

**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

**COMMENTS OF THE NATIONAL ASSOCIATION OF THEATRE OWNERS IN
RESPONSE TO THE MPAA'S PETITION FOR EXPEDITED SPECIAL RELIEF**

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SUMMARY

NATO and its members share the concerns of Petitioner MPAA with theft of movies and agree with the Petitioner that movie content during the window of initial release to movie theatres is extremely valuable—indeed, valuable precisely because it is exclusively in theatres for a period sufficient to drive a national conversation about the movie and stimulate demand, after a suitable period, in ancillary markets. For that reason, a business model that threatens to collapse the theatrical window—whether by selling DVDs, or streaming movies into the home, too near theatrical release—imperils a sequenced distribution system that has well served consumers of movies and the movie industry.

The cinema industry still provides the least expensive, best-value out-of-home entertainment available to Americans. For our millions of patrons who love the unique and compelling experience of seeing movies on the big screen with quality sound, consumer choice is disserved by business models that threaten the viability of cinemas. If, 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.

The Commission's basis for its SOC prohibition—the reason Petitioner bears such a heavy burden in overcoming the presumption against SOC—perfectly harmonizes with the basis for discrete release windows imperiled by the Petition. It is precisely because content is less valuable by the time it reaches television that consumers enjoy the trade-off of exercising more control over and manipulability of that content. The business model driving the Petition stands that trade-off on its head and inappropriately imports the rigors and restrictions of SOC into the home—just so Petitioner's members can charge more money for content, at cinemas' and

consumers' expense. It is a flawed and dangerous model and we respectfully request that the Commission deny the waiver request.

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INTRODUCTION

The Motion Picture Association of America (“MPAA” or “Petitioner”), on behalf of its member companies, filed a petition pursuant to Sections 1.3 and 76.7 of the Commission’s rules seeking an expedited permanent waiver of Section 76.1903 of the Commission’s rules (“the Petition”). The MPAA’s petition seeks a waiver of the Commission’s prohibition on the use of selectable output control (“SOC”) to facilitate a “new business model” where MPAA members would distribute recently released movies to the home in an early window.

The National Association of Theatre Owners (“NATO”) respectfully submits these comments concerning, primarily, the “new business model” advanced by the Petitioner as a justification for the proposed waiver. NATO is the trade association of the motion picture theatre industry. NATO members own and operate over 30,000 of the 39,000 motion picture

screens in the United States. NATO's members include all of the largest circuits as well as hundreds of smaller motion picture theatre operators.

On its face, the question of SOC would appear irrelevant to NATO and its members, and the Commission would have no reason to examine the business models of an industry beyond its jurisdiction, but for the procedural context and burden of persuasion in this proceeding, which may be summarized as follows:

- The Commission has by rule adopted a presumption against the use of SOC, and a petitioner for a waiver of the prohibition on SOC bears the burden of demonstrating that the waiver is in the public interest.
- In meeting that substantial burden, a petitioner must establish that the specific manner in which it intends to use SOC is in the public interest. That is, a petitioner cannot merely rest upon a naked request, or a vague insistence that its use of SOC will operate in the public interest. A petitioner must persuade as to its specific intended use.
- In seeking to persuade the Commission that its specific intended use of SOC is in the public interest, Petitioner here must necessarily describe the "new business model" that purportedly justifies a waiver. Without the justification of a "new business model" in the public interest, Petitioner cannot meet its burden of persuasion.
- It is that "new business model"—that necessary justification for a waiver—that draws NATO and its members into this proceeding. That "new business model" raises many unanswered questions, but it is clear that at least some manifestations of this "new business model" could have a devastating impact on movie theatres and their patrons and operate manifestly against the public interest.

We cannot say that we would oppose every possible use of SOC by Petitioner's member companies or that every possible use would disserve the public interest—but that does not appear to be our burden in this proceeding. We do say that certain uses of SOC facilitating collapsed release windows would operate manifestly against the public interest.

We accordingly request that the Commission decline to grant a blanket waiver, and that the Commission instead, at a minimum, request a fuller development of the record and a more thorough delineation of exactly how Petitioner's member companies desire to use SOC.

Whatever else may be said of SOC or of Petitioner's desire, Petitioner's "request for expedited special relief" simply has not satisfied its burden to show that its specific intended use of SOC is in the public interest. If the intended use is to facilitate collapsing the theatrical window, then we respectfully submit that no showing of public interest is possible.

1. Preservation of a Competitive Cinema Industry, Anchored by Healthy Release Windows, Is a Public Interest Imperative.

NATO member companies occupy the first release window for filmed entertainment. As described in the Petition, movies with commercial potential are typically released first to movie theatres, thereafter to airlines and hotels, thereafter to DVD, and thereafter to various television platforms. A movie's run in the theatrical window typically drives success in subsequent markets.¹ As will be evident from the number of times we quote Petitioner's member executives and other leading industry participants, there is a very broad consensus that the theatrical release window should be preserved in the public interest.

Because movies released to theatres are at their peak aesthetic, cultural and commercial value, as repeatedly emphasized by Petitioner, one might expect a premium pricing model in movie theatres. Yet the opposite pertains: movie theatres still constitute the least expensive, best-value, out-of-home entertainment experience available to Americans—with prices that compare very favorably to sports events, arcades, concerts, bowling, and a myriad of other entertainments. That is why, for example, the exhibition industry tends to fare relatively well during recessions. And that pricing value is a consequence of a robustly competitive exhibition

¹ Harry Sloan, CEO of MGM, observed in a March 16, 2006 speech at ShoWest, the annual convention for the exhibition industry, that his "diverse media career spans all the various distribution platforms. And what I have learned through my experience is that the North American theatrical exhibition and marketing drives the success of all other ancillary revenue streams throughout the world."

industry—notwithstanding the substantial cut of cinema grosses that studios take back in license fees.

Preservation of a healthy cinema industry is therefore a public interest imperative. It is America’s best-of-both-worlds: the movie in its first magnificence as it was intended to be seen on the big screen,² coupled with competitively-driven affordable prices.

The Petition seeks to shift pricing power away from the highly competitive exhibition industry and into a manifestly uncompetitive premium pricing context, thereby extracting additional revenue at the expense of the exhibition industry and consumers—who will suffer in proportion to the extent that the exhibition industry suffers, because fewer and fewer venues of competitively priced, high-value, out-of-home entertainment will be available.

We hear the mantra of “choice” frequently in the on-going dialogue about windows—typically in tandem with a cliché about giving consumers what they want—and “choice” makes

² Numerous leading motion picture directors have gone on record supporting the theatrical release window and opposing quick home release, including **James Cameron** (“I don’t want to see day-and-date because of the sacred experience of the cinema. I don’t want that grand, visionary, transporting movie experience made for the big screen to become a thing of the past”), National Association of Broadcasters Conference, Las Vegas, Nevada, April 23, 2006; **Jonathan Demme** (“Doesn’t it seem like the movie business is devouring itself because it can’t wait to get to home video?”), *Los Angeles Times*, January 22, 2006; **M. Night Shyamalan** (“If I can’t make movies for theaters, I don’t want to make movies. I hope [collapsed windows] is a very bad idea that goes away.”), *Los Angeles Times*, October 28, 2005; **Steven Spielberg** (“I have to go on record saying that I am not in favor of a DVD coming out the same day at the film opens, because I really believe that the average home system is far inferior to a movie house”), *Time Magazine*, March 27, 2006; **Tim Burton** (“Tim Burton . . . called the notion of simultaneous release absurd. Obviously, he said, cinema is a business, ‘but everything should be done to treat it as an art form – it’s a visceral medium.’”), *Los Angeles Times*, January 22, 2006; **Barry Sonnenfeld** (“I think the window should actually get longer, and I don’t understand that business model of releasing everything on the same day.”), *Wall Street Journal*, June 19, 2006; and **John Hamburg** (“I just don’t love (collapsing windows), because it’s indicative of our instant-gratification way of living today. Movies have a certain mystique and this comes from their need to be discovered and have that build-up that makes them more appreciated.”), *Film Journal*, April 2006.

its predictable appearance, frequently, in the Petition as well. This familiar invocation of choice assumes the question is framed this way for consumers: would you like all movies to be available instantly everywhere, or not?

In fact, of course, no such “choice” is possible. “Instant” availability everywhere means fewer cinemas, fewer showings at cinemas,³ less cinema experience word-of-mouth, a diminution of movie culture, a less and less cohesive national cultural conversation about shared stories through movies, no opportunity through successive windows to build support for sleeper hits, and less differentiation of movie content.⁴ Yes, “choice” is relevant—and instant availability reduces it.

Windows have well-served the movie industry and movie consumers for a quarter century, since the advent of home video. Indeed, tiered release is a primary driver in the American movie industry’s extraordinary success as an exporter of American products abroad. It is not a system with which the Commission, heretofore having little reason to seek mastery of movie industry microeconomics, should wish to trifle lightly. As James Gianopoulos, Co-Chairman of Twentieth Century Fox Filmed Entertainment, told the *Los Angeles Times* on

³ See Tom Sherak, Partner, Revolution Studios, *Kansas City Star*, November 27, 2005 (“There’s a reason for windows—it’s good for the art, and it’s good for the overall business. I think the idea of movies being made for and seen on the big screen is an important part of the experience. ... I don’t think movie theaters can exist if everything goes day-and-date (to all platforms). The idea of trying to rush everything at the same time is leading to the ruination of the theater as we know it.”).

⁴ Tom Bernard, President of Sony Pictures Classics told *Multichannel News* on November 7, 2005 that “collapsed windows are the worst thing that ever happened to specialized films.” In the April 2006 issue of *Film Journal*, Bernard explained further that “polluting the theatrical window is doom and hits like *Crouching Tiger Hidden Dragon*, *My Big Fat Greek Wedding* or *March of the Penguins* that need time to build would be all over in two weeks.” That is the world of instant access, and “consumer choice” is a highly misleading way to describe it.

January 22, 2006, tiered release “is not random. It’s not accidental. There’s logic to it. What advocates of simultaneous release are proposing makes no sense.”⁵

NATO participates in this proceeding precisely because Petitioner appears to propose, on the face of its vaguely described “new business model,” a form of simultaneous release, or at the least, what Tom Bernard called “polluting the theatrical window.”

2. Petitioner Bears a Heavy Burden to Establish that Importation of SOC Into the Home Viewing Environment, Coupled with Corruption of the Theatrical Release Window, Is in the Public Interest.

Section 76.7 (a)(4), 47 C.F.R. § 76.7(a)(4), requires a petitioner for waiver “to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest.”

Of the various encoding rules adopted by the Commission in 2003,⁶ the prohibition on SOC imposes a particularly high burden. As Commissioner Kathleen Abernathy explained in her statement, the “flat ban on selectable output control is necessary in light of the extreme consequences of an MVPS’s use of that tool.”⁷ Commissioner Abernathy contrasted the flat ban on SOC with the other “partial bans” within the encoding rules of the order.

⁵ See also Bill Mechanic, Pandemonium Films, former chairman and CEO of Fox Filmed Entertainment, *Movie City News*, August 19, 2005 (“When you read industry discussions about collapsing the theatrical and home entertainment windows, there is a fundamental lack of understanding about how the movie business works as a business. For the past 25 years, it has become a better and better business in terms of income only because of sequential distribution. Take it down to a single market and the economics collapse. ... Eliminate the theatrical window and the same pictures that don’t create a head of steam theatrically now will most likely fail to create a head of steam in video. And there will be no subsequent market to pick up the losses.”).

⁶ Second Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67 (Oct. 9, 2003).

⁷ Id. at 81.

Commissioner Jonathan Adelstein confirmed the burden on petitioners for a waiver with language that appropriately guides this proceeding: “We preserve the flexibility for the later use of certain methods of protecting premium content if it is shown that such uses are necessary and consumer-friendly.”⁸

We note this burden precisely because of the “extreme consequences” posed by Petitioner’s proposed “new business model,” and because we do not see in Petitioner’s argument any showing of necessity, nor any showing—save conclusory—of “consumer-friendly.”⁹

NATO need not devote space to belaboring the many justifications for the Commission’s SOC prohibition—and thus the full extent of the burden any waiver petition must meet. What the Commission may find interesting, however, is the logical relationship between its SOC prohibition and the system of tiered release that the Petition imperils.

In the language of consumer control at issue in this proceeding, windows operate in roughly ascending order of consumer manipulability. In the first window, during which the movie has, in Petitioner’s repeated description, maximum value, the consumer has least direct control. Patrons go to movies and view it on the big screen in an environment designed to optimize the full aesthetic value of the movie. They cannot pause or replay, much less copy, but they are experiencing the movie at its maximum aesthetic value and at its freshest as a cultural phenomenon. In successive windows, consumers acquire more control, but the product is, quite literally, a lesser thing. Viewing a movie on a television screen at home is not and cannot be the same aesthetic or cultural experience as viewing it on the big screen upon its release.

⁸ Id. at 86.

⁹ “Petitioners fully anticipate that any such Service will be implemented in a consumer friendly manner.” Petition at 5.

The logic of the Commission’s presumption against SOC is fully consistent with the logic of tiered release in the movie industry. By the time content reaches televisions, consumers expect to exercise their panoply of convenience and control manipulations on that content. The value of the content, by then, has diminished sufficiently to extend these convenience and control manipulations to consumers as part of the content bargain. These progressive trade-offs through the windows preserve an equilibrium that well serves the public interest. While the Commission may not have contemplated the windows equilibrium in crafting its prohibition against SOC, its conception of certain rights and powers in the home viewing environment harmonizes perfectly with the logic of windows.

The question is not, of course, whether the Commission should allow early release of movies into the home. Petitioner’s members may choose to attempt early release of any movie into the home at any time.¹⁰ The Commission’s imprimatur is irrelevant to that basic business power. The question is whether the Commission should disregard the logic of its own presumption against SOC in the home viewing environment so that Petitioner’s members can:

- Charge *more* money
- Invade and undermine the first window occupied by the more competitively priced cinemas; **and**

¹⁰ Indeed, undeterred by the commercial failure of his simultaneous release experiments, Mark Cuban recently announced that he intended not only to disregard the theatrical release window—but to create the first **negative window**—by sending movies to television *before* theatrical release. As reported by Wired.com on July 9, 2008, “contrarian media mogul Mark Cuban plans to air new movies produced by his company Magnolia Pictures on TV in advance of their theatrical release,” ... hoping to “build buzz for Magnolia’s art-house movies that will boost, rather than cannibalize, box office receipts.” Asked about the instant Petition by the MPAA, Cuban said, “we would never add the copy protection to our movies. I don’t care what the MPAA does.” However his newest negative window experiment plays out, it is worth noting that (1) Mr. Cuban is sending movies that he owns to a television outlet, HDNet, that he owns, hoping theatres, that he owns, won’t suffer; and (2) art-house movies do not typically fall within the domain of movies with significant commercial potential.

- Empower Petitioner’s members to deny consumers their panoply of convenience and control manipulations to which they are rightly accustomed in their homes.

Petitioner’s request is unsurprising: who wouldn’t want to have their cake, eat it, and charge you a premium for the privilege of briefly glimpsing (but not touching) it? We simply do not see the foregoing scenario serving the public interest.

3. NATO Shares Petitioner’s Concern with Piracy, But Sees No Public Interest Solution in Sending Movies Prematurely to Home Viewing.

According to a 2006 study commissioned by Petitioner, the cinema industry in North America loses approximately \$700 million each year in ticket sales to movie theft. NATO and its member companies generally support Petitioner and its members on measures designed to protect intellectual property. NATO and its members have: (1) partnered with Petitioner in lobbying for federal legislation to criminalize movie theft in cinemas; (2) partnered with Petitioner in lobbying for state legislation to criminalize movie theft in cinemas (now successful in over 40 states); (3) trained our 160,000 domestic employees to combat movie theft; (4) partnered daily with Petitioner to track movie theft location data and design prioritized enforcement efforts; (5) created educational materials on the internet, on movie theater posters, on movie screens and elsewhere; (6) redirected substantial NATO staff and resources to promotion of movie theft education and enforcement activities and a movie theft task force comprised of exhibitors and distributors; and (7) administered with Petitioner an awards program for our employees who successfully thwart acts of movie theft.

For NATO member companies, the worst-case scenario would be early-release to the home without any copyright protection controls, as that would stand the windows logic on its head and give consumers maximum manipulability, including copying and repeated play to multiple viewers, at precisely the moment of the movie’s maximum aesthetic, cultural and

commercial value, thereby enormously diminishing that value, eroding the value of the experience at the movie theatre, reducing the numbers of consumers who view the movie in its most aesthetically compelling form, reducing the incentive to produce aesthetically compelling movies in the first place, acculturating consumers to assuming movies are available everywhere instantly, reducing the revenues of the entire movie industry, and ultimately reducing the quality and quantity of motion pictures in America.

Such a world is television movie-of-the-week, and studios will have squandered the Hollywood panache that produces a national conversation about movies with each opening weekend.¹¹

We therefore agree with Petitioner that “theatrical movies are simply too valuable in this early distribution window to expose them to uninhibited copying or redistribution.” We simply take the next obvious step and assert that “theatrical movies” *do not belong in the home* during this early window, and that their value derives precisely from the fact that they are *not* in the home.

4. Petitioner Fails to Describe Its Intended Use of SOC with Sufficient Specificity to Meet Its Public Interest Burden.

A blanket waiver in this proceeding invites the bland television movie-of-the-week world because the Petition fails to answer basic questions about how its “new business model” would operate to preserve the cultural, aesthetic and financial value of movies. The Petition describes its “new business model” as “movies in high definition digital format provided to consumers for enjoyment in their homes prior to the date of their release on prerecorded media (e.g., DVDs) for

¹¹ See Howard Stringer, Chairman, Sony Corp., News Conference at the Michelangelo Hotel, New York City, September 29, 2005, as reported in *Variety*, Sunday, October 2, 2005 (“If you collapse a window or go day and date ... if you eliminate the movie theater, you’re doing movie of the week. And the sizzle ... of the movie industry will be gone. You have to guard the value of the content.”).

general in-home viewing.” Beyond that general description, the Petition offers no details or definition of the model, despite the Petition’s description of the model as “a discrete and well-defined new distribution window.”

“Discrete” suggests some limitations; the Petition describes none. “Well defined” suggests specific details of timing and scope; the Petition provides none. The record before the Commission therefore invites a leap of faith, a belief in the public interest because Petitioner says so. The incantation “new business model” is no substitute for persuasive public interest analysis.

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. Thus, for example, content that Petitioner’s members send straight to the home market, bypassing cinemas, because it lacks big screen appeal, would raise no red flags in this proceeding. Petitioner’s members could stream this content into the home at any time, with or without SOC, and raise no particular objection or question from NATO and its members.

The straight-to-DVD-style movies, however, do not appear to be Petitioner’s object in seeking the power of SOC.

Preservation of a theatrical-VOD window, commensurate with the current theatrical-DVD window, would likewise raise few alarms in the exhibition industry. Our concern is with sending movies with commercial potential prematurely into the home, regardless of the medium for home viewing.

Petitioner appears uninterested, however, in preserving a theatrical-VOD window commensurate with the theatrical-DVD window. Quite the contrary, in one of the few instances of specificity, Petitioner assures the Commission that it would no longer need or seek the SOC

power as of the time a movie is or would be released on DVD. Petitioner seeks the SOC power only before the DVD window—though exactly how much before is never detailed.

Simultaneously with theatrical release? Within a few days? Weeks? Concurrently with hotels and airlines? Somewhere between hotels/airlines and DVDs?

The timing of the releases would dramatically affect the negative impact on cinema patrons and the ability of the industry to maintain differentiated product offerings to consumers.

The vagueness of Petitioner's description masks another public interest conundrum. Either Petitioner's members wish to make wide use of early release to the home, that is, ostensibly serve the public, or Petitioner's members wish only a limited use to affluent consumers with certain kinds of high-end equipment. If the latter, any public interest argument is correspondingly diminished. As with the timing, the scope of the early releases would dramatically affect the negative impact on cinema patrons and the ability of the industry to maintain differentiated product offerings to consumers. The Petition fails to clarify.

CONCLUSION

For the foregoing reasons, NATO respectfully requests that the Commission decline to issue a blanket waiver that would imperil the theatrical release window and would therefore operate contrary to the public interest.

Respectfully submitted,

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