

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	CSR-7947-Z
Motion Picture Association of America)	
)	MB Docket No. 08-82
Petition for Expedited Special Relief;)	
Petition for Waiver of 47 C.F.R. § 76.1903)	

**COMMENTS
OF
PUBLIC KNOWLEDGE, CONSUMER FEDERATION OF AMERICA,
DIGITAL FREEDOM CAMPAIGN, ELECTRONIC FRONTIER FOUNDATION,
MEDIA ACCESS PROJECT, NEW AMERICA FOUNDATION, U.S. PIRG**

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Summary

In 2003, the FCC issued an order which, when combined with a Memorandum of Understanding between video distributors and consumer electronics companies, would provide third-party manufacturers with the ability to build devices which could directly receive and decode video from Multichannel Video Programming Distributors (“MVPDs”). In this order, the Commission forbade the use of Selectable Output Control (“SOC”) signals, which would allow content owners and distributors to remotely turn off individual video connections used in televisions and other consumer electronics equipment. In May of 2008, the Motion Picture Association of America (“MPAA” or “Petitioner”) petitioned the Commission to waive these rules to allow movie studios to selectively disable video connections for movies offered via Video on Demand on a more rapid schedule than in the past. Public Knowledge *et al.* oppose this petition as both unnecessary and contrary to the public interest.

First, granting the waiver will frustrate consumer expectations. Customers of MVPDs have invested thousands of dollars in high definition home electronics equipment with the understanding that it would be able to use all current and future content. If MPAA uses this waiver to *minimum* effect, millions of viewers will be forced to purchase costly new equipment to view content that their current equipment is quite capable of displaying. Some customers will be able to receive this content, while others will not, simply because of what kind of cable they happen to use between their set-top box and their television. And while MPAA touts this forced upgrade as an advantage, in reality it is both a violation of consumer expectations and an imposition of a large, unnecessary cost on users.

Second, the waiver is unnecessary. Releasing movies to the public at an earlier date is not new and does not qualify as a “new business model.” In reality, shifting the release window

is a simply a business decision – and a business decision that other companies have already made. Further, Petitioner has provided no evidence that disabling analog or unprotected digital outputs would have any significant effect on copyright infringement, with or without this change in release window.

Finally, granting the petition will give MPAA members unprecedented and undesirable control over consumer device design. The waiver is not limited to analog outputs, and would allow the selective disabling of *any* output on MVPD networks. Should the MPAA choose to turn off other types of connections, it will harm even more users. Perhaps worse, it will give content owners the leverage to decide which outputs should be used in consumer electronics. Using this leverage, content owners could force consumer electronics designers and manufacturers to agree to almost any conditions to display SOC content, including design choices which are consumer-unfriendly and which are not driven by reasonable consumer desires or technological considerations.

For these reasons, the FCC should preserve consumer expectations and device manufacturer independence, and deny the MPAA's petition.

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COMMENTS OF PUBLIC KNOWLEDGE *ET AL.*

Public Knowledge,¹ Consumer Federation of America,² Digital Freedom Campaign,³ Electronic Frontier Foundation,⁴ Media Access Project,⁵ New America Foundation,⁶ and U.S. PIRG⁷ (“Public Knowledge *et al.*”) submit these comments in opposition to the MPAA’s petition for a waiver of 47 C.F.R. § 76.190347 in the above-referenced docket.

¹ Public Knowledge is a Washington, DC based public interest group working to defend citizens’ rights in the emerging digital culture. Public Knowledge’s primary mission is to promote innovation and the rights of consumers, while working to stop legislation or administrative action that would slow technological innovation, unduly burden free speech, shrink the public domain, or prevent fair use.

² Consumer Federation of America is an advocacy, research, education, and service organization. As an advocacy group, it works to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. Founded in 1968, its membership includes some 300 nonprofit organizations from throughout the nation with a combined membership exceeding 50 million people.

³ The Digital Freedom campaign is dedicated to defending the rights of students, artists, innovators, and consumers to create and make lawful use of new technologies free of unreasonable government restrictions and without fear of costly and abusive lawsuits. For more information, see www.digitalfreedom.org.

⁴ The Electronic Frontier Foundation (“EFF”) is a nonprofit devoted to protecting civil liberties and free expression in technology, law, policy and standards. Founded in 1990, EFF actively encourages and challenges industry and government to support the rights of consumers and technology innovators in the digital world. EFF is a member-supported organization and maintains one of the most linked-to websites in the world at <http://www.eff.org/>.

⁵ Media Access Project is a thirty-five year old non-profit tax exempt public interest media and telecommunications law firm which promotes the public’s First Amendment right to hear and be heard on the electronic media of today and tomorrow.

⁶ The New America Foundation is a nonprofit, post-partisan, public policy institute that was established through the collaborative work of a diverse and intergenerational group of public intellectuals, civic leaders and business executives. The purpose of New America Foundation is to bring exceptionally promising new voices and new ideas to the fore of our nation’s public discourse. Relying on a venture capital approach, the Foundation invests in outstanding individuals and policy solutions that transcend the conventional political spectrum. Through its fellowships and issue-specific programs, the Foundation sponsors a wide range of research, writing, conferences and public outreach on the most important global and domestic issues of our time.

⁷ U.S. PIRG serves as the national advocacy office for and federation of the non-profit, non-partisan state Public Interest Research Groups. The PIRGs frequently advocate on behalf of their one million members, and all consumers, in support of an open, democratic media marketplace that preserves the rights of the viewers and
(continued)

Introduction

The Motion Picture Association of America (“MPAA” or “Petitioner”), representing six member studios, has petitioned the FCC to waive a Commission rule which forbids the use of Selectable Output Controls (“SOC”).⁸ This would allow movie studios to selectively turn off video connections in the home of a Multichannel Video Programming Distributor (“MVPD”) subscriber. This waiver is both unnecessary and contrary to the public interest. If granted, the waiver will frustrate consumer expectations regarding their home theater equipment and will give movie studios unprecedented and undesirable control over the design and use of home electronics equipment.

Home viewers have invested thousands of dollars in consumer electronics with the understanding that they will be capable of playing high definition content, regardless of when movie studios decide to release that content. Many of these systems rely on high definition analog or unencrypted digital connections, which Petitioner explicitly seeks to disconnect. Further, while Petitioner does not actually address what will happen to users who rely on older equipment that does not recognize these controls, none of the possible outcomes is acceptable. If MPAA succeeds, millions of users who have invested significant amounts of money in their systems will be left out in the cold with regard to new content simply because it is being released earlier.

Additionally, if granted, the waiver will give the largest motion picture production companies veto power over the connections which are used to connect set-top boxes, receivers, high definition televisions, home theater systems, digital video recorders (“DVR”), and other

listeners. U.S. PIRG recently released a national secret shopper report on implications of the DTV transition and has commented before the FCC on a variety of media ownership and telecommunications issues.

⁸ Motion Picture Association of America, *Petition for Expedited Special Relief, Petition for Waiver of 47 C.F.R. § 76.1903* (May 9, 2008) [hereinafter *MPAA Petition*].

consumer electronics devices. This veto power will give media companies leverage to dictate which home electronics manufacturers can produce products capable of viewing their content. Through that leverage, these media companies will gain the ability to control other aspects of the devices' design and the users' experience. The net effect of granting the waiver is to let content owners choose which types of connections users of digital content can have in their homes and what uses those connections allow, regardless of which connections users, consumer electronics manufacturers, MVPDs, and the rest of the relevant market decide are best. An innovative home electronics industry must be driven (as it has been for years) by user preferences and the device manufacturers' technology decisions, not by a content company-controlled veto.

The FCC should protect consumer expectations and the ability of consumer electronics manufacturers to make customer- and technology-driven design decisions by denying the MPAA's petition.

I. FACTUAL BACKGROUND

In 2003, the FCC concluded the "Plug-and-Play" proceeding, whose goal was to create rules which would allow consumers to receive high definition digital television signals directly through televisions or other devices, without requiring use of a set-top box provided by an MVPD.⁹ The final order resulted in 47 C.F.R. § 76.1903, which states that an MVPD may not "attach or embed data or information with commercial audiovisual content, or otherwise apply to, associate with, or allow such data to persist in or remain associated with such content, so as to prevent its output through any analog or digital output authorized or permitted under license, law or regulation governing such covered product."¹⁰ This type of signal is known as "Selectable

⁹ *In re Commercial Availability of Navigation Devices*, 18 F.C.C.R. 20885 (2003) [hereinafter *Plug-and-Play Order*].

¹⁰ 47 C.F.R. § 76.1903.

Output Control,” and it allows content producers to turn off individual outputs on a customer’s set-top receiver, choosing which types of video connections will or will not work in the customer’s home.

In banning SOC data, the Commission specifically “recognize[d] consumers’ expectations that their digital televisions and other equipment will work to their full capabilities.”¹¹ This was done in part because cable operators and consumer electronics companies voluntarily chose “to publicly advocate the elimination of any MVPD device obligation to respond to commands as to selectable output controls and the observance of the same encoding rules as called for herein in all digital delivery systems, including Satellite and Internet systems.”¹² Notably, the DFAST License Agreement, which device manufacturers must agree to before building devices which receive digital signals from MVPDs, “does not impose obligations to respond to selectable output control or down-resolution commands in the operation or implementation of the POD technology in the licensed devices.”¹³

However, in the *Plug-and-Play Order*, recognizing that it cannot predict all new technologies and uses of those technologies, the Commission stated that it would consider petitions and waivers for “future applications that could potentially be advantageous to consumers.”¹⁴ On May 9, 2008, the MPAA, on behalf of six member companies who produce and distribute theatrical films, petitioned the FCC for “expedited special relief” in the form of a waiver.¹⁵ The purpose of this waiver is ostensibly to provide additional protection for a “new

¹¹ *Plug-and-Play Order* ¶ 60.

¹² *Letter to FCC and Memorandum of Understanding* 9 (Dec. 19, 2002) [hereinafter *Plug-and-Play MOU*], available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-3A2.pdf.

¹³ *Plug-and-Play MOU* 9.

¹⁴ *Plug-and-Play Order* ¶ 61 (“We nonetheless recognize that selectable output control functionality might have future applications that could potentially be advantageous to consumers, such as facilitating new business models, and will consider waivers, petitions or other proposals to use selectable output control in this regard.”).

¹⁵ *MPAA Petition*.

business model.” This alleged business model consists of offering recently-released movies on Video on Demand (“VoD”) in “prior to the normal release date of prerecorded media (e.g., DVDs) for general in-home viewing.”¹⁶ In other words, these studios want to release the same movies to the same customers via the same VoD – but earlier.

Public Knowledge *et al.* now file these comments in opposition to the MPAA’s petition.

II. GRANTING THE WAIVER WILL FRUSTRATE CONSUMER EXPECTATIONS

In the order prohibiting MVPDs from incorporating selectable output control, the FCC made a special effort to recognize the importance of maintaining and supporting consumer expectations:

We also recognize consumers' expectations that their digital televisions and other equipment will work to their full capabilities, and the potential harm to the DTV transition if those expectations are frustrated. In particular, we are concerned that selectable output control would harm those “early adopters” whose DTV equipment only has component analog inputs for high definition display, placing these consumers at risk of being completely shut off from the high-definition content they expect to receive.¹⁷

Furthermore, the Commission indicated that its decision-making process specifically centered around striking a balance between the needs of copyright owners and consumers.

In addition, enacting limits on the amount of copy protection . . . strikes a measured balance between the desire of content providers and MVPDs . . . *and the preservation of consumer expectations* regarding the time shifting of programming for home viewing and other permitted uses of such material.¹⁸

The Commission should stand by its previous analysis of selectable output control and its stated emphasis on preserving consumer expectations. Granting a waiver of the ban on SOC would violate consumer expectations by blocking permitted uses and cutting users off from high-definition content that owners of legacy devices would expect to be able to receive. While

¹⁶ *MPAA Petition* i.

¹⁷ *Plug-and-Play Order* ¶ 60.

¹⁸ *Id.* ¶ 11 (emphasis added).

MPAA states that granting its petition “would not cause any consumer to lose a single linear channel the customer currently receives,”¹⁹ this misses the point. Consumers expect not only to access the linear channels they currently receive, but to be able to use VoD services as they always have. They do not expect that *some* VoD services will be unavailable to them simply because of the type of TV they own or the types of inputs it has.

A. SOC-Enabled Content Will Frustrate Consumer Expectations by Blocking Access by Owners of High Definition Legacy Devices

While the petition describes the seamless, ideal scenario experienced by a user owning only recent, HDCP²⁰-compliant devices and using only the protected connections, it fails to address the issue of legacy support. Many consumers have bought High Definition televisions with analog “component” inputs or unprotected digital DVI²¹ inputs. These users may also have purchased cable boxes, DVRs, and receivers which are compatible only with these inputs. In fact, over 11 million of the 83 million HDTVs sold in the last ten years have *only* analog inputs.²² And this number does not include the users who have bought HDTVs which offer unprotected digital connections like IEEE 1394,²³ or where the customer has chosen not to use HDMI²⁴ for reasons of cost and compatibility with other devices like home theater systems. And

¹⁹ *MPAA Petition 5*.

²⁰ High-Bandwidth Digital Content Protection (“HDCP”) is an encryption and content protection standard used by HDMI, *see infra* n.24, and other video interfaces. See *High Definition Multimedia Interface*, at <http://www.digital-cp.com/>.

²¹ Digital Visual Interface (“DVI”) is a video interface standard. DVI supports, but does not require HDCP protection. See *DVI Specification*, at http://www.ddwg.org/lib/dvi_10.pdf.

²² Rodolfo La Maestra, *High Definition Movies Before They Hit Blu-ray? Only if Your HDTV Permits It.*, HDTV Magazine (June 17, 2008), available at http://www.hdtvmagazine.com/articles/2008/06/high_definition_movies_before_they_hit_blu-ray_only_if_your_hdtv_permits_it.php.

²³ IEEE 1394 is a serial bus interface which is often used for transfer of digital audio and video data. See *IEEE 1394 Overview*, at <http://standards.ieee.org/micro/1394overview.html>.

²⁴ High Definition Multimedia Interface (“HDMI”) is an digital audio/video interface standard used by televisions and other home electronics devices. The HDMI specification requires support for HDCP protection. See *HDMI Frequently Asked Questions*, at <http://www.hdmi.org/learningcenter/faq.aspx>.

while *all* of these devices are capable of handling High Definition content on whatever date the creators choose to release it, the entire purpose of SOC is to turn those connections off.

What happens when a consumer purchases content with SOC data enabled, but attempts to use a legacy device that does not support the SOC data? Petitioner has been notably vague on this point, which forces both the Commission and interested parties to speculate. There are a number of ways that non-upgradeable legacy devices could respond to SOC-tagged data. First and most likely, MVPDs could choose to not offer these services to users of legacy devices. Second, these devices may fail to recognize the content altogether, and so display nothing. Third, they may fail to recognize the SOC restrictions and play the content through all outputs. None of these outcomes is acceptable.

1. If Legacy Devices Obey SOC Rules, Consumers Expectations Will Not Be Met

Petitioner states that "consumers without the necessary equipment will be aware that this new Service is not available to them,"²⁵ suggesting that legacy devices will not, in fact, display SOC-flagged content. This outcome could be achieved by encrypting or otherwise modifying the content so that pre-SOC devices cannot recognize it, or through MVPDs configuring their systems not to offer SOC content to pre-SOC devices.

While this would bring Petitioner closer to their goal of eliminating legacy outputs, it would have a severe impact on the consumer. Even in this best-case scenario, where customers will be prevented from ordering movies they cannot watch, consumer expectations will be frustrated. In this scenario, users who do not have or use MPAA-preferred, protected interfaces will be completely unable to see or order early-release content. These customers will include

²⁵ *MPAA Petition 5.*

those who have purchased large, expensive, HD-capable TVs before the advent of digital connections, or before HDCP was commonly part of those connections.

Users who purchase expensive multi-component HD-capable entertainment systems are likely to consider them generally future-proof and expect them to be capable of handling whatever media becomes available on the market. Reasonable consumers simply do not expect that because a movie studio chooses to shift the date on which it starts to distribute a movie through VoD, they will not be allowed to purchase that content for viewing on their high definition, perfectly functional televisions. Even if early-release films do not appear on the list of VoD offerings for these users, customers will be left wondering why neighbors and friends—those who subscribe to the same MVPD service at the same price, and have near-identical setups using different cables—are not offered the same movies.

It would be a significant and substantial violation of consumer expectations to require buying a new cable box, DVR, and TV just to be able to watch an on-demand video sooner than before, especially given that consumers do not tend to distinguish between the various industry-standard release windows. The fact remains that users in this situation have purchased hardware which is quite capable of delivering the Services discussed in the petition, but would be prevented from doing so by a policy choice made by content owners, not a design choice made by the manufacturers of those purchased devices or a purchasing choice made by users.

2. Legacy Devices Which Fail to Display Content After Purchase Will Frustrate Consumer Expectations

In its petition, the MPAA suggests that mere marketing is the only protection afforded consumers: “For example, one potential implementation could entail a dedicated channel that would be advertised, branded, marked within the program guide, and otherwise messaged to consumers as being available only to those subscribers who have the appropriate

equipment . . .”²⁶ Nowhere does the petition state that an individual who cannot display the content would be stopped from paying first. In that case, a user would purchase a movie, only to find that their television only displays a blank screen or an error message. This would produce yet more consumer frustration and confusion, as a purchaser’s only recourse would be to contest the charge after the fact. Even after consumers became aware of the MPAA-imposed limitations on their television use, they would be frustrated by the unnecessary disparity between their own options and their similarly-equipped neighbors’, and would incur extensive costs if they chose to “upgrade” their hardware to access those services.

3. Legacy Devices Which Do Not Recognize SOC Data May Offer Unprotected Access to the Video

Petitioner alleges that “[i]n order to make high value, high definition, early release movies available to consumers in this manner, the Petitioners need the Services to flow over secure and protected digital outputs in order to prevent unauthorized copying and redistribution.”²⁷ However, because legacy devices were not designed to recognize SOC data, it is impossible for them to respect it. For example, the license governing existing CableCard-based devices has no SOC requirement at all.²⁸ Even if the Commission allows MVPDs to add SOC data to the video stream, it is possible that legacy devices will ignore such SOC data and continue to output the video on connections that Petitioner would prefer to block. Petitioner would be left in the same situation it is in now – with no control over the outputs, they will be just as much exposed to illegal copying as they claim to be today.

²⁶ *MPAA Petition 5*.

²⁷ *MPAA Petition 6*.

²⁸ *Plug-and-Play MOU 2* (“The DFAST License Agreement does not impose obligations to respond to selectable output control . . .”). Note that this license does not affect the petition directly, as CableCard devices do not offer VoD or other two-way services.

This possibility also produces a situation where older devices have *more* functionality than newer devices. Petitioner claims that granting the petition will produce “a significant incentive for consumer to purchase HDTVs.”²⁹ But to those who want to use their televisions and video services in legal ways not possible on “protected” outputs, this produces the opposite incentive, and gives users a reason *not* to upgrade to newer, less functional devices.

There is also no guarantee that new devices will respond to SOC data, either, further reducing the usefulness of SOC data. For instance, tru2way is the current name of one standard being pushed for a standard similar to Plug-and-Play, but which supports “two-way” services like VoD.³⁰ Devices which use the tru2way specification must include SOC support. However, not all manufacturers have agreed to support the tru2way spec, and those who have agreed have not yet released tru2way-complaint devices. Because SOC restrictions limit consumer freedom, manufacturers would be encouraged *not* to support the new tru2way standard if SOC controls are allowed by the Commission.

B. Granting the Waiver Will Interfere with Consumers’ Expectations Regarding Legal Use of Content

In the original order forbidding use of SOC data, the Commission recognized that there are legal uses of content beyond what a cable box and television alone allow, and that consumers have legitimate “expectations regarding the time shifting of programming for home viewing and other permitted uses of such material.”³¹ It is important to recognize that mandating restrictions which Congress explicitly declined to adopt³² can conflict with copyright law—which is outside

²⁹ MPAA Petition 4.

³⁰ See tru2way, at <http://www.tru2way.com/>.

³¹ Plug-and-Play Order ¶ 11.

³² See, e.g., 17 U.S.C. § 1201(c)(3) (declining to force consumer electronics to respond to technological protections).

the Commission's purview—by severely limiting users' ability to legally use content in the ways they expect to.

Petitioner describes SOC as a “higher level of protection against copyright theft,”³³ but in reality, it is a blunt instrument capable only of *completely* preventing access to content without regard to the legality of the use. The Copyright Act, on the other hand, states explicitly that:

the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

17 U.S.C. § 107. This list of fair uses is not exhaustive:³⁴ Other uses which have been held to be “fair use” include recording video for later playback, or “time-shifting,”³⁵ as well as the ability to convert a recording into a different format in order to play it back in a different place (“space-shifting”).³⁶ These uses do not require permission from the content owner, but do require the ability of the user to access the content they have purchased.

Because such functionality is in high demand by the public, many successful consumer electronics devices on the market are specifically designed to implement time-shifting (*e.g.* TiVo³⁷ and Hauppauge HD PVR³⁸) or space-shifting (*e.g.* Slingbox³⁹). These types of devices could be rendered obsolete by selectable output controls that bar analog or unrestricted digital output. The Slingbox Pro and Hauppauge HD PVR do not have HDMI inputs⁴⁰ – mostly likely

³³ *MPAA Petition* i.

³⁴ *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994) (“The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. The text employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the ‘illustrative and not limitative’ function of the examples given. . . .”) (citation omitted).

³⁵ *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

³⁶ *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999).

³⁷ *TiVo*, at <http://www.tivo.com/>.

³⁸ *Hauppauge HD PVR*, at http://www.hauppauge.com/site/products/data_hdpvr.html.

³⁹ *Sling Media*, <http://www.slingmedia.com/>.

⁴⁰ *See Cable and Connector Glossary*, Sling Media Knowledge Base, at <http://support.slingmedia.com/get/KB-005332.html>; *Slingbox Pro Quick Start Guide*, at <http://support.slingmedia.com/get/KB-005166.pdf>; *HD Connect* (continued)

because the license agreement for HDMI and HDCP would prevent both devices from performing their legal, useful functions.⁴¹ Instead, these devices rely on high definition, analog component video to perform their functions. Shutting down the analog outputs of a cable box would therefore make obsolete devices that currently enable time- or space-shifting, and would prevent the numerous other legal uses listed in the Copyright Act. Consumers expect to be able to make legal use of the content they pay for. Granting the petition will prevent these legal uses and further frustrate consumer expectations.

C. Granting the Petition Will Be Costly to Consumers and Harm the DTV Transition

The only public interest that Petitioner lists to justify its request for a waiver of the SOC ban is that it will encourage the digital television (“DTV”) transition.⁴² This claim is spurious, as any effect on the DTV transition will be minimal and contrary to the public interest. In fact, in the *Plug-and-Play Order*, the Commission concluded that the opposite was true, and that banning SOC would further the DTV transition for broadcast television: “Bans on both the current use of selectable output control and the down-resolution of broadcast programming will further the DTV transition and ensure that consumer expectations regarding the functionality of their digital cable ready televisions and products are met.”⁴³ The Commission was correct.

First, the DTV transition and this petition are only nominally related. The relevant regulations and the petition only apply to MVPDs, and not to the over-the-air broadcasts which are at the core of the DTV transition. Customers who would be receiving this content from their

and HDMI, Sling Community Forums, at <http://www.slingcommunity.com/forum/thread/17888/HD-Connect-and-HDMI>; *Hauppauge HD PVR*, at http://www.hauppauge.com/site/products/data_hdpvr.html.

⁴¹ See, e.g., *Standing Shoulder to Shoulder - Brits No Longer Flying SOLO* (Sept. 26, 2007), at <http://www.slingcommunity.com/article/24612/Standing-Shoulder-to-Shoulder---Brits-No-Longer-Flying-SOLO/>; John P. Falcone, *Ask the Editors: Why Don't Video Recorders have HDMI Inputs?* (Feb. 22, 2008), at http://news.cnet.com/8301-17938_105-9870317-1.html.

⁴² *MPAA Petition* 8.

⁴³ *Plug-and-Play Order* ¶ 11.

MVPD are highly unlikely to also be receiving over-the-air DTV service on the same television. Even if one accepts Petitioner's claim that SOC will force people upgrade their TVs to expensive high definition models which are DTV-ready, it is *against* the public interest because it imposes a high cost on those who are least able to bear it – those who rely on over-the-air broadcast for television.

Second, any effect that a waiver will have on the public interest and the DTV transition will be negative. As discussed above, many people have already purchased digital high-definition TVs without protected inputs. If Petitioner truly only intends to allow this content to be provided through protected digital connections, then only those individuals owning recent, high-end devices will be able to view the content. This means that many consumers who purchased DTV-capable systems will *not* be able to view SOC content. These people would be forced to upgrade their equipment solely because the MPAA does not feel it is “protected” enough, and not because of any inability in the equipment. The best way to protect the DTV transition is to deny the MPAA's petition.

III. WAIVER OF THE SELECTABLE OUTPUT CONTROL RULES IS UNNECESSARY

Waiving the SOC ban for early-release VoD is unnecessary, both because shifting the release window is not a new business model and because there is no evidence that allowing SOC controls for this early release window would be necessary or useful for combating copyright infringement.

A. An Accelerated Release Window is Not a New Business Model

Merely shifting forward the release date for the same content in a existing delivery mechanism is not a "new business model" from the consumer's perspective. First, the offered content – the movie itself – is fundamentally unaltered. No content or value has been added beyond the ability to legally view it outside of a cinema but before it is distributed on DVD.

Second, the distribution channel is unchanged. Consumers have been able to order VoD and pay-per-view through their cable companies for many years, including high definition theatrical releases.⁴⁴ Allowing this type of marketing choice to qualify as a new business model eligible for a waiver will open the door to numerous future attempts to burden consumers with unnecessary restrictions.

Second, shifting the release window is not new. Many media and entertainment companies are already releasing VoD offerings at the same time as on DVD or earlier. Content producer Time-Warner has announced a shift to the "day-and-date" model with VoD concurrent with DVD release.⁴⁵ Over two years ago, the Independent Film Channel announced its intention to release films simultaneously in theaters, on DVD, and via VoD;⁴⁶ it currently releases two films per month simultaneously in theaters and via VoD.⁴⁷ Even two Petitioner members – Universal City Studios LLLP and Warner Bros. Entertainment, Inc. – participate in a Cablevision service that provides VoD to customers on the DVD release date, and mails the DVD to the customer's house to arrive later.⁴⁸ Some content owners are even pushing the release dates further – Mark Cuban recently announced that his production company, Magnolia Pictures, will air its new movies on VoD *before* theatrical release – and, of course, will not require or use any SOC restrictions.⁴⁹

⁴⁴ See, e.g., http://en.wikipedia.org/wiki/Video_on_demand;

<http://www.museum.tv/archives/etv/P/htmlP/payperview/payperview.htm>.

⁴⁵ Julia Boorstin, *Time Warner: Watch DVDs With VOD On Release Day*, CNBC Media Money (Apr. 30, 2008), available at <http://www.cnbc.com/id/24391232>.

⁴⁶ Sharon Waxman, *Missed It in the Theater Today? See It on DVD Tonight*, New York Times (Jan. 23, 2008), available at <http://www.nytimes.com/2006/01/23/business/media/23independent.html>.

⁴⁷ IFC In Theaters, at <http://www.ifcintheaters.com/aboutUs.htm>.

⁴⁸ Jennifer Netherby, *Cablevision Offers VOD, DVD Simultaneously*, Content Agenda (Feb. 4, 2008), available at <http://www.contentagenda.com/article/CA6528464.html>.

⁴⁹ Hugh Hart, *Mark Cuban to Show New Movies on TV Before Theatrical Release*, Underwire (July 9, 2008), available at <http://blog.wired.com/underwire/2008/07/cuban-to-show-n.html>.

Consumers are likely unaware of release window details for each individual delivery mechanism, and a shift from 150 days after theatrical release to 60 days after theatrical release may be welcome, but not be perceived as a paradigmatic change. Petitioner's belief that delivering the same content earlier requires a higher level of protection does not turn what is a simple shifting of release windows into a new business model or justify forcing large numbers of consumers to upgrade their equipment.

B. The MPAA Has Provided No Evidence that the Waiver is Necessary

Petitioner has provided no evidence that this restriction on users' rights is necessary or even helpful for their stated goal of preventing or reducing copyright infringement. The MPAA argues that their proposed business model, providing high definition content for in-home viewing, "would require a higher level of protection against copyright theft than is currently permissible under the Commission's rules."⁵⁰ The MPAA bases its argument for additional protection on the belief that their "theatrical movies are too valuable in this early distribution window to risk their exposure to unauthorized copying, redistribution or other unauthorized activities."⁵¹ Without additional protection, the MPAA alleges that "[d]istribution over insecure outputs would facilitate the illegal copying and redistribution of this high value content, causing untold damage to the DVD and other 'downstream' markets."⁵²

The MPAA's concern over the security of analog outputs is one that it has voiced since 2002.⁵³ In particular, the association has sought a solution to the perceived problem of the "analog hole." This "hole" in copy protection systems allows the duplication of even protected

⁵⁰ *Petition for Expedited Special Relief: Petition for Waiver of 47 C.F.R §76.1903*, CSR-7947-Z/MB Docket No. 08-82, i (May 9, 2008).

⁵¹ *Id.* at 3.

⁵² *Id.*

⁵³ Motion Picture Association of America, *Content Protection Status Report*, (Apr. 25, 2002) available at http://judiciary.senate.gov/special/content_protection.pdf.

digital transmissions when those digital signals “are stripped of their protection as they pass through analog outputs.”⁵⁴ As many digital devices can capture and record analog signals, this “analog hole” allows for the unauthorized access to unprotected content, even if digital rights management is employed by a content producer to restrict such access.

Of course, the mere ability to access the content does not mean that the illegal copying and redistribution feared by the MPAA will necessarily follow. In the Petition, the MPAA provides *no* evidence that this has happened or is likely to happen if its constituents shift their release windows. Evidence which the MPAA has relied on in the past to demonstrate the dangers of the “analog hole” is unreliable and inapposite.⁵⁵ In the complete absence of evidence, there is no reason to believe that additional, costly, restrictive technologies are needed.

In fact, MPAA’s proposed “business model” aims to bring recently-released movies into consumer homes, providing a legal, convenient source of new movies for home viewing. The proliferation of online, legal purchasing of music has amply demonstrated that when content owners offer their products in a convenient, non-restricted, reasonably priced form, people will pay for it.⁵⁶ In the words of Disney CEO Robert Iger, “The best way to combat piracy is to bring

⁵⁴ *Id.* at 4.

⁵⁵ In the past, MPAA has regularly cited the study of worldwide content piracy conducted commissioned by MPAA and performed by LEK Consulting as evidence that these unauthorized activities are occurring. See Motion Picture Association of America, *MPAA Releases Data From Piracy Study, Press Release (May 3, 2006)*, available at http://www.mpa.org/press_releases/2006_05_03lek.pdf. First, the LEK study has been publicly unavailable since its release. In fact, a Senate request to review the methodology behind the study has gone unfulfilled for over two years. See *The Analog Hole: Can Congress Protect Copyright and Promote Innovation?: Hearing Before the S. Comm. on the Judiciary*, 109 Cong. (2006) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary), <http://judiciary.senate.gov/hearing.cfm?id=1956>. Second, portions of the LEK study have already been proven incorrect. See *Revised MPAA Piracy Study Puts Less Blame on Students*, L.A. Times (Jan. 23, 2008), available at <http://articles.latimes.com/2008/jan/23/business/fi-download23>. Finally, nothing in the study suggested that source of the infringing materials was the “analog hole” or unprotected digital outputs from VoD, which is the only source that the petition would have any impact on at all.

⁵⁶ See, e.g., Thomas O. Barnett, *Interoperability Between Antitrust and Intellectual Property* 5-9 (2006), <http://www.usdoj.gov/atr/public/speeches/218316.pdf> (noting that iTunes solved problems of both rampant piracy and declining music sales).

content to market on a well-timed, well-priced basis.”⁵⁷ Therefore, such a move to earlier VoD release is likely to *reduce* infringement, even without SOC. On the other hand, when distributors attempt to reduce infringement by offering their paying customers *less* than what they are used to receiving, those customers react negatively.⁵⁸

Finally, Petitioner suggests that its member companies will not experiment with new release windows if the waiver is not approved.⁵⁹ This is reminiscent of Viacom’s threat in 2002 that “if the broadcast flag is not implemented and enforced by next summer, CBS will cease providing any programming in high definition for the 2003-2004 television season.”⁶⁰ This threat never materialized. As discussed above, Petitioner members and other content producers are already experimenting with VoD release timing. Absent any evidence that an earlier release window will result in massive copyright infringement, and in the face of new evidence to the contrary, will Petitioner’s members really choose not to explore these new business opportunities while their competitors continue to do so?

IV. THE MPAA IS SEEKING TECHNOLOGICAL CONTROL OVER CONSUMER ELECTRONICS DEVICES

MPAA would like to have the Commission believe that the sole purpose of the waiver is to protect its members’ copyright interests. In reality, the Petition has much more ambitious goals. It is also an attempt by large content owners to get additional control over the design and capabilities of consumer electronics devices and MVPD services. During the original Plug-and-

⁵⁷ See Gigi Sohn, *Disney's Iger to CES: We Can Compete with Free*, Public Knowledge Policy Blog (Jan. 9, 2007), at <http://www.publicknowledge.org/node/781>.

⁵⁸ See, e.g. Lorraine Woellert, *Sony's Escalating "Spyware" Fiasco*, Bus. Wk. (Nov. 22, 2005), available at http://www.businessweek.com/technology/content/nov2005/tc20051122_343542.htm (describing the fall in sales of Van Zant's 2005 release from number 887 to 25,802 in less than 3 weeks as word of the DRM drove fans away).

⁵⁹ See *MPAA Petition* at ii (“Absent sufficient protections, the Petitioners’ theatrical movies are simply too valuable in this early distribution window to expose them to uninhibited copying or redistribution.”).

⁶⁰ *Comments of Viacom*, Docket 02-230, available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394608.

Play proceeding, advocates of SOC sought to make it broadly available as a way to copyright infringement.⁶¹ In that proceeding, the Commission concluded that “a flat ban on selectable output control is necessary in light of the extreme consequences of an MVPD's use of that tool.”⁶² Those consequences will be no less extreme if SOC is used today or targeted at early-release movies.

Granting the waiver would put MPAA member companies on the path to controlling what types of connections will be used by all U.S. consumers, and to profiting from that control. The SOC waiver seeks not just the ability to turn off analog or unencrypted digital outputs, but veto power over *any* output that the content owner chooses, including currently-favored, encrypted outputs like HDMI. In the future, this ability could be used to turn off all existing connections for the proposed “Services,” and only allow those services to flow through a proprietary connection sanctioned by MPAA. It is not hard to imagine that manufacturers would have to support this connection, or that in order to license this connection, consumer electronics companies would have to agree to terms dictated by Petitioner. These terms might include any manner of restriction, including those which the Commission and Congress have chosen not to grant them.

A model of how this would work can already be seen. Sony Pictures recently announced it will be offering its new movie, *Hancock*, to some Sony television owners equipped with Sony’s Internet media connection before release on DVD and other home media.⁶³ However, the movie will only be available to those who own the Sony box, and *will only flow over Sony’s*

⁶¹ See *Plug-and-Play Order* ¶ 58.

⁶² *Plug-and-Play Order* 20965, Statement of Commissioner Kathleen Q. Abernathy.

⁶³ “*Hancock*” Coming to Sony Bravia TVs Before Blu-ray, DVD, or Cable, Consumer Reports Blog (July 4, 2008), available at <http://blogs.consumerreports.org/electronics/2008/07/will-smith-summ.html>.

proprietary video connection to a Sony TV. This model could easily be extended to MVPDs by leveraging SOC controls – if the Commission grants this waiver.

Decisions as to what types of technologies are put into consumer devices should be made by consumer electronics producers, as informed by market demands. The Commission should not allow this control to be pushed upstream to the content owners. Instead, it should deny the petition, allow the market to function, and stop MPAA's newest attempt to gain this type of control.

Conclusion

For the above reasons and the reasons, the Commission should deny MPAA's Petition for a waiver of the Selectable Output Control rules.

Respectfully Submitted,

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Digital Freedom Campaign
Electronic Frontier Foundation
Media Access Project
New America Foundation
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July 21, 2008

CERTIFICATE OF SERVICE

I, Jeffrey Pearlman, hereby certify that on this 21st day of July, 2008, I caused a copy of the foregoing Comments on Petition for Expedited Special Relief and Petition for Waiver of 47 C.F.R. § 76.1903 to be served by first-class mail, postage prepaid, to the following:

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