

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

In the Matter of)
Motion Picture Association of America) CSR-7947-Z
Petition for Expedited Special Relief;)
Petition for Waiver of the Commission's)
Prohibition on the Use of Selectable Output Control) MB Docket No. 08-82
(47 C.F.R. § 76.1903))

MEMORANDUM OPINION AND ORDER

Adopted: May 7, 2010

Released: May 7, 2010

By the Media Bureau:

I. INTRODUCTION

1. In this order, we act on a request for a waiver of Section 76.1903 of the Commission's rules to allow multichannel video programming distributors ("MVPDs") to disable certain audiovisual outputs on set-top boxes to assure that copy protection is active for certain high-value content, specifically early-release films. We deny the waiver request as filed, but, in order to encourage Motion Picture Association of America ("MPAA") member companies, independent filmmakers, and their MVPD partners to offer their films for home viewing during early release windows, we grant a limited waiver of the prohibition on disabling audio-visual outputs. We have limited and conditioned the waiver in a manner that balances the interests of content owners to protect their highest value content and to offer consumers access to early release, high-value content with the interests of those consumers who may be unable to view these films during the early-release window. The limitations and conditions placed on the waiver will ensure that consumers are not deprived of any programming options that they currently have.

II. BACKGROUND

2. In practical terms, selectable output control ("SOC") is a method that enables an MVPD to encode video programming with a signal to remotely disable selected audio/video outputs on the set-top box. In order to implement Section 629 of the Communications Act, the Commission adopted rules

1 See Motion Picture Association of America, Inc.'s Petition for Waiver of 47 C.F.R. § 76.1903, MB Docket No. 08-82 (filed May 9, 2008). The MPAA filed the Waiver Request on behalf of member companies Paramount Pictures Corporation, Sony Pictures Entertainment, Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment, Inc.

2 As explained in this order, MVPDs (rather than content owners), are subject to the rule, and therefore we are waiving application of the rule to the MVPDs that contract to provide this service with the companies that filed this petition or any other provider of first-run theatrical content. See 47 C.F.R. §§ 76.1901(a); 76.1903.

3 The Media Bureau has delegated authority to act on waiver requests. 47 C.F.R. §§ 0.61(h). 0.283.

4 A set-top box that a consumer uses to receive video service can have a variety of outputs, such as High-Definition Multimedia Interface, IEEE-1394, component YPbPr, S-Video, and Composite video. A consumer's television set,

in 2003 facilitating the connection of digital navigation devices to cable television and other MPVD systems.⁵ Among those rules was Section 76.1903, which prohibits the activation of SOC.⁶ Before adoption of the rule, content providers argued for the ability to disable analog component outputs and digital outputs that do not recognize copy protection because those outputs are most susceptible to unauthorized copying and distribution of copyrighted content.⁷ While the Commission recognized content owners' legitimate interest in protecting their content from unauthorized use, the Commission concluded that the SOC prohibition was necessary to protect early adopters of HDTVs. Early HDTVs typically only connect to set-top boxes using connections that content owners could deactivate through the use of SOC – i.e., analog outputs and digital outputs without encryption capability – and therefore would not be able to display any program that had been encoded with SOC to prevent the content from flowing through those connections. To avoid “placing these consumers at risk of being completely shut off from the high-definition content they expect to receive,” the Commission adopted the ban on the activation of SOC.⁸ However, while Section 76.1903 of the Commission's rules prohibits *activation* of SOC, the Commission recognized that SOC might have future utility in facilitating new video service business models and did not prohibit set-top box manufacturers from building SOC *capability* into their set-top boxes. The Commission also stated that it would consider waivers, petitions or other proposals to use SOC for future applications that would be in the public interest.

3. On May 9, 2008, the MPAA filed such a petition on behalf of its member companies and their potential MVPD partners. MPAA proposes “to provide consumers with the ability to order recently released theatrical, high definition movies directly through their MVPD.”⁹ According to MPAA and its supporters, MPAA's proposed service is precisely the type of new business model that the Commission contemplated because it will benefit the public by allowing consumers to view films in their homes sooner after those films are released in theaters.¹⁰ MPAA highlights that it will improve entertainment options for segments of the population that have trouble getting to movie theaters, such as “parents who want to see a new movie, but who cannot find or afford a babysitter.”¹¹

recording device, or stereo may have one or more inputs that can receive video from those outputs, depending on its age and model. When an MVPD activates SOC, it may turn off certain outputs on the set-top box for a specific program. If the consumer's television, recording device, or stereo's input is connected to an output on a set-top box and that output has been disabled, the device will not receive that program.

⁵ *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 (2003) (“*Plug and Play Order*”).

⁶ Section 76.1903 of the Commission's rules states, “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. A “covered entity” is defined as “any entity that is subject to [Subpart W – Encoding Rules].” 47 C.F.R. § 76.1902(h). The Encoding Rules are applicable to “multi-channel video programming distributor[s].” See 47 C.F.R. § 76.1901(a) (“Each multi-channel video programming distributor shall comply with the requirements of this [Subpart W – Encoding Rules].”).

⁷ See, e.g., Letter from Fritz Attaway, Executive VP, Government Relations, Motion Picture Association of America, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 3 (filed in CS Docket No. 97-80, Aug. 29, 2003)

⁸ *Plug and Play Order*, 18 FCC Rcd at 20911, ¶ 60.

⁹ Waiver Request at ii.

¹⁰ *Id.* at 8-9. MPAA also argues that the new service would aid the digital transition by providing more incentives to purchase new high definition televisions. *Id.* The transition from analog to digital television service for full-power stations was completed on June 12, 2009.

¹¹ *Id.* at 8.

III. DISCUSSION

4. We conclude that the service that MPAA proposes would serve the public interest and that providers of first-run theatrical content are unlikely to offer the service absent the ability to activate SOC. While a waiver of the SOC prohibition will prevent consumers who rely on unprotected audiovisual outputs from accessing this service,¹² we are convinced that in the absence of a waiver the service will not be offered at all. We also conclude that the breadth of the waiver requested by MPAA exceeds the protections necessary to guard against illegal copying of content. To assure that this waiver serves the public interest, we deny MPAA's waiver request in part and grant a waiver subject to certain limitations. On balance, this limited waiver will provide public interest benefits—making movies widely available for home viewing far earlier than ever before—without imposing harm on any consumers.

A. Public Interest Determination

5. MPAA makes its request pursuant to Sections 1.3 and 76.7 of the Commission's rules, which state, respectively, that the Commission will waive its rules "if good cause therefore is shown," or if "the public interest would be served by the grant" of a waiver request.¹³ MPAA's waiver request raises two issues: (i) whether MPAA's proposed service offering would serve the public interest, and (ii) if so, whether waiver is necessary to achieve the public interest benefits that would result from that service offering. We conclude that the proposed service offering would serve the public interest. While we are persuaded that first-run theatrical high-value content demands extraordinary protection, we believe that the sweeping SOC waiver that MPAA seeks is not necessary to protect that content. Therefore, we deny the MPAA waiver as filed and conclude that a limited waiver of the SOC prohibition, as outlined below, will achieve the public interest benefits of MPAA's proposed service offering with the least harm to consumers with legacy devices.

1. Consumer Benefits of MPAA's Proposed Service

6. We believe that providing consumers with the option to view films in their homes shortly after those films are released in theaters will serve the public interest. Certain opponents disagree about the public interest benefits, asserting that grant of MPAA's Waiver Request will deprive consumers of valuable cultural experiences. For example, the National Association of Theatre Owners ("NATO") argues that theatrical movies provide the "least expensive, best-value, out-of-home entertainment experience available to Americans."¹⁴ Accordingly, they argue, the preservation of the movie theater industry better serves the public interest.¹⁵ Furthermore, they argue that instant availability of films will reduce choice and limit the ability to develop "sleeper" hits in movie theaters.¹⁶ Arguing that granting MPAA's request will have a fundamental impact on independent programming, the Independent Film and Television Association ("IFTA") asserts that this new service would reduce access to independently produced films.¹⁷ Commenters that oppose MPAA's request also contend that because the Commission does not know the film industry's specific plans, it is impossible for the Commission to identify the benefits that the service will provide.¹⁸ Therefore, opponents to the waiver request assert that, as proposed, MPAA's service would not serve the public interest. We disagree. This offering will allow the

¹² See *infra*, n.24.

¹³ 47 C.F.R. §§ 1.3, 76.7.

¹⁴ National Association of Theatre Owners Comments at 3.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 5.

¹⁷ Independent Film and Television Alliance Comments at 6-7.

¹⁸ Letter from Jef Pearlman, Staff Attorney, Public Knowledge, to Austin Schlick, General Counsel, Federal Communications Commission, at 4-6 (Nov. 19, 2009).

homebound, parents with young children, and others who simply want to stay in for the night to choose a new entertainment option that they may value highly. As the record in this proceeding demonstrates, the American public places a high value on movies.¹⁹ It is not the Commission's function to protect industry sectors from competition, which generally benefits the public. In any event, we believe that this home viewing will complement the services that NATO and IFTA members offer and provide access to motion pictures to those consumers who cannot or do not want to visit movie theaters.²⁰ Accordingly, we conclude that MPAA's proposed service offering would serve the public interest.

2. The Need for Waiver

7. MPAA and its supporters assert that a waiver is necessary because MPAA member companies will not be willing to make first-run movies available to consumers for viewing at home in the absence of a waiver.²¹ As discussed above, one of the Commission's main concerns in adopting the prohibition on the use of selectable output control technology was that its use might frustrate consumer expectations regarding the use of equipment they have purchased. MPAA asserts that no consumer currently expects to be able to view movies at home while they are still showing in movie theaters, and that its request only pertains to early release content. Therefore, MPAA argues, waiver of the prohibition on the use of selectable output control would not frustrate any consumer's current expectations, even if certain consumers are unable to access the new service without buying new equipment.²² Comments filed in opposition to the Waiver Request argue that MPAA has failed to provide specific evidence of illegal copying through unprotected outputs and, therefore, has not met the burden of demonstrating why waiver of Section 76.1903 is necessary.²³ Furthermore, they argue, MPAA understates the effect that the waiver will have on consumers that rely on unprotected outputs. They assert that allowing MPAA to activate SOC will strand the millions of consumers who invested in older model high-definition televisions that only have analog component inputs because consumers expect to receive all MVPD services, regardless of the inputs that they have on their televisions.²⁴ Based on the arguments before us, the threshold issues

¹⁹ See, e.g., National Association of Theatre Owners Comments at 3-5; Thomas D. Sydnor II Reply at 2-3. See also National Association of Theatre Owners, Statistics, Number of U.S. Movie Screens, <http://www.natooonline.org/statisticsscreens.htm> (last visited April 26, 2010) (reporting that the U.S. has over 39,000 movie screens); National Association of Theatre Owners, Statistics, Total U.S. Box Office Grosses, <http://www.natooonline.org/statisticsboxoffice.htm> (last visited April 26, 2010) (reporting box office receipts of over \$10 billion in 2009).

²⁰ While we understand IFTA's concern that vertical integration in the entertainment business has affected its members negatively, that issue is beyond the scope of this waiver order. We do, however, extend the relief granted in this order to MVPDs who partner with IFTA's members as well as those who partner with MPAA members.

²¹ See, e.g., Waiver Request at 9-10; Cisco Reply at 2.

²² Waiver Request at 9-10.

²³ Home Recording Rights Coalition Comments at 5; Public Knowledge, Consumer Federation of America, Digital Freedom Campaign, Electronic Frontier Foundation, Media Access Project, New America Foundation, and U.S. PIRG Comments ("Public Knowledge Comments") at 15-17. Public Knowledge asserts that nothing currently prevents MPAA member companies from offering in-home release of films during an earlier window, and that everyone could benefit from the early release windows absent a waiver. Letter from Jef Pearlman, Equal Justice Works Fellow and Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 9, 2008).

²⁴ See Home Recording Rights Coalition Comments at 3; Public Knowledge Comments at 6-13. Certain commenters estimate that SOC activation could affect between 11 and 25 million television sets. See Letter from Jef Pearlman, Equal Justice Works Fellow and Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 17, 2008); Letter from James W. Hedlund, Vice President, Regulatory Affairs, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 18, 2008). Other estimates indicate that SOC activation would only affect 2.5 million HD subscribers whose television sets do not have protected audio-visual connections. Letter from Maureen O'Connell, Senior Vice President, Regulatory & Government Affairs, News Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, at

with respect to the need for a waiver are: (i) whether waiver of the SOC prohibition is necessary to provide adequate protection against illegal copying of the proposed service, and (ii) whether the public interest benefits of the proposed service outweigh the impact on consumers who have legacy television sets.

8. On balance, we find that waiver of the SOC prohibition is necessary to provide adequate protection against illegal copying of the proposed service. We disagree with Public Knowledge's ("PK") assertion that MPAA has failed to provide specific evidence of illegal copying through unprotected outputs.²⁵ While it would be impossible to demonstrate specific evidence of illegal copying for a service that does not yet exist, MPAA has provided specific evidence that illegal copying exists, and that unprotected outputs on the set-top box have led to unauthorized rebroadcast of content.²⁶ For example, MPAA points out that unauthorized copies of television shows are online so quickly that copies that air on the East Coast are available before they air on the West Coast.²⁷ Furthermore, a pay-per-view boxing event was broadcast online without authorization simultaneously with its airing on pay-per-view.²⁸ MPAA argues that if the Video-on-Demand ("VoD") release window is moved earlier, illegal copiers will focus on the earlier VoD release. As MPAA explains, illegal copying happens in waves as higher-quality versions of a film are made available.²⁹ The first wave occurs when a poor-quality camcorder version becomes available, the second wave when a higher-quality DVD version becomes available, and the third wave when the highest-quality Blu-Ray version is made available.³⁰ Therefore, MPAA argues, if a VoD version of similar quality to the Blu-Ray version is made available earlier than the Blu-Ray version, illegal copiers will gravitate to VoD for theft instead. PK asserts that SOC will not prevent all early-window illegal copying by consumers nor will it address other sources of illegal copies, such as illicit conduct by studio employees.³¹ While we agree with PK that SOC will not eliminate illegal copying, SOC will impede such copying by disabling outputs on the set-top box that provide no protections to prevent copying.³² Therefore, we conclude that SOC is necessary to provide protection against illegal copying of the proposed service.

1 (Oct. 3, 2008). Some commenters respond that consumers whose sets include protected audio-visual connections could be in the unenviable position of running out of protected inputs on their television sets, thereby being forced to choose between plugging in a cable set-top box and another piece of consumer electronics equipment, such as a Blu-Ray player. Home Recording Rights Coalition Comments at 3.

²⁵ Letter from Harold Feld, Legal Director, Public Knowledge, to William T. Lake, Chief, Media Bureau, Federal Communications Commission, at 1-2 (Oct. 14, 2009) (highlighting Paramount's admission that illegal copying of films is already rampant on or before the opening of films, and asserting that SOC will do nothing to stem illegal copying); Letter from Harold Feld, Legal Director, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 1-2 (Oct. 28, 2009) (arguing that if unprotected outputs "contribute[] to illegal copying, the number of illegal downloads should dramatically spike whenever a movie is released on VOD.>").

²⁶ See Letter from Antoinette Cook Bush and Jared S. Sher, Counsel, Motion Picture Association of America, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 7-8, Exhibit D (Nov. 23, 2009).

²⁷ *Id.* at 8.

²⁸ *Id.* In a few instances in which films were made available over VoD before theatrical release, those films have been copied before their theatrical release, confirming the potential consequences that flow from early releases of movies in high-quality formats susceptible to theft. *Id.* at 6-7.

²⁹ *Id.* at 4-5.

³⁰ *Id.* at 4-5. FOX provided data in the form of charts to support this claim. *Id.* at Exhibit C.

³¹ Letter from Jef Pearlman, Staff Attorney, Public Knowledge, to William T. Lake, Chief, Media Bureau, Federal Communications Commission, at 3-5 (Dec. 10, 2009).

³² In this instance, locking a door could be used as metaphor for disabling unprotected outputs. While a lock does not provide absolute protection from burglary, it does provide more protection than a door without a lock.

9. This logic explains why MPAA member companies are reluctant to offer this service without SOC protection. MPAA convincingly argues that films are “too valuable in this early release window to risk their exposure to unauthorized copying, redistribution or other unauthorized activities” and that, absent the requested waiver, this business model will not be implemented.³³ PK argues that MPAA member companies can, and eventually will, provide early-release films in the absence of a waiver and that MPAA member companies seem to be moving in that direction.³⁴ We disagree. PK argues that we should reject MPAA’s request because MPAA member companies were “already experimenting with VoD release timing” in the absence of waiver of Section 76.1903.³⁵ Over the past two years, however, there have not been any major VoD experiments, such as offering a film through an MVPD for in-home viewing more than a few days prior to DVD release, by MPAA member companies.³⁶ We are convinced that MPAA member companies will not make any substantial changes to the release window in the absence of adequate protection of high-value content, and that consumers will thus not enjoy the benefits of this service absent a waiver.

10. We conclude, therefore, that the public interest benefits of the proposed service outweigh the limited impact on consumers who rely on unprotected outputs on the set-top box. While the Commission has a duty to protect the interests of consumers with legacy devices, the Commission must also ensure that its rules do not inhibit introduction of new services. At this time, no consumer reasonably expects to be able to watch films at home before they are released on DVD or via lawful Internet download.³⁷ Consumers simply cannot expect to be able to access something that does not yet exist. We disagree with commenters that argue that consumers expect to receive all MVPD services, regardless of the inputs that they have on their televisions,³⁸ no reasonable consumer expects “every piece of home electronics equipment to be future-proofed to receive every future offering.”³⁹ Therefore, on balance, grant of MPAA’s waiver request will provide a benefit to those who have the appropriate equipment and would like to view movies in their homes in an early release window that outweighs the limited impact on consumers with legacy devices.⁴⁰ These findings of course apply only to the proposed service before us, involving an early release window for first-run theatrical content.

11. MPAA has demonstrated that protection of its high-value content is necessary to realize the public interest benefits described above. Accordingly, we find that it would be in the public interest to ease the SOC prohibition that dissuades film studios and their MVPD partners from offering their films for home viewing during early release windows. As discussed further below, however, nearly all commenters agree that we should not grant MPAA’s waiver request in its entirety, and suggest certain

³³ Waiver Request at 3. Indeed, the fact that MPAA member companies have not experimented significantly with early release films in the absence of these protections demonstrates that the content owners are unwilling to release these films without adequate protections.

³⁴ See, e.g., Letter from Michael Weinberg, Law Clerk, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2 (Oct. 27, 2009); Letter from Jef Pearlman, Staff Attorney, Public Knowledge, to Austin Schlick, General Counsel, Federal Communications Commission, at 4-6 (Nov. 19, 2009).

³⁵ Public Knowledge Comments at 17.

³⁶ Compare, e.g., Public Knowledge Comments at 14 with Letter from Antoinette Cook Bush and Jared S. Sher, Counsel, Motion Picture Association of America, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 5 (Nov. 4, 2009) (indicating that as of July 2008 MPAA member companies were allowing VoD release of some films on the day they were released on DVD, and that as of November 2009 one MPAA member company had tested a VoD offering of two films the weekend before DVD release in a single test market).

³⁷ See Waiver Request at 5-6.

³⁸ See Home Recording Rights Coalition Comments at 3; Public Knowledge Comments at 6-13.

³⁹ NCTA Reply at 16.

⁴⁰ *Id.* at 14 (“[T]here 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.”).

limitations or conditions to ensure that the waiver is granted in the most consumer-friendly way possible. We believe that many of these concerns have merit, and that the limits we prescribe below are appropriate to ensure that a grant of this waiver will not violate consumer expectations or take away any programming options that are currently available to consumers. With these limits, we are convinced that any adverse effects of granting the Waiver Request will be negligible, and that the public interest benefits will be substantial.

B. Limits on the Grant

12. The comments filed in response to MPAA's Waiver Request demonstrate disagreement over whether MPAA's proposed business plan would serve the public interest.⁴¹ Most commenters agree, however, that MPAA's Waiver Request is too broad and undefined.⁴² Many commenters who support MPAA's request also recognize that the Commission would serve the interests of consumers by limiting and defining any waiver it grants.⁴³ While we are convinced that a waiver of Section 76.1903 is appropriate and necessary to foster this new service offering, we also agree with commenters who argue that certain limits should be imposed on the waiver. Consumer protection is Section 76.1903's paramount goal, and therefore we limit the waiver to ensure that consumer expectations are protected.

13. *SOC Activation Window Limitations.* MPAA requests a waiver of the SOC prohibition for films until "the date of their release on prerecorded media (e.g., DVDs) for general in-home viewing."⁴⁴ In a footnote, however, MPAA explains that this "would not include media formats comparable to the new Services, such as prerecorded media with restrictions on output to protected digital interfaces."⁴⁵ As CEA explains in its comments, MPAA's definition of "prerecorded media" could "come to embrace the entire life of a movie or program" because it is crafted in such a way that it would only include DVD release, but not Blu-Ray release.⁴⁶ As DVDs are phased out and retired as a source of prerecorded media, this could lead to the unintended consequence of allowing an SOC waiver to continue in perpetuity. MPAA's proposal to have the waiver for any given film extend until release on DVD is untenable because it could permanently prevent legacy devices from accessing movies released after the grant of this waiver if the film is never released on DVD.⁴⁷ It is not our intent to grant such an open-ended waiver, as it could mean that consumers with legacy devices would never have access to, or face extended delays in accessing, these movies on VoD. Accordingly we will terminate the waiver for a particular film 90 days after the first activation of SOC, or immediately upon the retail release of the film on any prerecorded media (including Blu-Ray), whichever is sooner.⁴⁸ We understand MPAA's position that all movies do not follow the same release pattern,⁴⁹ however, and we believe that tying the commencement of the waiver period to the first use of SOC rather than to a film's theatrical release will present MPAA member companies the flexibility they desire in setting release patterns. This 90-day

⁴¹ Compare, e.g., Public Knowledge Comments with Directors Guild of America and IATSE Comments.

⁴² See, e.g. CEA Comments at 8-9; DTLA Comments at 9-15; Home Recording Rights Coalition Comments at 2-3.

⁴³ See DTLA Comments at 9-15; TiVo Comments at 3-7; Verizon Comments at 1-2; Vudu Comments at 3-4.

⁴⁴ Waiver Request at 2.

⁴⁵ *Id.* at n.1.

⁴⁶ CEA Comments at 8.

⁴⁷ See CEA Comments at 8.

⁴⁸ TiVo proposed tying the waiver's expiration to the date the film is released in theaters. TiVo Comments at 2, citing Waiver Request at n.1, 6. MPAA responded that films follow different release patterns, and therefore a limit on the SOC activation window could limit the availability of the offerings. MPAA Reply at 10-11. See also DTLA Comments at 3, citing Waiver Request at 2 n.2 and n.5. DTLA stated that it would not object to a larger window, but MPAA rejected this invitation for compromise.

⁴⁹ MPAA Reply at 10-11.

limitation will properly balance the interests of owners of legacy devices with the interests of owners of equipment that can access the new service, while allowing content owners to protect their content when it is at its most valuable.

14. *Waiver Permanence.* TiVo and Vudu suggest that this waiver grant should be temporary so that the Commission may revisit the issue in two years, which would provide those who take advantage of the waiver time to develop a business plan and launch the service, while also providing the Commission time to assess the results of the waiver.⁵⁰ MPAA counters that such a limitation would be tantamount to a denial, as its member companies would be unwilling to invest in a business plan that is based on a waiver with an expiration date.⁵¹ We agree with commenters who suggest that the Commission should have the opportunity to revisit this issue, but we do not believe that the grant should have a specified expiration date. Rather, we reserve the right to review the impact of the waiver and modify or terminate it if we find that it no longer serves the public interest. To facilitate our review, we require companies that take advantage of the waiver to file a report 2 years from the first use of SOC pursuant to this waiver. This report shall include: (1) a summary of any and all consumer complaints received by producers and their MVPD partners who take advantage of the waiver granted in this order regarding the early release service; (2) the average price charged for a video-on-demand movie with SOC activated; (3) the average price charged for a video-on-demand movie without SOC activated; (4) detailed theatrical box office results that indicate each film's box office results for the period before the film was offered on-demand with SOC activated and after such time; and (5) whether SOC has been an effective tool in combating illegal copying of these films during the early release window. This will enable the Commission to review whether the waiver has had any unanticipated adverse consequences, and if so, or if for any other reason the Commission finds the waiver no longer serves the public interest, the Commission may modify or terminate the waiver.

15. *Output Approvals.* Commenters who oppose MPAA's request assert that MPAA's request fails for its lack of specificity regarding approved set-top box outputs.⁵² They argue that granting the Waiver Request would give MPAA *carte blanche* to activate SOC on any and all outputs, possibly forcing the consumer electronics industry to adopt an expensive output that will limit the ability to network devices throughout the house, preventing consumer flexibility and innovation.⁵³ Even commenters that support the grant, like DTLA, Sony, TiVo and Vudu, suggest that we require MPAA and its partner MVPDs to implement SOC using a single, open, nationally available output technology.⁵⁴ These commenters argue that such a requirement would help to ensure that MPAA and its partner MVPDs do not develop a preference for an output that would discriminate against retail devices in favor of proprietary devices. MPAA counters that technology evolves so rapidly that the decisions regarding which outputs will be deactivated "are appropriately left to the marketplace and private sector solutions."⁵⁵ We disagree. We must ensure that MVPDs do not develop a preference for an output that would discriminate against retail devices in favor of proprietary devices. No commenter has suggested that protected outputs like HDMI provide inadequate protection for high-value content. Accordingly, we will condition the waiver on companies taking advantage of the waiver making the service available via all protected digital outputs that CableLabs has approved for unidirectional digital cable products or via any MVPD-approved protected output when delivered via Internet Protocol television or direct broadcast

⁵⁰ TiVo Comments at 3-4; Vudu Comments at 3.

⁵¹ MPAA Reply at 10.

⁵² CEA Comments at 3; Home Recording Rights Coalition Comments at 1; Independent Film and Television Alliance Comments at 3; National Association of Theatre Owners Comments at 2, 10-12; Public Knowledge Reply at 2-3.

⁵³ See, e.g., CEA Comments at 3-5, 8-9; Public Knowledge Comments at 17-19.

⁵⁴ DTLA Comments at 13-15; Sony Comments at 3; TiVo Comments at 5-7; Vudu Comments at 3.

⁵⁵ MPAA Reply at 8.

satellite. This output certification process must be based on objective criteria that the Commission can consider on appeal, if necessary.⁵⁶ Parties seeking Commission review of an output certification decision may file a petition for special relief pursuant to our normal procedures under Section 76.7 of the Commission's rules.⁵⁷

16. *Closed Captioning and Video Description.* The American Association of People with Disabilities favors MPAA's plan to offer high-definition films before the general in-home viewing release date and asserts it will serve our nation's disabled citizens by increasing the entertainment options available in the home.⁵⁸ The National Association of the Deaf argues that granting the requested Waiver can serve a vital role to our nation's deaf and blind citizens if the new product offerings include closed captioning and video description, as less than 1 percent of films shown in movie theaters are shown with captions.⁵⁹ We agree that MPAA's proposed service may provide a benefit to viewers with disabilities, particularly given that video-on-demand services must be offered with closed captions.⁶⁰ We condition grant of this waiver on the waiver holder's providing consumer education about how individuals with hearing disabilities can access closed captioning when using the proposed service. We further encourage MVPDs that take advantage of the waiver to ensure that the set-top devices used to access this new service are able to pass through video description when provided as part of the programming stream. We will monitor the developments in this area, and we encourage the public to aid us in this effort.

17. *Consumer Protection.* CEA, the Home Recording Rights Coalition, and PK express concern that a subscriber could purchase a video-on-demand movie with SOC activated before she realized that she would not be able to view it.⁶¹ Sony suggests that we allow consumers to lodge complaints, and act on those complaints in a timely manner, if a service provider uses SOC in a way that violates Section 76.1903 of our rules, for example, by continuing to use SOC for a film after the passing of the 90-day period described in paragraph [14] of this order.⁶² Sony also suggests that we require MPAA member companies and their MVPD partners to activate "SOC in a manner that creates a 'consistent and predictable experience' for consumers."⁶³ MPAA asserts that "this is a subjective metric that is difficult, if not impossible, to achieve through any specific requirement," but promises to work with its MVPD partners to provide such an experience.⁶⁴ We believe producers and their MVPD partners

⁵⁶ If an output certification decision is appealed to the Commission, we will review that decision as set forth in the *Plug and Play Order*:

CableLabs will specify each of the objective criteria used to evaluate the proposed output and copy protection technology and articulate in detail how such proposed output and copy protection technology met or failed to meet each of the criteria. Should CableLabs disapprove a particular output or content protection technology, we expect that CableLabs will articulate in detail the reasons for its disapproval. The Commission will review de novo both the reasonableness and necessity of the objective criteria, as well as CableLab's application thereof to the proposal under consideration.

Plug and Play Order, 18 FCC Rcd at 20919-20, ¶ 79.

⁵⁷ *See Id.* at 20919-20, ¶¶ 77-79.

⁵⁸ *See* American Association of People with Disabilities Comments at 2.

⁵⁹ American Association of People with Disabilities Comments at 2-3; National Association of the Deaf *et al.* Reply at 5-7.

⁶⁰ 47 C.F.R. §§ 15.122, 79.1.

⁶¹ CEA Comments at 9; Home Recording Rights Coalition Comments at 2-3; Public Knowledge Comments at 7-9.

⁶² Sony Comments at 3.

⁶³ *Id.* *See also* TiVo Comments at 7; Verizon Comments at 2; Vudu Comments at 4.

⁶⁴ MPAA Reply at 9.

have strong business incentives to implement this service in a clear manner that does not disappoint consumer expectations. Should the companies taking advantage of this waiver market their offering in a deceptive or unpredictable manner that does not allow consumers to “truly understand when, how, and why SOC is employed in a particular case,” however, the Commission will not hesitate to revoke this waiver.⁶⁵ The Commission will also investigate any alleged violations of Section 76.1903 of our rules and take swift enforcement action against any covered entity⁶⁶ that violates that rule. Selectable output control may be used only in the limited manner allowed by this waiver.

18. *Availability of the Waiver.* MPAA sought the instant waiver on behalf of its member companies and their MVPD partners. However, we see no public interest justification for limiting the waiver to MPAA member companies and their MVPD partners. Any similarly situated provider of first-run theatrical content (“similarly situated provider”) and its MVPD partners may take advantage of the instant waiver by filing an Election to Participate (“Election”) in this proceeding. Such Election shall contain the caption of this proceeding (including MB Docket No. 08-82 and CSR-7947-Z), a statement as to the identity of the similarly situated provider (*e.g.*, the film studio responsible for production of the film), and a statement supported by affidavit that the similarly situated provider and its MVPD partners will agree to abide by all of the conditions and limitations of the instant waiver. Any election must be filed with the Commission Secretary and with the Chief, Media Bureau. The Election will be effective upon filing.⁶⁷

IV. CONCLUSION

19. When the Commission adopted the prohibition on SOC, it specifically contemplated waivers for high value content to facilitate new business models. MPAA member companies have proposed a new business model – films available to consumers for in-home viewing earlier in the release process – and have made a compelling argument that they will not introduce that new business model in the absence of the content protection that SOC affords. Our SOC prohibition serves an important purpose in ensuring that owners of legacy television sets continue to receive the programming that they are accustomed to receiving. Given that the service that MPAA member companies propose will not affect any currently existing programming services, we conclude that the benefits of the new service outweigh any potential harms that could result from waiver as limited above. Therefore, we grant MPAA’s waiver request in part and deny it in part, as set forth in this order.

⁶⁵ Sony Comments at 3.

⁶⁶ *See supra* n.6.

⁶⁷ In the event that the Commission identifies a concern with a similarly situated provider’s filing, we will consider that issue in an expedited manner and deal with it accordingly.

V. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED** that, pursuant to Sections 0.61(h), 0.283, 1.3, and 76.7 of the Commission's rules, 47 C.F.R. §§ 0.61(h), 0.283, 1.3, and 76.7, the request for waiver of Section 76.1903 of the Commission's rules, 47 C.F.R. § 76.1903, filed by the Motion Picture Association of America **IS GRANTED IN PART AND DENIED IN PART**, subject to the terms and conditions set forth in this order.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau