

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 ) CSR-7947-Z  
Motion Picture Association of America )  
 ) MB Docket No. 08-82  
Petition for Expedited Special Relief; )  
Petition for Waiver of 47 C.F.R. § 76.1903 )

**REPLY COMMENTS  
OF  
PUBLIC KNOWLEDGE, CONSUMER FEDERATION OF AMERICA,  
DIGITAL FREEDOM CAMPAIGN, ELECTRONIC FRONTIER FOUNDATION,  
MEDIA ACCESS PROJECT, NEW AMERICA FOUNDATION, U.S. PIRG**

Public Knowledge, Consumer Federation of America, Digital Freedom Campaign, Electronic Frontier Foundation, Media Access Project, New America Foundation, and U.S. PIRG (“Public Knowledge *et al.*”)<sup>1</sup> submit these reply comments in opposition to the MPAA’s petition for a waiver of 47 C.F.R. § 76.190347 in the above-referenced docket.<sup>2</sup>

In this reply, we will touch on some of the important points commenters have made regarding the scope of the waiver and the its effect on the public interest. We reiterate, however, that even if the waiver is reduced in scope and taken in the most optimistic, consumer-friendly light, it is unnecessary and contrary to the public interest. Over five hundred individuals have filed comments asking the Commission to deny the waiver – five hundred individual consumers

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<sup>1</sup> For a description of the parties, *see Comments of Public Knowledge, Consumer Federation of America, Digital Freedom Campaign, Electronic Frontier Foundation, Media Access Project, New America Foundation, and U.S. PIRG 1*, MB Docket No. 08-82, (July 21, 2008) [hereinafter *Public Knowledge et al. Comments*], available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520034992](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520034992).

<sup>2</sup> The parties would like to acknowledge the assistance of Public Knowledge law clerks Jon Law and Alex Kanous in the preparation of their Comments and Reply Comments.

whose expectations and investments the SOC ban is meant to protect. We should not lose sight of the underlying fact: if granted, this waiver will strand *millions*<sup>3</sup> of users without access to movies simply because they are released on Video-on-Demand earlier. And with customer screens going dark and early adopters being punished, the DTV transition can only be harmed.

## **I. THE WAIVER TERMS ARE VAGUE**

Several commenters have pointed out ways in which the waiver is vague, overbroad, and replete with dangerous loopholes.<sup>4</sup> Even parties who support the waiver in principle have shown how it can be used to dramatically alter the competitive landscape. For instance, because the proposed window ends with DVD or other less-restricted format releases, the MPAA could extend the window for SOC use by pushing back DVD release windows in favor of Blu-Ray (which contains such restrictions), further disadvantaging those who do not have the newest hardware.<sup>5</sup>

The requested waiver also would be infinite in duration, even absent any showing that it is necessary now or would remain so in the future. Limiting the waiver in duration will not fix the problem, because once consumers have had their expectations violated and been forced to buy unnecessary equipment, it will be too late. *TiVo*, for instance, “believes a limited two-year waiver of the SOC prohibition would provide enough time to allow MPAA members to negotiate the terms of the Service with confidence and describe with clarity the parameters of the ‘new

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<sup>3</sup> See *Public Knowledge et al. Comments* 6.

<sup>4</sup> See, e.g., *Comments of the Independent Film and Television Alliance*, MB Docket No. 08-82 (July 21, 2008), available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520034956](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520034956); *Opposition of Consumer Electronics Association*, MB Docket No. 08-82 (July 21, 2008) [hereinafter *CEA Opposition*], available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520034932](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520034932); *Comments of Digital Transmission Licensing Administrator, LLC* 10, MB Docket No. 08-82 (July 21, 2008) [hereinafter *DTLA Comments*], available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520034913](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520034913); *Opposition of Home Recording Rights Coalition*, MB Docket No. 08-82 (July 21, 2008) [hereinafter *HRRC Opposition*], available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520034933](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520034933).

<sup>5</sup> *DTLA Comments* 10.

business model' that has developed, while giving the Bureau an opportunity to assess the results of the waiver before making any grant permanent.”<sup>6</sup> This reasoning is backwards. With an unclear definition of the alleged “new business model,” no evidence that the waiver will successfully address MPAA’s concerns, no deals with MVPDs, and full knowledge that millions of consumers will be left out in the cold or forced to make costly upgrades, the Commission has no good reason to grant the waiver, even temporarily.

Even the few, cautious, supporters recognize that the waiver would allow MPAA to turn off *any* output, including protected digital outputs – an ability which MPAA has made no attempt to justify.<sup>7</sup> In the original Plug-and-Play proceeding, the Commission concluded that there are sufficient protections on digital outputs that SOC would not be needed, even in the case that such protections were compromised.<sup>8</sup> The only reason to seek this type of control is to use an FCC-granted veto power over video connections to control which connections are used and under what conditions.

The Commission should not allow carefully crafted loopholes in a waiver to further extend the control that content owners have over home electronics.

## **II. EVEN AT ITS BEST, THE WAIVER SHOULD BE DENIED**

The most important point is that even if the waiver were reworded to close all the loopholes and limit its scope in terms of content, duration, and technology, it would remain unjustified and contrary to the public interest. The MPAA is requesting a broad waiver without a single shred of evidence that it is necessary or in the public interest beyond a threat to not offer

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<sup>6</sup> *Comments of TiVo, Inc.* 4, MB Docket No. 08-82 (July 21, 2008) [hereinafter *TiVo Comments*], available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520034901](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520034901).

<sup>7</sup> See *TiVo Comments* 5; *DTLA Comments* 9. See also *HRRC Opposition* 4; *CEA Opposition* 3; *Public Knowledge et al. Comments* 18.

<sup>8</sup> *In re Commercial Availability of Navigation Devices*, 18 F.C.C.R. 20885 ¶ 60 (2003) (“We therefore believe that MVPDs will in no way be harmed in their ability to protect content where output technologies have been compromised.”).

services that others already offer.<sup>9</sup> Comments filed by proponents of the Petition failed to add any evidence that analog, unencrypted digital, or secure digital video connections were the source of significant infringement, or that selectable output control would have any effect on such infringement. Nor did any comments alter the fact that granting the waiver will create the unprecedented situation where the only things stopping some viewers from accessing content is the video connection they use.

As observed by the Home Recording Rights Coalition, not only does closing off even the analog ports on MVPD receivers strand millions of users, but millions of “the earliest and most enthusiastic HDTV adopters”<sup>10</sup> who spent the most money on their equipment.<sup>11</sup> No constraints on the scope of the waiver will change this, and allowing the MPAA to effectively punish those who made the early investments will harm consumer confidence and serve only to slow consumer adoption of new technologies and in turn harm the DTV transition.<sup>12</sup>

Other commenter goals are simply incompatible with SOC. For instance, The Digital Transmission Licensing Administrator (“DTLA”) stated that “SOC should not be permitted to interfere with home networking or DVR functionality.”<sup>13</sup> *Sony* likewise asks the Commission to “[p]revent service providers and content providers from misusing SOC to discriminate against retail devices in favor of propriety devices; . . .”<sup>14</sup>

These requirements are impossible to meet. As stated in our comments, most DVRs and other innovative home electronics devices rely on the high definition analog outputs for their

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<sup>9</sup> See *Public Knowledge et al. Comments* 13-15.

<sup>10</sup> *HRRC Opposition* 3.

<sup>11</sup> See *CEA Opposition* 6-7 (noting that component video is still relied on by the earliest adopters who made the largest investments).

<sup>12</sup> See *CEA Opposition* 9; *HRRC Opposition* 7; *Comments of Lee Spangler* 2, MB Docket No. 08-82 (June 13, 2008) available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520028856](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520028856).

<sup>13</sup> *DTLA Comments* 12.

<sup>14</sup> *Comments of Sony Electronics, Inc.* 3, MB Docket No. 08-82 (July 21, 2008), available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520034917](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520034917).

functionality.<sup>15</sup> DTLA recognizes the danger in “grant[ing] [Petitioner] and the MVPDs free rein to decide which content protection technologies can be used to implement SOC.”<sup>16</sup> They worry that “[p]etitioners may intentionally select a technology that does not work with DVRs at all, or is designed to work only with DVRs supplied by the MVPD.”<sup>17</sup> Their solution,<sup>18</sup> however, does *exactly* that. We are aware of *one* non-MVPD DVR which supports a protected input, and many observers suggest that this device is in violation of the licensing restrictions on protected outputs.<sup>19</sup> Even if a more constrained waiver is granted, users of DVRs will be locked out, and control over these devices will be handed to Petitioner and MVPDs.

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<sup>15</sup> See *Public Knowledge et al. Comments* 11; *Hauppauge HD PVR*, at [http://www.hauppauge.com/site/products/data\\_hdprv.html](http://www.hauppauge.com/site/products/data_hdprv.html). We note that under some circumstances, DVRs with built-in tuners that do not rely on a separate tuner’s outputs at all will still function; they will, however, be subject to the same consumer expectation problems when SOC forces them to turn off their connection to the television.

<sup>16</sup> *DTLA Comments* at 13.

<sup>17</sup> *DTLA Comments* at 14.

<sup>18</sup> *DTLA Comments* at 15.

<sup>19</sup> See *Gefen DVR*, at [http://www.gefen.com/kvm/product.jsp?prod\\_id=4306](http://www.gefen.com/kvm/product.jsp?prod_id=4306); Dave Zatz, *Gefen DVR Records HD via HDMI* (Mar. 10, 2008), at <http://www.zatznotfunny.com/2008-03/gefen-dvr-records-via-hdmi/>. See also *HDCP License Agreement Exhibit C* § 3.1, available at [http://www.digital-cp.com/files/static\\_page\\_files/C64B6DF9-982D-F401-5E027664F448598B/HDCP%20License%20Agreement062608final.pdf](http://www.digital-cp.com/files/static_page_files/C64B6DF9-982D-F401-5E027664F448598B/HDCP%20License%20Agreement062608final.pdf).

## CONCLUSION

Nothing in the comments submitted to the Commission on this matter changes the facts surrounding this petition. Even if constrained in every way requested by supporting comments, it remains unnecessary and contrary to the public interest. For the reasons above and those detailed in our original comments, the Commission should deny the MPAA's petition for waiver of the Selectable Output Control ban.

Respectfully Submitted,

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July 31, 2008

## CERTIFICATE OF SERVICE

I, Jeffrey Pearlman, hereby certify that on this 31<sup>st</sup> day of July, 2008, I caused a copy of the foregoing Reply Comments on Petition for Expedited Special Relief and Petition for Waiver of 47 C.F.R. § 76.1903 to be served by first-class mail, postage prepaid, to the following:

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