

October 28, 2009

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

RE: Notice of *Ex Parte* presentation in CS Docket No. 97-80
MB Docket No. 08-82

Dear Ms. Dortch:

On October 27, 2009, I met with Bureau Chief William Lake, Assistant Bureau Chief Robert Ratcliffe, Alison Neplokh, Jeffery Neumann, Brendan Murray, Nancy Murphy, and Mary Beth Murphy, with regard to the above captioned matters.

With regard to the pending waiver request by the MPAA, I noted the recent deals between Comcast and Time Warner, as well as the other agreements previously noted, to release movies in advance of the existing VOD window. Staff asked what protection Comcast had offered to address piracy as conditions of early release. I responded that a) I was unaware of any special arrangements to address these piracy concerns; and, b) whatever protections were provided, it is clear that they were provided without the need for the pending waiver. The Commission should therefore permit the marketplace to operate under existing rules rather than create uncertainty by the grant of waivers.

I noted the lack of any evidence that indicated whether the ability to turn off selectable output controls has any impact on illegal copying. Staff asked if it didn't "just make sense." I observed that, to the contrary, it did not "make sense" in light of evidence already introduced that illegal copying occurs prior to the availability on VOD. If such evidence existed, Petitioners could produce it quite easily. For example, if the inability to deactivate selectable output controls contributes to illegal copying, ***the number of illegal downloads should dramatically spike whenever a movie is released on VOD.*** Further, given the growing number of movies released earlier than the window, it is possible to demonstrate the impact of the existing rule by noting whether illegal copying rates for the earlier release version vary dramatically for similar movies released under the existing window (controlling, of course, for such factors as popularity and audience demographic and other relevant factors that would assure a relevant comparison). The failure to produce any such evidence is telling. In the context of a data driven agency, the failure to produce such evidence should be particularly inexcusable.

I further noted that accepting an argument without evidence because “it just makes sense” shifts the burden for the extraordinary relief requested from Applicants to the public. Such an outcome is not merely contrary to Commission rules and precedent, it places an impossible burden on those opposing the waiver.

Staff questioned Public Knowledge’s assertion in its recent written *ex parte* that grant of the waiver would advance the availability of the content by “only 30 days,” as MPAA has stated in its waiver application that it will facilitate release of movies *before* the existing DVD window. I noted that MPAA has failed to commit to any timetable for release and could satisfy this language by release of movies a single day before the existing DVD window. If the Bureau believes that the length of time is a relevant detail, it should at a minimum require Applicants to submit some evidence into the record as to how much they will shorten the window.

Staff also questioned Public Knowledge’s insistence that MPAA produce some evidence relating to the value of moving the release window to VOD, or evidence that the existing rule is a barrier to resolving this through standard marketplace negotiations. Staff asked if it did not logically follow from the fact that people will pay to see first run movies or will pay for VOD that moving the window has value. Staff further asked why, if the rule does not present a barrier to renegotiating release windows, have studios not already done so and could staff not take this refusal to negotiate deals as evidence that a waiver was needed, given the assumption that it is valuable because people will pay to see first run movies?

Noting in passing that this argument rests on multiple untested assumptions, that Applicants have not based the application on generic value demonstrated by willingness to pay but on the purported value of accelerating release to those who have difficulty reaching a theater or ordering from a DVD delivery service, I observed that such suppositions do not constitute evidence of a public interest need. If the Bureau accepts the logic that the refusal of an industry participant to cut a deal is evidence that a rule does not serve the public interest, the Bureau would do well to abolish the rule entirely through a rulemaking rather than invite an endless stream of special interests lamenting that Commission rules frustrate profitable deals and that the public interest would be served by allowing parties to engage in conduct previously found harmful so as to facilitate this dealmaking.

Indeed, as to why parties do not conclude such deals, I noted that the Bureau’s apparent willingness to entertain these arguments as the basis for a grant of a waiver create a “moral hazard” that creates uncertainty within the industry as a whole. Because the Bureau holds out the possibility that it will rewrite the rules for specific companies on request, with varying allegiance to the purportedly rigorous standard imposed by the Commission’s rules and precedent, the resultant uncertainty induces parties to behave strategically rather than negotiate in their best financial interest. Worse, because these waivers have industry-wide

effect, the resultant uncertainty impedes the willingness and ability of those not parties in any given proceeding to engage in business negotiation or product development.

Staff asked me to address what harm would result from grant of the waiver. I again observed that the applicable standard is that Applicants must show a public interest benefit and that shifting the burden to waiver opponents to demonstrate harm is contrary to Commission rule and precedent. Worse, the creation of such “street law” on burden shifting undermines respect for the Commission’s rules and the ability of any industry stakeholders or the public to rely on the rules.

In addition to this broader institutional harm, grant of the waiver would replace the previous bright line rule with an exception capable of abuse and difficult to monitor. This was one of the reasons the Commission imposed a clear prohibition in the first place. Further, the fact that 25 million MVPD subscribers would need new equipment to benefit from the waiver makes it certain that consumers will suffer confusion, frustration and that many will believe incorrectly that they must buy or lease new equipment at additional expense. This will render devices such as Sling Box and TiVo useless for the content provided. Finally, to the extent the waiver includes content released earlier than the existing window after the time it would be available under the present rule, it deprives users of the existing use of their devices for which they have already paid and for which, in some cases, they continue to pay subscription fees.

In accordance with the Commission’s rules, a copy of this notice is being filed with your office today.

Sincerely,

_____/s/
Harold Feld
Legal Director
Public Knowledge

cc: William Lake
Robert Ratcliffe
Alison Neplokh
Jeffery Neumann
Brendan Murray
Nancy Murphy
Mary Beth Murphy