

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

In the Matter of)	
)	
Motion Picture Association of America, Inc.)	CS Docket No. 97-80
)	MB Docket No. 08-82
)	CSR-7947-Z
Petition for Waiver of)	
47 C.F.R. § 76.1903)	
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**Opposition of the Consumer Electronics Association
to Motion Picture Association of America Petition
for Waiver of 47 C.F.R. § 76.1903**

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The Consumer Electronics Association (“CEA”) submits these Comments in response and opposition to the permanent waiver of 47 C.F.R. § 76.1903, petitioned for by the Motion Picture Association of America (“MPAA”). CEA is the principal trade association promoting growth in the consumer technology industry through technology policy, events, research, promotion and the fostering of business and strategic relationships. CEA represents more than 2,200 corporate members involved in the design, development, manufacturing, distribution and integration of audio, video, mobile electronics, wireless and landline communications, information technology, home networking, multimedia and accessory products, as well as related services that are sold through consumer channels.

CEA has a strong interest in the outcome of this proceeding. CEA’s members manufactured and distributed to the public, in good faith, the television receivers that would unexpectedly go dark in many homes as a result of Selectable Output Control (“SOC”) being activated, remotely, by content providers or distributors. CEA was also a prime mover in proposing to the Commission the 2002 “Plug & Play” Memorandum of Understanding¹ with the cable industry and its prime members, and in proposing the regulatory framework, adopted by the Commission in October, 2003,² of which the

¹ See Letter from Carl E. Vogel, President and CEO, Charter Communications, *et al.*, to Michael K. Powell, Chairman, FCC, CS Dkt. 97-80 (Dec. 19, 2002), *Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers* (“MOU”).

² *In The Matter Of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Dkt. No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking (rel. Oct. 9, 2003).

Encoding Rules are a part. It was for good reason that CEA and others urged that Section 76.1903 be adopted as a flat prohibition against this practice, rather than one as to which exceptions might readily be granted. Accordingly, MPAA should bear a heavy burden to demonstrate that any waiver or exception – especially a permanent one – would be justified. The MPAA Petition, however, neither acknowledges nor accepts any such burden.

I. SELECTABLE OUTPUT CONTROL INVOLVES CONTROL OVER VIEWING, NOT JUST COPYING, SO ADVERSELY IMPACTS CONSUMERS WHO HAVE BOUGHT DIGITAL TELEVISIONS EVEN IF THEY OWN NO RECORDING DEVICE.

In CEA’s Comments on the Commission’s 2003 Notice of Proposed Rulemaking which led to the Encoding Rules from which MPAA now seeks a waiver, CEA expressed strong concerns about SOC’s prospective impact on consumers. Nothing has changed that would, or could, ameliorate these concerns. CEA told the Commission:³

Simply, Selectable Output Control is the remote selection, by the content provider or distributor, of the home interfaces that are to be active, and which ones are to be shut down, *on a program by program basis*. It is fundamentally unfair to consumers because it means that, even though they have acquired devices with apparently compatible interfaces, and rely upon these interfaces for the delivery of programming, the utility of the interface can be cut off without any consumer warning or input, so can never be relied upon for *viewing*, and well as *recording*, programs.

The only practical use for Selectable Output Control (instead of other available technical means to address security) is to discourage consumers from relying on an interface that supports home networking and home recording. If the person residing at 210 Oak Street buys products connected by a non-recordable interface, he or she would have little reason to fear that Selectable Output Control would be triggered, on a particular program, to sever the electrical connection between, *e.g.*, the set-top box and the display. If the person at 212 Oak Street acquires an identical box and display, but connected by an interface that supports recording, that connection may be cut off at the whim of the content provider or distributor. Thus, in accepting a license that provides for Selectable Output Control, the licensee is putting at risk any consumer who would rely on an interface that might *subsequently* be disfavored by the content provider.

Upwards of four million consumers have purchased HDTV receivers that rely, for HDTV content, on “component video” interfaces that content providers do not consider “secure” for copy protection purposes. Others will be offered a choice of receivers with secure digital interfaces, of which some support home recording

³ *In The Matter Of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Dkt. No. 00-67, Consumer Electronics Industry Comments at 18 – 19 (Mar. 28, 2003). (Comments were filed jointly with Consumer Electronics Retailers Coalition.)

and some do not. To allow the use of Selectable Output Control in MVPD transmissions would be to grant absolute control over consumer choice and experience to the content provider or distributor, irrespective of whatever Encoding Rules may otherwise apply to the programming. It would mean that even those consumers who do not own a recorder would be at risk of having the viewing screen go dark on an unpredictable, program by program basis. In response to statements of congressional concern, the Motion Picture Association of America has advised a congressional committee that it will *not* seek the imposition of Selectable Output Control in MVPD or other venues.⁴

CEA remains concerned that the inevitable consequence of SOC will be the loss of viewing, for which consumers have paid or are willing to pay, by consumers who may not be interested in recording and may not even own a recorder or have any Internet connection. SOC thus remains a blunt instrument. It is not a “copy protection” technology. It is, rather, a “last resort” device whose use must be balanced against the harm inflicted on innocent consumers and on the public interest. Thus, a strong, documented, detailed, and persuasive showing must be made on its behalf.

II. THE MPAA PETITION REFERENCES UNSECURED OUTPUTS AND A NEED FOR COPY PROTECTION BUT APPEARS TO APPLY EQUALLY TO SECURE DIGITAL INTERFACES.

The MPAA petition focuses on *when* SOC might be applied, but not on *how*. The emphasis on “piracy” and unsecured outputs implies that SOC would be employed only with respect to interfaces with no copy protection acceptable to the MVPD licensor. The Petition itself, however, neither says nor implies any such thing.

A. Before Any Consideration Or Further Comment Is Directed To This Petition MPAA Should Clarify That It Is Not Seeking Under Any Circumstance To Allow SOC To Be Applied To A Secure Digital Interface That Is Implemented By An MVPD Or Recognized In Any MVPD License.

Bluntly put, if MPAA is asking the FCC to grant a waiver that would allow a content owner or distributor to apply SOC to a protected digital interface that has been licensed or implemented by an MVPD or its vendor, MPAA should say so explicitly in this Petition. MPAA should then attempt to explain and justify why such a waiver should be granted. If MPAA is *not* proposing that the waiver allow a secure digital interface to be shut off, it should say so. This would save trees, energy, and expended hours by all concerned. CEA’s position is that no such waiver would ever be appropriate and that under no circumstance should any be granted.

⁴ Letter to Hon. Billy Tauzin, March 20, 2002. As quoted in Mr. Attaway’s September 6, 2002 letter to Mr. Ferree: ‘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.’ (fn. in original)

B. Content Owners And Distributors Should Not Be Granted The Power To Impose Selectable Output Control On Secure Digital Interfaces Or Technologies That Are Recognized In Any MVPD Navigation Device License.

CEA members have worked for more than a decade, through technology negotiations with content providers, license negotiations with MVPDs, standards consortia and standards-setting bodies, to establish standard interfaces and applied technologies, for home networks, that are deemed reliable and protected. MPAA now apparently is proposing that the very content owners and distributors whose concerns have been satisfied, and goals achieved, through these negotiations and proceedings be given the power simply to shut off and strand the secure interfaces and technologies in which device manufacturers and their customers have subsequently invested.

If this is what MPAA is proposing, it would amount to a breathtaking breach of faith with technology and device providers, and their many customers. The Encoding Rules emerged from a context in which industries tried to work out solutions that protected the legitimate concerns of content providers and distributors while allowing for competition and innovation. CEA members accepted license ground rules that involve technological restrictions in working with content owners and distributors to develop, and ask consumers to trust, technologies that would be accepted as secure and thus become home network connections. The consequences of allowing these same content providers and distributors arbitrarily to select these technologies and interfaces for *shutoff* could be manifold and profound.

1. No argument or justification has been made for such an exception.

The MPAA petition is devoid of any fact, reason or reasoning as to why it would be of benefit to content providers or distributors to shut down a protected digital interface, or why or how doing so would attract or promote early-window programming. It would thus be tempting for CEA to conclude that MPAA could not possibly have such shutoffs in mind. CEA and its members, however, are aware of other potential motives for acquiring this power, and of how it might be used. The Commission should consider these potential motives, and their implications, in judging why this power is being sought, and whether it should be granted.

2. Such an exception would grant content owners and distributors effective control over competing interface technologies and security applications, contrary to law and public policy.

The powers that would be granted via this petition would apply not only to *interfaces*, but also to *security technologies* that could be applied to interfaces. In other words, granting this petition would invite any content provider or distributor to shut down a secure interface entirely, irrespective of which technology makes it secure, or to shut down an interface that uses only *one* of the security technologies that can be applied to it. This power to pick and choose, arbitrarily, among secure interfaces and/or technologies

would hand content providers and distributors, collectively or individually, even *greater* leverage than they enjoy under existing license regimes. It would allow them arbitrarily to place new, even orthogonal, demands on technology and interface proponents.

The leverage that content providers and distributors would gain over technology providers would not be limited to the interfaces and technologies now at hand. The *SOC Sword Of Damocles* would give MPAA's members the negotiating power to play one technology provider against another on *any* subject – downstream impositions on consumers in a home network; building filtering technologies into entirely unrelated products; net neutrality; or any other subject on which a technologist might have begged to differ with a content provider or distributor.

No matter how temporary the SOC “window” may be (and, as is discussed below, the MPAA petition appears to have a gaping loophole in this respect), the application of SOC must have a profound effect on how consumers purchase and configure home networks. Consumers are not likely to re-wire on a daily or weekly basis so as to use some interfaces for some purposes and other interfaces for other purposes. Thus, to threaten a technologist with an SOC “turn-off” is to threaten his product with commercial extinction. This can happen in multiple contexts:

- A threat directed to an entire interface – such as one that supports home recording, even though it fully conforms to license Compliance and Robustness rules.
- A threat directed at a particular security technology, one of two or more that could be applied under license to make an interface secure. This allows the content providers or distributors, individually or collectively, to use the *SOC Sword of Damocles* to play off one technologist or standards proponent against another.

MPAA, in the 2002 letter to former Rep. Tauzin quoted in n. 4 above, did purport to speak collectively for MPAA members on the subject of licensing impositions that would *not* be imposed. While CEA is not asserting that MPAA will act collectively in an unlawful fashion, even unilateral requirements by MPAA members or by major cable operators may determine the development of technologies, and thus have far-reaching effects on products and services available to consumers. It is well known that there are only six MPAA members and only a handful of major cable operators, any of which already can exert profound influence on industry vendors and licensees. (Indeed, inconsistent or contrary impositions by MPAA members can puzzle and frustrate consumers, just as collective actions would intimidate technologists.)

III. MPAA HAS NOT ESTABLISHED THAT SELECTABLE OUTPUT CONTROL SHOULD BE APPLIED TO THE STANDARD HDTV COMPONENT VIDEO INTERFACE.

While at least a theoretical rationale does exist for the SOC shutoff of effectively unprotected component video interfaces, this option *also* is unconscionable because it remains, as it has been for years, *unjustifiable*. CEA has been open, for a decade, to discussion of legislative measures to protect this interface *if* a showing could be made of actual or prospective harm from this “analog hole.” In the last Congress, MPAA stepped up to the plate on this score and struck out. In the absence of any showing that MPAA’s concern is more than theoretical, consumers who rely on this interface should not suffer the very real surprise and disappointment that SOC would entail.

A. The HDTV Component Video Interface Is Still Relied Upon By The HDTV Early Adopters Who Have Made The Largest Investment In HDTV Viewing And Has An Important Role Even Where Secure Digital Interfaces Are Also In Use.

Proposals such as this SOC petition put at risk the very “early adopters” who are most open to and interested in innovations from content and device industries. CEA is concerned about maintaining the value of devices in which consumers invested earliest and most heavily. MPAA should be, too.

For the first several years of HDTV televisions, the *only* interface available to receive the input of an HDTV signal from a cable or satellite set-top box was the “Component Video” (or “Component Analog”) interface. These were also the years in which HDTV receivers cost the *most* – commonly \$5,000. Some flat panel plasma displays with only Component Video inputs, comparable to those costing less than \$2,000 today, cost \$9,000 then.⁵

Televisions, unlike many “IT” products, are investments whose continued utility consumers expect to enjoy for a decade or more. Hence, shutting off HDTV signals to “early adopter” consumers who have made the biggest investments in new technologies and programming seems particularly unfair. This should require, at the least, *compelling evidence and a compelling justification* for the FCC to consider it. Moreover, the potential consequences are not limited only to consumers with HDTV receivers that are fully dependent on the Component Video interface. Many additional consumers own HDTV receivers or monitors that have only one other secure input, and have another HDTV source connected to that input. These consumers may not know how to re-wire a professionally installed system, to move their MVPD source away from the Component Video input, or may be simply unable to do so, even with professional help, given the other device demands on their system. Acquiring and using signal switchers to allow

⁵ The FCC and the Court of Appeals have long accepted and indeed officially expected that consumer electronics devices that entail digital technology would decrease sharply in price over time due to “learning curves” and economies of scale. *See Consumer Elec. Ass’n v. FCC*, 347 F.3d 291, 303; *Charter Communications, Inc. v. FCC*, 460 F.3d 31, 42 (D.C. Cir. 2006).

multiple uses of a secure input may also be expensive and challenging or beyond the capability of many homes. It may also be a foolish investment, frustrated by another MPAA member's subsequent or contradictory choice of a *different* interface or technology as the only one left on.

Such impositions on our industries' most loyal customers should not be made lightly or without compelling evidence (1) of its necessity, (2) of limitations on the adverse effect on these loyal consumers, and (3) that something tangible is being offered in return. MPAA has not even *addressed* the need for any such showing – now, in the petition stage, or later, on a case by case basis, if the FCC were to grant any relief.

B. When Challenged By The Congress To Adduce Evidence Of Harm From The “Analog Hole,” MPAA And Its Members Could Not Point To Any.

MPAA and members had the chance to make their case for commercial injury from the “analog hole,” as represented by the Component Video interface, in the last Congress. The Senate Judiciary Committee held a hearing on legislation aimed at securing this interface. While CEA and others expressed concerns over the technology that was put forward for this purpose, CEA, Committee members, and Chairman Hatch also challenged the proponents to adduce any evidence of harm from this “analog hole” – even of the “actual potential” variety that was accepted by the Commission with respect to the “Broadcast Flag.”⁶ MPAA was unable to point to any responsive data in the course of the hearing. MPAA promised to provide some,⁷ but CEA is not aware that any ever was provided or exists.⁸

In now petitioning the Commission, MPAA still neither invites nor accepts any burden to adduce evidence of compelling need or justification. Nor does MPAA accept any burden to be met on a case by case basis before a member pulls the SOC trigger. Until MPAA accepts and satisfies such burdens, applying SOC to the Component Video interface remains unconscionable as well as unjustifiable.

⁶ *The Analog Hole: Can Congress Protect Copyright and Promote Innovation?: Hearing Before the S. Judiciary Comm, 106th Cong. 8-9 (June 21, 2006)* (statement of Gary Shapiro, President and CEO, CEA, Chairman, Home Recording Rights Coalition).

⁷ *The Analog Hole: Can Congress Protect Copyright and Promote Innovation? Hearing Before the S. Judiciary Comm, 106th Cong.16 (June 21, 2006)*. S. Hrg. 109-539; available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:29573.pdf.

⁸ The study referred to at the hearing, which Committee members observed seemed to say nothing about any “analog hole,” was later admitted by the MPAA to have been substantially flawed anyway. See Justin Pope, *MPAA Admits Mistake on Downloading Study*, The Associated Press (Jan. 23, 2008), available at <http://abcnews.go.com/print?id=4176307>; *Downloading by Students Overstated*, Inside Higher Ed (Jan. 23, 2008), available at <http://insidehighered.com/news/2008/01/23/mpaa>.

IV. THE MPAA PETITION DOES NOT ADEQUATELY PROTECT CONSUMER VIEWING WINDOWS AND MAKES NO PROVISION FOR MEETING ANY BURDEN OF PROOF OR NOTIFYING OR RECEIVING COMMENT FROM THE PUBLIC.

In addition to demanding that MPAA accept burdens and provide proof, the Commission needs carefully to look behind MPAA's key assertion that what it is asking for will be limited and temporary. Based on the fine print in MPAA's petition, it cannot and should not be assumed that the imposition of SOC will be either limited or temporary.

A. The MPAA Version Of Selectable Output Control Is Not Necessarily Time-Limited At All. Cable And Satellite Customers Could Be Denied Viewing Indefinitely And Other Formats Could Be Affected.

A close reading of footnote one to the MPAA Petition suggests that the persistence of SOC on programming may be more profound and intrusive than the Petition otherwise asserts. In footnote one, the MPAA heavily *qualifies* its assurance that the SOC period for MVPD content would be limited to the period prior to release on prerecorded media for "general home viewing." The *fine print* of footnote 1 excludes from this category the release on prerecorded media that also carry "restrictions on output to protected digital interfaces." Based on existing leverage that the studios enjoy, this loophole will come to embrace the entire life of a movie or program, or at least the period in which the movie or program is released on a format such as Blu-Ray, but not on DVDs as currently configured. Moreover, studios could *further* leverage such a proviso to *prolong* the period during which content is *kept* only on carriers that offer similar control, and *away* from the formats on which consumers currently rely, such as DVD. Hence, the *windowing* "limitation" of the MPAA petition might actually be used as a lever to *prolong* the SOC application to programming, *and* as a reason not to license such programming to the most commonly available and relied-upon formats.

B. MPAA Does Not Offer To Meet Any Burden Of Proof, Either For The Waiver That Is Sought Or For A Waiver For Any Particular New Business Model, Or To Demonstrate Any Need Related To Security.

The MPAA loophole in footnote one appears to be the only area in which the MPAA descends to specifics to describe how and when and under what circumstances SOC might actually be applied. The existing Encoding Rules, with respect to exceptions or waivers, define new business models, circumstances, and burdens of proof to be met, as well as periods for public comment and determinations by the Commission. The MPAA, by contrast, proposes to move SOC from a flat prohibition to an option, under circumstances cagily defined by MPAA, to which no notice, burden, review, or determination would apply. There is nothing in MPAA's presentation to qualify its proposal for such treatment. Rather, if the FCC is going to consider this petition at all, MPAA should be obliged to come forward with presentations in each of these areas, and

subject these presentations to a full round of public comment before the Commission can even consider that it has a record on which it can make a non-arbitrary determination.

C. MPAA Does Not Propose Any Obligation To Make A Prior Notification To The Public, Or Any Process For The FCC To Seek Or Receive Public Comment.

In addition to offering nothing as to how it will satisfy public policy obligations for decision-making based on adequate notice and comment, MPAA offers nothing as to how the public would be advised of the SOC imposition, and who would be responsible for dealing with complaints from the public. CEA members have already suffered through a CableCARD regime in which clear defects in cable operators' devices, software, support, training, and personnel were blamed on properly designed and functioning consumer electronics devices.⁹ MPAA has come forward with nothing to assure that consumers will not be surprised or inconvenienced, or that their concerns and complaints will be properly channeled to the responsible parties – the content providers, the content distributors, and the Commission.

V. THE DIGITAL TRANSITION REQUIRES THAT CONSUMER CONFIDENCE IN LAWFUL CONSUMER ELECTRONICS PRODUCTS BE MAINTAINED RATHER THAN THREATENED.

The MPAA petition is received by the Commission at a time that the words “shutoff,” and concerns about “screens going dark,” appear daily in the press. The struggle against public confusion over the transition to digital television is a daily battle. This is a time when the confidence in the integrity of the inputs of lawfully sold TVs needs to be strengthened, not undermined, and when consumer confusion and disappointment should be avoided. Many consumers have already expressed puzzlement or even mistrust over the well-documented motivation behind the DTV Transition. CEA respectfully asserts that at this crucial time it would be unwise for the Commission to take action that would undermine public confidence in the utility of lawful television products that were sold to consumers in good faith.

VI. CONCLUSION.

Based on all of the foregoing, CEA recommends that the FCC simply deny this Petition as presented by the MPAA, as providing inadequate justification or qualification with respect to the relief sought. If the MPAA or another interested party were to file a petition more complete as to scope, justification, operation, limitations, burdens, and notices, the Commission could publish that petition for comment. CEA and others then would be in a position to address such a petition on an adequately specific basis, in light of what is at stake for consumer equity and confidence, the credibility with the public of each concerned industry, and the ability of the Commission to make reasoned decisions.

⁹ See *Charter Communications, Inc. v. FCC*, 460 F.3d 31, 41 (D.C. Cir. 2006); *In The Matter Of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, Second Report and Order ¶ 27 (Mar. 17, 2005).

Respectfully submitted,

A handwritten signature in black ink that reads "Gary Shapiro". The signature is written in a cursive, flowing style.

Of counsel
Robert S. Schwartz
Mitchell L. Stoltz
Constantine Cannon LLP
1627 Eye Street, N.W.
10th Floor
Washington, D.C. 20006
(202) 204-3508

Gary J. Shapiro
President and CEO
Consumer Electronics Association
1919 S. Eads St.
Arlington, VA 22202
Tel: (703) 907-7600

Dated: July 21, 2008

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Opposition of the Consumer Electronics Association to Motion Picture Association of America Petition for Waiver of 47 C.F.R. § 76.1903 was sent on July 21, 2008, by first-class mail postage prepaid, to the following counsel for Petitioner:

Kathleen Q. Abernathy
Robert S. Strauss Building
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Michael P. O'Leary
Motion Picture Association of America, Inc.
1600 Eye Street, N.W.
Washington, DC 20006

/s/ LaClaudia Dyson
LaClaudia T. Dyson