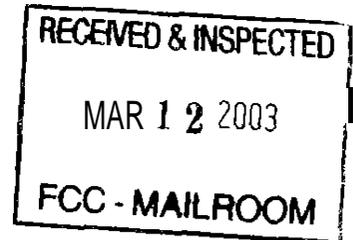


March 10, 2003

Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 10554



RE Notice of Proposed Rule Making, MB Docket No 03-15, FCC 03-8

Ladies and Gentlemen of the Commission:

This comment letter is regarding the Proposed Rules regarding conversion to digital television, specifically Parts 49 and 50, as listed on www.regulations.gov. You requested comment as to whether manufacturers should be required to label "pure monitors," analog-only television sets, and other television sets that are not "digital cable ready." I would suggest that, from the perspective of consumer law, this requirement would be highly valuable to consumers, to retailers, and to manufacturers alike.

Existing Law and Its Discontents

It is not currently required that televisions be specifically labeled as to their digital cable readiness. While this appears only to be a minor problem at first, it can become something of an economic disaster to many consumers and retailers.

While we as Americans pride ourselves on our technological expertise, there are those among us who are somewhat wanting in understanding. Among those are the elderly—to whom techno-speak may be as foreign as Swahili—and the undereducated. One cannot fairly expect a career janitor or fry cook to appreciate the differences between analog and digital broadcasting.

Such being true, let us assume that a technological innocent goes to a retailer to purchase a new television set. It may be that our innocent does not know to ask whether the television is

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“digital cable ready”, if he buys now, and winds up with an analog-only set, he will have to purchase an appropriate tuner—an additional expense which, on a fixed or low income, he may not be able to afford. So he is stuck with what is referred to in the technology industry as “an expensive boat anchor”.

Now let us assume that our innocent buyer gains knowledge of analog and digital, before the changeover is complete but after he has already paid and awaits delivery of his set. The set must make it from point of origin to its new home, and in many cases it will be by delivery truck. A problem then arises: Who gets to pay for delivery if the set is refused? And what if the set is broken en route either way? Frequently, the retailer will, for PR purposes, absorb the cost and damage, but this will raise prices for its other customers, because it cannot afford lost profits.

Another change of facts. What if the buyer is actually well-informed when he goes to buy his set, and an unwitting—or unethical—salesman sells him the wrong one? Now we come into points on which there is already legislation, specifically the Uniform Commercial Code (“UCC”).

UCC § 2-314 provides that there is an implied warranty of merchantability—as you know, that goods “pass without objection in the trade under the contract description; and are fit for the ordinary purposes for which such goods are used.” § 2-315 defines a warranty of fitness for a particular purpose as applying if the seller knows of the purpose for which the buyer was intending—unless, of course, the buyer has had the opportunity to inspect the merchandise (§ 2-316).

The problem with the UCC application, however, is twofold. Firstly, the ordinary function of a television set is to pick up broadcasts, which are not yet required to be digital; therefore, it would require quite a measure of legal argument to convince a stubborn court that

the television is in breach of the warranty of merchantability. Secondly, a court would also have to determine just how much inspection is reasonable and necessary to invalidate a warranty of fitness for a particular purpose; again, a stubborn court would require a good deal of expert legal argument.

The usual venue for such disputes is small claims court, because television sets are so seldom above the maximum limit (in Texas, for instance, more than \$5,000). This poses a problem for the layman who buys a television set, because now he must make an argument to set legal precedent. and this as well against a battery of lawyers representing the retailer. The consumer loses. frequently, because to his mind it **is** not worth the \$500 or however much *to* hire a lawyer over a \$300 loss. So here you have people losing money, without reasonable means to recoup, and a severely clogged legal system.

The Law As It Would Be

Your proposed labeling system would bring order to the chaos that is presented by the problem at hand. It is not unprecedented. Manufacturers of many rather sensitive products are required to label as to use and content; for instance, the **FDA** requires that all food products must disclose nutritional information. The product's condition need not even be "essential" to warrant certain representations, in many parts of the nation, a seller of a house must disclose whether there was a death on the premises.

The general public would be informed. **A** manufacturer should be required to express "pure monitor," "analog-only set," or "digital cable ready"—and be tightly confined to those terms, without room *to* juggle them such as "digital cable capable," while *in finer print* the label adds "with converter box. sold separately." Our innocent janitors, fry cooks, and senior citizens may rest secure in their purchase.

And if, by some chance, someone slips through the system, there are **still** clear protections 16 CFR § 700.3, promulgated by the Federal Trade Commission pursuant to the Magnuson-Moss Warranty Act, observes that “representations, such as energy efficiency ratings for electrical appliances, care labeling of wearing apparel, and other product information disclosures may be express warranties under the Uniform Commercial Code.”

If this system is applied, we may also be certain that the protections derive from the implied warranty of merchantability, because among other requirements, the goods also “conform to the promises or affirmations of fact made on the container or label ” UCC § 2-314. A retailer will have no chance of making a mistake, and no defense if it misrepresents deliberately. There will be no need for lengthy legal discussions in small claims courts, before judges who may not have attended college, much less law school.

Conclusion

The basic premise behind product labeling is to protect the innocent, the unlearned, the uninformed. **As** technology continues to advance, we find that information is rushed at us in such a way that learning is rather like a fire hose aimed at a Dixie cup; one may try to catch the full brunt, but very little of the water will remain inside the cup, and he himself will probably be flat on his back and stunned before it **is** over. Even the brightest among us may not be informed enough to protect themselves on every front. **A** requirement for television labeling such as you have propounded is beyond a doubt a valuable and even essential piece of regulation for all

Sincerely,



Julie M. Kelley, Law Student
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