Why the FCC should deny MPAA's Selectable Output Control Waiver

MPAA's Claim: Major studios propose a "new" service that would allow consumers to view high-value content on Video-on-Demand ("VoD") before it is released on DVD. Their proposal is conditioned on obtaining FCC permission to trigger Selectable Output Control ("SOC"), which is the ability to remotely turn off HD component video ("HD analog") outputs. The major studios claim they need SOC in order to protect their high-value content from piracy. They also claim that without the ability to control the HD analog interfaces on consumers' DTVs, they will not make the content available before it is released on DVD.

The Current Rule: In 2003, the FCC adopted a rule that prohibits all pay-TV providers ("MVPDs") from selectively disabling set-top box outputs to consumer devices. The Commission reasoned that content owners' concerns about piracy did not outweigh "consumers' expectations that their digital televisions and other equipment will work to their full capabilities." It also indicated that it would entertain waivers from the prohibition for pro-consumer applications "such as facilitating new business models."

Waiver standard: The burden of proof is on the MPAA to demonstrate that granting it an exception to the Commission's rules is in the public interest. That means that it must provide evidence that supports their need for SOC.

No evidence of a new business model: Pre-DVD release of films via VoD is not a new business model. One of their own members, Warner Brothers, has begun offering pre-DVD films on VoD. The Independent Film & Television Alliance (IFTA), whose members account for more than 60% of Oscars awarded for Best Film in the past 27 years, filed a lengthy list of films released on VoD either prior to or simultaneously with theatrical or DVD release. These included box office hits like Superman Returns, Michael Clayton, The Bourne Ultimatum, State of Play, Away We Go, Dark Knight, and Observe and Report.

No evidence of piracy via HDTV interfaces: The MPAA has had multiple opportunities to provide evidence of piracy occurring through outputs to consumers' HDTV receivers. The Senate Judiciary Committee sought such evidence in a hearing in 2006. It is still waiting. In response to an FCC request for evidence, the MPAA filed a 37-page pleading that admitted it could not show that piracy originates from any analog outputs to consumer-owned devices, HD or otherwise. If such evidence exists, it should not be hard to find given the number of pre-DVD box office hits released on VoD.

Real evidence of consumer harm: Grant of MPAA's waiver would exclude over 20 million DTVs, and an unknown number of related audio/video devices, from displaying SOC-encumbered content. There is no lawful way to make a converter box to accommodate these existing televisions and other home video equipment; in order to access the content, consumers would have to purchase new televisions and equipment. SOC rules would also make consumers uncertain about future purchases. They will worry that equipment they purchase today will be turned off by digital protection schemes selectively implemented by content owners tomorrow. Millions of Americans could no longer be sure the technology they purchased in good faith would continue to be fully functional.

What this is really about: MPAA's inability to provide evidence of a "new business model" or of piracy stemming from analog interfaces proves one thing: the MPAA petition is not about protecting their members' content or enabling a new business model. It's about Hollywood seeking unprecedented control over the design, functions, and features of lawful consumer electronics. We urge the FCC not to grant MPAA's members veto power over which products get to market for use with consumers' MVPD networks, as well as over the feature sets of unrelated products or technologies.