

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

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

**COMMENTS OF  
THE INDEPENDENT FILM & TELEVISION ALLIANCE**

The Independent Film & Television Alliance (“IFTA”) respectfully submits these Comments in response to the Petition by the Motion Picture Association of America (“MPAA”), which seeks a waiver of the prohibition on use of selectable output controls (“SOC”) for its seven Hollywood studio members.<sup>1</sup> As more fully discussed below, IFTA believes that granting the waiver request would diminish access to films that are produced independently and would damage the public’s interest in expanded availability of diverse programming. Accordingly, IFTA urges the Commission to deny the Petition.

***IFTA Background***

IFTA is the non-profit trade association for the independent film and television industry worldwide. Its members produce and distribute feature films and television programming that is financed substantially from sources other than the MPAA studios. Its membership includes 160 companies such as The Weinstein Company, Lionsgate,

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<sup>1</sup> SOC provide the ability to remotely shut off a particular output or connector on a program-by-program basis, thereby funneling content only through other authorized outputs and/or connectors.

PeaceArch, Lakeshore, Morgan Creek, NuImage, Troma and CineTel. IFTA member companies have been responsible for more than half of the Academy Award “Best Pictures”® in the past thirty years, including *The Departed*, *Million Dollar Baby*, *Crash*, *The Lord of the Rings*, and *The Last Emperor*. Collectively, its members produce more than 400 independent films and countless hours of television programming each year and generate more than \$4 billion in distribution revenues annually.

IFTA has filed comments in prior proceedings requesting the Commission to address the ever-diminishing opportunities for independent programming on U.S. television and cable.<sup>2</sup> We have urged the Commission to take action to re-open television to diverse and creative programs. We believe that the public interest can be best served by ensuring that, as part of the digital transition, new capacity offers the public more choices and viewing experiences.

### ***The Rule at Issue***

Section 76.1903 of the Commission’s Rules provides:

A covered entity shall 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.

47 C.F.R. §76.1903. This provision effectively prohibits the implementation of SOC by Multichannel Video Program Distributors (“MVPDs”).

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<sup>2</sup> In the Matter of 2006 Quadrennial Regulatory Review-Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et seq., MB Docket No. 06-1211(Oct. 23, 2006); *In the Matter of 2002 Biennial Regulatory Review, and Related Dockets*, MB Docket No. 02-277 (May 12, 2003).

### *MPAA's Waiver Request*

In its May 9, 2008, Petition for Expedited Special Relief, MPAA requests that the Commission permanently waive Section 76.1903 to permit the use of SOC in the case of an MVPD offering high definition movies in digital format prior to their release on prerecorded media, such as DVDs. The waiver request would limit this special exception to the content of the seven member studios, to the detriment of the public and of the hundreds of other producers of movies and high definition video programming.

### *The Proposed Services are Vague and Undefined*

The MPAA waiver request appears to be designed to foster some form of a new high definition service that would be provided to the public by MVPDs. Unfortunately, the petition is extraordinarily vague as to exactly how this new service would work, or even whether MVPDs desire to offer such a service.

It appears that MPAA hopes to use the grant of the requested waiver to kick start discussions with the MVPD industry. The MPAA suggests that arrangements between respective studios and MVPDs to distribute content through the use of SOC will be negotiated, but it offers no concrete details about the structure, extent or market application of SOC in the arrangements or about the necessary consumer and competitive safeguards, such as protections against over-extended use of SOC or equitable treatment for similarly situated content providers.<sup>3</sup>

For example, while the Petition defines the programming subject to the new arrangements to be “studio films in current theatrical release,” there is no indication whether this includes all such films or a handful or, perhaps, none. The absence of

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<sup>3</sup> The only description of the new “services” is that of a distribution platform for studio content created through private arrangements between the Petitioners (studios) and the MVPDs in an ultimately unregulated, unrestricted environment.

specifics and the non-participation by the MVPDs in this proceeding precludes a necessary understanding of any conceived parameters. This is of extreme concern given the power that will be vested in the MVPDs to deploy SOC if the waiver is granted.

Further, the proposed offering does not resemble a “service” at all, but merely an alternative way to deliver studio films to consumers a few months earlier in time at a presumably higher cost. The public benefit from this is minimal at best. Studio films are widely distributed through cinemas (frequently on in excess of 3000 screens), DVD, premium/pay television, and eventually cable and free broadcast. There is no lack of access to these films in any community in the United States.

***“Services” are Exclusive between Studios and their Partnered MVPDs***

The MPAA seeks an exception for the benefit of only a small number of companies within the industry. The proposed “Services” will be comprised of MPAA studio content only and the only “service providers” will be those MVPDs who enter into contractual partnerships with the studios. While the MPAA studios’ releases are frequently the most expensive and extensively marketed films to reach the cinemas, numerous independent producers and theatrical distributors also invest heavily to create and release films in cinemas in competition with the studios’ own films.

We assume that, should the Waiver be granted, the Commission must consider favorably any similar requests by other content providers. However, competitive and consumer implications still exist. As noted above, the MVPDs have not joined in this Waiver request and their willingness to treat all providers equally is unknown.

In a fair and open marketplace, creating another option for consumers would be fine. Here, however, it is posed in a highly exclusionary fashion that would reinforce the

already restricted marketplace. Thus, consumers would lose rather than gain if the waiver is granted.

***Intellectual Property Protection and Market Access Not Mutually Exclusive***

The MPAA claims that the use of SOC is a necessary mechanism to prevent piracy and to allow certain motion pictures to be viewed on television earlier in the distribution stream. IFTA fully supports efforts to better protect intellectual property from piracy, and protection of its Members' valuable content is an utmost priority in the digital era. However, the slogan "anti-piracy" cannot be used as a rationalization that automatically allows market access for independent content to be compromised and legitimate programming choices for consumers to be eliminated. There is simply no record to support the conclusion that the use of SOC will sufficiently impact the worldwide problem of piracy to justify granting the Petition on that basis.

***Public Interest Considerations***

Section 73.1903 was adopted in response to the direction of Congress in the Telecommunications Act of 1996 to adopt rules allowing consumers to obtain "navigation devices" from commercial sources other than their MVPD.<sup>4</sup> It was based upon sound consumer considerations, including concerns regarding investment in existing video technology and uncertainty about the impact of SOC on consumers, and it was designed to promote the digital transition without burdening consumers.

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<sup>4</sup> The Commission imposed the SOC rule pursuant to Section 629 of the Communications Act to "assure the commercial availability of navigational devices." [*In the Matter of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigational Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, 18 FCC Rcd 20885, 20905 (2003)] The Commission was particularly concerned that SOC would harm "early adopters" whose DTV equipment only had component analog inputs for high definition display, "placing these consumers at risk of being completely shut off from the high definition content they expected to receive." *Id.* at 20911.

Waiver of the SOC rule requires a showing that the potential public interest benefits of the waiver outweigh both the public interest benefits associated with the rule and the potential harms that could result from granting the waiver.<sup>5</sup> However, the Petition fails to establish that consumers have materially upgraded their home electronics or that the passage of time has otherwise obviated these concerns.

More fundamentally, the Petition fails to address the impact of the proposed “service” on alternative program supply. Independent programming is no longer easily available to the public on either broadcast or cable television. It has been progressively eliminated as the studios-networks-cable companies have vertically integrated. Independently produced and supplied feature length films are particularly difficult to license on commercially acceptable terms. Without the potential for release on U.S. television, many films are unable to obtain financing and will simply not be made. Overall, the public will lose its access to independent voices.

The Petition’s request for more exclusive access for only studio-supplied content simply reinforces the alarming trend that U.S. television increasingly is only a channel for content by a few companies to reach the public, contrary to the purpose of the Communications Act and sound public policy.

Accordingly, the benefits of the proposed Waiver are ill-defined and very narrow and far outweighed by the foreseeable and detrimental impact on the supply of

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<sup>5</sup> The MPAA seeks a waiver of the SOC rule pursuant to the public interest waiver standard, 47 C.F.R. §§ 1.3 and 76.7(i). For discussion on the burden to obtain a waiver by the Commission see *In the Matter of Comcast Corporation; Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigational Devices; Application for Review*, CSR-7012-Z, CS 97-80 ¶ 17 (rel. Sept. 4, 2007); see also *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) “An applicant for waiver faces a high hurdle even at the starting gate. ‘When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.’” [quoting *Rio Grande Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (1968)].

independent content and its availability to the American public. If there is some magical new service on the horizon, MPAA, MVPDs and other affected parties, including IFTA's membership and equipment manufacturers, should work cooperatively to define exactly what sort of service is desirable, how such a service would be defined, and whether the use of SOC is essential to the development of that service. Then an appropriate waiver request could, if needed, be framed and prosecuted. At this time, however, the petition tilts too heavily in favor of private interests rather than those of the public.

***Conclusion***

The MPAA's request seeks permanent waiver of an important rule without demonstrating whether any "new service" will actually be offered. Adoption of the Petition would be contrary to the public interest. For the reasons set forth herein, the Commission should deny the MPAA's Request for Expedited Special Relief and reject its waiver request.

Respectfully submitted,

INDEPENDENT FILM & TELEVISION ALLIANCE

/s/  
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