and small entities that such a change would entail. We have also sought comment on other suggestions that would facilitate the development of a commercial marketplace for navigation devices. We will consider and examine the effect of those suggestions on businesses and small entities as well. Should commenters disagree with any of our conclusions, we welcome comments suggesting ways in which any perceived burden upon small entities could be mitigated.

17. *Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules:* None.

SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI

IN THE MATTER OF THE COMMERCIAL AVAILABILITY OF NAVIGATION DEVICES—
IMPLEMENTATION OF SECTION 304 OF THE TELECOMMUNICATIONS ACT OF 1996: *Further Notice of
Proposed Rulemaking and Declaratory Ruling*

I support today's declaratory ruling clarifying the application of our navigational devices rule¹ to the question of devices that rely on technology licenses that include or require copy protection for content delivered over cable systems. I write separately to emphasize the narrowness of our holding.

Specifically, our ruling in no way authorizes any attempt by providers of services to utilize this ruling to combine technology with copy protection in a manner that interferes with, or unreasonably restricts, a consumer's fair use of copy-protected material.² "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose..." , *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 575 (1994). Congress reaffirmed its support for this principle by enacting the Digital Millennium Copyright Act in 1998.³ Today's declaration ensures the financial rewards of copy protection to content owners while protecting citizens from the dispossession of their right to fair use. Based on the record before us and controlling Supreme Court precedent, I believe we have struck the appropriate balance.

¹ See Navigation Devices Order, 13 FCC Rcd 14775 (1998).

² See e.g. U.S. Const., Art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); 17 U.S.C. § 107 (1988 ed. and Supp. IV)(fair use); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)(recognizing fair use in video recording context); see generally Register of Copyrights, Copyright Law Revision, 87th Cong., 1st Sess., 6 (Comm.Print 1961) (noting some limitations and conditions on copyright are essential in the public interest).

³ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).