

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

In the Matter of)	File Number EB-07-SE-204
)	
Fry's Electronics, Inc.)	NAL/Acct. No. 200832100039
)	
600 East Brokaw)	FRN 0016695157
San Jose, CA 95112)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: April 9, 2008

Released: April 10, 2008

By the Commission:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("NAL"), we find that Fry's Electronics, Inc. ("Fry's") apparently willfully and repeatedly violated Section 15.117(k) of the Commission's Rules ("Rules")¹ by failing to place the required Consumer Alert label immediately adjacent to and clearly associated with television receiving equipment that contains an analog broadcast television tuner but does not contain a digital broadcast television tuner (hereinafter "analog-only tuner") that it displayed or offered for sale or rent. We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"),² that Fry's is apparently liable for a forfeiture in the amount of three hundred eighty-four thousand dollars (\$384,000).

II. BACKGROUND

2. Congress has established February 17, 2009 as the deadline for the end of analog transmissions for full power television stations. The Commission is statutorily obligated to promote the orderly transition to digital television, "a critical step in the evolution of broadcast television."³ As we stated previously, "[w]e are committed to ensuring the rapid completion of that transition in a way that delivers the greatest possible benefits to the viewing public."⁴ As part of that commitment and in light of the upcoming deadline, we recently announced that "it is necessary and appropriate to require retailers to provide consumers with information regarding this transition date at the point of sale."⁵ We reached this conclusion after determining that consumer electronics industry efforts had not adequately informed consumers how analog-only television equipment purchased now will function when the transition to digital broadcasting ends.⁶

¹ 47 C.F.R. § 15.117(k).

² 47 U.S.C. § 503(b).

³ *2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13825 ¶ 532 (2003).

⁴ *Id.*

⁵ *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, Second Report and Order, 22 FCC Rcd 8776 ¶ 1 (2007) ("*Second DTV Periodic Report and Order*").

⁶ *Id.* at ¶ 10.

3. To ensure that consumers do not inadvertently buy analog-only television equipment without understanding that such devices will not be capable of receiving off-the-air television reception of digital signals after analog broadcasting ends unless connected to a digital-to-analog converter or a digital subscription service, we adopted rules requiring anyone that sells, offers for sale, or rents television receiving equipment that does not contain a digital television (“DTV”) tuner to display a Consumer Alert at the point of sale.⁷ This requirement also applies to the sale or rent of analog-only television receiving equipment via direct mail, catalog, or electronic means (e.g., the Internet). These requirements are contained in Section 15.117(k) of the Rules, which became effective on May 25, 2007.⁸

4. Section 15.117(k)(3) of the Rules requires that the Consumer Alert contain the following language:

CONSUMER ALERT

This television receiver has only an analog broadcast tuner and will require a converter box after February 17, 2009, to receive over-the-air broadcasts with an antenna because of the Nation’s transition to digital broadcasting. Analog-only TVs should continue to work as before with cable and satellite TV services, gaming consoles, VCRs, DVD players, and similar products. For more information, call the Federal Communications Commission at 1-888-225-5322 (TTY: 1-888-835-5322) or visit the Commission’s digital television website at: www.dtv.gov.

The Consumer Alert must be in a size of type large enough to be clear, conspicuous and readily legible, consistent with the dimensions of the equipment and the label. The alert either must be printed on a transparent material and affixed to the screen, in a manner that is removable by the consumer and does not obscure the picture when displayed for sale, or displayed separately immediately adjacent to each television receiver offered for sale and clearly associated with the analog-only model to which it pertains.⁹ In the case of other analog-only video devices that do not include a display (e.g., VCRs, DVD players), the Consumer Alert must be in a prominent location on the device, such as on the top or front, or displayed separately immediately adjacent to and clearly associated with the analog-only model to which it pertains.¹⁰ To the extent that any persons display or offer for sale or rent via direct mail, catalog, or electronic means analog-only television receiving equipment, they must prominently display the Consumer Alert as part of all advertisements or descriptions of such television receiving equipment, in clear and conspicuous print, and in close proximity to any images or descriptions of such equipment.¹¹

5. Immediately after the rule became effective, the Commission’s Enforcement Bureau began inspecting hundreds of stores throughout the country, as well as dozens of popular retailer websites, and observed many models of analog-only television receiving equipment on display without the required Consumer Alert labels. On May 31, 2007, the Enforcement Bureau issued a Citation to Fry’s for offering for sale television receiving equipment having an analog-only tuner without displaying the required

⁷ *Id.* at ¶ 14. See 47 C.F.R. § 15.117(k). In the *Second DTV Periodic Report and Order*, the Commission defined “point of sale” as the “place where televisions are displayed for consumers prior to purchase.” See *Second DTV Periodic Report and Order* at n. 29.

⁸ *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 72 Fed. Reg. 28894-01 (May 23, 2007).

⁹ 47 C.F.R. § 15.117(k)(1).

¹⁰ *Id.*

¹¹ 47 C.F.R. § 15.117(k)(2).

Consumer Alert in close proximity.¹² Between May 30, 2007 and June 8, 2007, the Enforcement Bureau conducted inspections at numerous stores and, based on these inspections, issued additional Citations to Fry's for violations at its stores and www.frys.com.¹³ After affording Fry's a reasonable opportunity to respond to the first Citation,¹⁴ on June 13, 2007, agents and investigators from the Enforcement Bureau began inspecting numerous additional Fry's stores in various states and once again observed television receiving equipment with analog-only tuners on display without the required Consumer Alert labels in Fry's stores.¹⁵

6. Under Section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹⁶ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.¹⁷ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act¹⁸ and the Commission has so interpreted the term in imposing forfeitures pursuant to Section 503(b).¹⁹ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.²⁰ "Repeated" means that the act was committed or omitted more than once, or lasts more than one day.²¹ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.²² The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.²³ As we set

¹² *Fry's Electronics, Inc.*, Citation No. C20073248002 (Enf. Bur. Atlanta Office, rel. May 31, 2007).

¹³ See Attachment A for a list of the citations issued to Fry's (collectively "Citations"). In preparing the Citations, Enforcement Bureau staff relied on publicly available information, including retailer websites, to identify the television receiving equipment with analog-only tuners. All of the Citations were based on inspections conducted prior to June 13, 2007.

¹⁴ We note that following issuance of the citations, the Enforcement Bureau, after reviewing the device's technical specifications and user's manuals, determined that the following citations referred to erroneously identified equipment models: Citation No. C20073298008 (Toshiba D-R400) and Citation No. C20073294010 (Samsung DVD-VR357 and Panasonic DMR-ES35V5). In light of this evidence, we hereby cancel the relevant portions of the above citations with respect to those models.

¹⁵ See Attachment B for a listing of the stores visited and the models observed at each store. Enforcement Bureau staff determined that these models had analog-only tuners by consulting the manufacturer's product manuals or, if such were unavailable, the models' technical specifications from Fry's website.

¹⁶ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(2).

¹⁷ 47 U.S.C. § 312(f)(1).

¹⁸ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁹ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*").

²⁰ See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 10 (2001) ("*Callais Cablevision*") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage).

²¹ *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388 ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362 ¶ 9.

²² 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

²³ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 ¶ 4 (2002) (forfeiture paid).

forth below, we conclude under this standard that Fry's is apparently liable for forfeiture for its apparent willful and repeated violations of Section 15.117(k) of the Commission's rules.

III. DISCUSSION

7. Based on the evidence before us, we find that Fry's apparently willfully and repeatedly violated Section 15.117(k) of the Rules by failing to display conspicuously and in close proximity to equipment with an analog-only tuner, in clear and conspicuous print, the required Consumer Alert label. Specifically, as detailed in Attachment B, agents and investigators from the Enforcement Bureau observed a number of different models of television receiving equipment having only an analog-only tuner on display in six stores without the required Consumer Alert labels.²⁴ Fry's previously received nine Citations for this same type of conduct prior to the agents' inspections.²⁵

8. Under Section 503(b)(2)(D) of the Act,²⁶ we may assess an entity that is neither a common carrier, broadcast licensee or cable operator a forfeiture of up to \$11,000 for each violation or each day of a continuing violation, up to a statutory maximum forfeiture of \$97,500 for any single continuing violation. In exercising such authority, we must take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."²⁷

9. The Commission's *Forfeiture Policy Statement*²⁸ and Section 1.80 of the Rules do not establish a specific base forfeiture for violation of the analog-only tuner labeling requirements. In adopting the Consumer Alert labeling requirements, the Commission stated that "[a]ccurate communication of this impending change is a highly material disclosure for consumers contemplating the purchase of a

²⁴ Attachment B lists the dates of the Enforcement Bureau inspections, the analog-only models identified in violation of Section 15.117(k), as well as the Fry's stores involved.

²⁵ Section 503(b)(5) states that no forfeiture liability shall be determined against any person who does not hold a license, permit, certificate, or other authorization issued by the Commission unless, prior to issuance of any Notice of Apparent Liability, such person is "(A) sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation." 47 U.S.C. § 503(b)(5). The apparent violations discussed in this *NAL* are subject to forfeiture because we afforded Fry's a reasonable opportunity for a personal interview or to submit a written response to its first Citation before conducting a second round of inspections that would count towards potential forfeiture liability. *See supra* para. 5 and notes 13 and 14. To the extent that the television receiving models involved in this *NAL* differ from those listed in the *Citations*, no additional citations are necessary because the more recent apparent violations are "conduct of the type described" in the earlier *Citations* – violations of Section 15.117(k). *See HighTech CB Shop*, Forfeiture Order, 20 FCC Rcd 12514, 12516, ¶ 9 (Enf. Bur., South Central Region 2005), *recon. denied*, 20 FCC Rcd 19269 (Enf. Bur. 2005).

²⁶ 47 U.S.C. § 503(b)(2)(D). The Commission twice amended Section 1.80(b)(3) of the Rules, 47 C.F.R. § 1.80(b)(3), to increase the maximum forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. *See Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000) (adjusting the maximum statutory amounts from \$10,000/\$75,000 to \$11,000/\$87,500); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 19 FCC Rcd 10945 (2004) (adjusting the maximum statutory amounts from \$11,000/\$87,500 to \$11,000/\$97,500).

²⁷ 47 U.S.C. § 503(b)(2)(E). *See also* 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

²⁸ *See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17115 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

television.”²⁹ We also noted that it is a matter of public safety for consumers who rely on analog-only televisions to obtain critical emergency information.³⁰

10. Similar issues arose regarding labeling requirements for wireless hearing aid-compatible handsets. In those cases, the Enforcement Bureau established a base forfeiture amount of \$8,000 per handset model that failed to comply with the labeling requirements.³¹ The labeling requirements for wireless hearing aid-compatible handsets and the analog-only tuner labeling requirements both serve the important goal of ensuring that consumers have access to necessary information. In light of the similarities in these labeling requirements, we conclude that a \$8,000 base forfeiture amount per unlabeled model or device in each store where Bureau agents and investigators observed a violation is appropriate for apparent violations of Section 15.117(k).³²

11. We find that, beginning on June 13, 2007, as detailed in Attachment B, even after receiving the *Citations* warning of violations in its stores across the country, Fry’s displayed numerous models of equipment with an analog-only tuner in six stores without the required Consumer Alert label. As a result, Fry’s continued to market television receiving equipment to consumers without adequately warning that the equipment contained an analog-only television receiver. Those consumers may not learn of their equipment’s limitations until the analog-only devices cease to receive over-the-air television signals, long after any period for returning the equipment has expired. This scenario is precisely the outcome that our rule was intended to prevent.³³ Applying the analysis set forth above to the facts of this case, we conclude that Fry’s is apparently liable for a \$384,000 base forfeiture.³⁴

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, **Fry’s Electronics, Inc.** is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of three hundred eighty-four thousand dollars (\$384,000) for violations of Section 15.117(k) of the Rules.³⁵

13. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's Rules within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, **Fry’s Electronics, Inc.** **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

14. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account

²⁹ *Second DTV Periodic Report and Order* at ¶ 12.

³⁰ *Id.* at 8783 ¶ 12. *See also* 47 C.F.R. §§ 11.1-11.61, 79.2.

³¹ *See Pine Telephone Inc.*, Notice of Apparent Liability, 22 FCC Rcd 9205, 9210 ¶ 11 (Enf. Bur., Spectrum Enf. Div. 2007) (subsequent history omitted); *IT&E Overseas, Inc.*, Notice of Apparent Liability, 22 FCC Rcd 7660, 7665 ¶ 10 (Enf. Bur., Spectrum Enf. Div. 2007).

³² We caution Fry’s and other retailers that future cases involving repeat offenders may result in the imposition of forfeitures on a continuing violation basis.

³³ “After the transition, absent a label requirement, even cable and satellite subscribers might be surprised to find that they cannot receive television broadcasts over-the-air on an analog-only television purchased today if they choose to discontinue subscription service or their cable or satellite service is terminated by disaster, service disruption, or for non-payment of their bills.” *Second DTV Periodic Report and Order* at ¶ 12.

³⁴ *See* Attachment B regarding the calculation of the total proposed forfeiture amounts.

³⁵ 47 U.S.C. § 503(b), 47 C.F.R. §§ 1.80, 15.117(k).

Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

15. The response, if any, must be mailed to Federal Communications Commission, Enforcement Bureau, and must include the NAL/Acct. No. referenced in the caption.

16. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

17. Requests for payment of the full amount of this Notice of Apparent Liability for Forfeiture under an installment plan should be sent to: Associate Managing Director, Financial Operations, 445 12th Street, S.W., Room 1A625, Washington, D.C. 20554.³⁶

18. **IT IS FURTHER ORDERED** that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by Certified Mail, Return Receipt Requested, and regular mail, to Steve F. Rebagliati, General Counsel, Fry's Electronics, Inc., 600 E. Brokaw Road, San Jose, CA 95112.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁶See 47 C.F.R. § 1.1914.

Attachment A

Store - Location	Citation No.	Release Date
3296 Commerce Ave., Duluth, GA	C20073248002	May 31, 2007
700 E. Plano Pkwy, Plano, TX	C2007325004	June 1, 2007
800 Garden Ave. N, Renton, WA	C20073298008	June 1, 2007
9825 Stonecrest Boulevard, San Diego, CA	C20073294010	June 5, 2007
www.frys.com	DA 07-2384	June 7, 2007
43800 Osgood Rd., Fremont, CA	C20073296011	June 7, 2007
1695 Willow Pass Rd., Concord, CA	C20073296013	June 8, 2007
3370 E. La Palma, Anaheim, CA	C20073290027	June 8, 2007
4100 Northgate Blvd., Sacramento, CA	C20073296023	June 18, 2007

Attachment B

1. June 13, 2007, Fry's Electronics, Inc.: 2300 West Baseline Road, Tempe, AZ.

Manufacturer	Device	Model #	Forfeiture Amount
Sony	DVD Recorder	SLV-D370P	\$8,000
Samsung	DVD/VCR	DVD-V5650	\$8,000
Samsung	DVD Recorder	DVD-R130	\$8,000
Sony	DVD Recorder	RDR-VX530	\$8,000
JVC	DVD/VCR	HR-XVC16BU	\$8,000
JVC	DVD/VCR	HR-XVC17SU	\$8,000
JVC	DVD/VCR	DR-MV7SU	\$8,000
Phillips	DVD/VCR	DVP3150V	\$8,000
Subtotal			\$64,000

2. June 14, 2007, Fry's Electronics, Inc.: 9820 Kincaid Drive, Fishers, IN.

Manufacturer	Device	Model #	Forfeiture Amount
Panasonic	DVD Recorder	DMR-ES15	\$8,000
Mitsubishi	HD Digital VCR	HS-HD2000U	\$8,000
Subtotal			\$16,000

3. June 14, 2007, Fry's Electronics, Inc.: 6845 Las Vegas Blvd., Las Vegas, NV.

Manufacturer	Device	Model #	Forfeiture Amount
Samsung	DVD/VCR	DVD-V5650	\$8,000
Samsung	DVD	DVD-R130	\$8,000
Phillips	DVD/VCR	DVP3150V	\$8,000
Sony	DVD	SLV-N750	\$8,000
Sony	DVD	RDR-GX315	\$8,000
Sony	VCR	SLV-N900	\$8,000
Sony	DVD	RDR-GX330	\$8,000
Sony	DVD/VCR	SLV-D370P	\$8,000
Panasonic	DVD	DMR-ES15	\$8,000
Sony	DVD/VCR	RDR-VX530	\$8,000
JVC	DVD/VCR	HR-XVC17SU	\$8,000
JVC	DVD/VCR	HR-XVC16BU	\$8,000
Funai	DVD/VCR	FDRV90E	\$8,000
Subtotal			\$104,000

4. June 14, 2007, Fry's Electronics, Inc.: 550 E. Brokaw Road, San Jose, CA.

Manufacturer	Device	Model #	Forfeiture Amount
Samsung	DVD/VCR	DVD-V5650	\$8,000
Sony	DVDR/VCR	RDR-VX530	\$8,000
JVC	DVD/VCR	HR-XVC16BU	\$8,000
JVC	DVD/VCR	HR-XVC17SU	\$8,000
Sony	VCR	SLV-N900	\$8,000
Sony	VCR	SLV-D370P	\$8,000
Phillips	DVD/VCR	DVP3050V	\$8,000
Subtotal			\$56,000

5. June 18, 2007, Fry's Electronics, Inc.: 3300 Finley Road, Downers Grove, IL.

Manufacturer	Device	Model #	Forfeiture Amount
Panasonic	DVD Recorder	DMR-ES15	\$8,000
Subtotal			\$8,000

6. June 19, 2007, Fry's Electronics, Inc.: 2488 Market Place Blvd., Irving, TX.

Manufacturer	Device	Model #	Forfeiture Amount
Sony	TV/VCR	KV-20FS120	\$8,000
JVC	DVD/VCR	DR-MV7SU	\$8,000
JVC	DVD/VCR	HR-XVC17	\$8,000
Mitsubishi	VCR	HS-HD2000U	\$8,000
Samsung	DVD	DVD-R130	\$8,000
Samsung	DVD/VCR	DVD-V5650	\$8,000
Sony	DVD	RDR-GX330	\$8,000
Sony	DVD	RDR-VX530	\$8,000
Sony	DVD/VCR	SLV-D370P	\$8,000
Sony	VCR	SLV-N750	\$8,000
Sony	VCR	SLV-N900	\$8,000
Toshiba	DVD	D-RW2	\$8,000
Subtotal			\$96,000

7. July 12, 2007, Fry's Electronics, Inc.: 13401 Crossroads Parkway, La Puente, CA.

Manufacturer	Device	Model #	Forfeiture Amount
JVC	DVD/VCR	HR-XVC17	\$8,000
JVC	DVD/VCR	HR-XVC16	\$8,000
Sony	DVD/VCR	SLVD370P	\$8,000
Sony	DVD/VCR	RDR-VX530	\$8,000
Panasonic	DVD	DMR-ES15	\$8,000
Subtotal			\$40,000

TOTAL PROPOSED FORFEITURE: \$384,000