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March 28, 2003

BY HAND

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
c/o 236 Massachusetts Avenue, NE
Suite 110
Washington, DC 20002

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MAR 28 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CS Docket No. 98-120; PP Docket No. 00-67

Dear Ms. Dortch:

On behalf on Starz Encore Group LLC, enclosed are an original and eleven copies of comments in the above-referenced "Plug and Play" proceeding. Please distribute a copy of the comments to each Commissioner.

If you have any questions regarding this filing, please contact me

Sincerely,



Thomas F. Bardo
Counsel for Starz Encore Group LLC

TFB:lac
Enclosures

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Before the

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAR 28 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 304 of the)	CS Docket No. 97-80
Telecommunications Act of 1996)	
)	
Commercial Availability of Navigation Devices)	
)	
Compatibility Between Cable Systems and)	PP Docket No. 00-67
Consumer Electronics Equipment:)	
)	
)	

COMMENTS OF STARZ ENCORE GROUP LLC
ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

STARZ ENCORE GROUP LLC

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March 28, 2003

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**COMMENTS OF STARZ ENCORE GROUP LLC
ON THE FURTHER NOTICE OF PROPOSED RULEMAKING**

Starz Encore Group LLC (“SEG”) submits these Comments in response to the Commission’s Further Notice of Proposed Rulemaking in the above-captioned proceeding, Implementation of Section **304** of the Telecommunications Act of 1996, FCC 03-3, released January 10, 2003 (“Further Notice”). The Further Notice seeks comment on whether the Commission should adopt rules to implement an agreement reached between the consumer electronics industry, represented by the Consumer Electronics Association (“CEA”), and multiple cable television system operators (“MSOs”), represented by the National Cable and Telecommunications Association (“NCTA”), seeking to establish a so-called “cable plug and play” standard for digital television sets and receivers

I. Introduction and Summary

On December 19, 2002, the CEA and NCTA filed with the Commission a “Memorandum of Understanding” (“MOU”) which sets out an agreement between such parties on a cable compatibility standard for an integrated, unidirectional digital cable television receiver, as well as other unidirectional cable products. Television sets and other unidirectional cable television receivers manufactured pursuant to the MOU would be capable of receiving analog basic, digital basic, and digital premium cable television programming by direct connection to a cable system providing analog and digital programming. The MOU sets forth a comprehensive set of actions that would be undertaken by the consumer electronics manufacturers and the cable operators to implement the plug and play agreement, as well as a broad set of rules that those parties proposed for the Commission to adopt that would apply to all multichannel video programming distributors (“MVPDs”), including direct broadcast satellite (“DBS”) and other non-cable distributors, as well as to program producers, broadcasters, and satellite distributed programming networks (such as SEG).

Most importantly to SEG, the proposed rules would govern encoding of audiovisual content for reception by such digital receivers (“Encoding Rules”). These Encoding Rules specifically define the rights of consumers to make copies of programs carried on broadcast stations and programming networks. The Further Notice seeks public comment on the rules proposed by the MOU.

Starz Encore Group is one of the largest providers of cable and satellite digital programming in the United States. Starz Encore Group is also a pioneer in the newly emerging category of Subscription-Video-On-Demand (“Subscription-VOD”)

programming offered over cable television, direct broadcast satellite, ADSL and internet protocol (“IP”)-based broadband distribution systems. **As** such, SEG has a strong interest in the Encoding Rules that have been proposed as part of the Further Notice.’ While SEG strongly endorses protecting video programming against piracy, SEG believes that certain of the proposed Encoding Rules are contrary to the intent of Congress as clearly articulated in the Digital Millennium Copyright Act, 17 USC § 1201(k) (“DMCA”), and do not reflect consumers’ reasonable and legitimate expectations of their fair use ability to copy televised programming. In particular, SEG submits that any rules adopted by the Commission should allow for a single copy to be made of programs that are part of any Subscription-VOD offering. The rules as proposed would allow program suppliers and studios to prevent any copy being made of such programs provided through Subscription-VOD, a limitation which is contrary to the clear intent of the DMCA, contrary to subscribing consumer’s reasonable expectations, and inconsistent with the law of fair use.

Finally, as part of these Comments, SEG respectfully requests that the Commission clarify that copying under the Encoding Rules must be analyzed from the consumer’s perspective, such that any prohibition or limitation on copying starts from the moment that the signal leaves the consumer’s reception equipment, and does not exclude copying necessary to implement reception and use of the applicable technical distribution platform.

¹ Although SEG is an associate programmer member of the NCTA, SEG was not a party to any of the negotiations between NCTA and CEA in reaching the MOU, and is not a signatory to the MOU. Only multiple cable system operator (“MSO”) members of NCTA were signatories to the MOU. Unlike many other satellite cable programming vendors, SEG has no significant common ownership with any MSO, MVPD or, for that matter, any major movie or television production studio.

11. **Starz Encore Group Has Been the Primary Innovator of Subscription-VOD Technology and Service**

SEG does not arrive at its views on this subject casually. Rather, SEG is the most prominent innovator of Subscription-VOD, and views Subscription-VOD as an extremely important advance for consumers that promises to revolutionize cable, satellite, and other broadband delivered television. Leveraging important advances in the underlying technical distribution platform, the Subscription-VOD business model empowers subscribers, in return for paying a monthly subscription fee, to choose from a rotating listing of movies or other programs, which subscribers may select and view at any time during the time period that a particular program is offered, with full control of playback, including start, fast forward, rewind, pause, stop and restart. When offered in conjunction with SEG's premium linear movie programming networks, **SEG's** current version of Subscription-VOD, which *is* branded, "Starz On Demand," offers approximately 700 programs each month, with roughly one quarter of such programs rotated out every week and replaced with new programs.⁴ The films included in Starz On Demand are generally licensed from the Hollywood studios and appear on Starz On Demand in the same "windows" as the first run and library films found on SEG's linear services (STARZ!, Encore, and SEG's other multiplexed channels), through SEG's numerous first run output and library agreements with such studios.

As noted above, SEG has been the leading innovator of Subscription-VOD.

SEG's agreement with Disney studios in 1999 represents premium television's first film

² **SEG** may ultimately offer program schedules for Subscription-VOD programming that change more frequently, and in less of a formulaic manner, as SEG learns more about consumer demand and the capacity of various delivery platforms used by MVPD networks.

licensing agreement with a major Hollywood studio that bundled broad Subscription-VOD rights together with traditional linear premium channel distribution rights. SEG has spent years advocating to cable operators and other MVPDs that they launch the service, and has had several successful tests and launches. SEG was the first, and remains the only, premium television service to establish and launch, in August 2002, a test of Subscription-VOD on a DBS platform utilizing personal video recorder/receivers, in conjunction with DIRECTV and TiVo. SEG was the first, and remains the only, premium television service to enter into an agreement, announced in December 2002, to launch Starz On Demand Subscription-VOD on an IP-Based broadband technical distribution platform, in conjunction with RealNetworks, so that subscribers may receive downloads of Starz On Demand films on their personal computers via high speed broadband connections. That service is expected to be launched within a few months. See SEG Press Releases about innovations in Subscription VOD attached to these Comments as Appendix A.

With respect to Subscription-VOD, SEG's interest, knowledge, and experience far exceeds that of the parties to the CEA-NCTA MOU, that is, the consumer electronics industry, which has no experience with the intricacies and nuances of Subscription-VOD. and indeed the cable industry, whose experience with Subscription-VOD is extremely limited.³

At the same time, Subscription-VOD is still a nascent, emerging product, which has yet to have widespread consumer deployment. The business model continues to

³ See pages 15-16 below for a description of the limited grasp of Subscription-VOD on the part of drafters of 5C and the MOU.

evolve rapidly in many respects, in terms of retail pricing, movie and programming mix, and the time rotations during which such movies and programming are scheduled to be available to consumers to optimize customer satisfaction. Many of the Subscription-VOD and Starz On Demand launches are still considered to be tests, as SEG and its distribution partners work out the structure of the service in efforts to make the service as compelling as possible for consumers.

In urging the Commission to revise the proposed Encoding Rules to include Subscription-VOD in the “Copy Once” category instead of the “Copy Never” category, SEG emphasizes that it is not wildly asserting that all limits on copying must be removed, or that file sharing is good, or that free copying for commercial gain is just fine. Nothing is further from the truth. Indeed, SEG is appalled and outraged by the growing levels of file sharing piracy. SEG is convinced that valuable video programming must be strongly protected from piracy in all forms, and that without tight controls on illegal file sharing or commercial copying, the production of films will eventually be doomed. Without tight controls on such illegal copying of copyrighted films, all financial incentives to create such films will disappear. SEG is fully committed to the protection of copyrighted works. Nonetheless, in the narrow issue of the proper classification of Subscription-VOD, there are important reasons that such Subscription-VOD service should be moved from the Copy Never category to Copy Once, for personal, non-commercial household viewing.⁴

⁴ While we may empathize with the consumer’s fair use expectations to copy Video on Demand content as well, the DMCA is clear in classifying VOD as Copy Never, unlike with Subscription-VOD. There is a clear distinction between PPVNOD, which are one-time transactions that allow a single or limited number of viewings of a single program, and Subscription-VOD, which

111. Clear Definition of the Term “VOD” Explains Why Subscription-VOD Can Only Be Properly Classified as Copy Once

Over the last several years, regulators and industry commentators have begun to imprecisely use the term “VOD” interchangeably to describe two very different concepts—first, VOD as a *business model*, and second, VOD as a *technical distribution platform*. Clarifying the confusion inherent in these two fundamentally different usages helps demonstrate the error inherent in including Subscription-VOD in Copy Never under the proposed Encoding Rules, and the importance of including Subscription-VOD in Copy Once.

The DMCA used the term “VOD” purely in its *business model* sense, but subsequent misinterpretations of the DMCA have incorrectly used “VOD” in its *technical distribution platform* sense. In the DMCA, Congress established two categories of television programming: one category for which the copyright owner could prevent **all** copying (“Copy Never”), for pay-per-view (“PPV”) and other transactional programming services; and a second category for which the copyright owner could prevent all copying other than the first copy (“Copy Once”), for subscription premium programming services. 17 USC § 1201(k) (“DMCA”). The Conference Report for the DMCA clearly demonstrates Congress’s intent to include VOD (in its *business model* sense) in Copy Never. Conference Report to accompany H.R. 2281 [DMCA] (“Conference Report”) p. 70.

is a subscription transaction that allows an unlimited number of viewings from among an open-ended group of programs.

In delineating between Copy Never television programming and Copy Once television programming, Congress used definitions that are based entirely on the business model. The television programming can be offered over any technical distribution platform, without influencing whether the programming fits into Copy Never or Copy Once. For example, Copy Once applies to programming “where payment is made by a member of the public for such channel or service in the form of a subscription fee that entitles the member of the public to receive all of the programming contained in such channel or service.” DMCA § 1201(k)(2)(B). Copy Never applies to programming consisting of a “single transmission, or specified group of transmissions, . . . for which a member of the public has exercised choice in selecting the transmissions, including the content of the transmissions or the time of receipt of such transmissions, or both, and as to which such member is charged a separate fee for each such transmission or specified group of transmissions.” *Id.*, § 1201(k)(2)(A).

In each case, the technical distribution platform is neutral to the outcome under the DMCA. In no way does the platform over which such programming is distributed influence whether the programming fits into Copy Once or Copy Never. The Copy Once definition is based entirely on the subscription nature of the business model, while the Copy Never definition is based entirely on the transactional nature of the business model.

Separately, the term “VOD” has also come to be used to describe a *technical distribution platform* for television programming. Technical distribution platforms for multi-channel premium television have evolved in the United States through several distinct stages, culminating in VOD. In the beginning, MVPDs offered a single analog channel for each programming service. Subsequently, with the advent of digital

compression, MVPDs offered multiple digital channels. Ultimately, MVPDs offered VOD, in its *technical distribution platform* sense, leveraging technical innovations such as two-way networks, video servers and user interface applications that enable subscribers to choose programming to view at his or her choosing, with full control over playback.

In each of these three steps during this evolution of technical distribution platforms, two business models emerged, one transactional in nature and the other subscription in nature. See, Figure 1, supra, (Evolution of Premium Television Technical Distribution Platforms and their Corresponding Business Models).

Figure 1.0 Evolution of Premium Television Technical Distribution Platforms and their Corresponding Business Models

Business Model Technical Distribution Platform	Transactional *		Subscription **	
	Offering	Copy Rules ⁵	Offering	Copy Rules ⁵
Single Analog channel	PPV--Single transmission of a premium TV program (e.g., Request TV)	Copy Never	Single premium TV channel (e.g., HBO)	Copy Once
Digital Multichannel	YVOD--Transmission of single premium TV program over multiple digital channels, with tagged start times for viewer convenience (e.g., On Demand NVOD)	Copy Never	Multiple premium TV channels-- Multiplexed over multiple digital channels (e.g., Encore Multiplex)	Copy Once
VOD	Transactional-VOD-- Transmission of single premium TV program, with viewer control over start time and over playback (e.g., In Demand VOD)	Copy Never	Subscription-VOD-- Ability to view any program from an open-ended, rotating programming offering, with viewer control over start time and over playback (e.g., Starz On Demand)	Copy Once

* Transactional Fee Structure: Separate fee for each individual program transmission purchased from amongst the offering.

** Subscription Fee Structure: Monthly subscription fee for all program transmissions of the offering.

⁵ The copy rules for all of the business models shown in this Figure 1.0, except Subscription-VOD, are based on the DMCA, 5C and the MOU. The Copy Once copy rule shown for Subscription-VOD is the copy rule urged pursuant to these comments.

The term, “Subscription-VOD” has embedded within it the term, “VOD,” in its sense as the most advanced *technical distribution platform*, unrelated to the concept of transactional VOD as a *business model*. Significantly, the term, “Subscription-VOD” overlays the subscription business model onto the VOD technical distribution platform. As such, Subscription-VOD can only be properly categorized among the other programming categories in the DMCA which are characterized by a subscription business model, for which Copy Once applies.

Note that Copy Once has been the appropriate copy rule for offerings in the subscription business model, during each advance in the evolution of technical distribution platforms. To switch to Copy Never for Subscription-VOD, as proposed in the MOU, would represent a significant step backwards in terms of consumer functionality and ease of use, contrary to the reasonable expectations of consumers of subscription premium television.

IV. The Rules, If Adopted, Should Classify Subscription-VOD as a “Copy Once” Service

Fair use is an equitable rule of reason. Sony Corporation of America et. al. v. Universal City Studios, Inc., et. al., 464 U.S. 417, 448 (“Betamax case”). Copying for time-shifting purposes is one form of legitimate fair use, id. at 456. SEG submits that an act of Congress and a decision of the Supreme Court both require that consumers should be permitted to make a single copy of Subscription-VOD transmissions for time-shifting purposes.

While Congress has elected in the past to not set a bright line test of fair use, it has addressed what it believed to be the reasonable and legitimate expectation of

consumers to make fair use of and copy analog programming on certain analog devices in the DMCA. While Subscription-VOD transmissions will be digital, from a consumer perspective there is no difference between analog and digital transmissions: the consumer is aware of watching a program on his or her television screen, not of the means of transmission or reception of the signal, and so the reasonable expectation with respect to personal use copying remains the same. The fair use principles contained in the DMCA are consumer driven, and provide an equitable balance between the interests of the copyright owner and the consumer. Conference Report, p. 70.

As noted above, in the DMCA, Congress divided televised programming into two categories: Copy Never and Copy Once. DMCA §§ 1201(k)(2)(A) and (B). Also as noted above, in the Copy Never category, Congress included programming which had a “single transmission, or specified group of transmissions, . . . for which a member of the public has exercised choice in selecting the transmissions, including the content of the transmissions or the time of receipt of such transmissions, or both, and as to which such member is charged a separate fee for each such transmission or specified group of transmissions.” Id., § 1201(k)(2)(A). Congress clearly intended this category of programming to include PPV, VOD (in its transactional *business model* sense) and NVOD. Conference Report, p. 70.

Alternatively, in the Copy Once category, Congress included programming which “is provided by a channel or service where payment is made by a member of the public for such channel or service in the form of a subscription fee that entitles the member of the public to receive all of the programming contained in such channel or service.” DMCA § 1201(k)(2)(B). **As** above, the legislative history (Conference Report, p. 70)

clearly demonstrates Congressional intent to include in Copy Once subscription pay television services, such as those provided by SEG on its linear programming services STARZ!, Encore and their respective multiplexed channels.

A method of transmission not directly addressed by the DMCA is one that is currently being offered by SEG (as well as other premium programming services **such as** HBO and Showtime), called Subscription-VOD.⁶ Through Subscription-VOD, a consumer pays a monthly subscription fee which entitles the consumer to see all the programming which SEG offers on the Subscription-VOD service. The consumer selects the program he or she wants to watch, from a Subscription-VOD schedule provided by SEG, and the program is provided immediately after the selection has been made. While it may seem like Subscription-VOD would fit into both the Copy Never and the Copy Once categories, and so would be included in the Copy Never category under DMCA §1201(k)(2), this is not the case. Subscription-VOD does *not* fit into the Copy Never category.

To be included in the Copy Never category under the DMCA, a consumer must be “charged a separate fee for each such transmission or specified group of transmissions.” DMCA § 1201(k)(2)(A). With Subscription-VOD, a consumer is not charged a separate fee for each transmission. Rather, the consumer pays a monthly subscription fee. Also, the subscription fee is not a separate fee for a specified group of transmissions. The consumer does not choose any specific group of transmissions. Rather, SEG offers the consumer the ability to watch an unlimited **amount** of

⁶ See page 4-5, above, and Appendix A, below, for a description of SEG’s pioneering efforts in the development of SVOD.

transmissions over a specified period of time, from the Subscription-VOD program schedules. SEC sets what programming will be offered during the period of time, both the number and the specific programs. The consumer selects which particular program to watch, but does not, at the time of paying his or her subscription fee, pay a separate fee for a specified program or number of transmissions. In other words, with VOD, NVOD and PPV, the consumer picks *a particular program or group of programs* and pays a specified fee, while with Subscription-VOD, the consumer subscribes and pays for a *particular service*, not a particular program or group of programs.

Based on the language of Congress as set forth in the DMCA, it is clear that Subscription-VOD should be included in the Copy Once category.

The DMCA provides that if a type of transmission meets the definitions of both Copy Never and Copy Once, then such transmission should be included in the Copy Never category. DMCA § 1201(k)(2). However, subsequent to the passage of the DMCA, two non-legislative and non-regulatory events have occurred which purport to interpret the words of the DMCA but which do so incorrectly. The **first** was the agreement between consumer electronics manufacturers Matsushita, Sony, Toshiba, Hitachi and Intel, commonly known as the “5C” Agreement, announced late in 1998, and the second is the recent “Plug and Play” agreement described in the MOU, which is the subject of this Further Notice.

Both of these agreements have incorrectly included Subscription-VOD in the Copy Never category. Both do so by *significantly changing the plain language and intent* of the DMCA. Where the DMCA provides that to be included in Copy Never a consumer must be “charged a separate fee for each such transmission or *specified group*

of transmissions” (DMCA § 1201(k)(2)(A) emphasis added), 5C and Plug and Play include Subscription-VOD in Copy Never, 5C Agreement § 5.1(a)(i); Proposed Rule 76.1903 § 2(b)(A)(i), and both define Subscription-VOD as a transmission of a program “for which Program or specified group of Programs subscribing viewers are charged a periodic subscription fee for the reception of programming delivered by such service during the *specified viewing period covered by the fee.*” 5C Agreement § I, definition of “Subscription-on-Demand”; Proposed Rule 76.1902 § 1, definition of “Subscription-on-Demand” (Emphasis added). Each of these agreements changes the fee aspect from a *separate* fee for specified programming to a *subscription* fee for a specified viewing period.

5C erred in including Subscription-VOD in Copy Never by mistakenly applying the term “VOD” embedded in Subscription VOD in its *business model* sense, when in fact the embedded term “VOD” merely defines the *technical distribution platform*.

SEC fully understands the mistake the drafters of 5C made with the incorrect classification of Subscription-VOD as Copy Never, in view of the facts that these were equipment manufacturers, not programmers or operators, and that Subscription-VOD had not yet even launched anywhere or even been fully thought out in 1998 when 5C was developed. The 5C negotiators were considered experts in copy protection technologies. But insofar as the 5C negotiators functioned in an entirely unrelated industry, and also because Subscription-VOD simply did not exist at the time of the 5C, the 5C negotiators lacked any knowledge of the intricacies and nuances of the Subscription-VOD business model.

Unfortunately, four years later in the course of the MOU negotiations, the equipment manufacturers' lack of knowledge and experience with Subscription-VOD was carried over into the MOU. By their own declaration, the MOU negotiators began with the 5C agreement as their starting point for the business model classifications, divided into Copy Once, Copy Never, or unrestricted copying. Cover Letter to The Honorable Michael K. Powell, December 19,2002, accompanying the filing of the MOU. Significantly, the MOU negotiators did not include SEG or any other Subscription-VOD programmers. Although no movie or television production studios signed the MOU, these studios functioned as "behind the scenes" interested parties influencing the negotiations. Kevin Leddy (Time Warner Cable), Oral Presentation on Cable CEA Plug and Play, February 20,2003. At the urging of the studios, the negotiators agreed at the outset to retain all the pre-existing 5C classifications, unless someone at the closed-door negotiating table came up with a reason to shift a 5C classification. Id. Thus the MOU merely perpetuated 5C's erroneous misclassification of Subscription-VOD as Copy Never.

Reinforcing the clearly-articulated intent of Congress, a pre-existing decision of the Supreme Court also requires that Subscription-VOD be included in the Copy Once category. The Supreme Court, in the Betamax case, stated that "time-shifting for private home use must be characterized as a noncommercial, nonprofit activity." Betamax case, supra, at 448. Any "challenge to a non-commercial use of a copyrighted **work** requires proof either that a particular use is harmful, or that if it **should** become widespread, it would adversely affect to potential market for the copyrighted work." Id., at 45].

While the Betamax case dealt with free broadcasts, the principles are applicable to pay television transmissions such as those of SEG. In the Betamax case, the Court noted “that time-shifting merely enables a viewer to see a work which he had been invited to witness in its entirety free of charge.” Id., at 449. Here, a consumer is invited to view all of the programming exhibited on SEG’s services for a single monthly fee. It is reasonable for the consumer to expect that he or she can make a copy of such programming for viewing at a time convenient to the consumer. The argument is in fact stronger for the pay television and Subscription-VOD consumer, in that he or she has actually paid a fee to get access to the programming.

Since the Betamax case, consumers have come to reasonably and legitimately expect that they can make one copy for personal use of programming delivered by pay television providers such as SEG. Through its Subscription-VOD offerings, SEG is now delivering its pay television services in an “on-demand” environment. This change does not change the expectation of the consumer. If the consumer pays a subscription fee, he reasonably expects that he can make a personal copy of our programming, whether scheduled or on-demand, Subscription-VOD is properly included in the Copy Once category.

While some might argue that the “on-demand” nature of Subscription-VOD programming obviates the need for time shifting, this is not the case. Today, a particular program may be shown on a scheduled linear service once or several times. The consumer, however, is free to make a copy of any particular exhibition of a program from the linear service for later viewing at the viewer’s convenience, without being required to check every day of the entire monthly schedule to see if the program would be available

for a later viewing. With Subscription-VOD, the programmer (that is SEG in our case) offers unlimited viewing of its selected programs over a specified limited time period, which time period is subject to change by the programmer. Because the programmer controls *rotations* of Subscription-VOD programs during the month, the consumer may or may not be aware of when a Subscription-VOD program will no longer be available. Just as on a linear schedule, the consumer will have a reasonable expectation that he or she can elect to have the Subscription-VOD program exhibited in his or her home to record for viewing at a later time.

Even more importantly, since the DMCA clearly permits Copy Once for subscription pay television services over analog technical distribution platforms, consumers should certainly continue to enjoy the same balanced, fair use benefits of Copy Once for the same business model over advanced, on-demand technical distribution platforms.

Allowing Subscription-VOD to be included in Copy Once is not harmful to copyright owners, and it will not adversely affect the potential market for the copyrighted works that SEG licenses. By definition, in order for a consumer to be able to copy a program off of an Subscription-VOD service, SEG (or some other provider) will have had to already licensed such program from the copyright holder. The commercial value of that transaction remains intact. As to an argument that widespread copying will harm the copyright owners, perhaps damaging videocassette or DVD sales or subsequent licensing to other television programmers, this is simply not the case. Consumers have had the ability to make copies for personal use since at least the Betamax case in 1984. In that time, the sales and rentals of pre-recorded videocassettes and DVDs have grown

to over \$20 Billion in annual retail sales for 2002. “DVD Dollar Derby,” Variety.com, January 8, 2003.

In fact, if the ability of consumer to view programming on Subscription-VOD lessens the amount of copying that consumers do, then the copyright owners’ argument that Subscription-VOD should not be Copy Once is weakened, in that there will be less potential harm to the market from Subscription-VOD than there is from scheduled services. And no one has suggested that scheduled services should be any more restrictive than Copy Once.

Moreover, all of SEG’s linear and Subscription-VOD services are uninterrupted by commercial advertising messages, and are supported 100% by consumers’ subscription payments, so Copy Once can inflict absolutely no economic harm on the copyright owners.

Indeed, the harm to the copyright owner, or the lack of such harm, are critical factors in determining whether limited copying can be considered “fair use.” Betamax case, supra, at 451. In this case, not only *is* there a lack of demonstrable harm to the copyright owners for allowing a single personal use copy of an Subscription-VOD program, it is likely that there will be more harm to such copyright owners in the event that Subscription-VOD is allowed to remain in the Copy Never category. As noted at the outset, Subscription-VOD is still very new, and has just barely been rolled out in one DBS system and some cable systems scattered around the country. Although Subscription-VOD promises a revolutionary level of consumer convenience, the service has not been broadly launched and not yet broadly accepted by consumers. At the same *time*, SEC has paid in advance for Subscription-VOD rights from its program suppliers,

the Hollywood studios, resulting in substantial incremental revenue to such studios, Limited copying rights, that is, Copy Once for personal time shifting purposes, preserves the expectations of consumers and enhances the value of Subscription-VOD to subscribers. If Subscription-VOD is rendered less attractive to subscribers because of unreasonably restrictive personal copying rights, that is, Copy Never, in opposition to consumers' reasonable expectations, then Subscription-VOD may fail as a viable service, resulting in less incremental revenues to the studios in the long run. Consumers will be confused and frustrated if they are allowed to copy a program on a digital or analog linear service, but are prevented from making a copy of the same program on a related Subscription-VOD service. While the reduction in incremental revenues is a potential long term harm to the studios if Subscription-VOD is left in Copy Never-land, such potential harm *is* in contrast to no other cognizable or theoretical harm to such copyright owners if Subscription-VOD *is* moved into the Copy Once category.

For all of the foregoing reasons, copyright owners have no basis whatsoever to contend they are economically harmed by treating Subscription-VOD the same as scheduled services.

V. Copy Prohibitions Must Start Only After the Consumer Views the Content

As a final point, SEG respectfully requests that the Commission clarify that the determination of how many copies can be made (if any) must be analyzed from the point of view of the consumers' usage. With respect to Copy Once, for example, if a means of transmission requires that one or more copies must be made as part of the delivery process, prior to the consumer viewing the program, the consumer must still be permitted

to make a single copy, at his or her option. For example, one method of Subscription-VOD currently in use by SEG makes a copy of the program on the consumer's personal video recorder ("PVR"), before the consumer views the program. The consumer can then elect to watch the programming as it plays off the PVR. If the consumer elects, he or she should also be able to make a copy for later viewing, regardless of the fact that one copy has already been made on the PVR. By way of a second example, cable MSOs offer server-based Subscription-VOD offerings today in which one or more copies of the programs are made and reside on servers at the MSOs' headends. Similarly, none of these copies should be counted against copies the consumer is permitted to **make** (if any) under the proposed rules.

VI. Conclusion

The Commission should not set rules which permit copyright owners, through their agreements with SEG, to counteract the reasonable and legitimate expectations of consumers and the guidance provided by Congress. For these reasons, SEG urges the Commission to shift the classification of Subscription-VOD services from Copy Never to Copy Once if the Commission determines to adopt Encoding Rules as proposed by the MOU. SEG also requests that the Commission clarify that the number of copies permitted under the Encoding Rules must be counted from the consumer's perspective, that is from the time the content has been viewed by the consumer.

Respectfully submitted,

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March 28, 2003