

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

In the Matter of	)	
	)	
Motion Picture Association of America, Inc.	)	CSR-7947-Z
Petition for Waiver of 47 C.F.R. § 76.1903	)	MB Docket No. 08-82

**REPLY COMMENTS OF**



**THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

William A. Check, Ph.D.  
Senior Vice President  
Science & Technology

Daniel L. Brenner  
Neal M. Goldberg  
National Cable & Telecommunications  
Association  
25 Massachusetts Avenue, NW – Suite 100  
Washington, D.C. 20001-1431  
(202) 222-2445

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The National Cable & Telecommunications Association (NCTA), the principal trade association for the U.S. cable industry representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks, files these reply comments in support of the Petition submitted by the Motion Picture Association of America, Inc. (MPAA) for waiver of the Commission’s selectable output control (SOC) rule.<sup>1</sup> For the reasons stated below, the Commission should grant the MPAA waiver request.

**INTRODUCTION AND SUMMARY**

In its landmark “Plug and Play” Order, the Commission addressed the issue of selectable output control in a careful manner:

The issue of selectable output control ... involves a difficult balancing of interests. On the one hand, we recognize content owners’ legitimate interest in protecting their content from piracy. 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.<sup>2</sup>

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<sup>1</sup> 47 C.F.R. § 76.1903 (SOC rule).

<sup>2</sup> *In the Matter of: Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, 18 FCC Rcd 20885, 20911, ¶ 60(2003).

Taking these issues into account, and with the support of NCTA, the Commission adopted a ban on the use of selectable output controls. Significantly, however, after carefully considering the arguments for selectable output control (the same or similar arguments as those repeated in this proceeding by CEA and HRRC), the Commission also pointedly concluded that “[w]e 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.”<sup>3</sup> In addition, the Commission made clear that, because it might permit the use of SOC in the future, it did “not prohibit the inclusion in devices of the capability to exercise selectable output control, only the current use of such capability by MVPDs.”<sup>4</sup>

MPAA has sought waiver of the ban on SOC to permit MVPDs to provide consumers with more viewing options, which can only be made available if the ban on SOC is waived. That is just the scenario contemplated by the Commission when it adopted the ban but indicated it would be flexible were interested parties to seek waiver of the ban for “future applications that could potentially be advantageous to consumers.”

As indicated below, a broad spectrum of interests – Multichannel Video Programming Distributors (MVPDs) from all industry sectors (including DBS providers, telephone company video providers, and traditional cable operators), consumer electronics manufacturers, members of the creative community and the largest entertainment union in the world as well as citizens groups – agree that grant of a waiver of the SOC rule is in the public interest, although some of these groups seek modifications or conditions on the MPAA request. These groups agree that

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<sup>3</sup> *Id.* at 20912, ¶ 61.

<sup>4</sup> *Id.* (emphasis in original).

grant of the waiver will provide consumers with more viewing choices – choices they would not have in the absence of a waiver. The few parties opposing the waiver of the SOC ban in the limited circumstances proposed by MPAA, repeat the arguments the Commission has heard before about potential harm to consumers, particularly “first adopters.” But the Commission has previously agreed that those very objections could be overcome by proposals for new offerings which would be “advantageous to consumers,” as the MPAA proposal clearly is. Moreover, the arguments that a waiver would result in harm to consumers are unsupported and unsupportable. The waiver should be granted.

**I. GRANT OF THE MPAA WAIVER WILL BENEFIT CONSUMERS BY PROVIDING THEM WITH MORE VIDEO CHOICES**

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Despite the misinformed protests of some commenters, there is one unassailable fact that should be determinative in this proceeding: Grant of the MPAA waiver request will provide consumers with more choices than they have now in video offerings. Nothing will be taken away from consumers; rather, grant of the MPAA Petition will permit consumers unprecedented early access to programming that *they do not have today and could not have without the requested waiver*. Nothing in the record to date contradicts that basic fact.

As we explained in our initial comments:

If the MPAA Petition were granted, consumers could have the ability to order movies that are recently released in theaters for viewing over cable and other Multichannel Video Programming Distributors (MVPDs) from the comfort of their homes. Consumers would no longer need to wait for the DVD release, or release to pay-per-view, subscription television, or television broadcast services which today are normally delayed by many months or longer after theatrical release.<sup>5</sup>

Companies from across the MVPD industry agree that grant of the MPAA waiver request would be in the public interest because, among other things, it would provide consumers with

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<sup>5</sup> NCTA Comments at 1.

more and better viewing options. AT&T observes that “MPAA has persuasively shown that grant of its waiver request will *expand consumer choice by allowing consumers to purchase and enjoy high definition digital movies in their own homes prior to release of such films on pre-recorded media, and thus much early [sic] than they can today.*”<sup>6</sup> Similarly, DirecTV emphasizes that it “would like to offer its subscribers this *new viewing option*, and supports grant of the Petition.”<sup>7</sup> It continues, “[g]rant of the Petition is advantageous to consumers because it will yield several public interest benefits. First, *waiver will enable consumers to view content in their homes sooner than they can today, facilitating a broad range of activities by many different segments of the viewing public.*”<sup>8</sup> DirecTV also notes that a waiver could spur the transition to digital: “Moreover the Petition presents the Commission with an opportunity to promote the digital transition. As the Commission has observed, the availability of unique, high-definition services drives consumer adoption of digital television sets. Consumer set purchases, in turn, incent programmers and MVPDs to offer more digital content, creating a cycle that furthers the goal of transitioning more and more video programming and equipment to a digital format.”<sup>9</sup>

Leading consumer electronics companies as well as DTLA, the licensor of DTCP content protection technology, also recognize the additional viewing options that grant of the MPAA request would bring and support a waiver albeit with some conditions. TiVo comments that “a properly crafted waiver will ... allow the MPAA’s members to bring exciting *new* content to consumers”<sup>10</sup> and states that “the Bureau should grant the Petition with [TiVo’s proposed]

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<sup>6</sup> AT&T Comments at 2 (emphasis added).

<sup>7</sup> DirecTV Comments at 2 (emphasis added).

<sup>8</sup> *Id.* at 2-3 (emphasis added).

<sup>9</sup> *Id.*

<sup>10</sup> TiVo Comments at 3 (emphasis added).

safeguards.”<sup>11</sup> Sony Electronics, like TiVo an innovator in bringing exciting new products to consumers, also supports a waiver despite its previous steadfast opposition to relaxing the ban on the use of selectable output controls. Indeed, Sony says it “now believes that under certain, very narrow, circumstances, SOC could bring benefits to consumers that on balance would outweigh any potential drawbacks. Specifically, the Commission should permit SOC (and should only permit SOC) for content delivered under the wholly new business model that the MPAA proposes in the Petition,”<sup>12</sup> *i.e.*, “[M]ovies in high-definition digital format provided to consumers for enjoyment in their homes prior to the date of their release on prerecorded media ... for general in-home viewing ...”<sup>13</sup> As Sony explains, “this limited implementation of SOC will benefit consumers because ... the major motion picture studios will not otherwise make this content available to consumers under these circumstances without the option of invoking SOC.”<sup>14</sup> It concludes correctly that “[a]llowing this exception will not harm consumers as long as it does not eliminate or delay the release of these movies on fixed media (*i.e.*, on DVD or Blu-Ray prerecorded discs). *Rather, the exception would permit consumers to receive a service that they otherwise would not receive.*”<sup>15</sup>

In the same vein, the Digital Transmission Licensing Administrator, LLC (DTLA) which licenses DTCP technology used to protect digital audiovisual outputs also would not oppose any waiver that protected the rights of consumers and competition among manufacturers. DTLA recognizes that “[a]n early window on-demand high definition service could provide additional

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<sup>11</sup> *Id.* at 8.

<sup>12</sup> Sony Electronics Comments at 2 (emphasis in original).

<sup>13</sup> *Id.* at note 2, *citing* Petition at 2.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* (emphasis added).

*value and enjoyment to consumers, particularly those who have invested in new high-definition displays and home theater products.*”<sup>16</sup>

Members of the creative community and the largest entertainment labor union in the world also support the MPAA waiver. In Joint Comments the Directors Guild of America (DGA) and the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada (IATSE) make clear that grant of the waiver would benefit consumers by providing them with additional viewing options: “By granting this waiver, we believe the Commission will *enable new entertainment choices to become available to the American public in ways that can further benefit the public interest in expanding their home viewing options.*”<sup>17</sup> Moreover, they note that, in addition to the consumer benefits grant of the MPAA waiver would bring, it also would benefit the movie industry. As they state: “Both the experimentation of new business models and the protection of copyrighted content (*e.g.*, films) are essential for the continued health of our industry.”<sup>18</sup> They continue: “We share the MPAA perspective that new services cannot readily be provided to consumers unless the content that drives those services – and makes them valuable – is protected from those who would denigrate that economic value through piracy.”<sup>19</sup> They conclude: “While we have no expectation that piracy will be fully erased, we do know it can be greatly diminished when effective security protection measures are put in place. *The Commission has at its disposal one such measure in its ability to enable the use of the most secure connections on HD television sets for the transmission of on-demand content delivered by cable, satellite or IPTV providers. By*

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<sup>16</sup> DTLA Comments at 8 (emphasis added).

<sup>17</sup> DGA/IATSE Comments at 8 (emphasis added).

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.*

*doing so, the Commission not only protects the films but opens new doors to consumer services.”*<sup>20</sup>

Finally, citizens groups such as The American Association of People with Disabilities (AAPD), the National Taxpayers Union (NTU), Americans for Tax Reform (ATR) and the Media Freedom Project (MFP) support the MPAA waiver request. AAPD states that “there are people with disabilities who may benefit greatly from an *expanded range of audiovisual entertainment options available within the home* and who may, therefore, benefit from an exception to the SOC prohibition.”<sup>21</sup> NTU makes the point that “consumers deserve maximum freedom of choice” and that grant of the MPAA request “would provide yet *another exciting entertainment option* that would empower consumers to choose whether or not to pay for such programming.”<sup>22</sup> In joint comments ATR and MFP make the same point: “The ability of motion picture studios to partner with multi-channel video programming distributors ... to offer first-run movies in the home through a secure SOC would be *a benefit to consumers by offering them more options for their entertainment dollar.*”<sup>23</sup>

In sum, the record reflects what should be obvious to all – grant of the waiver would provide more viewing choices and options for the consumer. Unable to refute this fact, opponents of the waiver rely on scare tactics and claim that grant of the waiver will “harm” consumers even if they are provided with more choice. As we show below, these contentions are without merit.

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<sup>20</sup> *Id.* at 7 (emphasis added).

<sup>21</sup> AAPD Comments at 2 (emphasis added). AAPD supports an SOC waiver that is limited and includes usability and “accessibility safeguards for consumers with disabilities.” *Id.* at 3-4.

<sup>22</sup> NTU Comments at 1 (emphasis added).

<sup>23</sup> ATR/MFP Comments at 1 (emphasis added).

## II. GRANT OF THE MPAA WAIVER WILL NOT HARM CONSUMERS

Five Comments were filed opposing the MPAA Petition. They were filed by: (1) The Consumer Electronics Association (CEA), (2) CEA's alter ego, the "Home Recording Rights Coalition," (3) the National Association of Theatre Owners (NATO), (4) the Independent Film & Television Alliance (IFTA), and (5) 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.*). None of them demonstrate that consumers will be harmed by grant of the MPAA petition.

First, the comments of NATO are premised on concerns about its members' private commercial interests, not the public interest, and, in any event, are without merit. NATO's basic – and exaggerated – concern is that grant of the MPAA request "threaten[s] the viability of cinemas" by "threaten[ing] to collapse the theatrical window ... imperil[ing] a sequenced distribution system that has well served consumers of movies and the movie industry."<sup>24</sup> Calling the offering to consumers of early release movies over their TV sets a "new gizmo," it speculates that "[i]f, as we believe inevitable, neighborhood cinemas begin disappearing in the wake of collapsed windows, consumers will recognize too late that the new gizmo of early release movies in the home was hardly worth the novelty."<sup>25</sup> But theatre owners have railed against "new gizmos" offering consumers more video options in the past, whether it was the development of television, pay television, HBO, VCRs, DVD players, etc.<sup>26</sup> All of these doom and gloom predictions have failed to materialize and the theatre box office is still going strong.<sup>27</sup>

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<sup>24</sup> NATO Comments at i.

<sup>25</sup> *Id.*

<sup>26</sup> In opposing what it called "the siphoning of current movies by cable pay TV," NATO previously forecast not just harm to "children and teenagers," but "the destruction of the motion picture theatre industry, a vital force in the commercial and cultural life of America's decaying cities, thus hastening the destruction of those cities."

The National Taxpayers Union makes this point succinctly: “Initially, the advent of television, and then VCRs, and in turn multi-channel cable packages, was regarded as the harbinger of death to the movie-theater industry. Although the ‘creative destruction’ that took place after these products were introduced did result in some loss of market share for theaters, the owners of these venues adapted to changing tastes to provide other experiences ... that in-home entertainment platforms could not deliver. So it will be if MPAA’s petition is granted.”<sup>28</sup>

Americans for Tax Reform and the Media Freedom Project echo that observation:

An outing to the theater will always carry with it the aura of a special event, but for some leaving the house is not always a possibility. ... Allowing consumers the option of viewing first-run movies in the comfort of their home will not duplicate the theatre experience or replace it. The allure of the big screen and sound system only a theater can offer will not be diminished by adding the option of viewing the picture at home. *Consumers should be afforded the option through their MVPD to view any legal product the entertainment industry would like to offer them, it is then up to consumers to decide if they wish to exercise that option.*<sup>29</sup>

More importantly, NATO got it right when it noted that “[o]n its face, the question of SOC would appear irrelevant to NATO and its members, and the Commission would have no

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*Sterling Manhattan Cable Television v. N.Y. Tel. Co.*, 38 FCC 2d 1149 (1973). Likewise, NATO has opposed single channel subscription television, pay TV, video cassette recorders, and early release to DVD. *See, e.g., Nat’l Ass’n of Theatre Owners v. FCC*, 420 F.2d 194, 204(D.C. Cir. 1969) (noting NATO’s “long and vociferous opposition to the establishment of [pay TV]”); Richard A. Gershon, *Pay Cable Television: A Regulatory History*, 12 *Comm. & L.* 3, 7 (1990); Mark D. Hoffer, *The Power of the FCC to Regulate Pay-TV: Jurisdictional and Constitutional Limitations*, 53 *Denver L.J.* 477, 479-81 (1976); *Home Recording of Copyrighted Works: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong.* (1982) (statement of Richard H. Orear, President, National Association of Theatre Owners); *Natoonline.org*, *Talking Points, Release Windows*, <http://www.natoonline.org/exhibitionissues.htm> (last visited July 28, 2008); John Borland, *Media Revolutionaries Team With Old Guard*, *CNETNews.com*, Dec. 1, 2005, [http://news.cnet.com/Media-revolutionaries-team-with-old-guard/2100-1025\\_3-5978648.html](http://news.cnet.com/Media-revolutionaries-team-with-old-guard/2100-1025_3-5978648.html).

<sup>27</sup> For example, by its second weekend, the *Dark Knight* domestic box office totaled \$314.2 million. Top 10 Films: *The Dark Knight*, *THE WASHINGTON POST*, July 28, 2008, at C03. *See also* David Germain, ‘*Dark Knight* Sets Box Office Record with \$66.4M’, *THE WASHINGTON POST*, July 19, 2008, *available at* [www.washingtonpost.com](http://www.washingtonpost.com) (one-day box office record with \$66.4 million on opening day); David Germain, With ‘*Dark Knight*,’ Hollywood’s Brightest Weekend Ever, *THE WASHINGTON POST*, July 21, 2008, at C07 (record \$155.34 million in its first weekend).

<sup>28</sup> NTU Comments at 2.

<sup>29</sup> ATR/MFP Comments at 1-2 (emphasis added).

reason to examine the business models of an industry beyond its jurisdiction....”<sup>30</sup> And NATO provides no good public interest reason within the FCC’s jurisdiction to oppose the MPAA waiver. NATO concedes that the “chief concern for NATO’s members is the collapse of windows for movies with commercial potential – which is to say, the economic engine of the movie industry.”<sup>31</sup> Potential loss of profits from its members’ commercial enterprises is not a sufficient reason to deny consumers additional viewing options. And while NATO belittles consumer “choice,” that is what this proceeding is all about.

Previous objections by NATO members against television, pay television and other innovations proved hyperbolic, but even if NATO’s new fears were legitimate, denying the MPAA waiver would not help theater owners. As NATO concedes, MPAA’s “members may choose to attempt early release of any movie into the home at any time.”<sup>32</sup> That being the case, MPAA’s request is to protect those early release movies against unauthorized redistribution and copying. This should benefit NATO’s members by protecting the financial engine that produces the motion pictures they exhibit in first run. As NATO acknowledges, “[f]or NATO member companies, the worst-case scenario would be early-release to the home without any copyright protection controls ....”<sup>33</sup> In any event, while the MPAA request could be read to permit release to MVPDs simultaneous with theatrical release, which appears to be NATO’s biggest fear,<sup>34</sup> given the economics of movie distribution that is unlikely to occur. And, if it did, providing more choices to consumers can hardly be contrary to the public interest.

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<sup>30</sup> NATO Comments at 2.

<sup>31</sup> *Id.* at 11.

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.* at 9.

<sup>34</sup> See NATO Comments at 6 (Petitioner appears to propose ... a form of simultaneous release, or at least, what Tom Bernard called ‘polluting the theatrical window.’”).

Similarly, IFTA contends that granting the MPAA waiver “would diminish access to films that are produced independently and would damage the public’s interest in expanded availability of diverse programming.”<sup>35</sup> IFTA appears to believe that the studio beneficiaries of the MPAA request will only be MPAA’s studio members and not ITFA’s members.<sup>36</sup> NCTA has no comment on this intra-industry debate, but notes that it would support extension of the benefits of MPAA’s requested waiver to all providers of similar services, including ITFA and other non-MPAA members. Any studio should be able to take advantage of the waiver to provide early release content to an MVPD. Such a result is consistent with ITFA’s stated goals to “re-open television to diverse and creative programs” and to ensure that, “as part of the digital transition, new capacity offers the public more choice and viewing experiences.”<sup>37</sup>

The comments of CEA and its surrogate the Home Recording Rights Coalition claim that consumers will be harmed by grant of the MPAA waiver but offer no compelling support for such a prediction. This is unsurprising since neither CEA nor HRRC has ever met a content protection technology that they could support without reservation. CEA argues that television receivers would “unexpectedly go dark in many homes” if SOC is activated, and the “inevitable consequence of SOC will be the loss of viewing, for which consumers have paid or are willing to pay, by consumers who may not be interested in recording and may not even own a recorder or have any Internet connection.”<sup>38</sup> HRRC echoes these claims.<sup>39</sup> CEA also asserts that activating SOC would “shut off and strand interfaces and technologies in which device manufacturers and

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<sup>35</sup> IFTA Comments at 1.

<sup>36</sup> *Id.* at 4 (“The MPAA seeks an exception for the benefit of only a small number of companies within the industry.”).

<sup>37</sup> *Id.*

<sup>38</sup> CEA Comments at 3.

<sup>39</sup> HRRC Comments at 2.

their customers have subsequently invested.”<sup>40</sup> But these claims are unfounded. In fact, the consumer would lose nothing he or she did not have before the SOC waiver was granted and implemented since the MVPD would not have been able to offer the programming to the consumer without SOC. Moreover, if the waiver is granted and if SOC is activated for a particular early release movie, consumers will understand, via electronic program guides, marketing materials, and other sources, that they are not able to record or view such an offering if they do not have and use the necessary connectors – just as they cannot view a program in HD if they do not have an HD set, or cannot view a movie released on HBO if they do not subscribe to HBO. Which titles are available on which channels and when are routinely described in electronic program guides that consumers have become quite adept at using. Just as on-line video providers use their screens to inform customers of the resources required and the outputs permitted for on-demand video, cable operators will use their electronic program guides and on-demand menus to inform and guide customer purchases.<sup>41</sup>

CEA and HRRC further claim that the selection of any one output over another for any title is a “breach of faith” with those who use that other connector. The claim is overblown. First, cable operators have every incentive to maximize the number of outputs (and potential viewers) to whom these movies may be offered securely, and we believe studios do as well.

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<sup>40</sup> CEA Comments at 4.

<sup>41</sup> Service and program providers today routinely inform consumers what minimum resources are required to run computer programs and operating systems, what broadband connections are optimal for receiving on-line content, whether a customer’s browser and media player are compatible with on-line network episodes, and how to address a wide variety of “known issues” with on-line video playback. On-demand web portals offer movies to rent or buy with restrictions on such outputs as DVD burning or transfer to portable devices. Cable operators’ electronic program guides routinely display, but prevent tuning to, linear channels and “virtual” channels that are “not authorized” to the subscriber viewing the guide. Cable on-demand menus display which on-demand offerings are available for free or at a variety of price points, the days that on-demand offerings are available, and how long an on-demand title may be saved for later viewing. Current suppliers to the cable industry have introduced many more tools for handling the thousands of on-demand titles available over cable, such as next-generation social networking, search and recommendation capabilities. These electronic program guides and on-demand menus can be used to inform and guide customer purchases of the new offerings that grant of the requested waiver can make available.

Second, no existing content is at issue: the requested waiver would not alter any current offerings in today's release windows over existing connectors. Third, output controls are becoming increasingly common for video distribution. For example, video titles offered over the Internet today are encoded to prevent their indiscriminate redistribution through unsecured outputs that may exist on PCs and other receiving devices. Similar technologies exist to give television viewers the same choices as Internet "viewers." The digital connectors that are currently "approved" and in use for DVD players, DVRs, and digital television would close holes through which early release content could leak out of secure devices.<sup>42</sup> And fourth, even "approved" digital connectors are changing continually to keep up with technology and new business models. The Commission would impede such technological and business innovation if it declared that any particular interface or technology to be forever perfect as-is for every possible use or title.

CEA concedes that "at least a theoretical rationale does exist for the SOC shutoff of effectively unprotected component video interfaces," but it rejects this "analog hole" rationale as "unconscionable because it remains, as it has been for years, *unjustifiable*."<sup>43</sup> CEA argues that "consumers who rely on this interface should not suffer the very real surprise and disappointment that SOC would entail"; that the MPAA petition "put[s] at risk the very 'early adopters' who are most open to and interested in innovations from content and device industries; and that "CEA is concerned about maintaining the value of devices in which consumers invested earliest and most

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<sup>42</sup> The protection integrated into Blu-ray Players contemplates a "digital only token" that can likewise protect DVD-window content from leaking out of protected digital devices or domains. DTLA, the licensor of DTCP content protection technology, specifically notes its expectation to follow with similar protections for DTCP interfaces. DTLA Comments at 6.

<sup>43</sup> CEA Comments at 6 (emphasis in original).

heavily.”<sup>44</sup> In almost identical language, HRRC makes the same assertions.<sup>45</sup> CEA and HRRC concerns are misplaced for the simple reason that technology cannot stand still. Indeed, Congress mandated that the Commission, in implementing its navigation device rules, take care to “avoid actions which could have the effect of freezing or chilling the development of new technologies and services.”<sup>46</sup> The situation is analogous to any early adopter who acquires new equipment which, with the passage of time, cannot access as easily or at all new services coming down the road. From computers to cell phones to televisions, that has been and likely always will be the case. The important point is that nothing is being taken away from those consumers, and other consumers with more capable devices will have more viewing options. Indeed, there can be no public interest justification for denying new choices to a majority of consumers simply because a small minority cannot avail themselves of those choices.

In sum, the arguments raised by CEA and HRRC are without merit. Indeed, they were arguments that parties made to the FCC in support of the SOC rule and which the Commission indicated could be overcome by a proposal, like MPAA’s request, that is “advantageous to consumers.” Consumers will benefit from the additional viewing options that grant of the MPAA waiver would permit and no consumer would lose any viewing options he or she currently has.

While there may be questions about how consumers are informed about the availability of new offerings, those are issues that can be addressed through negotiations between the MPAA members and their MVPD partners in developing the proposed services. This approach has

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<sup>44</sup> *Id.*

<sup>45</sup> See e.g., HRRC Comments at 2 (“The FCC’s granting to MPAA’s members of such remote control over consumers’ TVs will surprise and disappoint consumers.”), and 3 (If a waiver is granted, “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.”).

<sup>46</sup> S. Conf. rep. No. 104-230, at 181 (1996).

already been successful in the development and marketing of other new services, as consumers have managed to navigate their choices of tiers, premiums, video-on-demand, and DVR options, informed by their electronic programming guides, marketing materials, and other MVPD communications. The Commission should have little concern that consumers will not be well informed about new offerings of early release movies by their MVPDs, and how to obtain them.

For these reasons, while we agree with Public Knowledge *et al.* (PK) about the importance of addressing “consumer expectations,” we believe PK’s concerns in this regard are unfounded. PK argues that granting the waiver request “will frustrate consumer expectations” because they 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.”<sup>47</sup> PK contends that “[g]ranted 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 expect to be able to receive.”<sup>48</sup> NCTA shares PK’s concern about consumer expectations because those consumers are cable customers too.

But PK ignores a number of factors. First, as we stated above, without a waiver of the SOC ban, *no consumer* would receive the acknowledged benefit of early release movies being available for in-home viewing on the TV set. Second, consumers with “legacy devices” that might not receive early-release movies subject to SOC would not be “cut[ ]-off from high-definition content” that they expect to receive. They would still be able to view that content once the early release window is over as they do now over premium channels or video-on-demand. In that regard, the consumer would be able to use their existing services as they always have, and

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<sup>47</sup> PK Comments at ii.

<sup>48</sup> *Id.* at 5.

would still receive the programming in its normal release window after the brief window when SOC was permitted to be activated.

Third, with due respect, we do not agree that consumers expect every piece of home electronics equipment to be future-proofed to receive every future offering.<sup>49</sup> We would not be surprised if digital televisions of the future routinely come with Ethernet ports, but we would be very surprised if consumers would protest the availability of video over the Internet because they bought a television without such a port. Consumers have upgraded their home electronics to receive High Definition, to update their home networking and Wi-Fi, to play new games for newer gaming platforms, to place calls and surf on 3G networks, and to run more demanding computer programs. They do not expect all new offerings to work with all legacy devices, and we doubt that they would wish innovative offerings to stop. We believe that consumers will welcome the availability of new offerings by their MVPDs. Those who highly value the offering may even upgrade their electronics if needed. Innovation is a consumer benefit, not a detriment.

PK also contends that an SOC waiver is unnecessary because “shifting the release window is not a new business model.”<sup>50</sup> That claim is without merit. As the objections of NATO and others make clear, MPAA *is* proposing a new business model whether or not the underlying content (movies) or service (Video-on-Demand) is “new” or not. Moreover, the fact that some suppliers are currently experimenting with (or contemplate providing) early release VoD movies provides clear evidence that what MPAA is proposing is an emerging new business

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<sup>49</sup> PK observes that “[u]sers 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... [C]ustomers 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.” *Id.* at 8. PK also suggests that some customers might order and pay for an on-demand SOC movie but then would be unable to view it. *Id.* at 9. This is an unlikely scenario, but, in any event, if billing errors occur on *any* service level, existing FCC regulations already assure prompt correction. 47 C.F.R. §76.309(c)(3)(ii).

<sup>50</sup> *Id.* at 13.

model, not (as PK would have it) proof that a new release window is not new. The MPAA proposal would allow a new business “model” to develop making such offerings more widely available to more consumers with suitable content protection.

Next, PK argues that “there is no evidence that allowing SOC controls for this early release window would be necessary or useful for combating copyright infringement.”<sup>51</sup> PK concedes that the “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,”<sup>52</sup> but contends that “MPAA provides *no* evidence that this has happened or is likely to happen if its constituents shift their release windows.”<sup>53</sup> But the evidence is right before our eyes: the economic model of the motion picture industry requires securing content in early windows so it can be provided in later windows. The prospects of unauthorized copying and redistribution in an unsecured home environment has kept early release motion pictures out of the home, locked exclusively in theatrical, hotel, and airlines windows when consumers want the choice to view it at home on-demand over their MVPD systems. There is no stronger proof of the threat of piracy than this market reality, and no better proof of the need for Commission waiver to open the home to the choice of early release motion pictures.

Finally, PK contends that MPAA’s proposal is an “attempt by large content owners to get additional control over the design and capabilities of consumer electronics devices and MVPD services.”<sup>54</sup> PK has it backwards, as its own example well illustrates. PK notes that “Sony Pictures recently announced it will be offering its new movie, *Hancock*, to some Sony television

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<sup>51</sup> *Id.* at 15-16

<sup>52</sup> *Id.* at 16.

<sup>53</sup> *Id.* (emphasis in original).

<sup>54</sup> *Id.* at 17.

owners equipped with Sony's Internet media connection before release on DVD and other home media. However, the movie will only be available to those who own the Sony box, and *will only flow over Sony's proprietary video connection to a Sony TV.*"<sup>55</sup> PK uses this example as a reason not to grant the MPAA waiver, when, in fact, it is a reason to grant the waiver. *Hancock* is being made available only to devices that have no analog outputs – meaning that the Sony TV cannot output any content via analog, whether that content is early release or not. The MPAA waiver asks that this market be opened more widely to home electronic devices that may include many interfaces, but can control themselves when viewing early release content. A television could include many ports which may be useful for personal content, broadcast signals, MVPDs, and other current services, but could be turned off when the television wanted to receive the new early release content with SOC.

What the *Hancock* example shows is that without an SOC waiver, consumers will be able to receive early release movies over the Internet, but not from their MVPD. In contrast, the SOC waiver will enable consumers to view such early release movies not only on sets like the Sony Bravia, which Sony has built without analog outputs, but on other sets which would protect the SOC content by turning off unsecure ports. Seen in this light, the waiver is necessary to put MVPDs on an equal footing with their Internet competitors, to put television manufacturers on an equal footing with each other, and to open choices to customers who deserve to be able to view such movies over cable and other MVPDs no less than over the Internet.

In sum, the arguments of those opposing the MPAA waiver request are ill-considered and unsupported. The record makes plain that grant of a limited SOC waiver will provide consumers

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<sup>55</sup> *Id.* at 18-19 (footnote omitted; emphasis in original).

with more viewing options and will not harm consumers. The Commission should act expeditiously on the MPAA request.

**CONCLUSION**

For the foregoing reasons, the MPAA Petition for Waiver should be granted.

Respectfully submitted,

**/s/ Daniel L. Brenner**

William A. Check, Ph.D.  
Senior Vice President  
Science & Technology

Daniel L. Brenner  
Neal M. Goldberg  
National Cable & Telecommunications  
Association  
25 Massachusetts Avenue, NW – Suite 100  
Washington, D.C. 20001-1431  
(202) 222-2445

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**Certificate of Service**

I do hereby certify that on July 31, 2008, I caused a true and correct copy of the foregoing Comments of the National Cable & Telecommunications Association to be served via USPS or e-mail, on the following:

Kathleen Q. Abernathy  
Robert S. Strauss Building  
1333 New Hampshire Avenue, N.W.  
Washington, D.C. 20036

Michael P. O'Leary  
Motion Picture Association of America, Inc.  
1600 Eye Street, N.W.  
Washington, DC 20006

Brendan Murray (via email)  
Media Bureau  
Room 4-A737  
445 12th Street, S.W.  
Washington, D.C. 20554  
Brendan.Murray@fcc.gov

**/s/ Neal M. Goldberg**