

**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
)	

**OMNIBUS REPLY OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.
TO THE OPPOSITIONS FILED BY THE CONSUMER ELECTRONICS INDUSTRY,
HOME RECORDING RIGHTS COALITION, NATIONAL CABLE &
TELECOMMUNICATIONS ASSOCIATION, PUBLIC KNOWLEDGE & CONSUMERS
UNION, AND STARZ ENCORE GROUP LLC**

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INTRODUCTION AND SUMMARY

The Motion Picture Association of America, Inc. (“MPAA”) submits this omnibus reply to the Oppositions filed by the Consumer Electronics Industry, Home Recording Rights Coalition, National Cable & Telecommunications Association, Public Knowledge & Consumers Union, and Starz Encore Group LLC to its Petition for Reconsideration.¹ The MPAA in its Petition requested that the Commission reconsider several aspects of its “Plug & Play Order”² that may have unintended negative consequences.

First, the MPAA *merely* requested that selectable output control (“SOC”) *capability* be required in DFAST-licensed Plug & Play devices. The Consumer Electronics Industry (“CE”),

¹ See Petition for Reconsideration of the Motion Picture Association of America, Inc. (“MPAA Petition”) (filed Dec. 29, 2003).

² See Second Report and Order and Second Further Notice of Proposed Rulemaking, *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment*, C.S. Docket No. 97-80, P.P. Docket No. 00-67, FCC 03-225 (rel. Oct. 9, 2003) (“Plug & Play Order”).

Home Recording Rights Coalition (“HRRC”), and others opposed the MPAA’s Petition as unnecessary given the current ban on SOC in Section 76.1903. However, such oppositions ignore the fact that the Commission specifically stated that it was not prohibiting selectable output control capability, and that it would consider petitions, waivers, or other proposals for the use of selectable output control in the future. For example, the Commission should consider permitting SOC in connection with the development of innovative new business models, or to prevent involuntary, unavoidable liability for the triggering of content protection technologies. Such petitions, waivers, or other proposals will be pointless, however, if the capability for selectable output control is not built into devices; and the capability is not likely to be built into devices absent currently permitted uses for selectable output control. The Commission should resolve this Catch-22 by mandating selectable output control capability be built into devices as part of its supervision of the DFAST license.

Second, Starz Encore Group has objected to Subscription Video-on-Demand (“SVOD”) services being allowed – not required, but allowed – to be encoded as restrictively as “Copy Never.” Starz claims that such a definition of SVOD would prevent it from seeking lower levels of encoding, such as “Copy One Generation,” for its services. There is absolutely no evidence in the record to support this contention.

Third, the Commission should modify the procedures for launching Undefined Business Models to make them less onerous on those attempting to offer innovative services to their customers. Although CE objects that the MPAA’s concerns are hypothetical, in fact it appears clear that the rule would unnecessarily require numerous launch announcements of identical services by multiple MVPDs. Furthermore, the rule’s provision of a two-year period to object is needlessly protracted. Although Starz objects that a two-year period is necessary for business

models to develop, in fact the business model as represented by a particular launch will be fully developed for that service upon launch; ninety days should be a more than sufficient time to file a complaint.

Finally, the MPAA requested that the Commission clarify that Section 76.1908(a) of the Commission's rules does not immunize MVPDs from their agreements with content owners or from other laws or regulations. It appears that no party contests MPAA's reading of the existing rules. The Commission should therefore simply clarify that Section 76.1908(a) does not abrogate content licenses entered into by MVPDs, or create an exception to any rules and regulations other than those in the remainder of Subpart W.

I. Selectable Output Control Capability Should Be Required in Plug & Play Devices

The MPAA requested, in its Petition for Reconsideration, that the Commission require that the *capability* for selectable output control ("SOC") be built into DFAST-licensed devices, as opposed to generally permitting the use of SOC at this time, so that when uses of SOC are approved under the Commission's waiver or petition process, the capability is there to exercise those uses. Several parties, opposed to SOC in any form, objected to this proposal.

CE claims vociferously and repeatedly that what is being sought is the ability to "turn off *any or all* home interfaces . . . in the sole and unfettered judgment of the content provider or distributor."³ CE, however, simply ignores what the Commission has stated and what the MPAA has requested. The Commission has stated that, despite the ban on the use of SOC, it would be

³ Consumer Electronics Industry Opposition to Petitions for Reconsideration ("CE Opposition") at 4; *see also* Opposition to Petitions for Reconsideration of Public Knowledge and Consumers Union ("PK/CU") at 3. CE states, in bold and italics, that it is opposed to a doctrine of "all restrictions whose use is not forbidden have been mandated." CE Opposition at 3. It is not clear what application CE's mantra has to this proceeding. No one in this proceeding has suggested that the fact that SOC capability has not been forbidden means that it has been mandated. Indeed, the entire point of the MPAA's Petition for Reconsideration on this issue is that the Commission must take the further step of requiring that SOC *capability* be built into DFAST devices in order to ensure that that capability is there when specific uses are approved.

willing to consider “future applications that could potentially be advantageous to consumers, such as facilitating new business models,” and that therefore the Commission would “consider waivers, petitions or other proposals to use selectable output control in that regard.”⁴ In turn, the MPAA has requested that the Commission require that capability to be built into Plug & Play devices, so that if and when such uses are approved, the capability is there, and that the Commission further consider certain narrow uses of that capability. If and when those uses are approved, it would only be for the purposes designated by the Commission, not by content owners. Thus, none of this suggests that content providers will be exercising “unfettered” selectable output control at any time in the near future. In any event, even if the Commission had not barred the use of SOC, it is simply a red herring to suggest that content owners would ever be able to exercise their “sole and unfettered judgment” to use SOC, given such factors as market forces.

In the same vein, CE further claims that the MPAA is “seeking an FCC mandate for *all* products, not just DFAST-licensed products.”⁵ In fact, the MPAA specifically requested only that the Commission require the capability for SOC “be included in Plug & Play devices.”⁶ Contrary to the claims of CE, that mandate would be authorized by the FCC’s supervisory authority over the DFAST license, as granted by its authority under Sections 624a and 629 of the Communications Act. CE also resurrects the claim that SOC will allow turning off a copy-protected 1394 interface in favor of a display-only interface such as DVI/HDMI.⁷ The MPAA

⁴ Plug & Play Order ¶ 61.

⁵ CE Opposition at 6.

⁶ MPAA Petition at 3.

⁷ See CE Opposition at 5; HRRC at 3.

and member companies have specifically disclaimed this scenario on numerous occasions.⁸

CE argues further that a mandate for SOC capability is unnecessary, as SOC capability could be negotiated directly from cable operators.⁹ This would be accurate, but for one important fact: the Commission, largely at CE's request, has currently banned the use of SOC. Given that prohibition, the cable industry has not included SOC capability as part of the DFAST license requirements. Having stepped in to regulate the market to prohibit the current use of SOC, the Commission has the further responsibility to ensure that the capability for SOC is there for the situations it later decides to permit.

Several parties claimed that the potential for patent liabilities for the triggering of a protection technology not authorized by a content owner was insignificant and did not justify a mandate for SOC capability. These comments miss two points. First, the comments suggest that such liability would be no different than the patent liabilities businesses face in the ordinary course of business. This is not accurate, however. In contrast to a manufacturer that voluntarily adopts a technology that later generates patent claims against the manufacturer, content owners may, as a result of the FCC's proceedings, see their content triggering protection technologies they have never agreed to use. It would be unjust to adopt a regulation that provides for the

⁸ See, e.g., Reply Comments of the MPAA at 15 (filed Apr. 28, 2003); Letter from Fritz E. Attaway to Chairman W.J. "Billy" Tauzin and Chairman Fred Upton at 1 (Mar. 20, 2002). CE has also attempted repeatedly to turn these limited disclaimers into a broad forswearing of SOC, and then charge the MPAA with inconsistency when it asserts otherwise. See, e.g., HRRC at 2-3; CE Industry Comments at 18-19 (filed Mar. 28, 2003). Contrary to the charge of HRRC, there is no need to update any records, as there has been no change in position. It is still the MPAA's policy, as Mr. Attaway stated, that "MPAA and its member companies are not seeking in the 5C license or in the OpenCable PHILA context the ability to turn off the 1394/5C digital interconnect in favor of a DVI/HDCP interconnect through a selectable output control mechanism." In context, Mr. Chernin's statement clearly applied to the Fox February 2000 proposal to use SOC to select between 5C (an interface that supports copying) and HDCP (an interface that does not support copying) in certain situations only, namely, in the event that 5C suffered a catastrophic hack. As HRRC is well aware, it was that "early stage proposal" that was later "explicitly abandoned" and "largely superseded by the 5C negotiations." See HRRC at 2-3. Obviously, neither statement applies to the use of SOC for other reasons, such as those cited in the MPAA's Petition for Reconsideration.

⁹ See CE Opposition at 7.

authorization of protection technologies over the objections of content owners, but then subjects them to uncontrollable liability for triggering those very same technologies merely by distributing their content.¹⁰ SOC may be one method of handling this problem if it ever arises, but it will not be a viable option if the capacity does not exist in DFAST devices.¹¹ In any event, the concern is quite real, as technology vendors refuse to provide assurances that such triggering claims are impossible.

II. Subscription Video-on-Demand Deserves Copy Protection Up to and Including “Copy Never”

Preliminarily, copyright owners have the right to determine the conditions upon which the owners will license their works for release into different distribution channels; those conditions include the levels of protection to be afforded those works. Consequently, as the MPAA has stressed before, encoding rules should be left to marketplace negotiations.¹² Given that the Commission has intervened in this area, however, the MPAA has requested that the Commission reconsider at least that part of its decision that classifies Subscription Video-on-Demand (“SVOD”) – which has been in the marketplace for years – as an “Undefined Business Model” subject to the procedures in Section 76.1906 upon every launch by a new MVPD. The MPAA requested that instead the Commission return to the proposal contained in the MOU to classify SVOD as a “Defined Business Model” that can be encoded as restrictively as “Copy

¹⁰ Contrary to the claims of CE, *see* CE Opposition at 8, the MPAA supports the use of SOC to protect not just content owners, but any party threatened by patent liability for triggering a content protection technology they had no part in selecting.

¹¹ *But see* PK/CU at 5 (suggesting use of petition/waiver process to deal with issue). Public Knowledge repeatedly chides the MPAA for failing to introduce new evidence to support its petition for reconsideration. *See* PK/CU at 2, 3, 5. Not only is new evidence not required for a petition for reconsideration, it is presumptively disfavored, and allowed by the Commission only in certain circumstances. *See* 47 C.F.R. § 1.429(b).

¹² The MPAA’s opposition to the Commission’s mandating encoding rules is well-documented. *See* Comments of the MPAA at 12-13 (filed Mar. 28, 2003); Reply Comments of the MPAA at 8-10 (filed Apr. 28, 2003).

Never.”

Starz Encore Group LLC opposed even this limited request, stating that because SVOD is “new and developing,” the Commission was correct to classify it as an Undefined Business Model.¹³ But as the MPAA and HBO have observed, SVOD is not “new and developing;” it is stable and developed, and it clearly is in use by several content providers for the most high-value content in their possession.¹⁴ Such content is appropriately protected as Copy Never. Given the high value of this content, even the potential that SVOD could not be marked Copy Never may stifle and limit innovation in the SVOD business model.

The great majority of Starz’s opposition to MPAA’s petition is devoted to explaining why SVOD should be treated as Copy One Generation. Starz’s argument is beside the point, however, because as the Commission noted and even Starz admits, Starz “remains free to negotiate with content providers and MVPDs for copy once status” even if the maximum encoding for SVOD were set to Copy Never.¹⁵ Thus, Starz’s argument for capping SVOD at Copy One Generation boils down to one assertion, made without any supporting evidence in the record in this proceeding: that “the MPAA member studios, which control virtually all American movie titles, will undoubtedly require in their agreements that all movie-based SVOD services be encoded as Copy Never.”¹⁶ This claim, however, misses the fundamental point that, except with regard to narrow exceptions not relevant here, a copyright owner controls reproduction and distribution rights (among other rights) to the owner’s works and is entitled to

¹³ Opposition of Starz Encore Group LLC to Petition for Reconsideration (“Starz”) at 4; *see also* PK/CU at 6 (MPAA request would “impos[e] the Copy Never regime on the developing market of SVOD”).

¹⁴ MPAA Petition at 5; Comments of Home Box Office, Inc. (“HBO”) at 4.

¹⁵ Plug & Play Order ¶ 73.

¹⁶ Starz at 5; *see also* PK/CU at 7.

negotiate the terms upon which the owner will release those works into a particular distribution channel.

Further, even if that were not the case, Starz's claim would lack merit. Starz has not even alleged that it has actually failed to reach agreements with any of the MPAA member companies for its SVOD service. Indeed, Starz has claimed repeatedly in its press releases that it has reached agreements for SVOD content with "Disney, Universal, Sony, MGM, Paramount, New Line, Revolution Studios, and Miramax."¹⁷ The record is thus devoid of any support for the claim on which the Commission's decision rests.

Starz claims that its service is different from HBO's and Showtime's, in that Starz On Demand offers primarily theatrical releases contemporaneous with their availability on Starz's linear service.¹⁸ The mere fact that different programmers offer different forms of the SVOD service, however, does not mean that SVOD is undeveloped, or that it is appropriately capped at Copy One Generation. An SVOD service that is Copy One Generation effectively obliterates the "on-demand" portion of the definition of SVOD – instead of viewing content on demand during a certain window, SVOD with Copy One Generation encoding is essentially a "purchase and download" business model, no different than purchasing a copy of a Copy Never program for delivery through a cable or satellite system. Mandating that *all* SVOD be Copy One Generation would thus change the essential nature of the SVOD service. While Starz and others are of course free to develop a "purchase and download" business model, the Commission should not preclude content owners from offering SVOD to consumers as well, whether that SVOD service contains original programming or theatrical releases offered contemporaneously by a linear

¹⁷ Comments of Starz Encore Group LLC on the Further Notice of Proposed Rulemaking at App. A (filed Mar. 28, 2003).

¹⁸ Starz at 4-6.

service.¹⁹

The truth is that consumers will decide what they want. The market thus affects content owners as much as anyone else. If a significant number of consumers want to enjoy SVOD encoded as Copy One Generation, and it is economically viable to provide such content in that manner, then some enterprising content owners will find a way to fill that niche, because if they do not, their competitors will. Neither Starz nor Public Knowledge provides any evidence that Starz would not be able to develop a viable Copy One Generation SVOD service if the maximum permitted encoding is Copy Never. Importantly, however, Starz is not entitled to create a business that depends on compelled surrender of others' copyright rights.

Starz attempts to justify the proposed curtailment of those rights by invoking a claimed right "to make a single copy of programs for personal use."²⁰ No such right exists, however.²¹ In arguing to the contrary, Starz cites Section 1201(k) of the Digital Millennium Copyright Act of 1998 and the Supreme Court's decision in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Betamax*"). Neither supports Starz. Section 1201(k) is limited to specific analog devices, and the encoding rules in subsection (k)(2) are tied to the mandate in subsection (k)(1) for specific copy control measures for those analog devices.²² Starz's argument that the statute should here be extended to business models delivering high-resolution digital content should be rejected. It is made in the wrong forum, and represents an inappropriate attempt to bypass and contort Congress's intent.²³

¹⁹ See also HBO at 4-5/

²⁰ E.g., Starz at 2, 10.

²¹ See, e.g., *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1135 (N.D. Cal. 2002).

²² See Comments of the MPAA at 9 (filed Mar. 28, 2003); Reply Comments of the MPAA at 6 (filed Apr. 28, 2003).

²³ Furthermore, even if Section 1201(k) could apply to the digital content at issue here, the MPAA does not

Equally inappropriate is Starz's attempt to have the Commission extend to SVOD the Supreme Court's *Betamax* decision, a holding that relied heavily on specific factual findings following a full trial. Starz itself recognizes that the *Betamax* decision related only to time-shifted home recording of free over-the-air television. As the Court noted, no other forms of television were addressed: "The lengthy trial of the case in the District Court concerned the private, home use of VTR's for recording programs broadcast on the public airwaves without charge to the viewer. No issue concerning the transfer of tapes to other persons, the use of home-recorded tapes for public performances, or the copying of programs transmitted on pay or cable television systems was raised."²⁴ Despite the fact that SVOD is not free, does not involve a commercial broadcaster, and provides multiple viewing times, and that the *Betamax* decision was based on detailed findings of fact, Starz argues that *Betamax* should here be extended to SVOD. In any event, as with its Section 1201(k) argument, Starz's position is being advanced in the wrong forum, and should be rejected.²⁵

The issue before the Commission is the limits it will impose on content protection that copyright owners, distributors, and others may voluntarily agree to. Although the MPAA does not believe that the Commission should set those limits, if limits are to be set, SVOD should be

agree that SVOD could only be encoded Copy One Generation under Section 1201(k).

²⁴ 461 U.S. at 425 (footnote omitted).

²⁵ Although the issue is not properly before the Commission, the MPAA feels constrained to point out that in arguing for the extension of *Betamax*, Starz ignores the extensive discovery and argument reflected in the record as a result of eight years of litigation. Starz also disregards the emphasis placed by the Court on various factors that distinguish that case from the current situation, for example, that the public interest was served through free television's reaching an expanded audience; that revenues for broadcast television were generally advertising-based; time-shifting involved watching a free program once with advertisements and then erasing it; and that a substantial number of copyright owners did not object to the practice. Starz also mischaracterizes the fair use defense, focusing exclusively on one factor (potential harm to the market) and basing even that discussion on numerous unsubstantiated statements. Among other things, Starz ignores the distinction between digital copies, at issue here, and the degraded analog copies at issue in *Betamax*. That distinction, along with the appeal of advertisement-free versions of films, is critical to understanding the post-*Betamax* success of commercially-produced videotapes in the 1980s, a success upon which Starz erroneously relies to support its "no market harm" argument.

allowed to be encoded as restrictively as “Copy Never.” The heart of any decision regarding encoding is the value of the content that is being protected. As already noted, many programmers using the SVOD business model deploy their most valuable content over SVOD; thus Copy Never is appropriate for those services. Starz has not introduced any evidence or plausible arguments to the contrary.

III. The Commission Should Revise Its Undefined Business Model Procedures

The MPAA also requested, in its Petition for Reconsideration, that the Commission modify its procedures for announcing and challenging the encoding rules for Undefined Business Models, namely to limit the announcements that need to be made to a single, large MVPD, and to shorten the time period for raising objections to 90 days instead of two years.²⁶ Otherwise, as we stated previously, potentially dozens of unnecessary notices would need to be filed, and the uncertainty as to whether the encoding rules will be upheld could persist for years.

CE objects to the MPAA’s concerns as “hypothetical.”²⁷ But it is not hypothetical that the rules require perpetual launching notices from multiple systems even for the same new service launched on different systems, and indeed it is not hypothetical that each such notice generates a two-year period in which to object. It is also not hypothetical that those opposed to any content protection at all may organize thousands of identical objections in order to slow down the process.²⁸

Starz claims that there is no cause to shorten the period for objections from two years because “a substantial period of time is needed for a new business model to develop as

²⁶ See MPAA Petition at 8.

²⁷ CE Opposition at 9.

²⁸ See, e.g., many of the comments filed in the Broadcast Flag proceeding.

envisioned by its developers so that it becomes viable.”²⁹ This claim misses the mark. The service will presumably be defined as soon as it launches, along with its encoding rules. For example, SVOD services exist today; there is thus no need to wait two years for the emergence of encoding rules for SVOD. All that will be necessary is to put together the appropriate filing. Ninety days is an extremely generous time period to do so, more than is allowed in federal courts for responding to a complaint, or even by the FCC for commenting on a notice of proposed rulemaking. Two years, by contrast, is clearly excessive, and will leave content owners, programmers, and MVPDs unable to predict the future of their services for a prolonged period of time.

IV. The Commission Should Clarify That Section 76.1908 Does Not Itself Abrogate Content License Agreements

The MPAA also requested that the Commission amend Section 76.1908(a) to clarify that such section does not abrogate the obligations of MVPDs to abide by their license agreements with content owners, or other regulations and laws governing the “encoding, storing or managing Commercial Audiovisual Content.” Fortunately, it appears that no one reads Section 76.1908(a) to create any general immunity for an MVPD from its license agreements or other laws and regulations. The National Cable & Telecommunications Association (“NCTA”), for example, “does not dispute that the terms under which content may be distributed by cable operators are governed by affiliation agreements with programmers and FCC rules.”³⁰ CE misunderstood the MPAA’s request as “seek[ing] immunity for its members if FCC regulations conflict with the

²⁹ Starz at 24.

³⁰ See The National Cable & Telecommunications Association’s Opposition to Petitions for Reconsideration and Notice of Joint Proposal for Improved Testing Rules (“NCTA”) at 15.

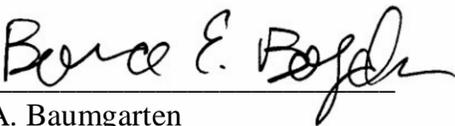
members' contractual choices,"³¹ but that is not the issue at hand. It is not that the MPAA is seeking any immunities, it is that we wish to ensure that no immunities are unintentionally created by Section 76.1908(a).³² So long as all parties are agreed, then an appropriate clarification of that principle should be unobjectionable.

CONCLUSION

For the reasons stated above, the MPAA respectfully requests that the Commission grant the Petition for Reconsideration of the Motion Picture Association of America, Inc., and require selectable output control capability in DFAST-licensed devices; classify Subscription Video-on-Demand as a Defined Business Model subject to encoding as restrictively as "Copy Never;" alter the procedures of Section 76.1906 to require launch notifications only from a limited number of MVPDs and to require objections with ninety days; and clarify that Section 76.1908(a) of the Commission's rules does not itself grant MVPDs immunity from any law or regulation apart from Subpart W, or from the terms of their private license agreements.

Respectfully submitted,

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³¹ CE Opposition at 3.

³² See also Starz at 22-23.

CERTIFICATE OF SERVICE

I, Bruce E. Boyden, hereby certify that a true and correct copy of the Omnibus Reply of the Motion Picture Association of America, Inc. to the Oppositions Filed by the Consumer Electronics Industry, Home Recording Rights Coalition, National Cable & Telecommunications Association, Public Knowledge & Consumers Union, and Starz Encore Group LLC was served on the following parties on March 22, 2004, by first-class mail, postage prepaid:

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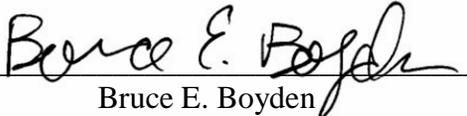
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