

November 10, 2009

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

RE: *MPAA Petition for Expedited Special Relief: Waiver of 47 C.F.R. §76.1903*
MB Docket No. 08-82

Dear Ms. Dortch:

Public Knowledge files the following comments to respond to recent filings by Petitioner MPAA and to additionally clarify Public Knowledge's position regarding the above captioned proceeding.

The question before the Bureau is not whether some individuals would find it more convenient to watch a given movie in their home via Video on Demand ("VoD") prior to the release of that same movie on DVD days or weeks later. The Bureau must determine whether the Applicants have met their burden to show that it is necessary to waive a rule already found to serve the public interest in order to better serve the public interest. In the case of the MPAA's Selectable Output Control ("SOC") waiver, the answer remains "no."

There is also no doubt that some providers of possible services would find it convenient to control selected outputs, and might chose to withhold services or content without a waiver. Controlling selected outputs allows a service provider or content owner to extract additional rents from consumers in a multitude of ways. Again, however, the standard for a waiver is not that an Applicant would like to have a waiver, or that the wavier would benefit the Applicant, or even that the Applicant threatens to withhold the service or content unless the Bureau grants the waiver. As the Commission has stated in the past "waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest. Moreover, in demonstrating whether a waiver is warranted, the burden of proof rests with the petitioner."¹ While the waiver requested by the MPAA might serve the MPAA, there is nothing more than speculation to suggest that it will serve the public interest.

In fact, the current record suggests that the MPAA's waiver will harm the public interest. Within the past week, over 1,700 individuals have filed comments in this docket.

¹ *Centennial Cellular Tristate Operating Partnership*, 21 FCC Rec. 9170, 9172 (2006).

The overwhelming majority of these comments urge the Commission to *deny* the MPAA's request. While the volume of comments in a particular docket can be an imprecise measure of public interest, the Commission would be well served to consider the public reaction to this waiver request. To the extent members of the public have expressed an opinion, they do not find the deal offered by the MPAA in their interest.

The MPAA also repeatedly suggests² that SOC would allow it to introduce the types of "new business models" contemplated when the Commission originally implemented SOC rules.³ This is incorrect for several reasons. First, it is the MPAA, not SOC, that is currently preventing the release of MPAA-member studio films to the public via VoD prior to DVD release. As Public Knowledge has documented in the past, a number of non-MPAA studios already make films available to the public without SOC protections.⁴ Second, there is nothing "new" about what the MPAA is proposing.

The MPAA's proposal would use existing technology to bring existing content to a place where consumers already view films. There simply is nothing new about using VoD to deliver movies to consumers at home. While it may be "new" for some MPAA members to grant consumers access to films at home prior to DVD release, it is far from new in the broader film industry.⁵

The MPAA explicitly recognizes this fact in its most recent letter.⁶ It states that the waiver "would merely permit MPAA-member studios to make some of this content available *earlier*."⁷ Merely releasing content "sometime prior to release on prerecorded media"⁸ can hardly be considered a "new" business model.

² See *MPAA Petition for Expedited Special Relief: Waiver of 47 C.F.R. §76.1903* ("MPAA Petition"). See also Letter from Antoinette Cook Bush, Counsel to MPAA, to Marlene H. Dortch, Secretary, Federal Communication Commission, MB Docket No. 08-82 (dated Nov. 4, 2009) ("MPAA November 4 Letter").

³ See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885, ¶ 61 (2003).

⁴ See Letter from Jef Pearlman, Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communication Commission, MB Docket No. 08-82 (dated Nov. 2, 2009) ("PK November 2 Letter").

⁵ *Id.*

⁶ MPAA November 4 Letter.

⁷ *Id.* at 5 (emphasis in original).

⁸ MPAA Petition at 2.

The MPAA limits its claims to “MPAA-member studios” because it must: a number of non-MPAA member studios feel free to distribute their “high-value content” to consumers well before the DVD release date.⁹ Just as Viacom disingenuously announced that its CBS broadcast network would be unable to broadcast in high definition without the broadcast flag, the MPAA is claiming that SOC is required to make films available via VoD the day before the DVD release date.¹⁰ As competitive pressures force more studios to dismantle traditional release windows MPAA-member studios, like Viacom before them, will recognize that additional consumer-unfriendly digital locks do not provide additional protection against unauthorized content reproduction.

In a final effort to gloss over the impact of its request and paint it’s Application as “pro-innovation,” the MPAA tries to go on the offensive by accusing Public Knowledge of holding back this “new service.”¹¹ MPAA’s choice of illustration, that “under Public Knowledge’s approach, the Commission would have taken decades to permit television stations to broadcast in color, since millions of American homes already had purchased black-and-white sets when color broadcasts were introduced in the 1950s,”¹² is particularly ill-chosen from the MPAA’s perspective.

As commenter Bill Paul, CEO of Neothings, Inc. points out, in the 1950s the FCC was tasked with choosing between a number of competing color television standards.¹³ The FCC initially favored a standard that would have required all viewers to purchase a new television to receive signals broadcast with the new color technology. Older televisions would gradually go dark as black and white transmission gave way to the CBS-proposed color standard. As a result, the public and the FCC ultimately adopted the RCA-proposed color standard, which permitted backward compatibility.

Congress attached such high value to ensuring that all televisions could receive all broadcast signals that it passed Section 303(s), giving the Commission explicit authority to regulate broadcast receivers so that no one could “break” television signals in the same way the MPAA proposes to break VoD – by requiring viewers to buy new equipment to see all the content to which they are entitled. Indeed, Congress has time and again acted to ensure

⁹ PK November 2 Letter.

¹⁰ *See Comments of Viacom*, Docket 02-230, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394608.

¹¹ MPAA November 4 Letter at 2.

¹² *Id.*

¹³ *See Letter from Bill Paul, CEO, Neothings, Inc. to Marlene H. Dortch, Secretary, Federal Communication Commission, MB Docket No. 08-82 (dated Nov. 5, 2009).*

that consumers can use the electronic devices of their choice to record and to view all lawfully available content.¹⁴

As Congress itself found in these cases, it *promotes* innovation and consumer welfare to prohibit “encoding or encryption technologies” that disable consumer electronic devices. Indeed, as MPAA’s color television example aptly demonstrates, the unique value placed by Congress, the Commission, and the public on access to video content through their existing equipment weighs heavily against the MPAA’s Application. When combined with the overwhelming rejection of the proposed “new service” by the public, and MPAA’s failure to provide any evidence that the waiver will even address MPAA’s own concerns about illegal copying, it becomes clear that the Bureau should reject the MPAA’s waiver request as contrary to the public interest.

Sincerely,

/s/

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Public Knowledge

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¹⁴ See 47 U.S.C. §544a(a) (Congressional findings that it is contrary to the public interest for “cable scrambling, encoding or encryption technologies” to disable “premium features and functions” in television sets and VCRs and that doing so will make consumers “less likely to purchase, and electronics equipment manufacturers less likely to develop, manufacture, or offer for sale television receivers or VCRs with new and innovative features and functions”). See also The Digital Transition and Public Safety Act of 2005, §3005 (creating digital-to-analog converter box program).

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