

November 28, 2008

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth St., SW
Washington, DC 20554

Re: *Notice of ex parte* presentation in: MB Docket No. 08-82

Dear Ms. Dortch:

On November 26, 2008, Gigi Sohn, Alex Curtis, and Jef Pearlman of Public Knowledge met with Commissioner Jonathan Adelstein and his Legal Advisor for Media Issues, Rudy Brioché regarding the Petition of the Motion Picture Association of America (MPAA) for a waiver of the selectable output control (SOC) ban in the above-referenced docket.

During the meeting we explained that *even* if one were to assume that it was necessary to give the MPAA the ability to turn off consumers' televisions in order to move up the Video-on-Demand (VoD) release date for feature films, the results would still be anti-consumer. This is because the harms to consumers far outweigh any minor benefit from receiving content through VoD earlier – a benefit which few consumers are even likely to notice. These harms include:

- forced obsolescence of over 20 million current, completely functional televisions and home entertainment systems
- additional cost of buying new equipment which is no better than the old
- blocking of customers' innovative consumer electronics such as Slingbox
- confusion among consumers whose high-end equipment will not display the same content as their neighbors'
- frustration when some consumers' televisions will only show content after a 60-day waiting period

The Commissioner and Mr. Brioché asked why the MPAA would choose to anger their own customers. We explained that by opposing new consumer-friendly technologies from the VCR to Digital Video Recorders (like ReplayTV and TiVo), the MPAA has repeatedly demonstrated their willingness to anger their customers and violate reasonable consumer expectations in an attempt to obtain absolute control over how, where, and when content is used.

The Commissioner and Mr. Brioché also asked whether the Commission had endorsed MPAA's petition by citing a letter from the MPAA in the original Plug-and-Play order, which banned the use of SOC. In stating that the Commission would "*consider* waivers" for "*future applications* that could potentially be *advantageous to consumers*, such as facilitating *new business models*," the Commission did cite to a letter from the MPAA as an example of a potential application they would consider.¹ That letter argued that "the prohibition against output control

¹ See Federal Communications Commission, *Second Report and Order and Further Notice of Proposed Rulemaking* ¶ 61, CS Docket No. 97-80, PP Docket No. 00-67 (Sept. 10, 2003) (emphasis added) (citing Fritz Attaway, MPAA, *Letter to Marlene Dortch, Secretary, FCC* (Aug. 29, 2003)).

effectively precludes possible new business models based on the delivery of very high quality programming (such as pre-video release movies).”²

First, the MPAA’s claim that such offerings are “precluded” is belied by content producers like the Independent Film Channel and Mark Cuban’s Magnolia Pictures who already do or have announced plans to release movies on VoD simultaneous with or before theater release *without* SOC. Further, the Petition fails *every single* requirement for granting a waiver of the SOC rules: Even if the proposal could have been considered a “new business model” or a “future application” in 2003, it cannot be considered so over five years later when others are already doing it. And for all the reasons described above, granting the waiver would not be at all “advantageous to consumers,” causing numerous harms while offering minimal value.

Finally, we reiterated that the MPAA has presented no evidence that analog or protected digital outputs are the source of copyright infringement or that the waiver would have any effect on infringement, while there is significant evidence that neither is true. The remaining substance of our discussion and examples cited herein are contained in our previous filings in this docket.

In accordance with Section 1.1206(b), 47 C.F.R. § 1.1206, this letter is being filed electronically with your office today.

Respectfully submitted,



Jef Pearlman
Equal Justice Works Fellow and Staff Attorney

cc:
Commissioner Jonathan Adelstein
Rudy Brioché

² Fritz Attaway, MPAA, *Letter to Marlene Dortch, Secretary, FCC* (Aug. 29, 2003).