Cable Carterfone

As video becomes just another application, pay TV operators should not be able to dictate the future of

The Problem

For the past 25 years, pay TV companies have been bringing new video programming options to the public. They used their networks to move America from a handful of broadcast channels to a 500-channel, pay-per-view, on-demand entertainment universe. Unfortunately, today large pay TV companies and set top box manufacturers are using their control of the industry to block anyone else from innovating.

Pay TV Controls the System

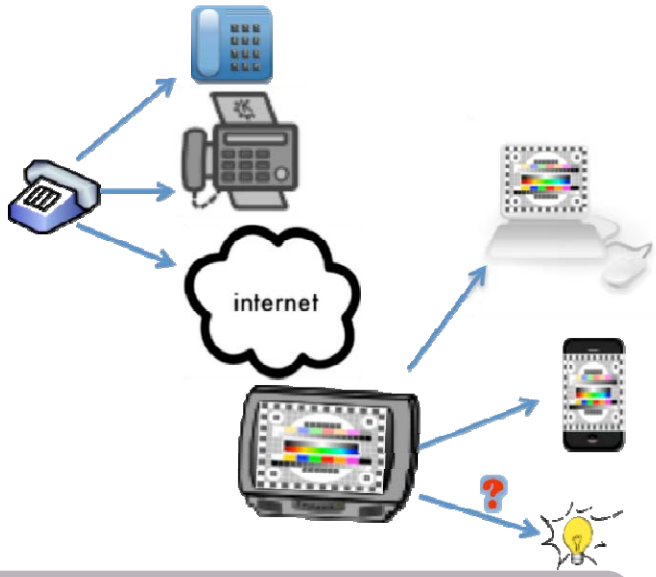
Most Americans subscribe to some sort of pay TV service. As a result, it should come as no surprise that the first innovations in online video distribution are designed to compliment, not necessarily replace, traditional pay TV offerings. These services are designed to add value to consumers' traditional services by offering additional access to internet streaming video, as well as integration with consumer-owned media and other web-based services in a single device with a single navigational menu.

However pay TV companies, along with a handful of set top box manufacturers, have worked hard to block this type of integration. Competitors have been unable to easily connect new hardware to existing systems. As a result, they have been unable to offer a unified entertainment solution. Innovators have been unable to offer consumers a single box with a single interface that integrates all of their entertainment services.

Pay TV Controls the Content

Of course, there is no reason that innovative video services must only complement existing subscriptions. A growing number of Americans are showing a desire to "cut the cord" and replace their pay TV subscription with an "over-the-top" internet based video service.

Many over-the-top video providers want to give consumers the option to mix the traditional content they like with new content. However, some pay TV companies are starting to strike deals that force consumers to pay for a full pay TV subscription *and* a full broadbroad subscription just to view certain content online, regardless of whether the content provider would prefer to make content available in another way. Deals like TV Everywhere, which give cable customers access to cable programming online only if they have both a full cable subscription and a broadband subscription, or ESPN360, which force ISPs to pay a per-subscriber fee (and is not available on an individual basis) in order to allow access to content, prevent over-the-top video providers from competing with traditional pay TV offerings.



Public Knowledge

The Solution: "Cable Carterfone"

The big pay TV companies and a handful of dominant equipment manufacturers, just like AT&T in the 1960s and 70s, are using their dominant position to block innovation while being unwilling or unable to innovate themselves. At the same time, they are trying to insert themselves into every consumer video transaction, and to make a traditional pay TV subscription the only key that can unlock online content.

The solution for pay TV today, as it was for AT&T in the past, is to create and enforce rules that allow any non-harmful device to attach to the pay TV network, and to give over-the-top competitors access to programming that currently exists on pay TV channels. The FCC must end its policy of malignant neglect that has assumed that the pay TV industry can regulate itself for the public good. It is time to establish rules that will benefit consumers, not industry incumbents.

In the 1970s, these rules for AT&T were called "Carterfone." Just as Carterfone allowed telecommunications to evolve from the ubiquitous "black phone" to fax machines, answering machines, and eventually the internet, a new "Cable Carterfone" would clear the way for any number of devices that combine traditional pay TV programming with new internet programming and services.

The Law Already Requires Pay TV to Allow Access

In 1996, Congress passed a law designed to increase video competition. It was designed to create a competitive market in third-party set top boxes, as well as to force pay TV companies to share programming with competitors. In the years since, the FCC has failed to enforce the law. Worse, it has stood by as pay TV companies implement half-baked solutions such as CableCard and do everything possible to prevent the melding of pay TV and other content in a single box or user interface.

Now that the FCC has started looking specifically at internet video as part of its National Broadband Plan, there is an opportunity to develop the rules that will force pay TV to cooperate with innovators and allow Americans to "cut the cord" by subscribing to a video service that they choose from a universe of many, instead of being chained to the one provider that happened to run a wire past their house.

Cable Carterfone will be grounded in a few simple principles:

- Prevent both wired and wireless internet access providers from discriminating against any content based on type or source. Consumers should be allowed to access the video content of their choosing over their internet connection without interference.
- Enforce existing protections designed to allow innovators to create set top boxes that integrate consumers' media and subscriptions into a single device.
- Establish rules that prevent existing video programmers from acting to block the emergence of new, internet-based competitors.
- Require the unbundling of video and broadband services so that consumers can "cut the cord" without incurring a financial penalty.

Statement of Gigi B. Sohn, President, Public Knowledge
Before the Federal Communications Commission
National Broadband Plan Workshop: Best Practices/Big Ideas

September 3, 2009

I would like to thank the Commission for inviting me to speak about Internet video and "over-the-top" Internet video services at today's "Best Practices/Big Ideas" workshop.

Introduction

Video over the Internet is one of the most important drivers of broadband adoption and utilization today. While many policy discussions focus exclusively on content produced by the big studios and production companies, the truth of the matter is that the Internet video ecosystem extends far beyond the boundaries of Hollywood. User-generated content, in its many forms, has enriched the lives of many Americans and rivals studio content in terms of popularity. The efforts of citizen journalists on YouTube, for example, have allowed citizens around the nation to instantaneously learn about events that are ignored or underreported on by the national news media.[1] The use of Internet video in the 2008 Presidential elections, meanwhile, encouraged participation in the democratic process, by providing a means by which candidates could speak directly to citizens and even allowing individuals to submit video questions for the Presidential debates.[2] With regard to education, many universities are now offering videos of lectures

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[1] "News Unfiltered: YouTube Embraces Citizen Journalism," Ars Technica, May 20, 2008 (http://arstechnica.com/old/content/2008/05/news-unfiltered-youtube-embraces-citizen-journalism.ars).

[2] "In Obama-McCain Race, YouTube Became a Serious Battleground for Presidential Politics," U.S. News and World Report, November 7, 2008 (http://www.usnews.com/articles/news/campaign-

to the general public, as part of a practice known as "OpenCourseWare". Pioneered by the Massachusetts Institute of Technology, this practice encourages universities to showcase their course materials to be made available to people all over the world, many of whom would normally not possess the means to pursue higher education in a traditional setting.[3]

Clearly, Internet video holds the potential to further some of the most important goals of the National Broadband Plan, by encouraging Americans to adopt broadband services and promoting their use for purposes such as education and civic engagement. As Chairman Julius Genachowski said at the FCC's July 2 open meeting:

> [W]e must ensure that our broadband infrastructure and services advance national purposes, including job creation and economic growth…education, health care, energy, public safety, civic participation and many others".[4]

It is for these reasons that, as part of the National Broadband Plan, the Federal government must help foster an Internet video ecosystem that is competitive, open to new entrants and accessible to all Americans.

According to a recent study by comScore, over half of all Americans—158 million—watched video over the Internet in July 2009.[5] This figure, which represents

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2008/2008/11/07/in-obama-mccain-race-youtube-became-a-serious-battleground-for-presidential-politics.html).

[3] "MIT's OpenCourseWare Project Continues Apace," The Chronicle of Higher Education, March 23, 2007 (http://chronicle.com/article/MIT-s-OpenCourseWare-Project/15958).

[4] "Prepared Remarks on National Broadband Plan Process," FCC Chairman Julius Genachowski, July 2, 2009, p. 1 (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291884A1.pdf).

[5] "U.S. Video Market Soars in July as Summer Vacation Drives Pickup in Entertainment and Leisure Activities Online," comScore, August 27, 2009 (http://www.comscore.com/Press_Events/Press_Releases/2009/8/U.S._Online_Video_Market_Soars_in_July_as_Summer_Vacation_Drives_Pickup_in_Entertainment_and_Leisure_Activities_Online).

some 81 percent of all U.S. Internet users, is the highest on record and serves as a testament to the creativity fostered by an open and decentralized Internet. Unbounded by traditional gatekeepers like broadcasters and Multichannel Video Programming Distributors (MVPDs), ordinary Americans have embraced the myriad opportunities that Internet video offers, producing and viewing content that ranges from simple to sophisticated and which fills a variety of critical, civic, educational, economic and cultural needs.

Meanwhile, innovative technology companies are allowing users to access this content in ways that move beyond the traditional video-watching paradigm. For example, Internet video providers like Hulu[6] and hardware manufacturers like Slingbox[7] allow users to watch network television programs on-demand from a computer or mobile device, even when they are away home. The Boxee application, in turn, allows traditional web videos like those from Hulu—and numerous other providers, including CNN, CBS, Comedy Central, YouTube, and independently created podcasts—to be viewed on home theater PCs and set-top-boxes like the Apple TV.[8] Internet video rental company Netflix, in partnership with hardware manufacturers like Roku, Microsoft, LG, Samsung and TiVo, now allows movie rentals to be streamed over the Internet, directly to a device that is connected to the user's television set.[9] Clearly, a great deal of innovation is taking place in the Internet video market. If this innovation is allowed to flourish, consumers will reap

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[6] See "Media Info," Hulu.com (http://www.hulu.com/about).

[7] See http://www.slingmedia.com/.

[8] See http://www.boxee.tv.

[9] See "Entertainment at Your Fingertips," Netflix (http://www.netflix.com/NetflixReadyDevicesList?lnkce=nrd-l&trkid=425738&lnkctr=nrd-l-m).

the benefits, in the form of increased choice and affordability as well as greater convenience.

MVPD and Programmer Practices That Could Negatively Impact the Growth of Over-the-Top Video Services

According to the Pew Internet and American Life Project, Internet video viewership has nearly doubled since 2006, due mostly to increased adoption of broadband Internet services.[10] If the National Broadband Plan is successful, it stands to reason that online video viewership will continue to increase. One ABI Research study estimates that worldwide Internet video viewership could quadruple during the next five years, with more than a billion people worldwide watching video over the Internet by the year 2013.[11] This explosive growth is a major source of concern for networks and content providers, who may see revenue from traditional video services—for example, MVPD services—dwindle as more viewers embrace Internet video. Of particular concern to these incumbents is so-called "over-the-top video," that is, video content that travels directly from the provider to the consumer without the involvement of a network provider middleman. Examples of over-the-top video include streaming video services like Hulu, Netflix and Blip.tv.

Increasingly, studies are demonstrating that as broadband adoption increases, more and more users are choosing to "cut the cord," by unsubscribing from MVPD

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[10] "Online Video Watching Nearly Doubles Since '06," MSNBC, July 29, 2009 (http://www.msnbc.msn.com/id/32201850/ns/technology_and_science-tech_and_gadgets/).

[11] "More Than One Billion Users Will View Online Video in 2013," ABI Research, May 27, 2008 (http://www.abiresearch.com/abiprdisplay.jsp?pressid=1138).

services.[12] According to Parks Associates, 900,000 U.S. households didn't pay for an MVPD service and relied solely on the Internet for television in 2008.[13] With the advent of over-the-top video services that can be easily watched on either a computer or a television set, incumbent providers have even more of an incentive now than in the past to unfairly disadvantage over-the-top video services vis-à-vis their own offerings. For this reason, the Commission must closely scrutinize practices by 1) a network provider that competitively disadvantage over-the-top video; and 2) a content provider that competitively disadvantages both over-the-top video and network providers, particularly smaller network providers.[14] A description of such practices follows.

A. "TV Everywhere"

"TV Everywhere" is an initiative being pursued by a number of cable companies, including Comcast and Time Warner Cable, to extend the reach of the cable MVPD subscription model into the world of Internet video.[15] Under the TV Everywhere model, subscribers to cable video services would be granted access to video content online as part of their cable subscription. While the full details of TV Everywhere have yet to be made public, the program could discourage innovation if it requires, encourages or allows

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[12] "Home Broadband Adoption 2009," Pew Internet and American Life Project, June 17, 2009 (http://pewinternet.org/Reports/2009/10-Home-Broadband-Adoption-2009.aspx).

[13] "More Households Cut the Cord on Cable," *The Wall Street Journal*, May 28, 2009 (http://online.wsj.com/article/SB124347195274260829.html).

[14] In light of a recent ruling by the United States Court of Appeals for the DC Circuit—which lifts a FCC market share cap intended to prevent further consolidation in the cable market—it is even more critical that over-the-top video providers be able to provide a competitive alternative to other multichannel video providers. See Comcast et al. v. F.C.C. et al., No. 08-1114, slip. op. (D.C. Cir. Aug. 28, 2009).

[15] "Everything You Need to Know About TV Everywhere," NewTeeVee, June 23, 2009 (http://newteevee.com/2009/06/23/what-you-need-to-know-about-tv-everywhere/).

programmers and content providers to sign exclusive deals with cable companies. As has been previously stated by the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), to the extent that TV Everywhere discourages the emergence of online-only MVPDs, prevents small or rural MVPDs or over-the-top providers from negotiating with programmers to offer that same content to users,[16] or discourages programmers from making that content available directly to the consumer, it should be carefully scrutinized by the Commission.

B. Bandwidth Caps

Since ISPs also act as MVPDs, the Commission should closely examine any practice that discourages users from viewing Internet video, to the advantage of an ISP's own video offerings. Increasingly, ISPs are looking to implement so-called "bandwidth caps," purportedly to deal with network congestion. A number of U.S. ISPs have already implemented such caps: Comcast, for example, caps bandwidth at 250GB for residential customers[17] and Time Warner Cable has experimented with bandwidth caps as small as 5GB per month in some areas.[18] While Public Knowledge recognizes that bandwidth caps can be used for legitimate network management purposes, it urges the Commission to monitor the use of such caps carefully to ensure that bandwidth rationing is not used for anticompetitive ends.

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[16] Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, FCC docket 07-269, July 29, 2009, p. 5-10 (http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019933893).

[17] "Announcement Regarding An Amendment to Our Acceptable Use Policy," Comcast (http://www.comcast.net/terms/network/amendment/).

[18] "Time Warner Cable Expands Internet Usage Pricing," Business Week, March 31, 2009 (http://www.businessweek.com/technology/content/mar2009/tc20090331_726397.htm).

While the implementation of bandwidth caps varies from provider to provider, some ISPs enforce bandwidth caps with the threat of overage charges. If a user exceeds the amount of bandwidth allotted per month, that user will be charged an additional amount, based on the amount of bandwidth used. In most cases, however, the user is not provided with any mechanism whereby she can monitor her consumption. Rather, the user is only notified in the event that the ISP believes she has already exceeded the limit. Such a system, which threatens users with additional fees while offering no tools with which to manage or check the ISP's record of users' bandwidth consumption, effectively discourages users from engaging in activities that consume large amounts of bandwidth, including viewing Internet video. Discouraging use of broadband networks in this manner in turn discourages network providers from investing in greater capacity.

To nurture innovation, prevent anticompetitive practices, and ensure that consumers are kept fully apprised of the use of bandwidth caps, the Commission should require that:

- bandwidth caps do not discourage the use of, development of and investment in innovative, high-bandwidth services like online video;
- bandwidth caps are dynamic and are adjusted over time, to reflect changes in the capacity and costs of the network and the needs of the average user;[19]

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[19] While Internet bandwidth demand continues to grow at a rate of 50-60% per year, "Bandwidth: Cogent Pricing @ $6, Juniper Confirms Normal Bandwidth Growth," Fastnews, August, 2009 (http://fastnetnews.com/dslprime/42-d/1331-bandwidth-price-down-growth-moderate-juniper-cogent), and ISPs continue to offer higher-speed connections to customers, bandwidth caps have generally remained static. Comcast, for example, has introduced new speed tiers during the last 12 months but has not adjusted its cap to account for increasing demand for bandwidth since first implementing it in October 2008. Comcast to Roll Out Extreme 50 MBPS High-Speed Internet Service in Oregon and Southwest Washington in December," Comcast, November 17, 2008 (http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=821).

- adequate notice is provided to users regarding the use of bandwidth caps;
- bandwidth caps be clearly defined as pertaining to downstream traffic, upstream traffic or both;
- bandwidth caps treat all bandwidth equally and do not discourage use of certain services by excluding traffic to and/or from certain privileged parties or services; and
- users are given robust tools for monitoring their bandwidth consumption.

C. Broadband Tying

The Internet was designed to facilitate the free flow of information and any attempt to impede the movement of data online holds the potential to dramatically alter the nature of the Internet ecosystem. Of recent concern are deals made between online service providers and ISPs for access to content, a practice that OPASTCO refers to as "broadband tying". While TV Everywhere ties access to content to an MVPD service, broadband tying ties access to content with a broadband service. The most prominent example of this practice is ESPN360.com, an Internet video service offered by the ESPN television network. ESPN360.com is currently only available to subscribers of certain ISP networks, which pay ESPN for that access.[20] This places rural users and ISPs at a disadvantage, since smaller ISPs may not have the resources to enter into such content deals.[21] In addition, the costs associated with acquiring access to such content in all likelihood will be passed on to consumers, thereby increasing the cost of broadband for

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[20] "Suddenlink Launches ESPN360.com," Multichannel News, August 17, 2009 (http://www.multichannel.com/article/327725-Suddenlink_Launches_ESPN360_com.php).

[21] Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, FCC docket 07-269, July 29, 2009, p. 13-16 (http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019933893).

all users, including those users who do not make use of the content in questions. This undermines one of the key goals of the National Broadband Plan, which is to increase the affordability of broadband services so as to encourage adoption.[22]

D. Discrimination Against Internet Video on Mobile Data Networks

In its response to the FCC Wireless Telecommunications Bureau's inquiry into its business practices, Apple Inc. revealed that it had blocked the SlingPlayer Mobile application from being used on the iPhone handset, because a subscriber who used the application would have violated AT&T Wireless' terms of service.[23] The SlingPlayer Mobile application, which is produced by Sling Media, allows users to access content from their home MVPD subscription on mobile devices. According to Apple, because AT&T's terms of service prohibit a user from "redirecting a TV signal to an iPhone using AT&T's cellular network," the application was rejected and was not approved until that capability had been removed (the application now only allows users to stream video content when attached to a WiFi network).[24] By preventing subscribers from using SlingPlayer Mobile over its 3G network, AT&T discourages them from using streaming video applications, possibly in an attempt to steer users toward its own video offerings, such as Mobile TV.[25]

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[22] Notice of Inquiry, FCC docket 09-51, April 8, 2009, p. 19-20 (http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-31A1.pdf).

[23] "Apple Answers the FCC's Questions," Apple Inc., August 21, 2009 (http://www.apple.com/hotnews/apple-answers-fcc-questions/).

[24] Ibid.

[25] See "AT&T Mobile TV," AT&T (http://www.wireless.att.com/learn/messaging-internet/mobile-tv/).

Regardless of intent, AT&T and Apple's treatment of SlingPlayer Mobile draws attention to a practice that will likely become prevalent as handsets become more technologically capable: the discriminatory treatment of Internet video. Video is simply another form of data that travels over the network and service providers should not be allowed to discriminate against traffic based on its type, protocol, source or destination.

Recommendations to the Commission With Regard to Internet Video

In light of the above, Public Knowledge makes the following recommendations to the Commission with regard to the treatment of online video in the National Broadband Plan.

A. Encourage the Use of Internet Video Applications

Internet video is a key driver for broadband adoption and utilization and is an important tool for promoting education, civic engagement and technological innovation. Practices that restrict access to Internet video threaten to undermine many of the policy aims of the National Broadband Plan. Furthermore, as was seen in both the Comcast/Bit Torrent[26] proceeding and the Commission's inquiry into the business practices of Apple and AT&T with regard to the iPhone,[27] practices that restrict Internet video also hold the potential to be used to anticompetitive ends. For these reasons, Internet video should be lauded as a valuable edge-based tool and not condemned as the exclusive province of so-called "bandwidth hogs".

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[26] Memorandum Opinion and Order, FCC docket 07-52, August 1, 2008 (http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf).

[27] See Section III. D.

As such, the National Broadband Plan should encourage the use of edge-based video services while rejecting calls to limit video consumption in the name of network management. As was asserted by the Commission in its *Memorandum Opinion and Order* in the Comcast/Bit Torrent proceeding, bandwidth can be adequately managed using application- and protocol-agnostic means.[28]

B. Encourage Hardware and Software Developers to Innovate

To encourage continued innovation in the Internet video market, the Commission should ensure that hardware and software developers who market devices and applications that allow users to create, view and interact with online video in new and exciting ways can continue to do so. To achieve these goals, we urge the Commission to:

1. prohibit both wireline and wireless Internet access providers from discriminating against any content, applications or services based on its source, ownership or destination and should apply its *Broadband Policy Statement*[29] to wireless Internet access.
2. rigorously enforce Section 629 of the Communications Act, to ensure that "cable Carterfone" protections allow innovators to deliver Internet video to the television set without interference.[30]
3. clarify that over-the-top video providers are "MVPDs" solely for the purposes of Section 628 of the Communications Act[31] and that linear video programming and producers of linear video programming are

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[28] Memorandum Opinion and Order, FCC docket 07-52, August 1, 2008 (http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf).

[29] *In re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.,* FCC No. 05-151, September 23, 2005.

[30] 47 U.S.C. § 549

[31] 47 U.S.C. § 548

covered by Section 616 of the Communications Act.[32] This would prevent existing video programmers or MVPDs from acting to prevent the emergence of new competitors, as doing so would violate Sections 628(b) and 616.[33]

4. require the unbundling of video and broadband services, so that those consumers who wish to "cut the cord" may do so without incurring a financial penalty.

Conclusion

It is important to remember that Internet video is ultimately just another form of data. Therefore, adoption and strict enforcement of many of the openness and non-discrimination recommendations that Public Knowledge has urged be made part of the National Broadband Plan[34] would go a long way toward ensuring the continued growth of Internet video and over-the-top video services. In addition, the Commission should seek to foster competition in the video market both by scrutinizing the practices highlighted above and by implementing the recommendations made above.

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[32] 47 U.S.C. § 536

[33] This recommendation is purposefully very narrow, and Public Knowledge does not intend to suggest that over-the-top video providers should be subject to the broader requirements of Title VI. The Commission should be mindful about the unintended consequences regulations placed on the video marketplace might have on the open nature of the Internet.

[34] *See comments of Public Knowledge, et al. in re: A National Broadband Plan for our Future*, GN Docket No. 09-51 at 6-17.

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	)	

COMMENTS

OF

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

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July 21, 2008

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Summary

In 2003, the FCC issued an order which, when combined with a Memorandum of Understanding between video distributors and consumer electronics companies, would provide third-party manufacturers with the ability to build devices which could directly receive and decode video from Multichannel Video Programming Distributors ("MVPDs"). In this order, the Commission forbade the use of Selectable Output Control ("SOC") signals, which would allow content owners and distributors to remotely turn off individual video connections used in televisions and other consumer electronics equipment. In May of 2008, the Motion Picture Association of America ("MPAA" or "Petitioner") petitioned the Commission to waive these rules to allow movie studios to selectively disable video connections for movies offered via Video on Demand on a more rapid schedule than in the past. Public Knowledge *et al.* oppose this petition as both unnecessary and contrary to the public interest.

First, granting the waiver will frustrate consumer expectations. Customers of MVPDs have invested thousands of dollars in high definition home electronics equipment with the understanding that it would be able to use all current and future content. If MPAA uses this waiver to *minimum* effect, millions of viewers will be forced to purchase costly new equipment to view content that their current equipment is quite capable of displaying. Some customers will be able to receive this content, while others will not, simply because of what kind of cable they happen to use between their set-top box and their television. And while MPAA touts this forced upgrade as an advantage, in reality it is both a violation of consumer expectations and an imposition of a large, unnecessary cost on users.

Second, the waiver is unnecessary. Releasing movies to the public at an earlier date is not new and does not qualify as a "new business model." In reality, shifting the release window

is a simply a business decision – and a business decision that other companies have already made. Further, Petitioner has provided no evidence that disabling analog or unprotected digital outputs would have any significant effect on copyright infringement, with or without this change in release window.

Finally, granting the petition will give MPAA members unprecedented and undesirable control over consumer device design. The waiver is not limited to analog outputs, and would allow the selective disabling of *any* output on MVPD networks. Should the MPAA choose to turn off other types of connections, it will harm even more users. Perhaps worse, it will give content owners the leverage to decide which outputs should be used in consumer electronics. Using this leverage, content owners could force consumer electronics designers and manufacturers to agree to almost any conditions to display SOC content, including design choices which are consumer-unfriendly and which are not driven by reasonable consumer desires or technological considerations.

For these reasons, the FCC should preserve consumer expectations and device manufacturer independence, and deny the MPAA's petition.

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COMMENTS OF PUBLIC KNOWLEDGE *ET AL.*

Public Knowledge,[1] Consumer Federation of America,[2] Digital Freedom Campaign,[3] Electronic Frontier Foundation,[4] Media Access Project,[5] New America Foundation,[6] and U.S. PIRG[7] ("Public Knowledge *et al.*") submit these comments in opposition to the MPAA's petition for a waiver of 47 C.F.R. § 76.190347 in the above-referenced docket.

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[1] Public Knowledge is a Washington, DC based public interest group working to defend citizens' rights in the emerging digital culture. Public Knowledge's primary mission is to promote innovation and the rights of consumers, while working to stop legislation or administrative action that would slow technological innovation, unduly burden free speech, shrink the public domain, or prevent fair use.

[2] Consumer Federation of America is an advocacy, research, education, and service organization. As an advocacy group, it works to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. Founded in 1968, its membership includes some 300 nonprofit organizations from throughout the nation with a combined membership exceeding 50 million people.

[3] The Digital Freedom campaign is dedicated to defending the rights of students, artists, innovators, and consumers to create and make lawful use of new technologies free of unreasonable government restrictions and without fear of costly and abusive lawsuits. For more information, see www.digitalfreedom.org.

[4] The Electronic Frontier Foundation ("EFF") is a nonprofit devoted to protecting civil liberties and free expression in technology, law, policy and standards. Founded in 1990, EFF actively encourages and challenges industry and government to support the rights of consumers and technology innovators in the digital world. EFF is a member-supported organization and maintains one of the most linked-to websites in the world at http://www.eff.org/.

[5] Media Access Project is a thirty-five year old non-profit tax exempt public interest media and telecommunications law firm which promotes the public's First Amendment right to hear and be heard on the electronic media of today and tomorrow.

[6] The New America Foundation is a nonprofit, post-partisan, public policy institute that was established through the collaborative work of a diverse and intergenerational group of public intellectuals, civic leaders and business executives. The purpose of New America Foundation is to bring exceptionally promising new voices and new ideas to the fore of our nation's public discourse. Relying on a venture capital approach, the Foundation invests in outstanding individuals and policy solutions that transcend the conventional political spectrum. Through its fellowships and issue-specific programs, the Foundation sponsors a wide range of research, writing, conferences and public outreach on the most important global and domestic issues of our time.

[7] U.S. PIRG serves as the national advocacy office for and federation of the non-profit, non-partisan state Public Interest Research Groups. The PIRGs frequently advocate on behalf of their one million members, and all consumers, in support of an open, democratic media marketplace that preserves the rights of the viewers and

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Introduction

The Motion Picture Association of America ("MPAA" or "Petitioner"), representing six member studios, has petitioned the FCC to waive a Commission rule which forbids the use of Selectable Output Controls ("SOC").[8] This would allow movie studios to selectively turn off video connections in the home of a Multichannel Video Programming Distributor ("MVPD") subscriber. This waiver is both unnecessary and contrary to the public interest. If granted, the waiver will frustrate consumer expectations regarding their home theater equipment and will give movie studios unprecedented and undesirable control over the design and use of home electronics equipment.

Home viewers have invested thousands of dollars in consumer electronics with the understanding that they will be capable of playing high definition content, regardless of when movie studios decide to release that content. Many of these systems rely on high definition analog or unencrypted digital connections, which Petitioner explicitly seeks to disconnect. Further, while Petitioner does not actually address what will happen to users who rely on older equipment that does not recognize these controls, none of the possible outcomes is acceptable. If MPAA succeeds, millions of users who have invested significant amounts of money in their systems will be left out in the cold with regard to new content simply because it is being released earlier.

Additionally, if granted, the waiver will give the largest motion picture production companies veto power over the connections which are used to connect set-top boxes, receivers, high definition televisions, home theater systems, digital video recorders ("DVR"), and other

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listeners. U.S. PIRG recently released a national secret shopper report on implications of the DTV transition and has commented before the FCC on a variety of media ownership and telecommunications issues.

[8] Motion Picture Association of America, *Petition for Expedited Special Relief, Petition for Waiver of 47 C.F.R. § 76.1903* (May 9, 2008) [hereinafter *MPAA Petition*].

consumer electronics devices. This veto power will give media companies leverage to dictate which home electronics manufacturers can produce products capable of viewing their content. Through that leverage, these media companies will gain the ability to control other aspects of the devices' design and the users' experience. The net effect of granting the waiver is to let content owners choose which types of connections users of digital content can have in their homes and what uses those connections allow, regardless of which connections users, consumer electronics manufacturers, MVPDs, and the rest of the relevant market decide are best. An innovative home electronics industry must be driven (as it has been for years) by user preferences and the device manufacturers' technology decisions, not by a content company-controlled veto.

The FCC should protect consumer expectations and the ability of consumer electronics manufacturers to make customer- and technology-driven design decisions by denying the MPAA's petition.

I. FACTUAL BACKGROUND

In 2003, the FCC concluded the "Plug-and-Play" proceeding, whose goal was to create rules which would allow consumers to receive high definition digital television signals directly through televisions or other devices, without requiring use of a set-top box provided by an MVPD.[9] The final order resulted in 47 C.F.R. § 76.1903, which states that an MVPD may not "attach or embed data or information with commercial audiovisual content, or otherwise apply to, associate with, or allow such data to persist in or remain associated with such content, so as to prevent its output through any analog or digital output authorized or permitted under license, law or regulation governing such covered product."[10] This type of signal is known as "Selectable

[9] *In re Commercial Availability of Navigation Devices*, 18 F.C.C.R. 20885 (2003) [hereinafter *Plug-and-Play Order*].
[10] 47 C.F.R. § 76.1903.

Output Control," and it allows content producers to turn off individual outputs on a customer's set-top receiver, choosing which types of video connections will or will not work in the customer's home.

In banning SOC data, the Commission specifically "recognize[d] consumers' expectations that their digital televisions and other equipment will work to their full capabilities."[11] This was done in part because cable operators and consumer electronics companies voluntarily chose "to publicly advocate the elimination of any MVPD device obligation to respond to commands as to selectable output controls and the observance of the same encoding rules as called for herein in all digital delivery systems, including Satellite and Internet systems."[12] Notably, the DFAST License Agreement, which device manufacturers must agree to before building devices which receive digital signals from MVPDs, "does not impose obligations to respond to selectable output control or down-resolution commands in the operation or implementation of the POD technology in the licensed devices."[13]

However, in the *Plug-and-Play Order*, recognizing that it cannot predict all new technologies and uses of those technologies, the Commission stated that it would consider petitions and waivers for "future applications that could potentially be advantageous to consumers."[14] On May 9, 2008, the MPAA, on behalf of six member companies who produce and distribute theatrical films, petitioned the FCC for "expedited special relief" in the form of a waiver.[15] The purpose of this waiver is ostensibly to provide additional protection for a "new

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[11] *Plug-and-Play Order* ¶ 60.
[12] *Letter to FCC and Memorandum of Understanding* 9 (Dec. 19, 2002) [hereinafter *Plug-and-Play MOU*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-3A2.pdf.
[13] *Plug-and-Play MOU* 9.
[14] *Plug-and-Play Order* ¶ 61 ("We nonetheless recognize that selectable output control functionality might have future applications that could potentially be advantageous to consumers, such as facilitating new business models, and will consider waivers, petitions or other proposals to use selectable output control in this regard.").
[15] *MPAA Petition*.

business model." This alleged business model consists of offering recently-released movies on Video on Demand ("VoD") in "prior to the normal release date of prerecorded media (e.g., DVDs) for general in-home viewing."[16] In other words, these studios want to release the same movies to the same customers via the same VoD – but earlier.

Public Knowledge *et al.* now file these comments in opposition to the MPAA's petition.

II. GRANTING THE WAIVER WILL FRUSTRATE CONSUMER EXPECTATIONS

In the order prohibiting MVPDs from incorporating selectable output control, the FCC made a special effort to recognize the importance of maintaining and supporting consumer expectations:

> We also recognize consumers' expectations that their digital televisions and other equipment will work to their full capabilities, and the potential harm to the DTV transition if those expectations are frustrated. In particular, we are concerned that selectable output control would harm those "early adopters" whose DTV equipment only has component analog inputs for high definition display, placing these consumers at risk of being completely shut off from the high-definition content they expect to receive.[17]

Furthermore, the Commission indicated that its decision-making process specifically centered around striking a balance between the needs of copyright owners and consumers.

> In addition, enacting limits on the amount of copy protection . . . strikes a measured balance between the desire of content providers and MVPDs . . . *and the preservation of consumer expectations* regarding the time shifting of programming for home viewing and other permitted uses of such material.[18]

The Commission should stand by its previous analysis of selectable output control and its stated emphasis on preserving consumer expectations. Granting a waiver of the ban on SOC would violate consumer expectations by blocking permitted uses and cutting users off from high-definition content that owners of legacy devices would expect to be able to receive. While

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[16] *MPAA Petition* i.
[17] *Plug-and-Play Order* ¶ 60.
[18] *Id.* ¶ 11 (emphasis added).

MPAA states that granting its petition "would not cause any consumer to lose a single linear channel the customer currently receives,"[19] this misses the point. Consumers expect not only to access the linear channels they currently receive, but to be able to use VoD services as they always have. They do not expect that *some* VoD services will be unavailable to them simply because of the type of TV they own or the types of inputs it has.

A. SOC-Enabled Content Will Frustrate Consumer Expectations by Blocking Access by Owners of High Definition Legacy Devices

While the petition describes the seamless, ideal scenario experienced by a user owning only recent, HDCP[20]-compliant devices and using only the protected connections, it fails to address the issue of legacy support. Many consumers have bought High Definition televisions with analog "component" inputs or unprotected digital DVI[21] inputs. These users may also have purchased cable boxes, DVRs, and receivers which are compatible only with these inputs. In fact, over 11 million of the 83 million HDTVs sold in the last ten years have *only* analog inputs.[22] And this number does not include the users who have bought HDTVs which offer unprotected digital connections like IEEE 1394,[23] or where the customer has chosen not to use HDMI[24] for reasons of cost and compatibility with other devices like home theater systems. And

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[19] *MPAA Petition* 5.

[20] High-Bandwidth Digital Content Protection ("HDCP") is an encryption and content protection standard used by HDMI, *see infra* n.24, and other video interfaces. See *High Definition Multimedia Interface*, *at* http://www.digital-cp.com/.

[21] Digital Visual Interface ("DVI") is a video interface standard. DVI supports, but does not require HDCP protection. *See DVI Specification*, *at* http://www.ddwg.org/lib/dvi_10.pdf.

[22] Rodolfo La Maestra, *High Definition Movies Before They Hit Blu-ray? Only if Your HDTV Permits It.*, HDTV Magazine (June 17, 2008), *available at* http://www.hdtvmagazine.com/articles/2008/06/high_definition_movies_before_they_hit_blu-ray_only_if_your_hdtv_permits_it.php.

[23] IEEE 1394 is a serial bus interface which is often used for transfer of digital audio and video data. *See IEEE 1394 Overview*, *at* http://standards.ieee.org/micro/1394overview.html.

[24] High Definition Multimedia Interface ("HDMI") is an digital audio/video interface standard used by televisions and other home electronics devices. The HDMI specification requires support for HDCP protection. *See HDMI Frequently Asked Questions*, *at* http://www.hdmi.org/learningcenter/faq.aspx.

while *all* of these devices are capable of handling High Definition content on whatever date the creators choose to release it, the entire purpose of SOC is to turn those connections off.

What happens when a consumer purchases content with SOC data enabled, but attempts to use a legacy device that does not support the SOC data? Petitioner has been notably vague on this point, which forces both the Commission and interested parties to speculate. There are a number of ways that non-upgradeable legacy devices could respond to SOC-tagged data. First and most likely, MVPDs could choose to not offer these services to users of legacy devices. Second, these devices may fail to recognize the content altogether, and so display nothing. Third, they may fail to recognize the SOC restrictions and play the content through all outputs. None of these outcomes is acceptable.

1. If Legacy Devices Obey SOC Rules, Consumers Expectations Will Not Be Met

Petitioner states that "consumers without the necessary equipment will be aware that this new Service is not available to them,"[25] suggesting that legacy devices will not, in fact, display SOC-flagged content. This outcome could be achieved by encrypting or otherwise modifying the content so that pre-SOC devices cannot recognize it, or through MVPDs configuring their systems not to offer SOC content to pre-SOC devices.

While this would bring Petitioner closer to their goal of eliminating legacy outputs, it would have a severe impact on the consumer. Even in this best-case scenario, where customers will be prevented from ordering movies they cannot watch, consumer expectations will be frustrated. In this scenario, users who do not have or use MPAA-preferred, protected interfaces will be completely unable to see or order early-release content. These customers will include

[25] *MPAA Petition* 5.

those who have purchased large, expensive, HD-capable TVs before the advent of digital connections, or before HDCP was commonly part of those connections.

Users who purchase expensive multi-component HD-capable entertainment systems are likely to consider them generally future-proof and expect them to be capable of handling whatever media becomes available on the market. Reasonable consumers simply do not expect that because a movie studio chooses to shift the date on which it starts to distribute a movie through VoD, they will not be allowed to purchase that content for viewing on their high definition, perfectly functional televisions. Even if early-release films do not appear on the list of VoD offerings for these users, customers will be left wondering why neighbors and friends–those who subscribe to the same MVPD service at the same price, and have near-identical setups using different cables–are not offered the same movies.

It would be a significant and substantial violation of consumer expectations to require buying a new cable box, DVR, and TV just to be able to watch an on-demand video sooner than before, especially given that consumers do not tend to distinguish between the various industry-standard release windows. The fact remains that users in this situation have purchased hardware which is quite capable of delivering the Services discussed in the petition, but would be prevented from doing so by a policy choice made by content owners, not a design choice made by the manufacturers of those purchased devices or a purchasing choise made by users.

2. Legacy Devices Which Fail to Display Content After Purchase Will Frustrate Consumer Expectations

In its petition, the MPAA suggests that mere marketing is the only protection afforded consumers: “For example, one potential implementation could entail a dedicated channel that would be advertised, branded, marked within the program guide, and otherwise messaged to consumers as being available only to those subscribers who have the appropriate

equipment . . ."[26] Nowhere does the petition state that an individual who cannot display the content would be stopped from paying first. In that case, a user would purchase a movie, only to find that their television only displays a blank screen or an error message. This would produce yet more consumer frustration and confusion, as a purchaser's only recourse would be to contest the charge after the fact. Even after consumers became aware of the MPAA-imposed limitations on their television use, they would be frustrated by the unnecessary disparity between their own options and their similarly-equipped neighbors', and would incur extensive costs if they chose to "upgrade" their hardware to access those services.

3. Legacy Devices Which Do Not Recognize SOC Data May Offer Unprotected Access to the Video

Petitioner alleges that "[i]n order to make high value, high definition, early release movies available to consumers in this manner, the Petitioners need the Services to flow over secure and protected digital outputs in order to prevent unauthorized copying and redistribution."[27] However, because legacy devices were not designed to recognize SOC data, it is impossible for them to respect it. For example, the license governing existing CableCard-based devices has no SOC requirement at all.[28] Even if the Commission allows MVPDs to add SOC data to the video stream, it is possible that legacy devices will ignore such SOC data and continue to output the video on connections that Petitioner would prefer to block. Petitioner would be left in the same situation it is in now – with no control over the outputs, they will be just as much exposed to illegal copying as they claim to be today.

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[26] *MPAA Petition* 5.
[27] *MPAA Petition* 6.
[28] *Plug-and-Play MOU* 2 ("The DFAST License Agreement does not impose obligations to respond to selectable output control . . ."). Note that this license does not affect the petition directly, as CableCard devices do not offer VoD or other two-way services.

This possibility also produces a situation where older devices have *more* functionality than newer devices. Petitioner claims that granting the petition will produce "a significant incentive for consumer to purchase HDTVs."[29] But to those who want to use their televisions and video services in legal ways not possible on "protected" outputs, this produces the opposite incentive, and gives users a reason *not* to upgrade to newer, less functional devices.

There is also no guarantee that new devices will respond to SOC data, either, further reducing the usefulness of SOC data. For instance, tru2way is the current name of one standard being pushed for a standard similar to Plug-and-Play, but which supports "two-way" services like VoD.[30] Devices which use the tru2way specification must include SOC support. However, not all manufacturers have agreed to support the tru2way spec, and those who have agreed have not yet released tru2way-complaint devices. Because SOC restrictions limit consumer freedom, manufacturers would be encouraged *not* to support the new tru2way standard if SOC controls are allowed by the Commission.

B. Granting the Waiver Will Interfere with Consumers' Expectations Regarding Legal Use of Content

In the original order forbidding use of SOC data, the Commission recognized that there are legal uses of content beyond what a cable box and television alone allow, and that consumers have legitimate "expectations regarding the time shifting of programming for home viewing and other permitted uses of such material."[31] It is important to recognize that mandating restrictions which Congress explicitly declined to adopt[32] can conflict with copyright law–which is outside

[29] *MPAA Petition* 4.
[30] *See tru2way*, *at* http://www.tru2way.com/.
[31] *Plug-and-Play Order* ¶ 11.
[32] *See, e.g.*, 17 U.S.C. § 1201(c)(3) (declining to force consumer electronics to respond to technological protections).

the Commission's purview–by severely limiting users' ability to legally use content in the ways they expect to.

Petitioner describes SOC as a "higher level of protection against copyright theft,"[33] but in reality, it a blunt instrument capable only of *completely* preventing access to content without regard to the legality of the use. The Copyright Act, on the other hand, states explicitly that:

> the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

17 U.S.C. § 107. This list of fair uses is not exhaustive:[34] Other uses which have been held to be "fair use" include recording video for later playback, or "time-shifting,"[35] as well as the ability to convert a recording into a different format in order to play it back in a different place ("space-shifting").[36] These uses do not require permission from the content owner, but do require the ability of the user to access the content they have purchased.

Because such functionality is in high demand by the public, many successful consumer electronics devices on the market are specifically designed to implement time-shifting (*e.g.* TiVo[37] and Hauppauge HD PVR[38]) or space-shifting (*e.g.* Slingbox[39]). These types of devices could be rendered obsolete by selectable output controls that bar analog or unrestricted digital output. The Slingbox Pro and Hauppauge HD PVR do not have HDMI inputs[40] – mostly likely

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[33] *MPAA Petition* i.
[34] *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994) ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. The text employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the examples given, . . .") (citation omitted).
[35] *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).
[36] *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999).
[37] *TiVo*, *at* http://www.tivo.com/.
[38] *Hauppauge HD PVR*, *at* http://www.hauppauge.com/site/products/data_hdpvr.html.
[39] Sling Media, http://www.slingmedia.com/.
[40] *See Cable and Connector Glossary*, Sling Media Knowledge Base, *at* http://support.slingmedia.com/get/KB-005332.html; *Slingbox Pro Quick Start Guide*, *at* http://support.slingmedia.com/get/KB-005166.pdf; *HD Connect (continued)*

because the license agreement for HDMI and HDCP would prevent both devices from performing their legal, useful functions.[41] Instead, these devices rely on high definition, analog component video to perform their functions. Shutting down the analog outputs of a cable box would therefore make obsolete devices that currently enable time- or space-shifting, and would prevent the numerous other legal uses listed in the Copyright Act. Consumers expect to be able to make legal use of the content they pay for. Granting the petition will prevent these legal uses and further frustrate consumer expectations.

C. Granting the Petition Will Be Costly to Consumers and Harm the DTV Transition

The only public interest that Petitioner lists to justify its request for a waiver of the SOC ban is that it will encourage the digital television ("DTV") transition.[42] This claim is spurious, as any effect on the DTV transition will be minimal and contrary to the public interest. In fact, in the *Plug-and-Play Order*, the Commission concluded that the opposite was true, and that banning SOC would further the DTV transition for broadcast television: "Bans on both the current use of selectable output control and the down-resolution of broadcast programming will further the DTV transition and ensure that consumer expectations regarding the functionality of their digital cable ready televisions and products are met."[43] The Commission was correct.

First, the DTV transition and this petition are only nominally related. The relevant regulations and the petition only apply to MVPDs, and not to the over-the-air broadcasts which are at the core of the DTV transition. Customers who would be receiving this content from their

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and HDMI, Sling Community Forums, *at* http://www.slingcommunity.com/forum/thread/17888/HD-Connect-and-HDMI; *Hauppauge HD PVR*, *at* http://www.hauppauge.com/site/products/data_hdpvr.html.

[41] *See, e.g.*, *Standing Shoulder to Shoulder - Brits No Longer Flying SOLO* (Sept. 26, 2007), *at* http://www.slingcommunity.com/article/24612/Standing-Shoulder-to-Shoulder---Brits-No-Longer-Flying-SOLO/; John P. Falcone, *Ask the Editors: Why Don't Video Recorders have HDMI Inputs?* (Feb. 22, 2008), *at* http://news.cnet.com/8301-17938_105-9870317-1.html.

[42] *MPAA Petition* 8.

[43] *Plug-and-Play Order* ¶ 11.

MVPD are highly unlikely to also be receiving over-the-air DTV service on the same television. Even if one accepts Petitioner's claim that SOC will force people upgrade their TVs to expensive high definition models which are DTV-ready, it is *against* the public interest because it imposes a high cost on those who are least able to bear it – those who rely on over-the-air broadcast for television.

Second, any effect that a waiver will have on the public interest and the DTV transition will be negative. As discussed above, many people have already purchased digital high-definition TVs without protected inputs. If Petitioner truly only intends to allow this content to be provided through protected digital connections, then only those individuals owning recent, high-end devices will be able to view the content. This means that many consumers who purchased DTV-capable systems will *not* be able to view SOC content. These people would be forced to upgrade their equipment solely because the MPAA does not feel it is "protected" enough, and not because of any inability in the equipment. The best way to protect the DTV transition is to deny the MPAA's petition.

III. WAIVER OF THE SELECTABLE OUTPUT CONTROL RULES IS UNNECESSARY

Waiving the SOC ban for early-release VoD is unnecessary, both because shifting the release window is not a new business model and because there is no evidence that allowing SOC controls for this early release window would be necessary or useful for combating copyright infringement.

A. An Accelerated Release Window is Not a New Business Model

Merely shifting forward the release date for the same content in a existing delivery mechanism is not a "new business model" from the consumer's perspective. First, the offered content – the movie itself – is fundamentally unaltered. No content or value has been added beyond the ability to legally view it outside of a cinema but before it is distributed on DVD.

Second, the distribution channel is unchanged. Consumers have been able to order VoD and pay-per-view through their cable companies for many years, including high definition theatrical releases.[44] Allowing this type of marketing choice to qualify as a new business model eligible for a waiver will open the door to numerous future attempts to burden consumers with unnecessary restrictions.

Second, shifting the release window is not new. Many media and entertainment companies are already releasing VoD offerings at the same time as on DVD or earlier. Content producer Time-Warner has announced a shift to the "day-and-date" model with VoD concurrent with DVD release.[45] Over two years ago, the Independent Film Channel announced its intention to release films simultaneously in theaters, on DVD, and via VoD;[46] it currently releases two films per month simultaneously in theaters and via VoD.[47] Even two Petitioner members – Universal City Studios LLLP and Warner Bros. Entertainment, Inc. – participate in a Cablevision service that provides VoD to customers on the DVD release date, and mails the DVD to the customer's house to arrive later.[48] Some content owners are even pushing the release dates further – Mark Cuban recently announced that his production company, Magnolia Pictures, will air its new movies on VoD *before* theatrical release – and, of course, will not require or use any SOC restrictions.[49]

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[44] *See, e.g.*, http://en.wikipedia.org/wiki/Video_on_demand; http://www.museum.tv/archives/etv/P/htmlP/payperview/payperview.htm.
[45] Julia Boorstin, *Time Warner: Watch DVDs With VOD On Release Day*, CNBC Media Money (Apr. 30, 2008), *available at* http://www.cnbc.com/id/24391232.
[46] Sharon Waxman, *Missed It in the Theater Today? See It on DVD Tonight*, New York Times (Jan. 23, 2008), *available at* http://www.nytimes.com/2006/01/23/business/media/23independent.html.
[47] IFC In Theaters, *at* http://www.ifcintheaters.com/aboutUs.htm.
[48] Jennifer Netherby, *Cablevision Offers VOD, DVD Simultaneously*, Content Agenda (Feb. 4, 2008), *available at* http://www.contentagenda.com/article/CA6528464.html.
[49] Hugh Hart, *Mark Cuban to Show New Movies on TV Before Theatrical Release*, Underwire (July 9, 2008), *available at* http://blog.wired.com/underwire/2008/07/cuban-to-show-n.html.

Consumers are likely unaware of release window details for each individual delivery mechanism, and a shift from 150 days after theatrical release to 60 days after theatrical release may be welcome, but not be perceived as a paradigmatic change. Petitioner's belief that delivering the same content earlier requires a higher level of protection does not turn what is a simple shifting of release windows into a new business model or justify forcing large numbers of consumers to upgrade their equipment.

B. The MPAA Has Provided No Evidence that the Waiver is Necessary

Petitioner has provided no evidence that this restriction on users' rights is necessary or even helpful for their stated goal of preventing or reducing copyright infringement. The MPAA argues that their proposed business model, providing high definition content for in-home viewing, "would require a higher level of protection against copyright theft than is currently permissible under the Commission's rules."[50] The MPAA bases its argument for additional protection on the belief that their "theatrical movies are too valuable in this early distribution window to risk their exposure to unauthorized copying, redistribution or other unauthorized activities."[51] Without additional protection, the MPAA alleges that "[d]istribution over insecure outputs would facilitate the illegal copying and redistribution of this high value content, causing untold damage to the DVD and other 'downstream' markets."[52]

The MPAA's concern over the security of analog outputs is one that it has voiced since 2002.[53] In particular, the association has sought a solution to the perceived problem of the "analog hole." This "hole" in copy protection systems allows the duplication of even protected

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[50] *Petition for Expedited Special Relief: Petition for Waiver of 47 C.F.R §76.1903*, CSR-7947-Z/MB Docket No. 08-82, i (May 9, 2008).
[51] *Id*. at 3.
[52] *Id*.
[53] Motion Picture Association of America, *Content Protection Status Report*, (Apr. 25, 2002) *available at* http://judiciary.senate.gov/special/content_protection.pdf.

digital transmissions when those digital signals "are stripped of their protection as they pass through analog outputs."[54] As many digital devices can capture and record analog signals, this "analog hole" allows for the unauthorized access to unprotected content, even if digital rights management is employed by a content producer to restrict such access.

Of course, the mere ability to access the content does not mean that the illegal copying and redistribution feared by the MPAA will necessarily follow. In the Petition, the MPAA provides *no* evidence that this has happened or is likely to happen if its constituents shift their release windows. Evidence which the MPAA has relied on in the past to demonstrate the dangers of the "analog hole" is unreliable and inapposite.[55] In the complete absence of evidence, there is no reason to believe that additional, costly, restrictive technologies are needed.

In fact, MPAA's proposed "business model" aims to bring recently-released movies into consumer homes, providing a legal, convenient source of new movies for home viewing. The proliferation of online, legal purchasing of music has amply demonstrated that when content owners offer their products in a convenient, non-restricted, reasonably priced form, people will pay for it.[56] In the words of Disney CEO Robert Iger, "The best way to combat piracy is to bring

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[54] *Id.* at 4.

[55] In the past, MPAA has regularly cited the study of worldwide content piracy conducted commissioned by MPAA and performed by LEK Consulting as evidence that these unauthorized activities are occurring. *See* Motion Picture Association of America, *MPAA Releases Data From Piracy Study, Press Release* (May 3, 2006), *available at* http://www.mpaa.org/press_releases/2006_05_03lek.pdf. First, the LEK study has been publicly unavailable since its release. In fact, a Senate request to review the methodology behind the study has gone unfulfilled for over two years. *See The Analog Hole: Can Congress Protect Copyright and Promote Innovation?: Hearing Before the S. Comm. on the Judiciary*, 109 Cong. (2006) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary), http://judiciary.senate.gov/hearing.cfm?id=1956. Second, portions of the LEK study have already been proven incorrect. *See Revised MPAA Piracy Study Puts Less Blame on Students*, L.A. Times (Jan. 23, 2008), *available at* http://articles.latimes.com/2008/jan/23/business/fi-download23. Finally, nothing in the study suggested that source of the infringing materials was the "analog hole" or unprotected digital outputs from VoD, which is the only source that the petition would have any impact on at all.

[56] *See, e.g.*, Thomas O. Barnett, *Interoperability Between Antitrust and Intellectual Property* 5-9 (2006), http://www.usdoj.gov/atr/public/speeches/218316.pdf (noting that iTunes solved problems of both rampant piracy and declining music sales).

content to market on a well-timed, well-priced basis."[57] Therefore, such a move to earlier VoD release is likely to *reduce* infringement, even without SOC. On the other hand, when distributors attempt to reduce infringement by offering their paying customers *less* than what they are used to receiving, those customers react negatively.[58]

Finally, Petitioner suggests that its member companies will not experiment with new release windows if the waiver is not approved.[59] This is reminiscent of Viacom's threat in 2002 that "if the broadcast flag is not implemented and enforced by next summer, CBS will cease providing any programming in high definition for the 2003-2004 television season."[60] This threat never materialized. As discussed above, Petitioner members and other content producers are already experimenting with VoD release timing. Absent any evidence that an earlier release window will result in massive copyright infringement, and in the face of new evidence to the contrary, will Petitioner's members really choose not to explore these new business opportunities while their competitors continue to do so?

IV. THE MPAA IS SEEKING TECHNOLOGICAL CONTROL OVER CONSUMER ELECTRONICS DEVICES

MPAA would like to have the Commission believe that the sole purpose of the waiver is to protect its members' copyright interests. In reality, the Petition has much more ambitious goals. It is also an attempt by large content owners to get additional control over the design and capabilities of consumer electronics devices and MVPD services. During the original Plug-and-

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[57] *See* Gigi Sohn, *Disney's Iger to CES: We Can Compete with Free*, Public Knowledge Policy Blog (Jan. 9, 2007), *at* http://www.publicknowledge.org/node/781.

[58] *See, e.g.* Lorraine Woellert, S*ony's Escalating "Spyware" Fiasco*, Bus. Wk. (Nov. 22, 2005), *available at* http://www.businessweek.com/technology/content/nov2005/tc20051122_343542.htm (describing the fall in sales of Van Zant's 2005 release from number 887 to 25,802 in less than 3 weeks as word of the DRM drove fans away).

[59] *See MPAA Petition* at ii ("Absent sufficient protections, the Petitioners' theatrical movies are simply too valuable in this early distribution window to expose them to uninhibited copying or redistribution.).

[60] *Comments of Viacom*, Docket 02-230, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394608.

Play proceeding, advocates of SOC sought to make it broadly available as a way to copyright infringement.[61] In that proceeding, the Commission concluded that "a flat ban on selectable output control is necessary in light of the extreme consequences of an MVPD's use of that tool."[62] Those consequences will be no less extreme if SOC is used today or targeted at early-release movies.

Granting the waiver would put MPAA member companies on the path to controlling what types of connections will be used by all U.S. consumers, and to profiting from that control. The SOC waiver seeks not just the ability to turn off analog or unencrypted digital outputs, but veto power over *any* output that the content owner chooses, including currently-favored, encrypted outputs like HDMI. In the future, this ability could be used to turn off all existing connections for the proposed "Services," and only allow those services to flow through a proprietary connection sanctioned by MPAA. It is not hard to imagine that manufacturers would have to support this connection, or that in order to license this connection, consumer electronics companies would have to agree to terms dictated by Petitioner. These terms might include any manner of restriction, including those which the Commission and Congress have chosen not to grant them.

A model of how this would work can already be seen. Sony Pictures recently announced it will be offering its new movie, *Hancock*, to some Sony television owners equipped with Sony's Internet media connection before release on DVD and other home media.[63] However, the movie will only be available to those who own the Sony box, and *will only flow over Sony's*

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[61] *See Plug-and-Play Order* ¶ 58.
[62] *Plug-and-Play Order* 20965, Statement of Commissioner Kathleen Q. Abernathy.
[63] *"Hancock" Coming to Sony Bravia TVs Before Blu-ray, DVD, or Cable*, Consumer Reports Blog (July 4, 2008), *available at* http://blogs.consumerreports.org/electronics/2008/07/will-smith-summ.html.

proprietary video connection to a Sony TV. This model could easily be extended to MVPDs by leveraging SOC controls – if the Commission grants this waiver.

Decisions as to what types of technologies are put into consumer devices should be made by consumer electronics producers, as informed by market demands. The Commission should not allow this control to be pushed upstream to the content owners. Instead, it should deny the petition, allow the market to function, and stop MPAA's newest attempt to gain this type of control.

Conclusion

For the above reasons and the reasons, the Commission should deny MPAA's Petition for a waiver of the Selectable Output Control rules.

Respectfully Submitted,

Public Knowledge
Consumer Federation of America
Digital Freedom Campaign
Electronic Frontier Foundation
Media Access Project
New America Foundation
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July 21, 2008

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

In the Matter of	)	
	)	
Cablevision Systems Corporation	)	MB Docket No. 09-168
Petition for Waiver of Section 76.630(a)	)	
Of the Commission's Rules as Applied to	)	
Cablevision's New York City All-Digital Systems	)	

COMMENTS OF PUBLIC KNOWLEDGE
AND
MEDIA ACCESS PROJECT

SUMMARY

Public Knowledge and Media Access Project (collectively "Commenters") do not oppose the waiver request of Cablevision Systems Corporation ("Cablevision"),[1] subject to certain conditions to protect consumers and businesses that rely upon the current availability of an unencrypted basic tier signal. Cablevision has shown specific facts and circumstances why in the case of New York City it would serve the public interest to grant a waiver – assuming Cablevision mitigates the cost to consumers by providing free set top boxes for some period, and can guarantee that "legacy equipment" such as DVRs without CableCARD will continue to function through the use of the analog output.

While Cablevision is the first major cable system to apply for such a waiver, it certainly will not be the last. To the contrary, this petition marks only the beginning of a "cable digital conversion" that will reshape the industry. Commenters' qualified support for Cablevision's unique circumstances does not condone eviscerating a Commission rule by waiver and handling a critical industry transition on a piecemeal basis. It is ***critical***

[1] Cablevision Systems Corporation Petition for Waiver of Section 76.630(a) of the Commission's Rules As Applied to Cablevisions's All-Digital Systems ["Petition"].

that the Commission move expeditiously to a general rulemaking so that the broader questions raised by industry stakeholders such as Elgato Systems[2] are addressed in a coherent fashion and consumers do not receive differing and uneven remedies for the expense of the cable digital transition. Grant of this waiver to Cablevision must not become the template for generic "Cablevision waivers" that substitute for a rulemaking.

ARGUMENT

I. THE COMMISSION MUST INSTITUTE A FORMAL RULEMAKING TO GOVERN THE CABLE DIGITAL CONVERSION.

Although Cablevision provides appropriate specific details with regard to its situation in New York City, the overall situation is shared by the industry as a whole. In the coming years, the entire cable industry will move towards all digital signals. As more cable operators seek to reclaim bandwidth for broadband offerings, it is only logical that they will request permission to fully digitize their network. The Commission cannot wait to address this shift as individual waiver requests are filed market by market, company by company.

Instead, the Commission must recognize the shift occurring in the cable industry and initiate a formal rulemaking. The Commission cannot allow policy-by-waiver to become standard procedure. The Cablevision petition may be the first of its kind, but without larger Commission action it will not be the last. These requests are easy to anticipate, and would be well served by a considered, universal policy regarding the transition from analog to digital cable signals.

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[2] Opposition of Elgato Systems, LLC (Oct. 15, 2009).

If the Commission fails to initiate a rulemaking, it will once again find itself forced to deal with an important issue in an inefficient, piecemeal fashion. Catch-as-catch-can policymaking produces inconsistent rules that harm innovators by reducing certainty and undermining competition by destroying a level playing field. Consumers are harmed when providers are granted narrow waivers that undermine their expectations, businesses that rely on Commission rules are harmed when waivers unexpectedly destroy product markets, and the Commission's credibility is harmed when waivers make it clear that no rule is final. Only a formal rulemaking will allow the Commission to develop the type of universal, coherent policy that this issue requires.

II. CABLEVISION PRESENTS SPECIFIC REASONS FOR REQUESTING THIS WAIVER, BUT CONSUMERS MAY STILL BE HARMED

Notwithstanding the urgent need to address the cable digital transition in a formal rulemaking, Cablevision's petition appears to be a reasonable request and a rational response to specific local circumstances. As noted in the petition, full encryption of the basic tier would only occur once the conversion to all-digital programming is complete in the New York City market.[3] The need for encryption is related to concerns specific to the New York City market such as the cost of truck rolls and problems associated with trying to coordinate site access due to the large number of multiple dwelling units in the franchise area. In addition, to the extent Cablevision seeks to expand capacity as a direct consequence of competitive pressure from FIOS, the Commission should encourage such positive pro-consumer responses to competition.

[3] Petition at 1.

As Cablevision acknowledges in its Petition, the transition will force customers that still rely on unencrypted signals to add a set top box in order to view cable. The transition may also harm businesses that have relied on Commission rules in developing products and services. The Bureau should take notice of the opposition comments filed by current Cablevision customers who enjoy basic analog service.[4] As the Bureau is well aware, any filings by customers in a proceeding of this nature is extraordinary. That these customers find Cablevision's proposal alarming enough to draft and file comments explaining their objections demonstrates the potential for consumer harm is not minimal for those who continue to rely on an unencrypted basic tier, despite their comparatively small number as a percentage of Cablevision's total subscriber count. While Commenters do not suggest that all customers should be denied the benefit of increased bandwidth from an all digital signal, the Bureau should require Cablevision to protect these customers from what amounts to a sudden and an unanticipated rate increase from the need to rent new equipment.

Additionally, the comments of Elgato Systems, LLC provide an example of a consumer product developed to fully comply with Commission rules that will be severely crippled if the waiver is granted.[5] Cablevision does not address the potential impact on services such as Elgato's. Nor does it address the potential concern for "legacy equipment" that relies on the so-called "analog hole." The Bureau should require that Cablevision address these concerns, and ensure adequate protection to consumers and service providers.

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[4] *See, e.g.* Comments of Gerald Boehme (Oct. 6, 2009).
[5] *See* Opposition of Elgato Systems, LLC (Oct. 15, 2009).

Commenters do not believe that Cablevision failed to address these concerns through bad intent. To the contrary, Cablevision has made a laudable effort to provide a detailed analysis of how grant of the waiver would serve the public interest. But the failure of Cablevision to address these concerns in its application only underscores the need for a general rulemaking. Such a proceeding would allow all potentially impacted parties to air their concerns in one proceeding and allow the Commission to set governing rules based on a thorough understanding of the implications for the industry and consumers.

Commenters do not dispute the public interest benefits described by Cablevision, particularly given the unique circumstances of the New York City market. Furthermore, although Cablevision does not specifically mention the power of competition in promoting the cable digital conversion, Commenters note that New York City currently benefits from competition between Cablevision and Verizon's FiOS service. FiOS has advertised heavily, with a focus on its high-speed Internet offerings. Cablevision's attempt to increase its own bandwidth in order to compete with Verizon is the positive response to competition between cable and traditional telephone providers that the Commission should encourage. While this does not mean the New York City market is fully competitive by any means, the Commission should certainly welcome such responses and facilitate them.

III. THE COMMISSION MUST IMPOSE CONDITIONS ON THE WAIVER

Although Cablevision provides adequate evidence both of public interest benefits and of the unique circumstances in New York City, the Bureau cannot grant the waiver

request without imposing conditions to adequately protect consumers. This includes both consumers who subscribe to the unencrypted basic tier and consumers who use products or services dependent on an analog or unencrypted output.

Protect consumers from an unanticipated new cost. Although an overwhelming percentage of Cablevision customers already use set top boxes, there remain a significant number of individuals who will require a set top box for the first time. That these customers subscribe to only the basic tier of service suggests they have limited means.[6] These most vulnerable consumers should not be suddenly required to pay for set top boxes merely to continue accessing the basic channel lineup. The Bureau should require Cablevision to make set top boxes available for free for these basic tier subscribers for some reasonable transition period.

Protect Legacy Devices and Services. While a number of Cablevision's arguments are compelling in regard to switching to an all-digital network, they present no compelling motivation for moving towards an all digital home. As Commenters have pointed out in a number of different contexts,[7] consumers have invested in many devices that rely on analog protocols in order to function. Additionally, the availability of analog outputs unencumbered by restrictive licensing terms drives innovation in consumer use of content in their homes. Neither Cablevision nor any other cable company should be able to use the conversion of its network to digital as an excuse to close the "analog hole."

This is especially true in the context of basic cable. It is unlikely that most current basic tier only subscribers have televisions with digital inputs. Giving them set

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[6] *See, e.g.* Comments of Paresh Parikh (Oct. 15, 2009).
[7] *See, e.g.*, Public Knowledge's continued opposition to Selectable Output Control, *at* http://www.publicknowledge.org/issues/soc.

top boxes without analog outputs would amount to a requirement to purchase a new television set. By the same token, the cable digital conversion must not deprive consumers of services that rely on the presence of an unencrypted output.

Waiver to expire after completion of a general rulemaking. Commenters anticipate that the issues raised by Cablevision will be addressed more completely in a formal rulemaking. A formal rulemaking may impose a different set of conditions or impose different obligations on cable operators than the conditions suggested here. Because the purpose of a rulemaking would be to set appropriate rules for the industry, the Bureau should avoid any possible ambiguity that a waiver from the existing rule would automatically convey a waiver from any future industry-wide rules the Commission might adopt. Accordingly, the Bureau should make clear that any waiver granted will expire in the event the Commission modifies the existing rule.

CONCLUSION

The Commission must recognize that Cablevision's petition is a signal that existing rules may require significant revision in order to address the looming digital cable transition. If the Bureau does grant Cablevision's petition, it must do so as a first step towards a formal rulemaking designed to develop a set of universal rules to provide stability and guarantee consumer protection during the digital cable transition.

Respectfully submitted,

/s/

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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.*")[1] 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.[2]

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

[1] 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.
[2] 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*[3] 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.[4] 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.[5]

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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[3] *See Public Knowledge et al. Comments* 6.

[4] *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; *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; *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; *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.

[5] *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."[6] 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.[7] 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.[8] 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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[6] *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.

[7] *See TiVo Comments* 5; *DTLA Comments* 9. *See* also *HRRC Opposition* 4; *CEA Opposition* 3; *Public Knowledge et al. Comments* 18.

[8] *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.[9] 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"[10] who spent the most money on their equipment.[11] 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.[12]

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."[13] *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; . . ."[14]

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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[9] *See Public Knowledge et al. Comments* 13-15.
[10] *HRRC Opposition* 3.
[11] *See CEA Opposition* 6-7 (noting that component video is still relied on by the earliest adopters who made the largest investments).
[12] *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.
[13] *DTLA Comments* 12.
[14] *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.

functionality.[15] 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."[16] 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."[17] Their solution,[18] 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.[19] 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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[15] *See Public Knowledge et al. Comments* 11; *Hauppauge HD PVR, at* http://www.hauppauge.com/site/products/data_hdpvr.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.
[16] *DTLA Comments* at 13.
[17] *DTLA Comments* at 14.
[18] *DTLA Comments* at 15.
[19] *See Gefen DVR, at* 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.

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,

Public Knowledge
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Digital Freedom Campaign
Electronic Frontier Foundation
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July 31, 2008

CERTIFICATE OF SERVICE

I, Jeffrey Pearlman, hereby certify that on this 31st 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:

Kathleen Q. Abernathy
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Jeffrey Pearlman

Public Knowledge

October 14, 2009

William T. Lake
Chief, Media Bureau
Federal Communications Commission
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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

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[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).

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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 fillings 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

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[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

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[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).

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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 studios[14] 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 work[15] 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,

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[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 bribe[20] 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.

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[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 he 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).

October 28, 2009

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

RE: Notice of *Ex Parte* presentation in CS Docket No. 97-80
MB Docket No. 08-82

Dear Ms. Dortch:

On October 27, 2009, I met with Bureau Chief William Lake, Assistant Bureau Chief Robert Ratcliffe, Alison Neplokh, Jeffery Neumann, Brendan Murray, Nancy Murphy, and Mary Beth Murphy, with regard to the above captioned matters.

With regard to the pending waiver request by the MPAA, I noted the recent deals between Comcast and Time Warner, as well as the other agreements previously noted, to release movies in advance of the existing VOD window. Staff asked what protection Comcast had offered to address piracy as conditions of early release. I responded that a) I was unaware of any special arrangements to address these piracy concerns; and, b) whatever protections were provided, it is clear that they were provided without the need for the pending waiver. The Commission should therefore permit the marketplace to operate under existing rules rather than create uncertainty by the grant of waivers.

I noted the lack of any evidence that indicated whether the ability to turn off selectable output controls has any impact on illegal copying. Staff asked if it didn't "just make sense." I observed that, to the contrary, it did not "make sense" in light of evidence already introduced that illegal copying occurs prior to the availability on VOD. If such evidence existed, Petitioners could produce it quite easily. For example, if the inability to deactivate selectable output controls contributes to illegal copying, ***the number of illegal downloads should dramatically spike whenever a movie is released on VOD***. Further, given the growing number of movies released earlier than the window, it is possible to demonstrate the impact of the existing rule by noting whether illegal copying rates for the earlier release version vary dramatically for similar movies released under the existing window (controlling, of course, for such factors as popularity and audience demographic and other relevant factors that would assure a relevant comparison). The failure to produce any such evidence is telling. In the context of a data driven agency, the failure to produce such evidence should be particularly inexcusable.

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I further noted that accepting an argument without evidence because "it just makes sense" shifts the burden for the extraordinary relief requested from Applicants to the public. Such an outcome is not merely contrary to Commission rules and precedent, it places an impossible burden on those opposing the waiver.

Staff questioned Public Knowledge's assertion in its recent written *ex parte* that grant of the waiver would advance the availability of the content by "only 30 days," as MPAA has stated in its waiver application that it will facilitate release of movies *before* the existing DVD window. I noted that MPAA has failed to commit to any timetable for release and could satisfy this language by release of movies a single day before the existing DVD window. If the Bureau believes that the length of time is a relevant detail, it should at a minimum require Applicants to submit some evidence into the record as to how much they will shorten the window.

Staff also questioned Public Knowledge's insistence that MPAA produce some evidence relating to the value of moving the release window to VOD, or evidence that the existing rule is a barrier to resolving this through standard marketplace negotiations. Staff asked if it did not logically follow from the fact that people will pay to see first run movies or will pay for VOD that moving the window has value. Staff further asked why, if the rule does not present a barrier to renegotiating release windows, have studios not already done so and could staff not take this refusal to negotiate deals as evidence that a waiver was needed, given the assumption that it is valuable because people will pay to see first run movies?

Noting in passing that this argument rests on multiple untested assumptions, that Applicants have not based the application on generic value demonstrated by willingness to pay but on the purported value of accelerating release to those who have difficulty reaching a theater or ordering from a DVD delivery service, I observed that such suppositions do not constitute evidence of a public interest need. If the Bureau accepts the logic that the refusal of an industry participant to cut a deal is evidence that a rule does not serve the public interest, the Bureau would do well to abolish the rule entirely through a rulemaking rather than invite an endless stream of special interests lamenting that Commission rules frustrate profitable deals and that the public interest would be served by allowing parties to engage in conduct previously found harmful so as to facilitate this dealmaking.

Indeed, as to why parties do not conclude such deals, I noted that the Bureau's apparent willingness to entertain these arguments as the basis for a grant of a waiver create a "moral hazard" that creates uncertainty within the industry as a whole. Because the Bureau holds out the possibility that it will rewrite the rules for specific companies on request, with varying allegiance to the purportedly rigorous standard imposed by the Commission's rules and precedent, the resultant uncertainty induces parties to behave strategically rather than negotiate in their best financial interest. Worse, because these waivers have industry-wide

effect, the resultant uncertainty impedes the willingness and ability of those not parties in any given proceeding to engage in business negotiation or product development.

Staff asked me to address what harm would result from grant of the waiver. I again observed that the applicable standard is that Applicants must show a public interest benefit and that shifting the burden to waiver opponents to demonstrate harm is contrary to Commission rule and precedent. Worse, the creation of such "street law" on burden shifting undermines respect for the Commission's rules and the ability of any industry stakeholders or the public to rely on the rules.

In addition to this broader institutional harm, grant of the waiver would replace the previous bright line rule with an exception capable of abuse and difficult to monitor. This was one of the reasons the Commission imposed a clear prohibition in the first place. Further, the fact that 25 million MVPD subscribers would need new equipment to benefit from the waiver makes it certain that consumers will suffer confusion, frustration and that many will believe incorrectly that they must buy or lease new equipment at additional expense. This will render devices such as Sling Box and TiVo useless for the content provided. Finally, to the extent the waiver includes content released earlier than the existing window after the time it would be available under the present rule, it deprives users of the existing use of their devices for which they have already paid and for which, in some cases, they continue to pay subscription fees.

In accordance with the Commission's rules, a copy of this notice is being filed with your office today.

Sincerely,

/s/

Harold Feld
Legal Director
Public Knowledge

cc: William Lake
Robert Ratcliffe
Alison Neplokh
Jeffery Neumann
Brendan Murray
Nancy Murphy
Mary Beth Murphy

Public Knowledge

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

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[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).

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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 fillings 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

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[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.

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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

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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 work[15] 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,

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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.

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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).

November 2, 2009

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th 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 Ms. Dortch:

Public Knowledge would like to draw the Media Bureau's attention to the movie studios that are currently offering films through Video on Demand (VoD) prior to DVD release without Selectable Output Control (SOC). This is precisely the type of offering that the MPAA has claimed "necessarily would require a higher level of protection against copyright theft than is currently permissible."[1] The studios, including a signatory to the original MPAA petition waiver, clearly do not agree that the current SOC prohibitions are "a general regulatory impediment that prevents implementation of content protection required"[2] to make high value content available prior to DVD release.

Warner Brothers Entertainment, one of the named parties in MPAA's original petition, has already recognized that SOC is unnecessary to safely distribute high value content on VoD prior to DVD release.[3] In September, Warner debuted *Ghosts of Girlfriends Past* and *Observe and Report* on VoD prior to the release of the films on DVD.[4] Although the films were not protected by SOC, they still debuted as the numbers two and three best selling DVDs in the country.[5]

Other companies have embraced pre-DVD VoD releases. Magnolia Pictures has gone so far as to release a number of films on VoD prior to theatrical release.[6] Their success has inspired

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[1] Motion Picture Association of America, Petition for Expedited Special Relief, Petition for Waiver of 47 C.F.R. § 76.1903 at i (May 9, 2008) ("MPAA Waiver").
[2] *Id.* at ii.
[3] Jennifer Netherby, *Warner puts Observe, Ghosts on VOD before DVD*, Video Business (Sept. 28, 2009), *available at* http://www.videobusiness.com/article/CA6699156.html.
[4] *Id.*
[5] US DVD Sales Chart for Week Ending Sep 27, 2009, *available at* http://www.the-numbers.com/dvd/charts/weekly/2009/20090927.php.
[6] Hugh Hart, *Mark Cuban to Show New Movies on TV Before Theatrical Release*, Underwire

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a similar strategy by Starz Media.[7] IFC Entertainment's IFCInTheaters program utilizes a day and date distribution model, releasing films simultaneously in theaters and on VoD.[8] Needless to say, none of these studios and distributors rely on SOC protection when distributing their films. Finally it is worth noting that simultaneous VoD and DVD release, which is described by the MPAA as an "at best"[9] alternative to standard staggered release windowing, is rapidly becoming industry standard.[10]

The MPAA insists that SOC is required to offer pre-DVD release of high value content on VoD. As the above examples illustrate, not even MPAA member studios agree. SOC simply is not required to offer pre-DVD VoD release. There is no reason to grant the MPAA's waiver request and force consumers to replace over 20 million television sets, in addition to an unknown number of other consume electronic devices, in order to enable an already widely deployed service.

Sincerely,

/s/

Jef Pearlman
Michael Weinberg, Law Clerk
Public Knowledge

CC: Brad Gillen
Rosemary Harold
Rick Kaplan
William Lake
Mary Beth Murphy
Nancy Murphy
Brendan Murray

(July 9, 2008),
available at http://blog.wired.com/underwire/2008/07/cuban-to-show-n.html.

[7] Andre "DVDBack23" Yoskowitz, *Starz test movie via VOD bfore theaters, DVD*, Afterdawn.com (Sept. 7, 2009) *available at* http://www.afterdawn.com/news/archive/19253.cfm

[8] About IFC, *available at* http://www.ifcfilms.com/about-ifc-films

[9] MPAA Waiver at 2.

[10] Diane Garrett, *Studios collapsing VOD windows*, Variety (Oct. 8, 2009) *available at* http://www.variety.com/article/VR1118009748.html?categoryid=20&cs=1.

Alison Neplokh
Jeffery Neumann
Robert Ratcliffe
Sherrese Smith
Jennifer Schneider

October 28, 2009

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

RE: Notice of *Ex Parte* presentation in CB Docket No. 97-80
MB Docket No. 08-82

Dear Ms. Dortch:

On October 27, 2009, I met with Bureau Chief William Lake, Assistant Bureau Chief Robert Ratcliffe, Alison Neplokh, Jeffery Neumann, Brendan Murray, Nancy Murphy, and Mary Beth Murphy, with regard to the above captioned matters.

With regard to the pending waiver request by the MPAA, I noted the recent deals between Comcast and Time Warner, as well as the other agreements previously noted, to release movies in advance of the existing VOD window. Staff asked what protection Comcast had offered to address piracy as conditions of early release. I responded that a) I was unaware of any special arrangements to address these piracy concerns; and, b) whatever protections were provided, it is clear that they were provided without the need for the pending waiver. The Commission should therefore permit the marketplace to operate under existing rules rather than create uncertainty by the grant of waivers.

I noted the lack of any evidence that indicated whether the ability to turn off selectable output controls has any impact on illegal copying. Staff asked if it didn't "just make sense." I observed that, to the contrary, it did not "make sense" in light of evidence already introduced that illegal copying occurs prior to the availability on VOD. If such evidence existed, Petitioners could produce it quite easily. For example, if the inability to deactivate selectable output controls contributes to illegal copying, ***the number of illegal downloads should dramatically spike whenever a movie is released on VOD***. Further, given the growing number of movies released earlier than the window, it is possible to demonstrate the impact of the existing rule by noting whether illegal copying rates for the earlier release version vary dramatically for similar movies released under the existing window (controlling, of course, for such factors as popularity and audience demographic and other relevant factors that would assure a relevant comparison). The failure to produce any such evidence is telling. In the context of a data driven agency, the failure to produce such evidence should be particularly inexcusable.

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I further noted that accepting an argument without evidence because “it just makes sense” shifts the burden for the extraordinary relief requested from Applicants to the public. Such an outcome is not merely contrary to Commission rules and precedent, it places an impossible burden on those opposing the waiver.

Staff questioned Public Knowledge’s assertion in its recent written *ex parte* that grant of the waiver would advance the availability of the content by “only 30 days,” as MPAA has stated in its waiver application that it will facilitate release of movies *before* the existing DVD window. I noted that MPAA has failed to commit to any timetable for release and could satisfy this language by release of movies a single day before the existing DVD window. If the Bureau believes that the length of time is a relevant detail, it should at a minimum require Applicants to submit some evidence into the record as to how much they will shorten the window.

Staff also questioned Public Knowledge’s insistence that MPAA produce some evidence relating to the value of moving the release window to VOD, or evidence that the existing rule is a barrier to resolving this through standard marketplace negotiations. Staff asked if it did not logically follow from the fact that people will pay to see first run movies or will pay for VOD that moving the window has value. Staff further asked why, if the rule does not present a barrier to renegotiating release windows, have studios not already done so and could staff not take this refusal to negotiate deals as evidence that a waiver was needed, given the assumption that it is valuable because people will pay to see first run movies?

Noting in passing that this argument rests on multiple untested assumptions, that Applicants have not based the application on generic value demonstrated by willingness to pay but on the purported value of accelerating release to those who have difficulty reaching a theater or ordering from a DVD delivery service, I observed that such suppositions do not constitute evidence of a public interest need. If the Bureau accepts the logic that the refusal of an industry participant to cut a deal is evidence that a rule does not serve the public interest, the Bureau would do well to abolish the rule entirely through a rulemaking rather than invite an endless stream of special interests lamenting that Commission rules frustrate profitable deals and that the public interest would be served by allowing parties to engage in conduct previously found harmful so as to facilitate this dealmaking.

Indeed, as to why parties do not conclude such deals, I noted that the Bureau’s apparent willingness to entertain these arguments as the basis for a grant of a waiver create a “moral hazard” that creates uncertainty within the industry as a whole. Because the Bureau holds out the possibility that it will rewrite the rules for specific companies on request, with varying allegiance to the purportedly rigorous standard imposed by the Commission’s rules and precedent, the resultant uncertainty induces parties to behave strategically rather than negotiate in their best financial interest. Worse, because these waivers have industry-wide

effect, the resultant uncertainty impedes the willingness and ability of those not parties in any given proceeding to engage in business negotiation or product development.

Staff asked me to address what harm would result from grant of the waiver. I again observed that the applicable standard is that Applicants must show a public interest benefit and that shifting the burden to waiver opponents to demonstrate harm is contrary to Commission rule and precedent. Worse, the creation of such "street law" on burden shifting undermines respect for the Commission's rules and the ability of any industry stakeholders or the public to rely on the rules.

In addition to this broader institutional harm, grant of the waiver would replace the previous bright line rule with an exception capable of abuse and difficult to monitor. This was one of the reasons the Commission imposed a clear prohibition in the first place. Further, the fact that 25 million MVPD subscribers would need new equipment to benefit from the waiver makes it certain that consumers will suffer confusion, frustration and that many will believe incorrectly that they must buy or lease new equipment at additional expense. This will render devices such as Sling Box and TiVo useless for the content provided. Finally, to the extent the waiver includes content released earlier than the existing window after the time it would be available under the present rule, it deprives users of the existing use of their devices for which they have already paid and for which, in some cases, they continue to pay subscription fees.

In accordance with the Commission's rules, a copy of this notice is being filed with your office today.

Sincerely,

/s/

Harold Feld
Legal Director
Public Knowledge

cc: William Lake
Robert Ratcliffe
Alison Neplokh
Jeffery Neumann
Brendan Murray
Nancy Murphy
Mary Beth Murphy

November 10, 2009

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th 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 Ms. Dortch:

Public Knowledge files the following comments to respond to recent filings by Petitioner MPAA and to additionally clarify Public Knowledge's position regarding the above captioned proceeding.

The question before the Bureau is not whether some individuals would find it more convenient to watch a given movie in their home via Video on Demand ("VoD") prior to the release of that same movie on DVD days or weeks later. The Bureau must determine whether the Applicants have met their burden to show that it is necessary to waive a rule already found to serve the public interest in order to better serve the public interest. In the case of the MPAA's Selectable Output Control ("SOC") waiver, the answer remains "no."

There is also no doubt that some providers of possible services would find it convenient to control selected outputs, and might chose to withhold services or content without a waiver. Controlling selected outputs allows a service provider or content owner to extract additional rents from consumers in a multitude of ways. Again, however, the standard for a waiver is not that an Applicant would like to have a waiver, or that the wavier would benefit the Applicant, or even that the Applicant threatens to withhold the service or content unless the Bureau grants the waiver. As the Commission has stated in the past "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."[1] While the waiver requested by the MPAA might serve the MPAA, there is nothing more than speculation to suggest that it will serve the public interest.

In fact, the current record suggests that the MPAA's waiver will harm the public interest. Within the past week, over 1,700 individuals have filed comments in this docket.

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

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The overwhelming majority of these comments urge the Commission to *deny* the MPAA's request. While the volume of comments in a particular docket can be an imprecise measure of public interest, the Commission would be well served to consider the public reaction to this waiver request. To the extent members of the public have expressed an opinion, they do not find the deal offered by the MPAA in their interest.

The MPAA also repeatedly suggests[2] that SOC would allow it to introduce the types of "new business models" contemplated when the Commission originally implemented SOC rules.[3] This is incorrect for several reasons. First, it is the MPAA, not SOC, that is currently preventing the release of MPAA-member studio films to the public via VoD prior to DVD release. As Public Knowledge has documented in the past, a number of non-MPAA studios already make films available to the public without SOC protections.[4] Second, there is nothing "new" about what the MPAA is proposing.

The MPAA's proposal would use existing technology to bring existing content to a place where consumers already view films. There simply is nothing new about using VoD to deliver movies to consumers at home. While it may be "new" for some MPAA members to grant consumers access to films at home prior to DVD release, it is far from new in the broader film industry.[5]

The MPAA explicitly recognizes this fact in its most recent letter.[6] It states that the wavier "would merely permit MPAA-member studios to make some of this content available *earlier*."[7] Merely releasing content "sometime prior to release on prerecorded media"[8] can hardly be considered a "new" business model.

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[2] *See MPAA Petition for Expedited Special Relief: Waiver of* 47 C.F.R. §76.1903 ("MPAA Petition"). *See also* Letter from Antoinette Cook Bush, Counsel to MPAA, to Marlene H. Dortch, Secretary, Federal Communication Commission, MB Docket No. 08-82 (dated Nov. 4, 2009) ("MPAA November 4 Letter").

[3] *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).

[4] *See* Letter from Jef Pearlman, Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communication Commission, MB Docket No. 08-82 (dated Nov. 2, 2009) ("PK November 2 Letter").

[5] *Id.*

[6] MPAA November 4 Letter.

[7] *Id.* at 5 (emphasis in original).

[8] MPAA Petition at 2.

The MPAA limits its claims to "MPAA-member studios" because it must: a number of non-MPAA member studios feel free to distribute their "high-value content" to consumers well before the DVD release date.[9] Just as Viacom disingenuously announced that its CBS broadcast network would be unable to broadcast in high definition without the broadcast flag, the MPAA is claiming that SOC is required to make films available via VoD the day before the DVD release date.[10] As competitive pressures force more studios to dismantle traditional release windows MPAA-member studios, like Viacom before them, will recognize that additional consumer-unfriendly digital locks do not provide additional protection against unauthorized content reproduction.

In a final effort to gloss over the impact of its request and paint it's Application as "pro-innovation," the MPAA tries to go on the offensive by accusing Public Knowledge of holding back this "new service."[11] MPAA's choice of illustration, that "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,"[12] is particularly ill-chosen from the MPAA's perspective.

As commenter Bill Paul, CEO of Neothings, Inc. points out, in the 1950s the FCC was tasked with choosing between a number of competing color television standards.[13] The FCC initially favored a standard that would have required all viewers to purchase a new television to receive signals broadcast with the new color technology. Older televisions would gradually go dark as black and white transmission gave way to the CBS-proposed color standard. As a result, the public and the FCC ultimately adopted the RCA-proposed color standard, which permitted backward compatibility.

Congress attached such high value to ensuring that all televisions could receive all broadcast signals that it passed Section 303(s), giving the Commission explicit authority to regulate broadcast receivers so that no one could "break" television signals in the same way the MPAA proposes to break VoD – by requiring viewers to buy new equipment to see all the content to which they are entitled. Indeed, Congress has time and again acted to ensure

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[9] PK November 2 Letter.
[10] *See Comments of Viacom*, Docket 02-230, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394608.
[11] MPAA November 4 Letter at 2.
[12] *Id.*
[13] *See* Letter from Bill Paul, CEO, Neothings, Inc. to Marlene H. Dortch, Secretary, Federal Communication Commission, MB Docket No. 08-82 (dated Nov. 5, 2009).

that consumers can use the electronic devices of their choice to record and to view all lawfully available content.[14]

As Congress itself found in these cases, it ***promotes*** innovation and consumer welfare to prohibit "encoding or encryption technologies" that disable consumer electronic devices. Indeed, as MPAA's color television example aptly demonstrates, the unique value placed by Congress, the Commission, and the public on access to video content through their existing equipment weighs heavily against the MPAA's Application. When combined with the overwhelming rejection of the proposed "new service" by the public, and MPAA's failure to provide any evidence that the waiver will even address MPAA's own concerns about illegal copying, it becomes clear that the Bureau should reject the MPAA's waiver request as contrary to the public interest.

Sincerely,

/s/

Harold Feld
Michael Weinberg, Law Clerk
Public Knowledge

CC: Susan Aaron
Steven Broeckaert
William Freedman
Brad Gillen
Rosemary Harold
Jamila Bess Johnson
Rick Kaplan
William Lake
Mary Beth Murphy
Nancy Murphy

[14] *See* 47 U.S.C. §544a(a) (Congressional findings that it is contrary to the public interest for "cable scrambling, encoding or encryption technologies" to disable "premium features and functions" in television sets and VCRs and that doing so will make consumers "less likely to purchase, and electronics equipment manufacturers less likely to develop, manufacture, or offer for sale television receivers or VCRs with new and innovative features and functions"). *See also* The Digital Transition and Public Safety Act of 2005, §3005 (creating digital-to-analog converter box program).

Brendan Murray
Alison Neplokh
Jeffery Neumann
Robert Ratcliffe
Jennifer Schneider
Austin Schlick
Sherrese Smith
Marilyn Sonn
Phoebe Yang

Public Knowledge

November 19, 2009

Austin Schlick
General Counsel
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

Re: WT Docket No. 08-82

Dear Mr. Schlick:

In asking for an waiver of the selectable output control ("SOC") ban,[1] the Motion Picture Association of America ("MPAA") took upon itself the burden of proving that its request meets the evidentiary requirement established by Commission rule and precedent. In the year and a half since its filing, MPAA has failed to meet that burden, providing no "particular facts" that would justify this extraordinary relief. As the D.C. Circuit has previously found, grant of a waiver without sufficient basis warrants reversal.[2]

The arbitrary nature of a grant of the waiver on the basis of the existing record is further heightened by the fact that, when formulating the rule at issue, MPAA presented precisely the same arguments and conclusory statements about the need to use selectable output control (SOC) to protect copyrighted material. The Commission rejected these arguments, noting that it would consider a grant of a waiver in the event MPAA could justify why it required such an exception to offer a "new service."[3] For the Bureau to reverse the decision of the full Commission, based on the same conclusory statements and allegations the Commission previously found inadequate, would constitute an unprecedented act under delegated authority.[4] Accordingly, and especially in light of the significant public interest in this matter, the Bureau should refer the matter to the full Commission.

More to the point, to arrive at the opposite conclusion from the full Commission without further evidence or explanation is practically the definition of arbitrary decision making.[5] If the Bureau does take action on MPAA's Petition, the only reasonable action consistent with "existing precedents and guidelines" is to deny the Petition.

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[1] Motion Picture Association of America, *Petition for Waiver of 47 CFR § 76.1903*, MB Docket No. 08-82, CSR-7947-Z (May 9, 2008) (hereafter *MPAA Petition*).
[2] *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164 (DC Cir. 1990).
[3] Implementation of Section 304 of the Telecommunications Act of 1996, *Second Report & Order & Notice of Proposed Rulemaking*, 18 F.C.C.R. 20885, ¶ 61 n.158 (2003) ("Plug-and-Play Order").
[4] The Media Bureau has only those powers delegated to it pursuant to 47 C.F.R. §§ 0.5 and 0.238. These sections provide authority for "staff to act on matters which are minor or routine or settled in nature" and explicitly reserve to the Commission authority to resolve matters not resolvable under "existing precedent and guidelines."
[5] *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29 (1983).

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MPAA Has the Burden of Proof

MPAA's waiver request rests on two separate waiver provisions under the Commission's rules: Sections 1.3 and 76.7.[6]

Under Section 1.3 of the FCC's rules, the Commission has authority to waive its rules if there is "good cause shown"[7] and "particular facts would make strict compliance inconsistent with the public interest."[8] To meet the rules' requirement, (1) a waiver must be in the public interest, (2) the must be special circumstances warranting a deviation from the rules, and (3) the Commission must articulate a standard of general applicability under which the waiver should be granted.[9] Further, the D.C. Circuit has instructed that "the burden is on the applicant . . . to plead specific facts and circumstances which would make the general rule inapplicable."[10] Accordingly, "in demonstrating whether a waiver [under Section 1.3] is warranted, the burden of proof rests with the petitioner."[11]

In the context of the other provision cited by MPAA, Section 76.7, the Commission has arguably been even more explicit, explaining that Section 76.7 "requires petitioners to meet a substantial burden of proof by showing clearly, with reference to specific facts"[12] that the relief requested is warranted and "would serve the public interest."[13] Under 76.7 as under 1.3, MPAA has the burden of providing *evidence*, not bare assertions.

In short, the burden of proof is on MPAA to demonstrate why an exception to the Commission's rules is necessary to serve the public interest. It is not the FCC's job to fill in the gaps in MPAA's pleadings,[14] nor must opponents of the proposed exception provide proof that the proposed change is *not* in the public interest. Despite this, Public Knowledge and other parties have provided evidence that flatly contradicts MPAA's assertions.[15] Thus, not only does

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[6] *MPAA Petition* at 1; *see also* 47 C.F.R. §§ 1.3, 76.7.
[7] 47 C.F.R. § 1.3.
[8] *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (DC Cir. 1990).
[9] *Id.* at 1166 (citing *WAIT Radio v. F.C.C.*, 418 F.2d at 1159 (D.C. Cir 1969)); Application for Review of Bellsouth Wireless, *Memorandum Opinion & Order*, 12 F.C.C.R. 14031 (1997) (internal quotation marks omitted).
[10] *Tucson Radio v. F.C.C.*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).
[11] *Centennial Cellular Tristate, v. F.C.C.*, 21 F.C.C.R. 9170, 9172 (2006) (citing *Tucson Radio*, 452 F.2d at 1382). *See also 560 Broadcast Corp. v. F.C.C.*, 418 F.2d 1166 (D.C. Cir. 1969) ("The burden of pleading the specific facts and circumstances which, if true, would make the general rule inapplicable in a particular situation rests on each applicant requesting a waiver.").
[12] Applicability of Section 325(b) of the Communications Act to Non-Interconnected Distribution of Television Programming to Certain Foreign Stations, *Report & Order*, 75 F.C.C.2d 304, ¶ 119 (1979); *see also* William J. Potts, Jr. & James E. Dunstan, *Creeping CANCOM: Canadian Distribution of American Television Programming to Alaskan Cable Systems*, 7 Pace L. Rev. 127, 147 n.96 (1986) (Complaints under "Section 76.7 of the Commission's Rules . . . require[] petitioners to meet a substantial burden of proof" and reference "specific facts.").
[13] 47 C.F.R. § 76.7.
[14] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 n.2 (DC Cir. 1969) ("The agency is not bound to process in depth what are only generalized pleas, a requirement that would condemn it to divert resources of time and personnel to hollow claims. The applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary.").
[15] *See, e.g.*, Letter from Public Knowledge to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 08-82 (Nov. 2, 2009); *Opposition of the Consumer Electronics Association to Motion Picture Association of America Petition*, MB Docket No. 08-82 (July 21, 2008).

MPAA fail to carry its burden, but even if the FCC were to find its evidence-free assertions sufficient to make out a *prima facie* case warranting the grant of the waiver,[16] those assertions would be insufficient to overcome the substantial evidence introduced by opponents that a waiver is against the public interest.

MPAA Has Not Met Its Burden

MPAA has not proved that a waiver would be in the public interest.

MPAA contends that without a waiver of the SOC rules, its member studios will not release some movies on Video-on-Demand ("VOD") until they were also released on DVD. MPAA alleges that concerns about piracy would cause these member studios to hold movies back from release. This delay of content, MPAA argues, constitutes such a grave harm to the movie-watching public that it justifies this extraordinary relief.

Bare assertions that petitioners will not provide certain services absent regulatory change do not constitute "proof."[17] Petitioner's statements alone do not satisfy its burden. History should teach the Commission to be wary of these kinds of threats. In the past, industries have made hollow threats that they would not pursue certain business models unless they got the items on their regulatory wish list.[18] Threats – especially threats contradicted by the facts – do not constitute evidence.

Were an SOC waiver to be granted, real consumer harm would result. The market would be fragmented into those devices that obey an SOC shutoff order, and those devices (which may be otherwise identical to the consumer in terms of screen size, picture quality, and the other factors consumers care about) that remain under consumer control. This consumer harm has been amply documented in the record,[19] and is more than sufficient to rebut any allegations of a pro-consumer benefit that would result from a waiver's effect on MPAA members' business decisions.

MPAA has not shown special facts or circumstances justifying its request.

Underlying MPAA's request is the claim that releasing movies to VOD prior to DVD release would lead to more piracy of those movies.[20] Petioner's unjustified fears and conclusory

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[16] An applicant satisfies his burden of proof by making a *prima facie* showing, at which time the burden shifts to those opposing a waiver. *See* Arlington Telecommunications Corp., *Memorandum Opinion*, 69 F.C.C.2d 1923, ¶ 25 (1978). We argue *infra* that unsupported assertions are insufficient to meet this *prima facie* showing. Even if MPAA's statements were charitably viewed as "evidence," however, there is other evidence in the record sufficient to rebut them. *Supra*, note 15.

[17] *See, e.g.*, *Rio Grande Family Radio Fellowship, Inc. v. F.C.C.*, 406 F.2d 664, 666 (D.C. Cir. 1968) (rejecting petitioner's statement "that its operations would have 'no special impact'" as insufficient, and noting that the FCC "cannot be expected to do research for applicants.")

[18] For example, Viacom claimed that "[I]f a broadcast flag is not implemented and enforced by Summer 2003, Viacom's CBS Television Network will not provide any programming in high definition for the 2003-2004 television season." *Comments* of Viacom 1, MB Docket No. 02-230 (Dec. 6, 2002), at 1. This threat never materialized, and Viacom provided uninterrupted high definition content despite the lack of a broadcast flag.

[19] *E.g.*, *Opposition* of Consumer Electronics Association, CS Docket No. 97-80 (Jul. 21, 2008).

[20] *MPAA Petition* at 6.

statements do not constitute evidence.

MPAA's claim that SOC will somehow limit unlawful filesharing, however, is unsupported by the evidence in the record. Indeed, the facts lead to the opposite conclusion. MPAA's *own data* presented to the Commission in another docket demonstrate that preventing analog and unprotected digital outputs of certain movies would have no discernable effect on unauthorized filesharing. As MPAA's own recent filing with the Commission explains, pirated versions of *Star Trek* were available on the Internet "almost immediately upon the movie's release."[21] While it is true that these early copies were of lower quality than DVD, a chart filed by Viacom and Paramount Pictures indicates that an "excellent" copy of the film, copied from DVD, was circulating by September 21, well in advance of the film's American DVD release date of November 21.[22] Filesharing will not be slowed by making movies less available to the American consumers who lawfully acquire content because the current source of copies of movies that circulate on the Internet is not the American consumer, but international groups and insiders with early access to films.[23]

Reversing course without new evidence would be arbitrary and capricious.

The Commission considered an essentially identical record six years ago, and found that use of SOC in this situation would violate consumer expectations and be against the public interest. To come to the opposite conclusion when all new evidence supports the original would be the essence of arbitrary and capricious. Commission familiarity with the parties and confidence that a claim "just makes sense" do not constitute new evidence or valid bases for grant of a waiver.

When the Commission issued the Plug-and-Play Order in 2003, it concluded that the "proposed encoding rules [would] include a ban on the use of selectable output control technology . . ." in order to "ensure that consumer expectations regarding the functionality of their digital cable ready televisions and products are met."[24] Not wanting to foreclose itself from unforeseen "future applications that could potentially be advantageous to consumers," the Commission explained that it would "*consider* waivers, petitions, or other proposals to use selectable output control. . . ."[25] At that time, the Commission had before it the same claim we see now – that "the prohibition against output control effectively precludes possible new business models based on the delivery of very high quality programming (such as pre-video release movies)."[26] The Commission nonetheless decided that a ban on SOC was in the public interest. Yet six years later, we find MPAA asking for a waiver to accomplish what was

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[21] *Comments* of the Motion Picture Association of America 7, GN Docket No. 09-51 (Oct. 30, 2009).
[22] Viacom Inc./Paramount Pictures Corporation, *Star Trek Piracy Propagation Chart*, GN Docket No. 09-51 (Oct. 30, 2009).
[23] *Id.* See also Andy Baio, *Pirating the 2009 Oscars*, WAXY, Jan. 22, 2009 (updated Feb. 7, 2009), http://waxy.org/2009/01/pirating_the_2009_oscars ("The average time from the time screeners are received by Academy members to its leak online is 6 days.").
[24] Implementation of Section 304 of the Telecommunications Act of 1996, Second Report & Order & Notice of Proposed Rulemaking, 18 FCC Rcd 20885, ¶ 11 (2003) ("Plug-and-Play Order").
[25] *Id.* at ¶ 61 (emphasis added).
[26] *See id.* at ¶ 61 n.158, *citing* Letter from Fritz Attaway, MPAA to Marlene Dortch, Secretary, FCC (Aug. 29, 2003).

originally held to violate consumer expectations, *without a single new piece of data to suggest a different result.*

The D.C. Circuit has vacated as arbitrary and capricious waivers granted to parties based only on Commission familiarity with the parties and not evidence or general standards. For example, in *Northeast Cellular*, the Commission had granted a license to a cellular radio lottery winner despite the fact that the winner had failed to meet the requirement that it establish its financial qualifications within 30 days of having been selected.[27] The Commission justified waiving the requirement by explaining that "based on its prior dealings with NYNEX Credit,[28] it was confident that NYNEX met all of the necessary qualifications" and that therefore "strict compliance would not serve any interest and would only result in unnecessary delay."[29] It concluded, based on this "familiarity," that there was "no speculation" as to the financial qualification of the winner.[30] The Court of Appeals for the District of Columbia rejected this rationale, concluding that it "ha[d] not even come close to" complying with the legal standard for grant of a waiver and that the grant was therefore arbitrary and capricious.[31]

To grant MPAA's waiver request with no more evidence than was available in 2003, and with only a generalized feeling that MPAA's fears make sense, would likewise fail the Court of Appeals' test. The court in *Northeast Cellular* explained that a "we-know-it-when-we-see-it standard"[32] falls far short of the requirements for grant of a waiver. To reverse course on a carefully reasoned, pro-consumer rule based on a "just-makes-sense" standard and knowledge of the party would fall even further short of the mark and likewise be arbitrary and capricious.

There is no standard of general applicability to guide the waiver process.

Waivers may not be granted on an *ad hoc* basis. Rather, there must be a principle of general applicability that, given specific facts, justifies a deviation from the rules for the applicants, and that would justify a similar deviation for any other similarly situated party. But instead of providing any general rule which would guide the Commission as to in what circumstances it is permissible to disable viewer's television sets, and in what circumstances it is not, MPAA has merely asserted that its member studios would rather not provide VOD for certain movies on an earlier date without SOC. The only standard under which this would justify grant of a waiver is for "anyone who threatens to withhold content without a regulatory concession," which is surely a road the Commission does not wish to walk down.

The evidence shows that this preference for SOC is limited to MPAA member studios. Several parties, including petitioner members' competitors and an actual petitioner member studio, are already doing the very thing MPAA claims would be impossible without SOC – offering movies through VOD in advance of their DVD release date.[33]

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[27] *Northeast Cellular*, 897 F.2d 1164.
[28] NYNEX Credit was a lender that had tendered a letter of credit towards establishing the winner's financial qualifications.
[29] *Id.* at 1165-66.
[30] *Id.* at 1166.
[31] *Id.* at 1166-67.
[32] *Id.* at 1167.
[33] *Letter* of Public Knowledge to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket

Every petitioner, including an organization of the "big six" movie studios, needs to articulate general policy principles under which its relief may be granted. The concerns of MPAA member studios are not qualitatively different than the concerns of smaller producers. These smaller producers have not seen the need to petition the Commission for the ability to disable consumer's TV sets before making their movies more widely available. Some have actually objected to the petition; for instance, the Independent Film and Television Alliance has explained that the waiver will constitute an "extraordinary and unnecessary power," will likely have a "discriminatory impact," and "will harm independent[] [producers] and the public." By failing to even address the fact that independent film producers have seen no barrier to releasing movies through VOD prior to their DVD release date and objection to the waiver,[34] MPAA appears to be demanding special treatment on account of its size. As the DC Circuit held in overturning an FCC grant of a waiver, "[b]igness and national reputation are not reasonable standards for a waiver policy…."[35] The FCC must avoid enacting an *ad hoc* "policy that is susceptible to discriminatory application"[36] at the behest of one special interest.

The Bureau Lacks Authority To Grant A Petition Contrary To Prior Commission Precedent.

As noted above, the full Commission reviewed a similar request by the same petitioners as part of the 2003 *Plug and Play Order*. Based on a substantially similar record, the full Commission rejected MPAA's request.

It is hornbook law that only a vote by the full Commission can reverse a decision by the full Commission. The Media Bureau is limited to the authority delegated to it by the Commission under Section 0.238, which limits it to deciding matters subject to Commission precedent.[37] Even if the Bureau considers the full Commission's previous statement that it would "consider" such waiver requests as providing sufficient precedent, and that – contrary to the evidence in the record – grant would serve the public interest, both prudence and policy argue for referral to the full Commission. The proposed waiver would have industry-wide impact. On the basis of a single Bureau-level *Order*, every MVPD subscriber with a device utilizing an television output will for the first time find the functionality of this device subject to outside control. Since Public Knowledge alerted the public to the likelihood that the Bureau would soon issue a decision, more than 2300 members of the public have filed to oppose grant of MPAA's Petition. Organizations representing constituencies as diverse as electronic gamers, theaters, and independent film producers have joined with consumers and electronics manufacturers to oppose grant of the waiver.

No. 08-82 (Nov. 2, 2009) (discussing the current availability of movies on VOD prior to their release on DVD).

[34] MPAA attempts to downplay the fact that Warner Brothers is experimenting with releasing movies on VOD prior to their release on DVD, Letter of MPAA to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 08-82 (Nov. 4, 2009), but does not address the fact (which has been repeatedly presented to the Commission) that non-MPAA studios have seen no barrier to making their movies available to consumers prior to their being on DVD, and sometimes prior to theater release.

[35] *Northeast Cellular*, 897 F.2d at 1167.

[36] *Id.*

[37] 47 C.F.R. § 0.238.

Only a decision to deny the Petition would be consistent, in the words Section 0.283(c), with "existing precedent" of the Commission. If the Bureau chooses to act on delegated authority, therefore, it should deny the Petition.

Because MPAA Has Not Met Its Burden, the Commission Must Deny the Petition

The Commission has before it the same party making a familiar argument six years after the fact, without any additional supporting evidence, but asking for the opposite result. Where the "record reveals nothing unique about [petitioner's] situation,"[38] as compared with similarly situated parties, and where well-settled policy compels and opposite result, it would be irrational to grant a waiver.[39] Such a regulatory about-face without a supporting record (indeed, in the face of contrary evidence) would be arbitrary and capricious, unsupported by Commission authority, and contrary to the case law.

For the foregoing reasons, we urge the Commission to reject the petition.

Respectfully submitted,

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[38] *Northeast Cellular*, 897 F.2d at 1166.
[39] *Id.* at 1167.

Public Knowledge

Selectable Output Control

The Motion Picture Association of America (MPAA) has asked the Federal Communications Commission (FCC) for permission to use "selectable output control" (SOC). If the FCC agrees, the MPAA and the movie studios it is representing (Paramount, Sony, Fox, Universal, Disney, and Warner Brothers) would be able to turn off any output plug they choose, like those on the back of consumer electronics devices of an entertainment system, during certain video-on-demand movies on cable television.

What does this mean for me?

If you are one of the many millions who:

- Has a TV without a digital connection such as HDMI,
- Uses a DVR, a Slingbox, or a TV manufactured before 2004, or
- Connects your HDTV or home theater to your cable box with analog cables (either component or composite)

you will likely have to replace much if not all of your existing entertainment system to watch these movies.

Why would movie studios want to do that?

Today, the big movie studios release movies in theaters, then some months later on to DVD, and finally to Video on Demand (VoD). Traditionally, they wouldn't release the movies to VoD earlier because they were concerned about losing money from the higher-revenue DVD sales if people could already watch the movie at home.

Home viewers have always had the ability to record what they are watching. It is legal to make a copy in order to watch a movie at a different time or place, like on a Tivo or Slingbox. It's also legal to make short copies to educate, poke fun at, or criticize. In most cases, the only way to make copies at home for personal use is by using analog outputs because they don't have copy restrictions.

However, most digital plugs, like HDMI, do have copy protection which restricts even lawful copying. The MPAA claims it will only give you the "privilege" of watching the movie at home before DVD release if the movie can't be viewed or copied over the analog output. SOC would empower the MPAA to turn off any outputs, including the analog outputs, and only let you use the plugs chosen by the MPAA.

Is this really a new business model?

No. Movie studios have been releasing feature films in theaters, VoD, and DVD on the same day for some time *without* selectable output control. Magnolia Pictures is even releasing films on VoD before theater release and has committed to doing so without copy protection. It is only MPAA's claim that moving up the release date is a new consideration for its member studios.

That doesn't sound so bad. I only watch movies live and I only use digital plugs.

The MPAA is requesting the ability to turn off all the existing plugs on your cable box. If they did, you would have to buy a new TV with an "MPAA-approved" output plug if you wanted to watch on-demand movies before they come out on DVD. Consumer electronics manufacturers wanting to support the plug would have to agree to any other functionality limitations dictated by the MPAA.

Although this may sound like a silly idea, Sony has already put into practice with their Bravia Internet Video Link product. Last year, they announced that you can use it to watch *Hancock* on VoD over the Internet before it comes out on DVD, but ***only*** if you use a Sony Bravia TV with a special Sony-only plug. Sony is a movie studio, a member of the MPAA, and a petitioner.

The MPAA should not be in the position to dictate how consumer electronics are made, whose televisions will view content, and how people lawfully use the content they have purchased.

For more info on the petition, go to: http://publicknowledge.org/issues/soc