

December 10, 2009

William T. Lake  
Chief, Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> St. SW  
Washington, DC 20554

RE: *Ex Parte* Communication: MB Docket No. 08-82  
CSR-7947-Z

Dear Chief Lake:

On November 19, 2009, Public Knowledge submitted a letter to Austin Schlick, General Counsel of the Federal Communications Commission addressing the Bureau's ability to grant the Motion Picture Association of America, Inc.'s ("MPAA") *Petition*<sup>1</sup> in the above-mentioned docket.<sup>2</sup> In the letter, Public Knowledge stated that a waiver by the Bureau would be arbitrary as a matter of law, and that such a decision would exceed the Bureau's delegated authority.<sup>3</sup> The most recent submission by MPAA does nothing to alter this analysis.<sup>4</sup> Furthermore, the information that MPAA proffers as evidence is suspect and contradicts earlier provided information. Finally, MPAA's argument that its *Petition* would not cause harm is contradicted by filings by other market participants, as well as those from the general public.

### **MPAA'S PROFFERED EVIDENCE IS UNRELATED TO ITS *PETITION***

There are two related types of evidence that MPAA might put forward in support of its *Petition*. First, MPAA could offer evidence that the remedy of waiver is related to the problem described in the waiver request. Second, assuming MPAA succeeds in presenting both a problem and a solution, MPAA could offer evidence that its solution is in the public interest. MPAA has failed on both counts.

*MPAA Is Unable to Produce Consistent or Relevant Evidence in Support of its Petition*

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<sup>1</sup> See *MPAA Petition for Expedited Special Relief: Waiver of 47 C.F.R. §76.1903*. ("Petition")

<sup>2</sup> See Letter from Jef Pearlman, Staff Attorney, Public Knowledge to Austin Schlick, Office of General Counsel, Federal Communications Commission MB Docket No. 08-82 (Nov. 19, 2009).

<sup>3</sup> *Id.*

<sup>4</sup> See MPAA, *Letter to Marlene H. Dortch, Secretary, Federal Communications Commission*, MB Docket No. 08-82 (filed Nov. 23, 2009) ("MPAA Letter").

Even with absolute control over the data, MPAA is unable to establish anything beyond the vaguest assertion that infringement occurs and that it occurs from any source available, protected or not. Given its control it is strange that, while confident that “protections are necessary”<sup>5</sup> to release films via Video on Demand (“VoD”) before DVD release, MPAA is unable to determine if releasing a film on VoD prior to DVD has an impact on the availability of illegal copies.<sup>6</sup>

It is perfectly fine for MPAA to claim that “there is a perfectly obvious and rational reason why there is no ‘evidence’ today of massive theft of movies distributed via VOD,”<sup>7</sup> but it is disingenuous to insist that the absence of such data somehow enhances the credibility of MPAA’s wavier request. It is made all the more disingenuous when the reason given for the lack of evidence (that “by the time a movie is available on VOD today, almost *without fail it already has been stolen*”<sup>8</sup> because “[r]elease on DVD is today the first opportunity for thieves to get access to high-quality copy of a movie”)<sup>9</sup> is immediately qualified by the admission that “independent studios have experimented with releasing their movies earlier [than DVD] on VOD”<sup>10</sup> and contradicted in a footnote admitting that MPAA member Warner Brothers had, in fact, made two movies available via VoD prior to DVD release.<sup>11</sup>

This inability to produce relevant information is especially suspicious in light of MPAA’s ability to pinpoint sources of illegal copying when it suits its own goals. MPAA is able to track the source of illegal copies from Russia, to Ukraine, to a hotel pay-per-view system in order to illustrate the nature of online copying networks.<sup>12</sup> However, when it is relevant to the waiver discussion, MPAA cannot determine whether illegal copies of a member studio’s film came from the DVD release or the VoD release some days earlier.<sup>13</sup>

It is additionally noteworthy that, in light of the fact that member studios are already making films available via VoD prior to DVD release,<sup>14</sup> MPAA has been repeatedly forced to admit that it was incorrect when it insisted in its original *Petition* that “protections are necessary to deter unauthorized copying or redistribution” of films released via VoD “sometime prior to release” on DVD.<sup>15</sup>

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<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* at 9, fn. 30.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> *Id.* at 9, fn. 30.

<sup>12</sup> *See id.* at 4.

<sup>13</sup> *See id.* at 9, fn. 30.

<sup>14</sup> *Id.*

<sup>15</sup> *Petition* at 2-3.

MPAA soon clarified that it meant that Selectable Output Control (“SOC”) protections are necessary *except* in the case of ill-defined “limited trial[s],”<sup>16</sup> or, of course, when non-member studios release films. MPAA now additionally qualifies that SOC protection is only needed for VoD release of an MPAA member film “significantly earlier” than DVD release.<sup>17</sup> It remains unclear to Public Knowledge when “sometime prior” (not requiring SOC) becomes “significantly earlier” (thus requiring SOC), if “significantly earlier” is subject to additional clarification and redefinition as MPAA finds necessary to sustain its argument, and why the Commission should view that distinction as meaningful.

*MPAA Has Offered No Evidence Suggesting SOC Addresses Infringement Concerns or that SOC is in the Public Interest*

MPAA’s evidence fails to address two distinct, but related shortcomings of its *Petition*. First, nowhere does MPAA explain how SOC will reduce the flow of illegal copies that originate with MPAA member studios themselves, well before the films are available to consumers. Second, MPAA does not even attempt to explain why SOC will be effective in reducing illegal copies made by consumers in light of the failure of every previous protection technology MPAA has supported in the past.

### **SOC Will Not Prevent Illegal Copies Made By Consumers**

MPAA’s filing highlights several sources of online infringement. Most strikingly, every film released by an MPAA member studio via DVD was available for unlawful streaming or downloading.<sup>18</sup> This suggests, contrary to numerous prior assertions by the MPAA,<sup>19</sup> that the DVD encryption scheme is not an effective bar to illegal copying. There is every reason to think that SOC will prove similarly ineffective in addressing illegal copying while imposing significant costs on consumers.

However, DVD encryption schemes have had an impact. Products such as RealDVD and Kaleidescape, which allow consumers to make legal personal backups of legally purchased DVDs, have been blocked by courts because they ran afoul of DVD encryption licensing terms.<sup>20</sup> While DVD encryption has not been effective in reducing the availability of unlawful digital copies, it has been remarkable effective in reducing the availability of innovative consumer products. The record certainly suggests that SOC will be similarly

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<sup>16</sup> Letter from Antoinette Cook Bush, Counsel to MPAA, to Marlene H. Dortch, Secretary, Federal Communications Commission MB Docket No. 08-82 at 5 (Nov. 4, 2009).

<sup>17</sup> See *MPAA Letter* at 9.

<sup>18</sup> See *id.* at 4.

<sup>19</sup> See e.g. *Comments of the Motion Picture Association of America, Exception to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, United States Copyright Office Docket No. RM 2008-8 (Feb. 2, 2009).

<sup>20</sup> See *Realnetworks, Inc. v. DVD Copy Control Ass’n*, 641 F.Supp.2d 913 (N.D.Cal., 2009); *DVD Copy Control Ass’n, v. Kaleidescape, Inc.*, 176 Cal.App.4<sup>th</sup> 697 (Cal.App. 6 Dist., 2009).

ineffective at preventing unlawful copying while being similarly effective in stifling innovation.

In addition to DVDs, at least one film was obtained from a Blu-ray source (another “secure” video format)<sup>21</sup> and at least one film was “stolen from a hotel pay-per-view system.”<sup>22</sup> These sources (DVD, Blu-ray, and pay-per-view) all have one thing in common: they are sources that have received MPAA’s approval and have supposedly been secured through private negotiations and technology.<sup>23</sup> In other words, the data presented demonstrates a single fact: infringement occurs, regardless of the level of protection on the source.

MPAA’s newest “secure” solution has already been compromised. MPAA describes “HDMI protected with HDCP” as a “secure digital output.”<sup>24</sup> However, there are already established circumvention techniques accessible to users with a wide range of technical competencies.<sup>25</sup> As content protection only has to be defeated once for a film to be available to millions, there is no reason to think that “secure” SOC distribution will be any more effective at combating piracy than “secure” DVD or “secure” Blu-ray distribution has been. At the same time, there is every reason to think that “secure” SOC distribution will be just as effective at inhibiting innovation as prior “secure” formats.

Despite its own evidence that use of technological protections is completely ineffective, MPAA suggests that it should be granted the right to turn off any video connection (including current analog *and* digital connections,<sup>26</sup> *both* of which are currently “protected”<sup>27</sup>), forcing costly and unnecessary upgrades on millions so that it can ensure that only their preferred “protected” connections are available.

### **SOC Will Not Prevent Illegal Copies Made By Studio Insiders**

The smattering of heavily sanitized charts and affidavits provided by the MPAA and its member studios prove little more than the existence of online infringement of movies and the ineffectiveness of MPAA’s attempts at protection.<sup>28</sup> MPAA’s data is woefully inadequate to support any sort of external verification. The majority of its charts and graphs provide no actual titles, dates, or other information that would enable a third party to either verify the

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<sup>21</sup> *MPAA Letter* at Ex. C at Ex. B.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> MPAA describes pay-per-view distribution, the contents of which are “routinely” stolen, as “using the most protected means available today on MVPD platforms.” *See id.* at 7.

<sup>24</sup> *Id.* at 8.

<sup>25</sup> *See* HDContentSecurity, <http://sites.google.com/site/hdcontentsecurity/>. *See also* Ryan Block, *The Clicker: HDCP’s Shiny Red Button*, Engadget, July 21 2005 available at <http://www.engadget.com/2005/07/21/the-clicker-hdcps-shiny-red-button/>.

<sup>26</sup> MPAA Reply Comments, MB Docket No. 08-82 at 7 (July 31, 2008).

<sup>27</sup> *See* 47 U.S.C. § 76.1902(d), 76.1904(b)(1)(i).

<sup>28</sup> *See MPAA Letter*.

data or explore any alternative explanations for varying levels of measured infringement. Because MPAA controls the data, they can cherry pick single instances and insist that the examples are typical. While MPAA claims that what appear to be increases in downloading are due to the availability of a new copy, the anonymous and isolated nature of the data prevents anyone from presenting alternative explanations or verifying the existence of the increase.

What MPAA's data does make clear is that consumer access to content is not directly related to illegal copying. As Fox executive Ronald C. Wheeler's declaration states, a high quality DVD-sourced digital copy of an anonymous "heavily-pirated family action adventure movie" was available online "just 3 ½ weeks following the theatrical release."<sup>29</sup> Although it is impossible to determine which film this actually is from MPAA's data, it is highly unlikely that this "family action adventure movie" was available to the general public on DVD 3 ½ weeks after it was released in theaters. Similarly, Frederick Huntsberry of Paramount Pictures admits that a DVD-sourced "near-perfect digital copy" of Star Trek was available online *prior* to consumer DVD release.<sup>30</sup>

In the case of the anonymous "family action adventure movie," Star Trek, and many others,<sup>31</sup> it was irrelevant how the movie was protected when it was released to consumers. Illegal copying occurred well before consumers could access the movies and *the source of the copying was the studio itself*. No amount of burdensome digital rights management protection will prevent copying that occurs well before general public availability.

## MPAA IGNORES HARM TO CONSUMERS

When MPAA's proposal is evaluated by consumers, they reject it. Since November 1 over 2,700 consumers have filed comments with the Commission, the overwhelming majority urging rejection of MPAA's *Petition*. General interest and technology-oriented publications (with no direct financial stake in the FCC's decision) including *The Washington Post*,<sup>32</sup> *Ars Technica*,<sup>33</sup> *Gizmodo*,<sup>34</sup> *TechDirt*,<sup>35</sup> and *Consumerist*,<sup>36</sup> have also examined

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<sup>29</sup> *Id.* at Ex. C ¶ 4b.

<sup>30</sup> *See id.* at Ex. B ¶ 9.

<sup>31</sup> The availability of 20<sup>th</sup> Century Fox's film *Wolverine* online weeks before theatrical release this summer is only one of many examples of illegal copies of films appearing online well before theatrical release. *See* Lisa Respers France, *In digital age, can movie piracy be stopped?*, CNN.com, May 2, 2009 available at <http://www.cnn.com/2009/TECH/05/01/wolverine.movie.piracy/index.html>.

<sup>32</sup> *See* Rob Pegoraro, *Studios could provide new movies later to Netflix and Redbox, earlier to "protected" digital cable*, *The Washington Post*, Nov. 12, 2009, [http://voices.washingtonpost.com/fasterforward/2009/11/netflix\\_viewers\\_may\\_wait\\_longe.html](http://voices.washingtonpost.com/fasterforward/2009/11/netflix_viewers_may_wait_longe.html).

<sup>33</sup> *See, e.g.* Matthew Lasar, *Ars responds to Big Cable: TV networks nothing like an iPod*, *Ars Technica*, Nov. 18, 2009, <http://arstechnica.com/telecom/news/2009/11/selectable-output-control---more-choices-but-for-who.ars>.

MPAA's *Petition*. They overwhelmingly conclude that there is nothing pro-consumer about the MPAA forcing consumers to do less with their television sets and consumer electronic devices.

MPAA's assertion that SOC "would have no impact whatsoever on the ability of existing television sets, Tivos, Slingboxes or any other consumer product to work in exactly the same fashion that such devices work today"<sup>37</sup> evidences a misunderstanding of consumer expectations. For example, consumers purchasing a Slingbox are assured that it is compatible with "Cable Set-Top Boxes (Comcast, Cox, Time Warner, Cablevision, etc.)" and "Satellite Receivers (DIRECTV, DISH, etc.)."<sup>38</sup> Nowhere is this compatibility qualified with "except some content" or "only with MPAA permission."<sup>39</sup> Consumers expect their Slingboxes, as well as their high definition televisions, not to mention any number of other consumer products, to work with all of the programming flowing from their set top boxes. In fact, many audio/visual systems in homes and businesses rely on a series of switches, receivers, and control devices that utilize high definition analog signals for a variety of practical and technical reasons.<sup>40</sup>

Recent filings by MVPDs insisting that consumer concerns can be addressed by on-screen instructions<sup>41</sup> in fact do nothing to address these concerns. Informing consumers that their expectations are no longer going to be met does not mitigate the damage created when expectations are not met in the first place. When consumers are concerned that their devices will unexpectedly cease to function in the future, they are understandably reluctant to invest

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<sup>34</sup> See Danny Allen, *MPAA Still Trying to Plug Your Analog Hose with Selectable Output Control*, Gizmodo, Nov. 5, 2009, <http://gizmodo.com/5397818/mpaa-still-trying-to-plug-your-analog-hole-with-selectable-output-control>.

<sup>35</sup> See Mike Masnick, *FCC Poised to Let Hollywood Break Your TV and DVR*, TechDirt, Nov. 5, 2009, <http://www.techdirt.com/articles/20091105/1051206806.shtml>.

<sup>36</sup> See Chris Walters, *MPAA Asks FCC For Control Of Your TV's Analog Outputs*, Consumerist, Nov. 9, 2009, <http://consumerist.com/2009/11/mpaa-asks-fcc-for-control-of-your-tvs-analog-outputs.html>.

<sup>37</sup> *MPAA Letter* at 2.

<sup>38</sup> See Slingbox FAQ, *What audio/video devices are compatible with Slingbox?* available at <http://www.slingbox.com/go/slingbox-prohd-faq>.

<sup>39</sup> See *id.* Although Slingbox does state that radio frequency controlled devices are not currently supported, there is nothing to indicate that some types of programming are beyond functionality.

<sup>40</sup> See Letter from Bill Paul, CEO, Neothings Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission MB Docket No. 08-82 (Dec. 11, 2008). For more information about the reasons these systems rely on analog signals, see *Mr. X-Parté Episode 3: An SOC Interview with Neothings CEO Bill Paul*, Public Knowledge Policy Blog (Nov. 18, 2009) available at <http://www.publicknowledge.org/node/2774>.

<sup>41</sup> See Letter from Stacy Fuller, Vice President, Regulatory Affairs, Direct TV to Marlene H. Dortch, Secretary, Federal Communications Commission MB Docket No. 08-82 (Nov. 24, 2009).

in consumer electronics. Consumers rationally delayed their purchase of next generation video disc players while Blu-ray and HD DVD battled – in the current economic climate it is not rational to give consumers reason to hesitate in the purchase of consumer electronics.

## **MPAA IGNORES HARM TO OTHER MARKET PARTICIPANTS**

MPAA’s focus on Public Knowledge – while flattering – causes it to omit consideration of the spectrum of objections from trade associations whose members would suffer harm if the Bureau<sup>42</sup> granted the MPAA’s waiver request.<sup>43</sup> To the extent the Bureau weighs the claims of commercial harm from MPAA, NCTA, and individual MVPDs, it must give equal consideration to the economic harms NATO, IFTA, and CEA.

MPAA’s most recent response does nothing to address the concerns of NATO.<sup>44</sup> NATO describes the “devastating impact on movie theaters” that would result from a grant of MPAA’s *Petition*.<sup>45</sup> Public Knowledge is not in a position to evaluate the impact of SOC on traditional theater owners. However, NATO’s concerns make it clear that MPAA is asking the Bureau to choose winners and losers in the motion picture distribution industry. The Bureau should not inject itself into a battle between VoD-based distribution models and theater-based distribution models merely because MPAA would prefer that the former win over the latter.

IFTA is similarly skeptical of the wisdom of MPAA’s *Petition*.<sup>46</sup> While IFTA members have won over 50% of the “Best Picture” Academy Awards in the past 30 years and are undoubtedly sensitive to illegal copying of films, IFTA ultimately views SOC as

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<sup>42</sup> To the extent that the Bureau is considering granting this petition, Public Knowledge continues to assert that it cannot do so without examination by the full Commission. *See* Letter from Jef Pearlman, Staff Attorney, Public Knowledge to Austin Schlick, Office of General Counsel, Federal Communications Commission MB Docket No. 08-82 (Nov. 19, 2009).

<sup>43</sup> *See e.g.* Letter from Todd Halstead, Deputy Director of Government Affairs, National Association of Theatre Owners, Inc. (“NATO”) to Marlene H. Dortch, Secretary, Federal Communications Commission MB Docket No. 08-82 (Nov. 6, 2009); Letter from Jean M. Prewitt, President & CEO, Independent Film & Television Alliance (“IFTA”) to Julius Genachowski, Chairman, Federal Communications Commission MB Docket No. 08-82 (Nov. 10, 2009) (“IFTA Letter”); and Letter from James W. Hedlund, Vice President, Regulatory Affairs, Consumer Electronics Association (“CEA”) to Marlene H. Dortch, Secretary, Federal Communications Commission MB Docket No. 08-82 (Nov. 25, 2009) (“CEA Letter”).

<sup>44</sup> NATO filing

<sup>45</sup> Letter from Todd Halstead, Deputy Director of Government Affairs, NATO to Marlene H. Dortch, Secretary, Federal Communications Commission MB Docket No. 08-82 (Dec. 2, 2009).

<sup>46</sup> *See IFTA Letter*.

harmful to *filmmakers*, before even considering its impact on consumers.<sup>47</sup> IFTA is concerned that MPAA members will use SOC to recapture control over the initial film distribution window – control they lost years ago.<sup>48</sup>

CEA also expressed reservations about MPAA's *Petition*.<sup>49</sup> In addition to objections raised by Public Knowledge, CEA is concerned that the waiver will give the MPAA unprecedented control over the design, function, and features of lawful consumer electronics.<sup>50</sup> It will also make consumers concerned that equipment purchased today will be turned off by content protections implemented tomorrow.<sup>51</sup>

It should be no surprise that CEA members are unwilling to trust the judgment of an organization that once warned “the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone”<sup>52</sup> when it reassures CEA and the Bureau that no harm will come from SOC and that analog outputs spell doom for the industry. In another docket, IPCO, Inc.'s recent filing shows how seemingly innocuous rule changes (in the case of IPCO, the waiver of severable security rules for set top boxes) have the potential to radically alter sectors of the consumer electronics industry.<sup>53</sup> Fortunately for the MPAA of 2009, the MPAA of 1982 did not have the ability to destroy the technology that would eventually become, in the words of MPAA's latest filing, the “only” way “that studios are able to earn a profit on a given movie.”<sup>54</sup> CEA members are rightly worried that consumers, not to mention the MPAA of 2036, will not be so fortunate if MPAA's *Petition* is granted.

As a general matter, Public Knowledge does not believe that a public interest finding turns on the impact to industry participants' bottom line. Rather, this Greek chorus of concern should make clear to the Bureau that grant of an industry-wide waiver such as this

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *See CEA Letter.*

<sup>50</sup> *See* Letter from Mitchell L. Stoltz, Counsel to CEA, Constantine Cannon LLP to Marlene H. Dortch, Secretary, Federal Communications Commission MB Docket No. 08-82 (Oct. 26, 2009).

<sup>51</sup> *See* Letter from James Hedlund, Vice President, Regulatory Affairs, CEA to Marlene H. Dortch, Secretary, Federal Communications Commission MB Docket No. 08-82 (Dec. 8, 2009).

<sup>52</sup> *Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives*, 97<sup>th</sup> Cong. (1982) (testimony of Jack Valenti, President, Motion Picture Association of America, Inc.).

<sup>53</sup> *See* Letter from James Meyers, Counsel for IPCO, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission Mass Media Bureau Proceeding CSR-8206-Z (Oct. 8, 2009).

<sup>54</sup> *See MPAA Letter* at 2.

can reverberate in unexpected ways. The effort of MPAA and its would-be business partners to minimize the impact of this change does not make it any less disruptive or problematic.

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In sum, although reasonable people can reach different conclusions about matters of public policy, Public Knowledge urges the Commission to stay focused on the facts and not to be swayed by statements that distort the truth about the SOC waiver request. Moreover, Public Knowledge believes that MPAA failed to persuasively demonstrate that SOC will have any impact on unlawful copying, or that it provides any consumer benefit whatsoever. MPAA failed to explain why the concerns of the thousands of consumers who have called on the Bureau to reject this *Petition* should be ignored. MPAA failed to address why the Bureau should dismiss the harms to others in the motion picture distribution industry simply because it prefers one distribution method over another. Finally, MPAA failed to mitigate the harm to the waiver process that would be inflicted were the Bureau to grant a waiver to existing rules without requiring evidence in support of that waiver.

When coupled with the tremendous consumer costs that would flow from breaking tens of millions of consumer devices and undermining long standing consumer confidence that current and future devices will continue to function as expected when purchased, these failures presents the Bureau with no basis to grant MPAA's request.

Respectfully Submitted,

\_\_\_\_\_/s/  
Harold Feld  
Jef Pearlman  
Michael Weinberg  
Public Knowledge

cc: Austin Schlick