

November 2, 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 would like to draw the Media Bureau's attention to the movie studios that are currently offering films through Video on Demand (VoD) prior to DVD release without Selectable Output Control (SOC). This is precisely the type of offering that the MPAA has claimed "necessarily would require a higher level of protection against copyright theft than is currently permissible."¹ The studios, including a signatory to the original MPAA petition waiver, clearly do not agree that the current SOC prohibitions are "a general regulatory impediment that prevents implementation of content protection required"² to make high value content available prior to DVD release.

Warner Brothers Entertainment, one of the named parties in MPAA's original petition, has already recognized that SOC is unnecessary to safely distribute high value content on VoD prior to DVD release.³ In September, Warner debuted *Ghosts of Girlfriends Past* and *Observe and Report* on VoD prior to the release of the films on DVD.⁴ Although the films were not protected by SOC, they still debuted as the numbers two and three best selling DVDs in the country.⁵

Other companies have embraced pre-DVD VoD releases. Magnolia Pictures has gone so far as to release a number of films on VoD prior to theatrical release.⁶ Their success has inspired

¹ Motion Picture Association of America, *Petition for Expedited Special Relief, Petition for Waiver of 47 C.F.R. § 76.1903 at i* (May 9, 2008) ("MPAA Waiver").

² *Id.* at ii.

³ Jennifer Netherby, *Warner puts Observe, Ghosts on VOD before DVD*, *Video Business* (Sept. 28, 2009), available at <http://www.videobusiness.com/article/CA6699156.html>.

⁴ *Id.*

⁵ US DVD Sales Chart for Week Ending Sep 27, 2009, available at <http://www.the-numbers.com/dvd/charts/weekly/2009/20090927.php>.

⁶ Hugh Hart, *Mark Cuban to Show New Movies on TV Before Theatrical Release*, *Underwire*

a similar strategy by Starz Media.⁷ IFC Entertainment's IFCInTheaters program utilizes a day and date distribution model, releasing films simultaneously in theaters and on VoD.⁸ Needless to say, none of these studios and distributors rely on SOC protection when distributing their films. Finally it is worth noting that simultaneous VoD and DVD release, which is described by the MPAA as an "at best"⁹ alternative to standard staggered release windowing, is rapidly becoming industry standard.¹⁰

The MPAA insists that SOC is required to offer pre-DVD release of high value content on VoD. As the above examples illustrate, not even MPAA member studios agree. SOC simply is not required to offer pre-DVD VoD release. There is no reason to grant the MPAA's waiver request and force consumers to replace over 20 million television sets, in addition to an unknown number of other consume electronic devices, in order to enable an already widely deployed service.

Sincerely,

/s/

Jef Pearlman
Michael Weinberg, Law Clerk
Public Knowledge

CC: Brad Gillen
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(July 9, 2008),
available at <http://blog.wired.com/underwire/2008/07/cuban-to-show-n.html>.

⁷ Andre "DVDBack23" Yoskowitz, *Starz test movie via VOD before theaters, DVD*, Afterdawn.com (Sept. 7, 2009) available at <http://www.afterdawn.com/news/archive/19253.cfm>

⁸ About IFC, available at <http://www.ifcfilms.com/about-ifc-films>

⁹ MPAA Waiver at 2.

¹⁰ Diane Garrett, *Studios collapsing VOD windows*, Variety (Oct. 8, 2009) available at <http://www.variety.com/article/VR1118009748.html?categoryid=20&cs=1>.

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