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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 STARZ ENCORE GROUP LLC

Starz Encore Group LLC ("SEG') submits these Reply Comments in response to various comments filed on the Commission's Further Notice of Prouosed 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, 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. This agreement is in the form of a Memorandum of Understanding ("MOU"). The MOU includes certain proposed rules governing encoding of content for reception by digital receivers ("Proposed Encoding Rules"). The

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Proposed Encoding Rules define the rights of consumers to make copies of programs carried on broadcast stations and programming networks, specifically permitting program suppliers and studios to prevent any copy being made of programs ("Copy **Never")** provided through the programming category of Subscription-Video-On-Demand ("Subscription-VOD").

SEG, while recognizing the critical need to protect video programming against piracy, seeks the optimum balance between the reasonable and legitimate expectations of consumers to make limited copies, and the right of content owners to exploit and protect their content. Consistent with that premise, in its Comments filed on March **28, 2003,** SEG submitted that any rules adopted by the Commission should allow for **a** single copy to be made ("Copy Once") of programming provided via subscription video on demand services (referred to herein **as** ';Subscription-VOD).

SEG disagrees with certain of the Comments to this Further Notice filed by other commenters, for the reasons set forth below.

I. Encoding Rules Should Not be Left to Private Agreements

In their comments, The Motion Picture Association of America ("MPAA"), DIRECTV, INC. ("DIRECTV"), TiVo Inc. ("TiVo") and Public Knowledge and Consumers Union ("Consumer Groups") state that encoding rules should be left to private agreements. (MPAA Comments at **3-9.)** (DIRECTV Comments at ***6.)*** **(TiVo** Comments at 9.) (Consumer Groups Comments at **4.)** SEG strongly disagrees.

Content owners and equipment manufacturers have taken specific actions in their practices and private agreements that demonstrate their tendency to eviscerate *the*

reasonable and legitimate expectations of consumers (consistent with all "fair use" court decisions) to make personal copies of programming that consumers have paid to receive, for the limited purpose of time shifting.

Content owners have physical control over their content, combined with the technical means to subject their content to copy protection technologies. Content owners exert unfair bargaining leverage to force satellite and cable programming vendors, especially satellite and cable programming vendors that are smaller or are not under common ownership with the major studio content owners, to pass through, implement and enforce the most restrictive copy protection technology, as a condition of their license to distribute the content owner's content, all to the detriment of consumers' fair use rights and expectations.

Content owners are "licensees" under the private agreement announced in 1998 among Matsushita, Sony, Toshiba, Hitachi and Intel, commonly known as the "5C Agreement." As demonstrated in Section II of these Reply Comments, below, the 5C Agreement implements copying restrictions significantly beyond those permitted and endorsed by Congress in the Digital Millennium Copyright Act, 17 U.S.C. § 1201(k) ("DMCA").

Content owners also functioned as behind-the-scenes, interested parties to the negotiations between equipment manufacturers and multichannel video programming distributors ("MVPDs"), culminating in the MOU. Kevin Leddy, Oral Presentation of Cable Plug and Play, February 20, 2003. As demonstrated in Section II of these Reply Comments, below, like the 5C Agreement, the MOU implements copying restrictions significantly beyond those permitted by Congress in the DMCA. And, even with

restrictions beyond those contained in the DMCA, the MPAA asserts that such restrictions may not be adequate to allow its members to license product to entities such as SEG.

The foregoing examples demonstrate that if the Commission seeks to accommodate the reasonable and legitimate expectations of consumers to make copies, as delineated in fair use court cases as well as the DMCA, the Commission cannot simply leave encoding rules to private agreements.

II. The MOU Purports Simply to Follow the DMCA, but Makes Significant Errors in Doing So

In their comments, Comcast Corporation ("Comcast"), NCTA, Consumer Electronics Industry ("CEI"), ,and The Home Recording Rights Coalition ("HRRC") assert that the Proposed Encoding Rules and the 5C Agreement simply track the DMCA. (Comcast Comments at 5-6.) (NCTA Comments at 6, 9-10 and 16.) (CEI Comments at 17-18.) (HRRC Comments at 3-5 and 7.) SEG strongly disagrees.

For example, the DMCA allows unlimited copying of basic cable and extended basic cable tiers. DMCA § 1201(k)(2) and Conference Report 105-796 accompanying the DMCA ("Conference Report") at 70. Despite that fact, both the 5C Agreement and the MOU subject basic cable and extended basic cable tiers to Copy Once, thereby imposing copy prohibitions significantly more restrictive than Congress clearly intended.

As a second example, the DMCA allows Subscription-VOD to be copied at least once. Under the DCMA, the "Copy Once" category includes "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). This category thus clearly includes Subscription-VOD, which allows a consumer to pay a monthly subscription fee to see all the programming offered on the particular Subscription-VOD service.

Subscription-VOD certainly does not fit within Copy Never under the DMCA. To fit within Copy Never, the DMCA requires that a consumer be "charged a separate fee for each such transmission of specified group of transmissions." With Subscription-VOD, the consumer pays a monthly subscription fee. Also, the fee is not for a specified group of transmissions, but rather for unlimited numbers of transmissions over a specified period of time.

Despite Congress permitting Subscription-VOD to be copied at least once under the DMCA, both the 5C Agreement and the MOU improperly subject Subscription-VOD to Copy Never, again imposing copy prohibitions significantly more restrictive than Congress clearly intended. The only significant difference between analog transmissions (as addressed in the DMCA) and digital transmissions (as addressed in the proposed rules) is that digital copies can be retransmitted without any generational degradation in quality, for example over the World Wide Web on peer-to-peer file sharing **networks.** SEG agrees that unlicensed peer-to-peer file sharing is a legitimate concern and could lead to the devaluing of copyrighted content. But the risk of illegitimate retransmission is not solved by classifying Subscription-VOD as Copy Never. Rather, the risk of illegitimate retransmission is addressed directly by copy protection technology, which will prevent anyone receiving a previously designated Copy Once-protected file from viewing the file or making a second generation copy. The copy made by the original

legitimate recipient/subscriber in order to create a file for retransmission will be rendered Copy Never by the technology and cannot be copied again or viewed by another user. Therefore the application of Copy Once to Subscription-VOD will not lead to the proliferation of illegitimate peer-to-peer file sharing. In sum, these concerns over retransmission or file sharing do not justify a copying category classification difference being made between digitally transmitted Subscription-VOD and digitally transmitted linear subscription services.

III. To Subiect Subscription-VOD to Copy Never Would Be a Step Backwards and Create Intolerable Confusion for Consumers and Would Not Comport with the Supreme Court's Betamax Decision

Today, subscribers to Starz On Demand, SEG's Subscription-VOD service, are able to view movies on demand at the same time, and during the same release window, as they are able to view the same movies on SEG's linear services (such as STARZ!, STARZ! FAMILY and Encore). For example, during April, 2003, an SEG subscriber can view "Monsters, Inc." on Starz On Demand (at times chosen by the subscriber), and can also view "Monsters, Inc." on STARZ! FAMILY (at times set in the STARZ! FAMILY linear schedule).

Confusingly, the MOU would allow this subscriber to make a single recording of "Monsters, Inc." if he or she viewed it on STARZ! FAMILY (Copy Once under the MOU), but no copies at all if he or she viewed it on Starz On Demand (Copy Never under the MOU). This is a baffling and incomprehensible discrepancy that the Commission should avoid.

There is no logical reason to provide for a stricter limitation on programs available on a digitally transmitted Subscription-VOD basis than those available on a

digitally transmitted linear subscription basis. Under both means of exhibition, a program is only available on a schedule for a limited period of time. Such limited period of time during which a program can be viewed is one reason why consumers need to copy programs for time shifting purposes. If a consumer is unable to view a program at its scheduled time on a linear service, such consumer can record such program for viewing at a later time, as the Supreme Court held in the Sonv Betamax case. The consumer is not forced to research whether or not the program is scheduled at another, more convenient, time. The consumer simply has the right to record such program for later viewing.

Similarly, if a consumer sees that a particular program is available on the Subscription-VOD schedule, but the consumer cannot view the program at that time, the consumer should have the ability to record such program for later viewing. The consumer should not be forced to determine how much longer it will be available on such schedule. Indeed, the consumer may have no means of determining when such program will be taken off the Subscription-VOD schedule. It may be taken off that night, or three weeks from then. In any case, the consumer has paid a subscription fee for the ability to view the program on both a linear and on-demand basis. The consumer has the right to make a copy from the linear exhibition. The consumer should have the right to make a copy from the on-demand basis.

Should the consumer not have this right, this will be a significant step backwards for the consumer. No party has suggested that subscription linear programming be any more restrictive than Copy Once (although, it would seem that the MPAA and other commenters would like the ability to later assert that linear subscription programming be

Copy Never). And for years, the consumer has had the ability to make copies of programming purchased on a subscription basis. Why then should consumers have less rights than they have enjoyed in the past?

As previously noted by SEG in its initial Comments in this proceeding (at pages 16 to 20), the determination of whether a difference can be justified between Subscription-VOD and subscription linear services for copy protection purposes should flow from the fair use analysis, based on an equitable balancing of consumers' reasonable expectations against demonstrable harm to the economic interests of the copyright owners. As shown previously, consumers' reasonable expectations for a premium subscription service is for Copy Once to be the appropriate limitation. Indeed, no one has suggested that Copy Once is not the consumers' legitimate expectations for linear subscription services, as shown by the inclusion of linear .subscription services in the Copy Once category from the DMCA to 5C to the MOU. Also, as set forth in SEG's initial Comments at pages 16 to 20, there is no greater harm to the copyright owners' economic interests from Copy Once being applied to Subscription-VOD than for Copy Once to apply to linear subscription services. Given consumers' reasonable expectations and the lack of any different or greater economic harm to copyright owners, Subscription-VOD should be classified in the Copy Once category.

IV. The Commission Need Not Adopt the MOU Without Anv Modifications. but Rather Should Adopt the MOU Subiect to the One Simple Modification Submitted bv SEG

SEG disagrees with comments of Comcast and HRRC *to* the effect that the Commission's only choice is to accept the MOU with no modifications, or else jeopardize the entire agreement (Comcast Comments at 13), trigger a reversion to the

prior industry standoff (HRRC Comments at **2),** and unleash "a debacle for American consumers" (HRRC Comments at 10).

These commenters are essentially threatening the Commission, with American consumers as hostage. In order for consumers to get quality television, these commenters insist that consumers give up their fair use rights to copy certain programs. And (according to these commenters), it will all be the Commission's fault if consumers cannot get quality television.

SEG respectfully submits that the sky will simply not fall if the MOU is corrected to protect consumers in the one significant respect of switching Subscription-VOD from Copy Never to Copy Once.

V. Conclusion

The Commission should reject comments that would leave encoding rules to private agreements. The Commission should reject copy prohibitions in the MOU that are significantly more restrictive than those permitted by Congress in the DMCA. The Commission should avoid the confusing discrepancy of a consumer permitted to make no copies of a movie viewed via Subscription-VOD, even though the consumer can make one copy of the exact same movie viewed via the linear service of the same satellite cable programming vendor.

Rather, in any encoding rules adopted by the Commission in this rulemaking proceeding, the Commission should shif? the classification of Subscription-VOD services from Copy Never to Copy Once.

Respectfully submitted,

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