

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000
FAX: (202) 393-5760
www.skadden.com

FIRM/AFFILIATE OFFICES

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEW YORK
PALO ALTO
SAN FRANCISCO
WILMINGTON

BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
MUNICH
PARIS
SÃO PAULO
SHANGHAI
SINGAPORE
SYDNEY
TOKYO
TORONTO
VIENNA

November 4, 2009

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: *Ex Parte* Communication
MB Docket No. 08-82, CSR-7947-Z

Dear Ms. Dortch:

By and through its undersigned counsel, the Motion Picture Association of America, Inc. (“MPAA”) hereby submits this response to the *ex parte* letters submitted to the Commission by Public Knowledge, *et al.* over the last several weeks as part of the record in the above-captioned proceeding.¹ While the PK Letters essentially constitute a rehashing of Public Knowledge’s stale arguments in this proceeding, MPAA submits this response to set the record straight and make one thing perfectly clear: despite these rhetorical attacks, grant of MPAA’s request for waiver of the prohibition on the use of selectable output control (“SOC”) technology would be an incredibly *pro-consumer* development.

¹ See Letter from Jef Pearlman, Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 08-82 (dated Nov. 2, 2009) (the “November 2 Letter”); Letter from Jef Pearlman, Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 08-82 (dated Oct. 30, 2009) (the “October 30 Letter”); Letter from Harold Feld, Legal Director, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 08-82 (dated Oct. 28, 2009) (the “October 28 Letter”); Letter from Harold Feld, Legal Director, Public Knowledge, to William T. Lake, Chief, Media Bureau, Federal Communications Commission, MB Docket No. 08-82 (dated Oct. 14, 2009) (the “October 14 Letter”) (collectively, the “PK Letters”).

Notwithstanding the obvious pro-consumer benefits that the SOC waiver would provide, Public Knowledge continues to oppose MPAA's request. As MPAA has detailed throughout this proceeding, grant of the waiver would for the first time allow millions of consumers to view high-value, high-definition theatrical films during an early release window that is not available today. MPAA has explained that release of this high-value content as part of an earlier window, especially with respect to movies released for home viewing close to or even during their initial theatrical run, necessarily requires the highest level of protection possible through use of SOC. By Public Knowledge's odd reckoning, however, no consumer-oriented technological breakthrough ever could be introduced to American homes unless and until *every single* American home had access to the same opportunity at the same moment in time. That is a recipe for holding every innovation hostage until the last consumer adopts a new technology.

Under Public Knowledge's approach, the Commission would have taken decades to permit television stations to broadcast in color, since millions of American homes already had purchased black-and-white sets when color broadcasts were introduced in the 1950s. Indeed, whenever innovative technologies bring consumers new and better opportunities to enjoy media content, there is always a lag between when early adopters take advantage of these opportunities and when they become ubiquitous (*e.g.*, DVD players introduced consumers to new features and much higher quality for in-home movie viewing, but many households still used VCRs for years before DVDs became the primary vehicle for in-home viewing). That *some* consumers may wait longer to purchase new devices or take advantage of innovative technologies, however, is no reason to deny *every* consumer the potential benefits of new offerings.

Although Public Knowledge is loathe to admit it, grant of the SOC waiver *would* provide tens of millions of American households in-home access to high-value, high-definition video programming content that they cannot currently receive directly to their television sets. Rather than acknowledge the many millions of households that *would* gain access to a *new* offering, Public Knowledge simply continues to spend its time focusing on the fact that some number of consumers would not immediately have access to this new product because they rely on older television sets.² The fact that Public Knowledge continues to estimate, without any real basis, that the number of deployed high-definition television sets lacking secure digital inputs is 11 million, 20 million or 25 million is irrelevant (and the lack of precision in Public Knowledge's and its allies' ever-varying estimates is telling

² See October 14 Letter, at 3-4.

enough about the reliability of their claims).³ Whatever the number, the simple reality is that many millions of American homes *do* have televisions with secure digital inputs and *would* get access to this new offering if the Commission grants the waiver.⁴

It is therefore strange, to say the least, that Public Knowledge attempts to paint itself with a pro-consumer brush while opposing grant of this waiver request. If millions of Americans would get access to something that they have never had before, and *not a single American household would lose access to any content that it currently receives*, it defies reason for Public Knowledge to claim the mantle of the consumers' interest in this matter. The real consumer interest lies in allowing technology and innovation to thrive and to generate new and exciting opportunities for consumers in the modern media world to access compelling content. Indeed, Public Knowledge all but admits in the October 28 Letter that grant of the waiver would cause no harm to the public interest.⁵ When directly asked by the Commission's staff "what harm would result from grant of the waiver," instead of citing a single risk to the public interest, Public Knowledge's representative reports answering that evaluating public interest harms is not the "applicable standard" and that MPAA "must show a public interest benefit" in order to receive a waiver.⁶

Of course, MPAA *has amply demonstrated* a wide assortment of public interest benefits that would accrue from grant of the waiver. Most obviously, grant of the waiver would enable MPAA-member studios to offer consumers access to

³ *See id.* As MPAA previously has explained, however, even if accurate, the Public Knowledge figures are vastly overinclusive because they count homes where consumers *do* have at least one television set with protected digital inputs (even though they also may have older sets in other rooms in the house). In fact, many millions of consumers would not have to purchase new devices to receive the new, high-value content contemplated by MPAA's waiver request. *See* Letter from Antoinette Cook Bush, Counsel for MPAA, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 08-82 (dated Aug. 31, 2009).

⁴ For example, DirecTV has pointed out that it performs about 2 million installations every year for consumers whose television sets have protected digital inputs. Thus, a "significant percentage" of DirecTV's nearly 20 million subscribers "already have the infrastructure in place to take advantage of" the new service proposed by MPAA's members. *See* Letter from Stacy Fuller, Vice President, Regulatory Affairs, DirecTV, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 08-82 (dated Sept. 16, 2009) (the "DirecTV Letter").

⁵ *See* October 28 Letter, at 3.

⁶ *Id.*

high-value movies directly to their television sets earlier than they have ever been able to receive this content. Among other things, studios could distribute first-run movies in high-definition directly to television sets close to or at the same time that those very movies are released in theaters, offering millions of Americans a new way to experience compelling content in the comfort of their homes. MPAA also has explained that the waiver would spur competition in the multichannel video programming marketplace, as studios work with distribution partners to provide consumers different ways to access content in their homes (a point, not surprisingly, that DirecTV and the cable industry have reinforced in their own filings with the Commission).⁷ Public Knowledge has chosen simply to ignore these showings, but it is disingenuous at best for it to assert that “MPAA has presented no evidence whatsoever that the waiver it requested is necessary or in the public interest.”⁸

Wholly apart from the public interest benefits that MPAA has shown, and separate too from the total lack of public interest harms here, the Commission must take into account that MPAA’s waiver request was not made in a vacuum. Quite the contrary, the Commission specifically contemplated precisely this type of waiver request when it adopted rules governing the use of SOC.⁹ The Commission “recognize[d] that [SOC] functionality might have future applications that could potentially be advantageous to consumers, such as facilitating new business models,” and it therefore made clear that it would “consider waivers, petitions, or other proposals to use [SOC] in this regard.”¹⁰ Accordingly, this is not a generic request for waiver of a Commission rule, but rather a request arising at the invitation of the Commission that proposes to offer consumers a new business model for obtaining high-value content.

⁷ See generally, *In re Motion Picture Association of America, Inc.*, Petition for Waiver of 47 C.F.R. § 76.1903, Reply Comments of MPAA (filed July 31, 2008); see also DirecTV Letter, at 1; Letter from Neal M. Goldberg, Vice President & General Counsel, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 08-82 (dated Sept. 10, 2009), at 1-2.

⁸ October 30 Letter, at 1.

⁹ See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885, ¶ 61 (2003).

¹⁰ *Id.*

In any event, the PK Letters reveal Public Knowledge's position in opposing the waiver to be entirely untenable. As the October 14 Letter points out, consumers already have a multitude of ways, such as Netflix and other DVD rental and purchase options, to watch high-value video programming at home.¹¹ Grant of the SOC waiver would *not change any of these opportunities*. The waiver would merely permit MPAA-member studios to make some of this content available *earlier* to the millions of American homes that have digital television sets with secure inputs. Since it is true, as the October 14 Letter acknowledges,¹² that this very same content ultimately will be available anyway even to those consumers who do not yet have secure digital sets, then it begs the question of what exactly is the risk of harm to the public interest if the Commission were to grant the SOC waiver?

Public Knowledge fares no better in suggesting that MPAA studios do not need a waiver to protect their high value content based on the argument that some movies are now being made available via video-on-demand before the same movies are released via DVD.¹³ Public Knowledge cites specifically to a limited trial pursuant to which Warner Bros. made two movies available on-demand literally the weekend prior to the movies' releases on DVD in only one local market, and well after their theatrical runs had been completed.¹⁴ Although Warner Bros. and other content producers run such trials in order to better understand and be responsive to consumer demand, the threat of content theft – especially for theatrical movies in early windows – cannot be ignored. The harms caused by copyright theft result in serious economic damage to content producers and the American economy.¹⁵ Thus,

¹¹ See October 14 Letter, at 2.

¹² See *id.* (“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”) (emphasis in original).

¹³ See, e.g., November 2 Letter, at 1; October 30 Letter, at 2.

¹⁴ See November 2 Letter (citing Warner puts *Observe, Ghosts on VOD before DVD*, Video Business (Sept. 28, 2009)). In fact, the article cited by Public Knowledge specifically notes: (1) the limited nature of the video-on-demand (VOD) test by Warner Bros. and Comcast in the Atlanta area, (2) the fact that nearly all of Warner Bros.' titles this year have debuted on DVD and VOD simultaneously, and (3) that certain other Warner Bros. titles will involve VOD release after DVD. See Warner puts *Observe, Ghosts on VOD before DVD*, Video Business (Sept. 28, 2009). None of the other movie producers referenced in the article are MPAA-member studios.

¹⁵ See, e.g., *In re A National Broadband Plan for Our Future*, Comments of the Motion Picture Association of America, Inc., GN Docket No. 09-51 (filed Oct. 30, 2009), at 8-9 (citing *The True Cost of Copyright Industry Piracy to the U.S. Economy*, Institute for Policy Innovation, Policy Report 189 (October 2007), at i, 11-13 (conservatively estimating that copyright theft from the

in order to protect their highest-value creative works, MPAA studios will be unable to distribute such content absent the protection that use of SOC would provide. The limited example of the trial cited by Public Knowledge does nothing to change the fact that, without grant of the waiver, there will be a plethora of content that MPAA studios will not be able to make available to consumers during early release windows.

The reality, quite simply, is that the SOC waiver would not disenfranchise a single viewer because it would not result in any consumer losing access to any of the programming that he or she receives today. Nor would it preclude any viewer from getting access to any content through subsequent distribution windows. The thrust, then, of Public Knowledge's opposition to the waiver request is that consumers who do not own digital televisions with secure inputs would have to wait a short time before viewing at home the content that MPAA studios are willing to deliver earlier to those capable of receiving it in a protected fashion. Stripped of verbiage, the PK Letters thus reveal only too clearly how it is Public Knowledge that is attempting to obstruct innovation and *keep millions of American homes from getting access to a new service.*

In short, given that no consumer would be disenfranchised by grant of the waiver, and because so many consumers would gain access to an innovative new product offering, MPAA urges the Commission to grant its SOC waiver request and finally bring this proceeding to a close.

motion pictures, sound recordings, business and entertainment software and video games industries costs the U.S. economy \$58 billion in total output, results in the loss of nearly 375,000 jobs for American workers, and costs Federal, state and local governments \$2.6 billion in lost tax revenue)).

Marlene H. Dortch
November 4, 2009
Page 7

This letter is being submitted electronically in the above-referenced docket, which has been granted permit-but-disclose status, pursuant to Section 1.1206(b) of the Commission's Rules. Should you have any questions concerning this submission, kindly contact the undersigned.

Very truly yours,

/s/

Antoinette Cook Bush
Jared S. Sher
Counsel to MPAA

cc: William Lake
Robert Ratcliffe
Alison Neplokh
Jeffrey Neumann
Brendan Murray
Nancy Murphy
Mary Beth Murphy
Steve Broeckaert
Austin Schlick
Marilyn Sonn
Susan Aaron
Phoebe Yang