

October 15, 2009

William T. Lake
Chief, Media Bureau
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

Re: *MPAA Petition for Expedited Special Relief: Waiver of 47 C.F.R. §76.1903*
MB Docket No. 08-82

Dear Chief Lake:

Public Knowledge (PK) takes this opportunity to respond to recent *ex parte* presentations made by the Motion Picture Association of America (MPAA) in this docket, and to address certain other arguments raised by Multichannel Video Programming Distributors (MVPD) in support of the waiver.

The MPAA's waiver application and recent presentations in support of its waiver request provide the first real test of Chairman Genachowski's commitment to make the FCC a "data driven agency" rather than one where powerful interests demand favors in proportion to their political clout. Waiver applicants bear a heavy burden of proof to show that granting an exception to an established Commission rule will serve the public interest.¹ The MPAA has submitted no proof that grant of the waiver will serve the public interest at all. To the contrary, what proof exists in the record shows that the "problem" of a longer window for release of movies to MVPDs than for release on DVDs is a business decision made by MPAA's members. Rather than shed crocodile tears for the poor shut ins and busy parents who must either subscribe to NETFLIX to get the earlier window or wait a whole thirty days, MPAA's members could simply negotiate a shorter release window.

Indeed, as DIRECTV admits in its most recent filing,² the wash of MVPD support has everything to do with NETFLIX and nothing to do with providing a "new service" (which is, of course, merely the existing service 30 days earlier). Shut ins and busy parents may subscribe to NETFLIX or similar services to receive the same content on the thirty day schedule without purchase of a new HDTV. Accordingly, to the extent there is public interest value in an early window, it already exists without doing violence to the Commission's rules.

While PK has sympathy for MVPDs compelled by Hollywood to lobby for regulatory favors as a precondition to negotiation or risk losing more business to NETFLIX and other DVD distributors, the FCC cannot allow itself to become a pawn in commercial negotiations. Given that a representative from Paramount testified at a recent FCC workshop that most movies hit the

¹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.")

² *DIRECTV Ex Parte Letter*, MB Docket No. 08-82 (dated Sept. 16, 2009).

internet as illegal copies on or before opening day,³ the studios' argument that they cannot release the content to MVPDs 30 days earlier without the ability to control selectable outputs makes even less sense than when initially set forth in MPAA's *Petition*. The MPAA's members should therefore follow in the footsteps of other studios that make their content available to MVPDs and DVD distributors simultaneously.

But even if the FCC ignores the fact that the waiver is unnecessary for the MPAA to release the content, since this decision lies entirely with the MPAA's members, even if the FCC ignores the fact that grant of the waiver will have zero impact on illegal copying, the FCC cannot ignore the fact that 25 million television viewers would need to purchase new equipment to even access this "new service."⁴

In short, nothing justifies grant of the waiver application. The MPAA's members can provide this "new service" without the waiver. Grant of the waiver will not protect content from illegal copying, as illegal copies are available well before the proposed shortened window. Further, to the extent there is any value in encouraging the MPAA to make content available to those unable to get to the movie theater, the content is *already* available from DVD rental services. Grant of the waiver will not "level the playing field" between NETFLIX and MVPDs, as 25 million television viewers would need to purchase new equipment to benefit from the "new service" offered by the waiver and, in any event, it hardly serves the public interest for the FCC to eviscerate its own rules a precondition for one set of industry players to negotiate with another.

Finally, the MPAA's claim that the FCC must act to rescue viewers and MVPDs from the MPAA's decision to hold them hostage is only the latest in a series of demands that the FCC transform itself into the "Federal Copyright Cops" or MPAA will take its marbles and go home – none of which have actually come to fruition. For example, despite dire predictions that without the "broadcast flag" the networks would withhold content, the transition to digital television managed to come off successfully and on schedule. Despite the insistence that NTIA include copyright filtering in the stimulus package, the grant application process appears to be rolling smoothly.

MPAA's Non-Response.

After more than a year, the Motion Picture Association of America (MPAA) responded to our *ex parte* filings from September of 2008.⁵ Despite this considerable length of time to assemble a rebuttal, MPAA's filings do little to respond to the substance of Public Knowledge's objections. Rather, after asking the FCC in 2008 to grant expedited relief because it would encourage consumers to buy new HDTV sets before the digital transition,⁶ the MPAA now

³ See Paramount, *Chart, FCC Workshop: The Role of Content in the Broadband Ecosystem*, (Sept. 17, 2009), *available at* http://broadband.gov/docs/ws_bb_ecosystem/huntsberry.pdf.

⁴ See CEA, *Ex Parte Letter*, MB Docket No. 08-82 (dated Sept. 15, 2009).

⁵ See MPAA, *Ex Parte Letter*, MB Docket No. 08-82 (dated Aug. 31, 2009); MPAA, *Ex Parte Letter*, MB Docket No. 08-82 (dated Sept. 28, 2009).

⁶ *MPAA Petition* at 9.

pretends to astonishment that its proposal would bring no benefit to the millions of Americans who continue to use analog receivers and quibbles with precisely how many millions would find its proposed “new service” useless without expensive new equipment purchases. Further, rather than address the fact that the “problem” the waiver addresses comes from the refusal of MPAA members to negotiate a new release window with MVPDs, the MPAA chides PK President Gigi Sohn for drawing attention to its own inconsistency.

MPAA’s Non-Response On How Few Subscribers Could Actually Benefit From The Waiver.

In September 2008, PK estimated that 11 million high definition televisions would be unable to receive the content for which MPAA seeks special treatment.⁷ In other words, even if the Bureau grants the waiver, more than 11 million customers will not experience any benefit unless they purchase additional equipment. Worse, to the extent the MPAA embeds signals to control selectable outputs, it threatens the ability of viewers to use lawfully purchased devices such as DVRs to time-shift their viewing of the content. A year later, MPAA responds that “grant of the waiver would not disenfranchise a single viewer because it would not result in any consumer losing access to any of the programming he or she receives today.”⁸

This utterly misses the point. MPAA has requested extraordinary relief from an existing Commission rule, justifying this request on the grounds that it will encourage MPAA members to release content to MVPDs sooner and thus make this content available to MVPD subscribers a whole 30 days earlier. The fact that at least 11 million of these subscribers would not realize any benefit even if the Commission granted the waiver unless they purchased new equipment substantially undermines the MPAA’s already tenuous claim that the benefit to the public at large (rather than the benefit to MPAA’s members) justifies grant of the waiver.

MPAA Ignores The Documentation That 25 Million Viewers Would Need To Purchase New Equipment To Benefit From The “New Service” Enabled By Grant of the Waiver.

MPAA also suggested that the 11 million number submitted by PK is ill-sourced and overstates the number of consumers that will see no benefit from a waiver without purchase of new equipment. In fact, despite taking more than a year to respond, MPAA has failed to keep pace with the record. In November 2008, PK submitted a new estimate from the Consumer Electronics Association (CEA) demonstrating that 20 million consumers would received none of the meager benefits promised by MPAA – without purchasing new equipment -- because their television sets could not support programming with embedded SOC controls.⁹ Indeed, CEA explained that even this estimate understated the number of consumers negatively impacted by grant of the MPAA’s *Petition*.¹⁰ More recently, CEA stated that “[i]f the FCC granted MPAA’s

⁷ Public Knowledge, *Ex Parte Letter*, MB Docket No. 08-82 (dated Sept. 17, 2008)

⁸ See MPAA Aug. 31 Letter 2; MPAA Sept. 28 Letter 2.

⁹ See, e.g., Public Knowledge, *Ex Parte Letter* (dated Nov. 18, 2008) (two letters filed on that date); Public Knowledge, *Ex Parte Letter* (dated Nov. 18, 2008).

¹⁰ See CEA, *Ex Parte Letter*, MB Docket No. 08-82 (dated Nov. 18, 2008). See also CEA, *Ex Parte Letter*, MB Docket No. 08-82 (dated Sept. 15, 2009) (explaining why the 20 million number likely *underestimates* the size of the problem).

waiver request, *25 million* HDTVs would become incapable of receiving and displaying programming accessed via set-top boxes for which a content owner or distributor invokes Selectable Output Control.”¹¹

By contrast, other than speculation that certain populations might find some benefit in shortening the window of release to MVPDs – which the MPAA’s members could do without the waiver – MPAA has introduced no evidence to show that anyone would prefer to buy new MPAA approved equipment rather than simply continue to order new releases on DVD. MPAA continues its linguistic gymnastics, insisting that “grant of the waiver will provide American consumers with a entirely new and exciting home viewing options...”¹² and that “a waiver would for the first time enable millions of Americans to obtain access in their homes to high-value content...”¹³ Not only is this number pure speculation, it ignores the fact that this “high value content” that Americans will be able to access “for the first time” is the exact same content as before at a slightly earlier date. Further, nothing prevents MPAA members from following in the footsteps of other studios¹⁴ and changing their release dates *today* – it is their business judgment, and not a rule in need of a waiver, which prevents them from doing so.

MPAA’s Waiver Does Not Represent A Natural Evolution of Technology.

To the extent that MPAA at all addresses the need to buy new equipment to view SOC-embedded content and the potential direct costs to consumers of disabling existing equipment, MPAA seeks to portray this as a natural consequence of advances in technology. While incompatibility can and does occur as a side-effect of technological change, we are *not* faced with that situation here. This is not the case of the digital television transition, where an improvement in television viewing technology is only possible by forcing consumers to upgrade from one technology to another. Instead, a small group of content owners are attempting to artificially force the obsolescence of otherwise relatively new, highly capable, expensive home electronics. Consumers may accept that some day, their old black and white CRT will not work¹⁵ or they won’t be able to fit a DVD (which provides higher resolution, digital quality, and navigation features) into their VCR. But no consumer buys a TV thinking, “in a couple of years, there will be channels which have the exact same content in the exact same format at the exact same quality, but released at an earlier date, and my TV will be unable to display them.”

This threat by content owners not to provide content should sound familiar. In 2002, Viacom stated that it would not provide high definition content the next year without the similar, but perhaps less insidious, control that the Broadcast Flag would have granted them.¹⁶ Yet today, as in 2003, the public enjoys a broad offering of high definition broadcast television,

¹¹ CEA, *Ex Parte Letter*, MB Docket No. 08-82 (dated September 15, 2009) (emphasis added).

¹² *MPAA Sept. 28 Letter* 1.

¹³ *MPAA Aug. 31 Letter* 2.

¹⁴ *See, e.g., Public Knowledge et al., Comments* 14, MB. Docket No. 08-82 (dated July 21, 2008).

¹⁵ Old black-and-white televisions which can attach to an antenna generally *do* still work with cable or a DTV converter box.

¹⁶ Viacom, *Comments*, MB Docket No. 02-230 (dated Dec. 6, 2002).

including content from Viacom, free of anti-consumer restrictions. The Commission must not allow control of devices and innovation to be held hostage for a change that petitioners are free to implement today.

In this regard, it is worth noting that the MPAA originally justified its request for “expedited” treatment with the argument that grant of the waiver would encourage consumers to discard their analog receivers for more expensive HDTVs before the digital transition.¹⁷ A year later, with the digital transition complete without the assistance of the SOC waiver, the MPAA feigns umbrage when PK points to the logical counterpoint -- that the millions of consumers still using analog television receivers will at best receive no benefit and at worst be forced to purchase expensive new equipment they neither want nor need. Granting the *Petition* will do nothing for these consumers, but will give MPAA design control and veto power over the use of both secure digital and analog outputs for some content. This petition is outright anti-consumer and anti-innovation.

MPAA’s Foolish “Inconsistency.”

MPAA also suggests that it is “inconsistent” for Public Knowledge’s President, Gigi Sohn, to “criticize the release window”¹⁸ while Public Knowledge advocates against the waiver. MPAA’s “inconsistency” is based on the false choice the MPAA tries to present: that its members will not even consider shortening the release window to MVPDs without grant of the waiver.¹⁹ Gigi Sohn’s testimony at a recent FCC workshop calling on the MPAA to end this mock standoff of its own creation by negotiating a shorter window *without* a regulatory bribe²⁰ is perhaps an inconvenient truth from the MPAA’s perspective, but hardly “inconsistent” with PK’s position that a waiver is not merely unnecessary but contrary to the public interest.

Ironically, the MPAA’s argument that it “must” have the SOC waiver to protect itself from piracy was refuted by one of its own members at the same workshop. According to data presented by Paramount, infringing copies of movies are already widely available on the Internet on the day of theatrical release – months before the proposed home release.²¹ Granting this waiver would do *nothing* to limit the availability of these infringing copies. Use of Selectable Output Control is therefore equivalent to closing the barn door after the horses have escaped.

¹⁷ *MPAA Petition* at 8-9.

¹⁸ *MPAA Sept. 28 Letter 2*.

¹⁹ PK notes that no MPAA member has submitted any evidence that it has negotiated a shorter window with any MVPD that awaits only grant of the waiver. Indeed, nothing in the record suggests that any such deal is imminent. To the extent grant of the waiver would convey any benefits to those MVPD subscribers with equipment capable of receiving the MPAA’s promised content, consumers will have to wait some indefinite period while the parties negotiate.

²⁰ See Gigi B. Sohn, *Transcript of Testimony*, FCC Workshop: The Role of Content in the Broadband Ecosystem, (Sept. 17, 2009), available at http://broadband.gov/docs/ws_24_role_content.pdf.

²¹ See Paramount, *Chart*, FCC Workshop: The Role of Content in the Broadband Ecosystem, (Sept. 17, 2009), available at http://broadband.gov/docs/ws_bb_ecosystem/huntsberry.pdf.

In conclusion, “waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest. Moreover, in demonstrating whether a waiver is warranted, the burden of proof rests with the petitioner.”²² As petitioners have not provided a single shred of evidence that the waiver is necessary or would be anything other than a ransom for the release of content, the Commission should deny the petition.

Respectfully submitted,

Harold Feld
Legal Director

cc:

Chairman Genachowski
Commissioner Copps
Commissioner McDowell
Commissioner Clyburn
Commissioner Baker

²² *Centennial Cellular Tristate Operating Partnership*, 21 FCC Rec 9170, 9172 (2006).