

November 11th, 2009

Marlene H Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Notice of *Ex Parte* Presentation in MB Docket No. 08-82

Dear Ms. Dortch,

On November 10th Jean Prewitt, President and CEO of the Independent Film and Television Alliance sent the following letter to Chairman Genachowski expressing opposition to the MPAA's request for a waiver on the prohibition of selectable output controls.

Colin Crowell, Sherrese Smith, and William Lake also received copies of the letter.

Sincerely,



Elizabeth Sage
Podesta Group

Tuesday, November 10, 2009

Chairman Julius Genachowski
Federal Communications Commission
445 12th Street, SE
Washington, DC 20554

Re: MB Docket No. 08-82

Dear Chairman Genachowski,

The Independent Film and Television Alliance (IFTA) wishes to express its strong opposition to the Motion Picture Association of America's (MPAA) petition seeking a permanent waiver of 47 C.F.R. Section 76.1903 of the Commission's rules. As outlined in the Public Notice (MB Docket No. 08-82, June 5, 2008), the MPAA requests that the Commission waive its prohibition on the use of selectable output control ("SOC") for set top boxes in order to facilitate partnerships between the MPAA member studios and multichannel video programming distributors ("MVPDs") to provide copy-protected, high definition features films directly to subscribers prior to the films' prerecorded media release dates. The MPAA's waiver request does not appear to meet the legal standard for waiver nor give sufficient notice of who the MPAA studios' designated partners may be and what services they will offer. IFTA opposes this vague waiver request because, if granted, it would result in diminished access to films that are produced independently, thereby damaging the public's interest in the expanded availability of programming.

IFTA is the non-profit trade association for the independent film and television industry worldwide. Its members produce and distribute feature films and television programming that is financed substantially from sources other than MPAA studios. IFTA's membership includes 150 companies, such as the Weinstein Company, Lionsgate, PeaceArch, Lakeshore, Morgan Creek, Nu Image, Troma Entertainment and CineTel. IFTA members have been responsible for more than half of the Academy Award "Best Pictures" in the past thirty years including *SlumDog Millionaire*, *The Departed*, *Million Dollar Baby*, *Crash*, *Lord of the Rings* and *The Last Emperor*. On its members' behalf, IFTA is a strong advocate for copyright protection and access for independent programming to distribution platforms worldwide.

Granting MPAA's request would constitute an unjustified waiver of the SOC rule due to the likely discriminatory impact on independent producers outside of the MPAA member studios and therefore any public benefit would be significantly decreased because independent programming may be disproportionately missing from such services. "A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest." *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). If the waiver is granted, the

Commission must “articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.” *id.*

Cable companies should not be given this extraordinary and unnecessary power to essentially create a new, earlier (and perhaps first) window of exploitation from which realistically *only* the major studios and their designated MVPDs could initially benefit and receive revenues. Other services currently offer programming which was theatrically released and exploited via Video on Demand (“VOD”) in a window prior to the release of DVDs and have not requested the “protection” of a waiver. For example, Time Warner through both Time Warner Cable and Comcast is offering their programming via VOD “day and date” with the DVD release. Other services are experimenting with different business models which include releasing programming via VOD prior to DVD and in some cases, such as the Independent Film Channel, prior to the theatrical release. *While the MPAA Members are seeking a waiver to this crucial rule, they are simultaneously demonstrating that earlier release windows are already being utilized without the need for a waiver of FCC Rules.*

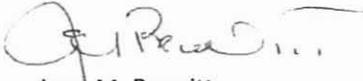
The major studios were forced to divest their interests in the first window of exploitation – theatrical release- decades ago. However, if granted, this waiver could result in the MPAA studios’ monopolization of the VOD release window – which quite possibly will be the first release window of the future and with lower distribution costs, will offer significantly increased profits as compared with DVD distribution. While the MPAA has said in its Reply Comments of July 31, 2008 that it “would have no objection to a waiver that would allow MVPDs to exercise SOC with respect any movie initially released in theaters prior to DVD release”, given the marketplace reality of a high degree of vertical integration among the studios-networks-cable companies and the scarcity of independent product on other television and cable platforms, it is unlikely that independent programming would routinely secure VOD distribution on such services established by major studios and MVPDS. Independents in general do not have the financial resources or market power to make such agreements. Therefore in most cases, any “benefit” to consumers to access “high value content” would be limited to studio programming. This petition requests *even more* exclusive access for only studio-supplied content, and thereby reinforces the alarming trend that U.S. television distribution platforms are the domain only of a few companies and are foreclosed to independents, contrary to the purpose of the Communications Act.

In seeking the waiver, the MPAA also claims that the use of SOC is necessary to prevent piracy of its members’ motion pictures, but it does not address the impact of the proposed service on independent program supply and their theatrical and DVD distributors (which are not vertically integrated), nor does it articulate the public benefit (except that consumers may see studio programming earlier in the distribution cycle). IFTA is a strong advocate for copyright protection, however, *the mere assertion of piracy by those who stand to benefit financially should not automatically justify compromising market access for independent content and broader programming choices for consumers.* The MPAA has yet to articulate how the potential anti-piracy benefits from SOC outweigh the public’s interest in greater options for programming. To our knowledge, the MPAA has also not provided information to substantiate that increased piracy stems from earlier release of programming on VOD. To the contrary, the major studios continue to successfully offer early release programming (often at a premium) without the cover of a waiver.

MPAA has not met its burden with this Petition. This self serving waiver request will harm independents and the public, and IFTA urges that it be denied.

Thank you very much for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Jean M. Prewitt". The signature is fluid and cursive, with a long horizontal stroke at the end.

Jean M. Prewitt
President & CEO
IFTA