

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

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

REPLY COMMENTS OF HOME BOX OFFICE, INC.

Home Box Office, Inc. (“HBO”), by its attorneys, hereby replies to the Comments of Starz Encore Group LLC (“SEG”), submitted on March 28, 2003 in response to the Commission’s Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned proceeding.^{1/}

SEG’s Comments are directed primarily toward the FNPRM’s proposal to adopt rules pertaining to Copying, Recording and Storage of Controlled Content (“Encoding Rules”) of digital audiovisual content transmitted by multichannel video program distributors (“MVPDs”). The Encoding Rules are part of a “joint regulatory recommendation” made to the Commission last year by the Consumer Electronics Association and the National Cable and Telecommunications Association.^{2/}

^{1/} *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Docket No. 97-80, Compatibility Between Cable Systems and Consumer Electronics Equipment, PP Docket NO. 00-67, Further Notice of Proposed Rulemaking (Rel. January 10, 2003).*

^{2/} Letter to The Honorable Michael K. Powell, Chairman, Federal Communications Commission from various cable, television and consumer electronics companies, December 19, 2002 at 3. The letter to Chairman Powell also submitted to the Commission a Memorandum of

Under the Encoding Rules, which are “modeled generally on those of Section 1201(k) of the Digital Millennium Copyright Act of 1998 (‘DMCA’) and the existing license for ‘DTCP’ technology,”^{3/} subscription video on demand (“SVOD”) services would be classified as “copy never.” HBO agrees with that classification.

I. Background and Summary

A. Background

HBO has been a leader in the development of premium video programming services offered in both a subscription “linear” format and through SVOD. HBO also is recognized as an innovator and creator of many of the most critically acclaimed and popular original programming in television. HBO’s original programming includes award winning dramatic series like “The Sopranos” and “Six Feet Under;” comedy series like “Sex and the City” and “Curb Your Enthusiasm,” and highly acclaimed miniseries such as “Band of Brothers” and “From the Earth to the Moon.” In all, HBO’s original programming has received 53 Golden Globes, 191 Primetime Emmys, 45 Peabody Awards, and 14 Oscars.

HBO was the first to offer a premium SVOD service, launching HBO On Demand on July 1, 2001. As explained in greater detail below, HBO makes available on its SVOD service substantial amounts of its original programming immediately after such programming debuts on the HBO linear service. Moreover, HBO On Demand customers often have access, at any one time, to all episodes of a new season, or episodes from prior seasons, of popular series such as “The Sopranos” or “Sex and the City”.

Understanding (“Plug and Play MOU”) among major cable and consumer electronics companies regarding numerous other “plug and play” digital television issues.

^{3/} *Id.*

Having the ability to encode its SVOD programming as copy never will enable HBO to make available on SVOD its most highly valued programming, including multiple episodes of its award winning series. SVOD consumers are not dependent on recording devices in order to time shift programming for later viewing. Unlike conventional linear programming services, where a particular program is available at a particular time, and needs to be recorded if a consumer is unable to watch it at such time, SVOD services inherently provide the consumer with the ultimate choice of which programs to watch and when to watch them. Moreover, SVOD consumers have the ability to pause, rewind and restart programming they are watching.

In its Comments, SEG, asserts that classification of SVOD under the Encoding Rules as copy never, as opposed to the more liberal copy once, is contrary to the statutory requirements of the DMCA and bad policy. HBO strongly disagrees with both assertions.

B. Summary

While the DMCA addressed analog content protection technologies and does not mandate the encoding rules for digital technologies, the Encoding Rules set forth in the Plug and Play MOU, under which SVOD is categorized as copy never, clearly are consistent with the copy never regime established under Section 1201(k) of the DMCA. The unwarranted speculation about Congressional intent put forth by SEG to reach a different result is neither necessary nor convincing.

Not only are SVOD services designated copy never by the DMCA, but such designation will not, as claimed by SEG, lead to the demise of SVOD “as a viable service.”^{4/} This is because the DMCA classification of SVOD as copy never is merely permissive; it does not mandate that consumer copying of SVOD be prohibited. Instead, content owners and SVOD distributors are free to determine among themselves the appropriate market-driven consumer viewing and copying options.

^{4/} SEG Comments at 20.

In the case of a SVOD programmer like HBO, which owns much of its SVOD programming, the copy never designation permits the SVOD programmer flexibility to decide which copying rules work best for its programming as a business and consumer proposition. Requiring all SVOD content owners to permit copying of their product through a copy once designation, however, would have a profoundly negative effect on the development of SVOD services. With a copy once requirement, content owners of valuable product simply may withhold such material from SVOD in order to protect the value of their property in other distribution markets.

HBO agrees with SEG that SVOD is a “nascent, emerging product” that “continues to evolve rapidly in many respects.”^{5/} These ongoing evolution and market competition factors are all the more reasons not to prejudge whether the market for SVOD will be more robust with a copy once requirement for all SVOD products, or, as HBO believes, with some combination of copying rights that will restrict copying of highly valuable product and permit more liberal copying of other material.

II. SVOD Is Copy Never Under the Digital Millennium Copyright Act

According to the DMCA, a copy never designation may be applied to

a single transmission, or *specified group of transmissions*, of live events or of audiovisual works 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.^{6/}

In the general SVOD model, a consumer (i) receives a specified group of transmissions (*i.e.*, a certain number of program titles per month), (ii) exercises choice in selecting the content

^{5/} *Id.* at 5, 6.

^{6/} 17 U.S.C. § 1201(k)(2)(A) (emphasis supplied).

and timing of the transmissions (*i.e.*, which title to watch and when to watch it), and (iii) is charged a separate fee for the specified group of transmissions. The SVOD model meets the definition of this category of service.

SEG claims that SVOD falls within the copy once classification of the DMCA. SEG is clearly wrong. To be copy once, a transmission must be “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.”^{7/} This language applies, as SEG acknowledges, to subscription “linear program services.”^{8/} There is no mention in the copy once language, however, of the critical elements of consumer choice over the selection of content and timing, which are the hallmarks of the SVOD and VOD models.

SEG postulates that there is a distinction between the "technology model" of delivering video on demand and the "business model" of a subscription service, and that the "business model" of subscription services dictates that SVOD should be treated in the same way as subscription linear programming services and classified as copy once.^{9/} SEG has no support for this argument in the DMCA or its legislative history. Moreover, SEG’s position contravenes the very purpose of the distinction between the copy never and copy once classifications made by

^{7/} 17 U.S.C. § 1201(k)(2)(B).

^{8/} SEG Comments at 13.

^{9/} SEG asserts that a consumer does not exercise choice in selecting the content of SVOD because the SVOD monthly titles are predetermined by the programmer. (SEG Comments at 13.) But even in a pure VOD model, where the consumer purchases programming on a title by title basis, a programmer or other third party makes the initial selection of which titles to offer. In the HBO On Demand service, a subscriber typically has more than 120 program choices at any one time. Even if SEG were correct that a consumer does not exercise choice in selecting SVOD content, the classification of SVOD as copy never would not change. The statute refers to consumer exercise of choice over content “or” time “or” both. Clearly, in the SVOD model, the consumer exercises choice over time, and in HBO’s view, the consumer exercises choice over content as well.

the DMCA. It is precisely because a consumer need not copy a program in an on-demand environment in order to time shift the program that on-demand services were classified as copy never under Section 1201(k).

Even if the copy once classification of the DMCA could be read to include SVOD, SVOD would not be classified as copy once. The DMCA expressly provides that if a transmission can be classified as copy once or copy never, it is to be classified as copy never.^{10/} Because SVOD falls squarely within the copy never category, the mere fact that it is sold on a subscription basis does not result in its classification as copy once.

Consumer copying of copyrighted video programming is based on the principle that such copying, for personal use, affords the consumer more flexibility in viewing habits, such as time-shifting of free over-the-air broadcasts.^{11/} Such flexibility is inherent already in the SVOD model, where the consumer may have, as SEG describes in its filing for its own SVOD service, “full control of playback, including start, fast forward, rewind, pause, stop and restart.”¹² Thus, where content and timing choices and control are clearly available, as in SVOD, such content may be accorded, as recognized by the DMCA, copy never treatment.

For all of the foregoing reasons, under the DMCA, SVOD qualifies for the copy never classification.

III. A Copy Once Designation for SVOD Would Stifle the Evolution and Development of SVOD

As a policy matter, the developing and competitive nature of SVOD counsels in favor of maximum flexibility to permit SVOD providers to experiment with a wide range of program

^{10/} 17 U.S.C. § 1201(k)(2).

^{11/} *Sony Corporation of America et. al. v. Universal City Studios, Inc., et. al.*, 464 U.S. 417 (1984).

¹² SEG Comments at 4.

mixtures and other features, including content copy protection and consumer viewing and copying options. To require all SVOD content to be copy once would be a bad policy choice.

For example, HBO and SEG have decided to compete in SVOD with very different content mixes. The SVOD service offered by SEG consists almost exclusively of films licensed by SEG from motion picture companies and carried on the SEG SVOD service during the same period as the films are shown on SEG's "linear" program services.^{13/} Prior to SEG exhibiting these films on its linear or its SVOD services, most have been distributed through movie theaters, home video outlets, pay per view services and/or via authorized Internet downloads. SEG has no proprietary content interest, other than its right to exhibit the movies for limited time periods, in most, if not all, of its SVOD product.

Unlike SEG, HBO is not a mere reseller of product licensed from others that already has been available to consumers through numerous outlets. Approximately 70 percent of the HBO On Demand content is HBO original productions (*e.g.*, "The Sopranos," "Six Feet Under," "Sex and the City," "Curb Your Enthusiasm," "Band of Brothers"). Only 30 percent of the HBO On Demand titles consists of licensed motion pictures. (By contrast, virtually 100 percent of SEG's on demand product is licensed movies.) The content on HBO On Demand changes constantly throughout each month, with approximately 25 percent of the titles rotating out, and new titles rotating in, on a weekly basis.^{14/}

The HBO On Demand service typically provides consumers the ability to view, on their own schedule, first run HBO content the day after it is first exhibited in the United States. For example, the day after a new episode of "Six Feet Under" premieres on the HBO linear service, it

^{13/} "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." SEG Comments at 4.

^{14/} HBO also offers a SVOD feature of its Cinemax service (Max On Demand) which provides a choice of approximately 30 titles per week, most of which are motion pictures.

is available via SVOD. In addition, from time to time HBO On Demand customers have access to all 13 seasonal episodes of some of HBO's most popular series. For example, all 13 episodes of the new season of "Six Feet Under" will be available on HBO On Demand commencing the day after the final episode of the season airs.

HBO's highly successful original productions require substantial investments, and the exploitation of this original product in other media (such as home video sales) is essential to justify these investments. HBO makes this popular programming available on SVOD for consumers to view on their desired schedule. If consumers wish to archive a series, HBO provides for that capability through its home video sales business model. HBO, and other owners of high value recently released content, would not likely provide so much of their original content on SVOD if it would facilitate archiving by consumers as opposed to convenience viewing. Thus, the rule proposed by SEG, while it would require that consumers be allowed to copy SVOD, would have the effect of depriving SVOD consumers of the ability to view a much richer and broader range of high value content over SVOD services.^{15/}

Classifying SVOD as copy never, consistent with the DMCA, does not mean that consumers will be prevented from copying all SVOD programming. The copy never classification is permissive, not mandatory. Accordingly, if SEG believes that more liberal copying rights are of benefit to consumers and will help it provide a more competitive SVOD service, it is free to offer its own SVOD service on a copy once basis; it need only secure the necessary rights in the programming marketplace. What SEG should not be permitted to do, however, is force all SVOD providers to accept a lower common denominator of copy protection and forego the opportunity to compete for viewers by providing them a richer mix of high value SVOD programming that will only be possible if copy never protection is available.

^{15/} HBO recognizes that consumers may archive all of a series such as "The Sopranos" by copying each episode each week from HBO's linear feed. HBO does not object to that practice (which would take months to accomplish), but it would be hesitant to further promote such archiving by making all episodes of "The Sopranos" available for copying at once on SVOD.

CONCLUSION

For the foregoing reasons, HBO submits that the Commission should adopt the Encoding Rules, as proposed in the FNPRM, and classify SVOD as copy never. Such a result is the only one consistent with the plain language of the DMCA and in keeping with the sound public policy in permitting the continued evolution and development of SVOD in a competitive marketplace.

Respectfully submitted

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April 28, 2003

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