



November 10, 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  
CS Docket No. 97-80

Dear Ms. Dortch:

Since 1981, the Home Recording Rights Coalition and the Consumer Electronics Association have been concerned about content owner proposals to limit the functionality of consumer electronic devices after they are purchased, in contravention of consumers' well-founded expectations as to how such devices will work. This *ex parte* letter replies to assertions in the letter submitted on behalf of the Motion Picture Association of America ("MPAA") on November 4 that seeks to reassure the Commission that its Selectable Output Control ("SOC") Petition is "pro-consumer." Since the MPAA's recent letter ignores what it actually proposed in its own SOC Petition, we urge the Commission to revisit it and consider the power MPAA members are requesting – power that will give them the ability to control how consumers can use lawfully acquired products in the privacy of their homes.

For example, MPAA simply ignores the fact that its petition would vest in its own members the power to choose among, and turn off selectively, secure digital interfaces to secure digital devices. As HRRC and CEA argued to the Commission more than a year ago,<sup>1</sup> one fundamental consumer expectation is that source devices with secure digital outputs will reliably deliver digital signals to the secure digital inputs of display devices

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<sup>1</sup> This letter draws on HRRC's formal Opposition, filed July 21, 2008, to MPAA's Petition. Accordingly, MPAA must be aware of these concerns. HRRC is not aware that MPAA has ever narrowed its Petition, or offered to do so, in response to these formally filed concerns. (HRRC maintains its concerns, and its view as expressed in July 2008, that MPAA has failed to offer any proof of harm or need as to the one point, with respect to consumers who in good faith rely on analog HDTV inputs, that MPAA did address in its Nov. 4 letter.)

and recorders. The Commission emphasized this point when it adopted the encoding rules, stating that while content owners have a legitimate interest in protecting their content from infringement, it also recognized “consumers’ expectations that their digital televisions and other equipment will work to their full capabilities.”<sup>2</sup> Yet if content distributors can remotely decide on a program-by-program or channel-by-channel basis that programming will only be made available via a favored interface or technology, consumers will be legitimately disappointed (and likely outraged):

- A consumer who has purchased an HDTV display with an HDTV input suddenly disfavored by an MPAA member will face a black screen rather than receive programs that her neighbor, who subscribes to the same service but bought a different brand or model, will continue to receive.
- Even a consumer who owns a display with an SOC “favored” input might find that input already connected to a device other than the MVPD’s set-top box. At a minimum, this consumer would have to incur the expense and inconvenience of re-jiggering connections, switching incessantly, or seeking professional help and additional gear. In some homes this might simply not be possible. And even if possible, the consumer who has invested in the change would then be frustrated if another MPAA member takes an opposite approach, or if the first changes its mind and reverses its choices. Predictably, complaints will flow back to device makers and public officials as well as to the MVPD.
- When applied to digital outputs and protection technologies that are already deemed secure, SOC apparently will be used only to discourage lawful home networking and home recording. Content will not be viewable solely because a consumer chose to purchase a digital device with an interface or protection technology that has suddenly been deemed unacceptable, for any arbitrary and unexplained reason, to an MPAA member.

The Petition offers no data in support of its claim that MPAA members should be able to shut off secure digital outputs on consumers’ lawfully purchased equipment. Moreover, the Petition’s attempt to justify limitations on legitimate consumers in the name of discouraging “piracy” makes little sense in reference to secure digital interfaces. Since the digital outputs are already protected according to the requirements of content distributor licenses, this is not a matter of legitimate intellectual property protection. Nor has the MPAA shown why the existing protections afforded to content made available over Video-on-Demand platforms is insufficient. They have provided no data to demonstrate that “piracy” occurs on these platforms to justify defeating consumers’ expectations that their devices will work to their full capabilities. One of their own members has provided evidence that the MPAA’s request is not warranted. Warner Brothers Entertainment, Inc. has begun offering films via VOD before the DVD release

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<sup>2</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order and Second Further Notice of Proposed Rulemaking ¶ 60 (rel. Oct. 9, 2003).

date – precisely the type of offering that the studios claimed “necessarily would require a higher level of protection against copyright theft than is currently permissible” in order to be implemented.

What appears to be sought here, instead, is the power to influence or even dictate the product and design choices, feature sets, and business agreements of the companies who have invested in secure technologies and products. For the Commission to grant this power would be to cede control to MPAA’s members over which products get to market for use with MVPD networks, as well as over the feature sets of *unrelated* products or technologies. An MPAA member could demand design changes or adaptations to entirely unrelated products under threat of disfavoring an MVPD-licensed home network interface or a protection technology in which the technology company has already invested.

There is simply no reason for the Commission to grant the MPAA and its member companies this draconian measure of control over consumers’ lawfully purchased devices. In economic terms, the likely result of granting to content providers and distributors such unnecessary and unwarranted power over the marketplace will be the inefficient development and commercial adoption of protection and interface technologies and products. MPAA member commercial incentives differ from those of device and technology developers who aim to serve an open market. The success of competing standards and technologies will depend not on their cost, utility, and interoperability, but on other considerations that may in fact be at variance with these factors and which (in the case of leverage exerted over products in other fields) may be entirely orthogonal to MVPD content distribution.

SOC will engender fundamental uncertainties about prospective DTV purchases. Rather than making her decision based upon picture quality, interface, size, and/or price, a savvy consumer will make her decision based upon her understanding of the manufacturer’s relationship with the most prominent MPAA members. Manufacturers may well pay dearly just to be able to say that the inputs and outputs on their devices will not be “Selected Out” by the MPAA. Even a limited grant of the MPAA’s waiver will sow uncertainty among consumers who can no longer count on the FCC to protect their expectations “that their digital televisions and other equipment will work to their full capabilities.”<sup>3</sup>

The MPAA does not propose that any prior showing be made or notice rendered to the public, or provide for any means of challenge in the event of SOC imposition, contrary to all existing exceptions to the FCC encoding rules. The MPAA Petition does not define any of the operational aspects of SOC imposition, or set forth how the public would be informed of SOC triggers or their impending use. A consumer may lawfully purchase a television, bring it home, and then find out that it simply does not work as expected with the services to which the family has subscribed. This is the exact opposite of the sort of experience that the Commission and the Congress have sought to assure.

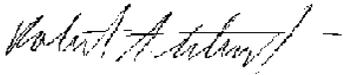
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<sup>3</sup> *Id.*

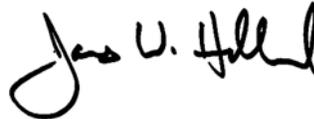
Finally, even the one issue the MPAA does address in the Nov. 4 letter – limitation according to time windows – is not borne out by the Petition itself. In difficult-to-follow footnote no. 1, MPAA reveals that the confinement of SOC use to “pre-release” content – the *only* limitation on otherwise gutting Section 76.1903 via waiver – might not be a limitation at all if the programming to which SOC is applied is *also* confined to prerecorded formats in which similar output control is applied. This loophole gives the content owner a means to play *formats*, as well as devices and technologies, off against each other – to “level the playing field” for “attracting” content by requiring SOC on players for prerecorded content *as well*. Viewed in this light, the sole “limitation” that MPAA seems willing to accept – windowing – may in reality be used as a *tool* to spread the use of SOC beyond the MVPD content environment. It could also be used to *lengthen* the time between release on SOC-applied media and on non-SOC-applied media. The result is the same – lawful consumers are disadvantaged, for no demonstrable reason.

This letter is 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.

Respectfully submitted,



Robert S. Schwartz  
Constantine Cannon LLP  
1627 Eye Street, N.W., 10<sup>th</sup> Floor  
Washington, D.C. 2006  
*General Counsel,*  
*The Home Recording Rights Coalition*



James W. Hedlund  
Vice President for Regulatory Affairs  
Consumer Electronics Association  
1919 S. Eads St.  
Arlington, VA 22202  
Tel: (703) 907-7644

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