Before the
Federal Communications Commission
Washington, D.C. 20554

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**

COMMENTS OF SHOWTIME NETWORKS INC.

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Showtime Networks Inc. ("Showtime") hereby files these comments in support of the Petition for Reconsideration of the Motion Picture Association of America, Inc. ("MPAA"). In particular, Showtime expresses its support of the MPAA's recommendation that the Commission classify Subscription Video-on-Demand ("SVOD") service as a "Defined Business Model" under Subpart W of the Plug & Play regulations and allow SVOD to be designated as restrictively as "Copy Never". Showtime also files these Comments in support of the Comments of Home Box Office, Inc., and in response to the Opposition of Starz Encore Group LLC to the Petition for Reconsideration.

Showtime owns and operates the Pay Television networks SHOWTIME, The Movie Channel and Flix, including, among other services, "Showtime On Demand," which is a monthly Subscription Video-on-Demand service that currently offers up to 120 hours of uncut, commercial-free high-value programming, including recent theatrical releases and original content, to subscribers at any given time. Showtime provides its SVOD subscribers with up to 30 hours of new programming each week, and Showtime's original content is made available to its subscribers prior to release on DVD or other outlets. Showtime On Demand has been

launched in Designated Market Areas that cover 70% of U.S. television households, including 41 of the top 50 DMAs.

INTRODUCTION

In its Second Report & Order and Second Further Notice of Proposed Rulemaking, the Commission "decline[d] to classify SVOD as a defined business model and . . . allow[ed] MVPDs to treat both existing and future SVOD program offerings as undefined business models."[1] The Commission concluded that "SVOD is a nascent service that was not contemplated by Congress when it adopted Section 1201(k) of the DMCA," and that "SVOD will grow and evolve to a significant degree and that other forms of this service, including those different than that offered by Starz Encore and HBO, will emerge in the near future." As the MPAA observed in its Petition for Reconsideration, however, and as explained below, SVOD is not a new or undefined business model, having been deployed successfully by MVPDs for almost three years, and permitting SVOD to be classified as restrictively as "Copy Never" can only enhance the availability of the programming offered thereon. The Commission should therefore grant the MPAA's Petition.

I. SVOD Is Not an Undefined Business Model

Showtime On Demand was first launched two and a half years ago and is now available in Designated Market Areas that cover 70% of U.S. television households, including 41 of the 50 largest DMAs. The other major Pay Television networks, HBO and Starz, likewise operate SVOD services that have also long been in existence, as do The Movie Channel, Cinemax, Disney Channel, and the Independent Film Channel. SVOD services are thus well established in

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[1] Second Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67, ¶ 73 (rel. Oct. 9, 2003) ("Plug & Play Order").

the marketplace, and there is no evidence in the record of any imminent and transformative new development of the SVOD business model. The "evolution" in SVOD services that the Commission hopes will occur has in fact already happened.

While SVOD services post-date the DMCA's classification of business models for analog videocassette recorders in Section 1201(k) of the Copyright Act, that fact alone does not make SVOD "undefined." The Digital Millenium Copyright Act was passed six years ago, in 1998, more than enough time for new business models to emerge and become established in the marketplace. The Commission need not wait for another congressional act before recognizing the existence of SVOD. Moreover, as explained below, SVOD clearly fits within the defined business models of Section 1201(k)(2).

Delay in classifying SVOD may harm the continued development of that business model. If SVOD is classified as "undefined," the risk will persist that the Commission may someday decide to limit encoding for SVOD to a copy protection state less restrictive than had been contemplated. Thus, some content providers may be reluctant to license their highest-value content for use on SVOD without predictable copy protection. Simultaneously, some programmers or MVPDs may be reluctant to launch a service under a license agreement that they know may be preempted at any time, possibly several years from now after long-term agreements have been signed and capital has been invested. Collectively, such uncertainty could threaten the progress of the SVOD business model, leading to less consumer choice, lower penetration in the marketplace and lower revenues for such business model.

Classifying SVOD as an "Undefined Business Model" may also lead to mischief, burdensome litigation, and needless delay. Under the procedures adopted by the Commission, it appears that every new MVPD system that launches an SVOD service must announce that fact in

PR Newswire, starting a two-year period for objections to the encoding rules set for that service. With each new launch, some may argue that a new two-year period has begun. Any interested party may decide to challenge each and every one of those launch notices. The threat of litigation every time a new service launch is announced will increase risk and heighten uncertainty. Thus, classifying SVOD as an undefined business model may actually work to stymie, rather than promote, continued development of the SVOD business model, further prolonging final resolution of the encoding cap to be applied. The Commission should spare SVOD, which has already been defined in the marketplace, from this unnecessary burden.

II. SVOD Should Be Allowed to Be Encoded as Restrictively as "Copy Never"

The purpose of encoding copy control information is to allow content providers to offer consumers a wider array of choices than they would otherwise have without copy control information. Thus, content providers can offer consumers who demand high-value, early-release-window content the opportunity to view such content before it becomes more widely available. Content providers can only offer this opportunity, however, if they can be reasonably certain that early windows will not destroy the market for later windows. For the earliest, most high-value content, "Copy Never" encoding is therefore appropriate.

Showtime On Demand provides subscribers with Showtime's most high-value programming, a significant portion of which consists of SHOWTIME original content, including special events and SHOWTIME original series such as "Queer as Folk," "The L Word," and "Soul Food." And since subscribers currently can choose from up to 120 hours of material whenever they want at any given time and more than 200 hours of material during any given month, Showtime On Demand makes copying for time-shifting purposes unnecessary.

Even though it was adopted in 1998, the DMCA recognized the distinction between high-

value content provided over business models allowing consumer choice and "Copy One Generation" services such as Pay Television. "Copy Never" content was clearly defined in the DMCA as programming for which the consumer selects the content and time of display. Showtime On Demand presents viewers with up to 120 hours of transmissions at any given time, including live events and audiovisual works, for which subscribers exercise choice in both the content and the time of receipt of the transmissions.

Some SVOD services, for example Starz On Demand, do not follow Showtime On Demand in offering original content to their subscribers. In either case, the principal assertions of Starz are not incompatible with a rule permitting SVOD to be encoded as restrictively as "Copy Never." As the Commission noted in its Second Report & Order, even if SVOD were defined as a business model subject to a maximum of "Copy Never" encoding, programmers would still have the freedom to encode its service as "Copy One Generation." The only response to this in the record is the claim that "as a practical matter the negotiating power of content providers will force the marketplace adoption of the most restrictive treatment possible under each cap."[2] However, there is no reason for the Commission to intervene in negotiations between programmers and content owners in this instance. The Commission should do no more than recognize that "Copy Never" is appropriate for SVOD, which will allow *all* of the SVOD services to continue offering their services as currently structured in a fair and open market for content.

CONCLUSION

For all of the foregoing reasons, the Commission should grant the Petition for Reconsideration of the Motion Picture Association of America, Inc., and classify Subscription

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[2] Second Report & Order ¶ 73.

Video-on-Demand as a Defined Business Model subject to encoding by MVPDs as restrictively as "Copy Never."

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

I, Melissa V. Bodrick, hereby certify that a true and correct copy of the Comments of Showtime Networks Inc. was served on the following parties on March 22, 2004, by first-class mail, postage prepaid:

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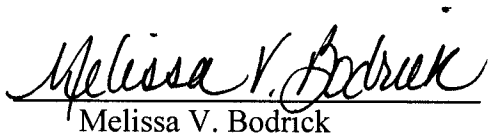

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