

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Motion Picture Association of America, Inc.)	CS Docket No. 97-80
)	MB Docket No. 08-82
)	CSR-7947-Z
Petition for Waiver of)	
47 C.F.R. § 76.1903)	
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to Motion Picture Association of America
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The Home Recording Rights Coalition (“HRRC”) respectfully urges that the Petition of The Motion Picture Association of America (“MPAA”) for a permanent waiver of 47 C.F.R. Section 76.1903 be denied. The MPAA has presented no sufficient reason or inducement for the Commission to lift the ban on this anti-consumer practice. Nor has the MPAA even recognized any obligation to meet any burden of proof in this respect.

The Petition fails to define adequately or to justify what it seeks to impose on law-abiding consumers. Selectable Output Control (“SOC”) is not copy protection. It is the wholesale denial of viewing rights to individuals who have invested in lawful products and who may not even be equipped for, or interested in, home recording. As petitioned for by the MPAA, SOC would be imposed on a basis that is arbitrary, capricious, and without recourse for consumers. It would likely chill the development of new products and interfaces that allow for lawful home recording. Finally, it would uniquely disadvantage HDTV content at a time when public viewing of and reliance on HDTV programming is nearing fruition. As the consumer electronics industry continues to work with the rest of the private and public sectors toward a successful DTV transition on February 17, 2009, we cannot imagine why the Commission would accede to the MPAA’s demands and thereby engender potential consumer confusion about whether future products will work as advertised.

In HRRC's Comments on the 2003 rulemaking that resulted in the regulation from which the MPAA now seeks a permanent waiver, HRRC said that SOC events, "in the context of initial consumer receipt and viewing of MVPD programming, would be unsupported, unnecessary, and unconscionable as impositions on the viewing public and discrimination against early DTV and HDTV adopters."¹ This is no less true today.

I. SELECTABLE OUTPUT CONTROL INEVITABLY HARMS INNOCENT CONSUMERS BECAUSE IT DENIES VIEWING AS WELL AS COPYING.

Selectable Output Control is the remote signaling of home devices by content providers or distributors, so as unilaterally to turn off consumer home interfaces or programs on a program-by-program basis. Once SOC is triggered, the interface in question simply will not operate for the particular program. Implementation of SOC would mean that a consumer could purchase a display with an HDTV input, and acquire a set-top box or other device with a matching HDTV output, only to find that for particular programs this interface between set-top box and display has been turned off by remote control.

Although not purportedly aimed at home recording *per se* (as it disables *viewing* as well), widespread use of SOC is likely to reduce the *future* array and characteristics of products available to consumers by driving from the market, in the sole discretion of MPAA members, any home interface that supports home recording. In other words, the FCC's giving MPAA members the unbridled and non-reviewable discretion to turn off recordable interfaces will allow them to do what neither the Congress nor the courts have tolerated since the *Betamax* case: to disable technology *simply because* it supports home recording by consumers. In the context of FCC regulations, granting this sole discretion to MPAA members would drive a stake not only through Section 76.1903, but also through the rest of Subpart W, the Commission's "Encoding Rule" regulations. Case law and FCC policy dictate that the Commission does not and should not grant waivers that undermine the core of the regulation from which the waiver is sought.²

The FCC's granting to MPAA members of such remote control over consumers' TVs will surprise and disappoint consumers. Consumers who have bought into the digital transition by investing in HDTV receivers and other products have a reasonable expectation that they will be able to use the essential functions and features of their devices. One fundamental expectation is that source devices with digital outputs will reliably deliver digital signals to the digital inputs of display devices and recorders. Yet if content distributors can remotely decide, on a program by program or channel by

¹ *In The Matter Of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Dkt. No. 97-80, *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Dkt. No. 00-67, Comments of the Home Recording Rights Coalition in Response to Further Notice of Proposed Rulemaking at 1 (Mar. 28, 2003).

² *See, e.g., Turro v. F.C.C.*, 859 F.2d 1498, 1499 (C.A.D.C., 1988) (upholding the Commission's denial of a waiver request because, *inter alia*, a grant would effectively undermine the rule).

channel basis, that programming will only be made available via a favored interface or technology, consumers will be legitimately disappointed (and likely outraged):

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

II. THE VIEWERS HARMED BY SELECTABLE OUTPUT CONTROL ARE THOSE WHO HAVE ALREADY INVESTED IN LEGITIMATE, LAWFUL PRODUCTS FOR WATCHING TV.

In order for digital television or any other product to succeed in the marketplace, it must be reliable. SOC will deter consumers from buying products by raising significant questions about whether the product or its features will continue to function as desired.

Under a waiver granted pursuant to the MPAA’s Petition, the earliest and most enthusiastic HDTV adopters – those who invested in DTVs equipped solely with Component Video interfaces – are the ones now most likely to end up with no picture at all. In 2003 HRRC, in supporting the adoption of Section 76.1903, warned of the heavy investment in Component Video interfaces made by consumers who had bought HDTV receivers that were several times more expensive (in decade-old dollars) than comparable models that are available today. Statistically, these receivers are barely half way through their expected lives. Lifting the ban on SOC, and disadvantaging these “digital pioneers,” is a surefire way to discourage consumers from becoming early adopters of future technologies.

III. THE MPAA PETITION WOULD APPLY TO SECURE AS WELL AS UNSECURED OUTPUTS, HARMING TECHNOLOGY DEVELOPMENT AS WELL AS CONSUMERS.

Under the MPAA's far-reaching proposal, it is not just the owners of Component-Video-only sets, who bought their TVs in the first five years of HDTV broadcasting, that will be penalized. Early adopters of receivers with secure digital interfaces, who bought their HDTV receivers in the *last* five years, will also be subject to having their picture cut off without notice. According to the MPAA Petition, its members would have the unbridled capacity to cut off as well – arbitrarily and without notice, comment, or showing of harm – the most modern and secure interfaces and technologies. Moreover, as is noted above, even those who own devices with interfaces momentarily *avored* by SOC-invokers will *still* find their screens going dark, because the favored inputs (and there may be only one per TV, even in recent-year models) may well have *other* devices plugged into them, on which viewers also rely.

The Petition offers not a single reason or rationale why MPAA members should be able to shut off secure digital outputs by remote control. Moreover, the Petition's attempt to justify limitations on legitimate consumers in the name of discouraging "piracy" makes little sense in reference to secure digital interfaces.

A. The MPAA Makes No Attempt To Explain Or Justify Why Selectable Output Control Should Apply To Secure Digital Interfaces And Technologies.

The most immediate question with respect to the MPAA Petition is why SOC should be available to shut down secure digital interfaces (entirely or only as protected by less favored technologies), as well as Component Video interfaces. Since the digital outputs already protected according to the requirements of content distributor licenses, this is not a matter of legitimate intellectual property protection. What appears to be sought here, instead, is the power to influence or even dictate the product and design choices, feature sets, and business agreements of the companies who have invested in secure technologies and products. For the Commission to grant this power would be to cede control to MPAA's members over which products get to market for use with MVPD networks, as well as over the feature sets of *unrelated* products or technologies. An MPAA member could demand design changes or adaptations to entirely unrelated products, under threat of disfavoring an MVPD-licensed home network interface or a protection technology in which the technology company has already invested.

B. Granting This Petition Would Distort Economic Incentives And Hence Harm The Development Of Technology In The Marketplace.

There is simply no reason for the Commission to grant the MPAA and its member companies this "unnatural selection" tool. In economic terms, the likely result of granting to content providers and distributors such unnecessary and unwarranted power over the marketplace – power which they have failed entirely to link to any legitimate

threat to their intellectual property rights – will be the inefficient development and commercial adoption of protection and interface technologies and products. MPAA member commercial incentives differ from those of device and technology developers who aim to serve an open market. The success of competing standards and technologies will depend not on their cost, utility, and interoperability, but on other considerations that may in fact be at variance with these factors and which (in the case of leverage exerted over products in other fields) may be entirely orthogonal to MVPD content distribution.

IV. MPAA HAS NOT DEMONSTRATED THAT COMPONENT ANALOG OUTPUTS POSE ANY THREAT OF PIRACY OR HARM.

Even as to interfaces to which effective security techniques have not been applied, the MPAA recognizes no burden and marshals no evidence that any SOC imposition is necessary – or is necessary enough to justify the harm inflicted on (1) early adopters and (2) consumers who would not know how to re-wire their systems to avoid MVPD shutdown of this interface.

One solution potentially available to the MPAA was to attempt, via legislation, to achieve technical standards and mandates to secure the commonly used Component Video, or “Component Analog,” interface – known as closing the “analog hole.” In the last Congress, the MPAA asked the Senate Judiciary Committee to consider legislation to do just that. In response, the Committee challenged the MPAA to (1) demonstrate some evidence of harm from this interface, and (2) answer questions about the technology that was proposed. The MPAA was unable to do so.

* * *

Chairman Specter. Mr. Glickman, lots of information about piracy from you and from the Department of Justice, but can you quantify any direct connection between piracy and the analog hole?

Mr. Glickman. We have just completed a major study called the LE case study which estimates that our companies lose about \$6.1 billion a year in piracy, and as part of that—

Chairman Specter. OK. I mean from analog—I have only got 5 minutes.

Mr. Glickman. OK, \$1 to \$1.5 billion in what we call noncommercial copying of movies for family and friends. We believe a big part of that is due to the analog hole.

Chairman Specter. How do you arrive at the figure of \$1.5 billion?

Mr. Glickman. The firm did worldwide and national piracy study focus groups. The methodology we considered to be quite good.

Chairman Specter. Well, let me ask you to supplement your answer with the specifics as to how you come to that conclusion.

Mr. Glickman. Sure, be glad to.

Chairman Specter. We would like to see the methodology because before we really tackle the problem, we want to know— before we really look for a solution, we would like to have a specification of the problem.

Mr. Glickman. We will get you that, Senator.³

* * *

HRRC is not aware that the MPAA ever did provide the Judiciary Committee with the specifics that it asked for. Indeed, it was later revealed that the study referred to:

- Did not pertain to the “analog hole” or the Component Video interface in any respect, and
- Contained an admitted procedural flaw that substantially multiplied and exaggerated the findings compared to the actual data.⁴

V. THE MPAA VERSION OF SELECTABLE OUTPUT CONTROL IS NOT NECESSARILY TIME-LIMITED. CABLE AND SATELLITE CUSTOMERS COULD BE DENIED VIEWING INDEFINITELY.

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

³ *The Analog Hole: Can Congress Protect Copyright and Promote Innovation?* Hearing Before the S. Judiciary Comm, 106th Cong.16 (June 21, 2006). S. Hrg. 109-539; available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:29573.pdf.

⁴ Justin Pope, *MPAA Admits Mistake on Downloading Study*, The Associated Press (Jan. 23, 2008), available at <http://abcnews.go.com/print?id=4176307>; *Downloading by Students Overstated*, Inside Higher Ed (Jan. 23, 2008), available at <http://insidehighered.com/news/2008/01/23/mpaa>.

VI. THE MPAA DOES NOT PROPOSE THAT ANY PRIOR SHOWING BE MADE OR NOTICE RENDERED TO THE PUBLIC, OR PROVIDE FOR ANY MEANS OF CHALLENGE IN THE EVENT OF SOC IMPOSITION, CONTRARY TO ALL EXISTING EXCEPTIONS TO THE FCC ENCODING RULES.

The MPAA Petition does not define any of the operational aspects of SOC imposition, or set forth how the public would be informed of SOC triggers or their impending use. A consumer may lawfully purchase a television, bring it home, and then find out that it simply does not work as expected with the services to which the family has subscribed. This is the exact opposite of the sort of experience that the Commission and the Congress have sought to assure with respect to the transition to digital television.

Consumers, many of whom will be new to DTV technology, no doubt will be confused as to why these black screens are being encountered. Certainly the Congress and the Commission would not escape consumer ire; nor would device manufacturers, or the reputation of the brands in which consumers are disappointed. If the MPAA has a specific plan to deal with this issue, that can be subject to scrutiny or evaluation, it has not put it forward in or with this Petition.

SOC will engender fundamental uncertainties about prospective DTV purchases. Rather than making her decision based upon picture quality, interface, size, and/or price, a savvy consumer will make her decision based upon her understanding of the manufacturer's relationship with the most prominent MPAA members. Manufacturers may well pay dearly just to be able to say that the inputs and outputs on their devices will not be "Selected Out" by the MPAA. As we are all working to ensure a consumer-friendly DTV transition, it would be a major step backward to create a situation in which lawfully purchased digital products might not work as advertised and expected.

VII. CONCLUSION

The MPAA Petition would gut the regulation from which waiver relief is granted and would likely nullify, via both direct and indirect operation, the entire set of "Encoding Rule" regulations adopted only five years ago. No scintilla of evidence or justification has been adduced to justify this imposition on the public interest. Granting this petition would harm and distort technological development, affect unrelated products, and undermine consumer confidence in the DTV Transition and in new digital products in general. This petition is fatally flawed and the Commission should not act on it.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M Petricone', with a stylized flourish at the end.

The Home Recording Rights Coalition
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Dated: July 21, 2008

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Opposition of the Home Recording Rights Coalition to Motion Picture Association of America Petition for Waiver of 47 C.F.R. § 76.1903 was sent on July 21, 2008, by first-class mail postage prepaid, to the following counsel for Petitioner:

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