

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Expanding Customers' Video Navigation Choices)	MB Docket No. 16-42
)	
Commercial Availability of Navigation Devices)	CS Docket No. 97-80

**Reply Comments of Copyright Law Scholars
and the Electronic Frontier Foundation**

May 23, 2016

We are professors of copyright law and a member-supported nonprofit organization dedicated to promoting sound copyright and technology policy. We write to address statements made by multichannel video programming distributors (MVPDs) and major media companies regarding copyright law, the national policies it embodies, and its effect on this rulemaking.

We offer the following observations: First, copyright is a legal doctrine whose ultimate goal is public enrichment and promoting the progress of knowledge. In light of this goal, copyright creates a limited set of exclusive rights, defined in statute, to use copyrighted works, while leaving all other uses available to the public without the need for permission or payment. Second, when one uses copyrighted works in ways that fall outside the exclusive rights of the rightsholder, nothing in the law compels the user to comply with additional terms or restrictions that the rightsholder may seek to impose. Indeed, copyright law disfavors the use of market power to expand the scope of the exclusive rights into areas reserved to the public. Third, we believe that the proposed rules are consistent with copyright and with the policies it embodies. The Commission is under no obligation to protect copyright holders' ability to leverage their exclusive rights to control uses that copyright does not regulate, including the presentation, search, navigation, recommendation, and time-shifting of lawfully acquired programming.

1. Copyright Confers a Limited Bundle of Rights; Other Uses Remain Free to the Public.

The Copyright Act gives effect to Congress's power "[t]o Promote the Progress of Science and useful Arts." U.S. Const. art. i, § 8, cl. 8.¹ While the Constitution specifies a means for Congress to achieve this goal—"by securing for limited Times to Authors and

¹ "Science," in eighteenth-century usage, meant "learning or knowledge of any sort." Jack Lynch, "A Guide to Eighteenth-Century English Vocabulary," <http://andromeda.rutgers.edu/~jlynch/C18Guide.pdf> (accessed May 17, 2016).

Inventors the exclusive Right to their respective Writings and Discoveries”—the exclusive rights are interpreted in light of the law’s ultimate objective:

The immediate effect of our copyright law is to secure a fair return for an “author’s” creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. “The sole interest of the United States and the primary object in conferring the monopoly,” this Court has said, “lie in the general benefits derived by the public from the labors of authors.”²

For most creative works in the U.S., the scope of copyright is defined entirely by federal statute.³ The only exclusive rights that a copyright holder has with respect to these works are the rights enumerated in the Copyright Act: to reproduce the work, to distribute copies, to prepare derivative works, and for some types of works, to perform the work publicly or to display it publicly.⁴ These rights are narrowed further by various exceptions and limitations, including the fair use doctrine.⁵

Copyright does not confer a general right of commercial exploitation or “use” of a work. Thus, products and services that touch copyrighted works do not infringe copyright, and do not require a license, except to the extent that they implicate one or more of the exclusive rights. A television set is worthless without video programming to view, and a home audio system has little purpose without music. One could argue that the commercial value of these devices derives from the copyrighted works they touch. Following that reasoning, the sale of TVs and home audio equipment could be deemed a commercial exploitation of copyrighted works. But because these devices don’t ordinarily reproduce, distribute, or publicly perform works (let alone meet the rigorous standards for establishing secondary liability under copyright law), the law does not give copyright holders any right to prohibit their use and sale, dictate their design, or demand royalties.

This is no mere oversight on the part of Congress, because “the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement.”⁶ The structure of copyright law as a limited

² *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)); see also *Universal City Studios v. Sony Corp.*, 464 U.S. 417, 431 (1984); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994); *Quality King Distribs., Inc. v. L’anza Research Int’l, Inc.*, 523 U.S. 135, 151 (1998).

³ Copyright in the United States is a “creature of statute.” *Stewart v. Abend*, 495 U.S. 207, 251 (1990). The exception is sound recordings made before February 15, 1972 in some states. 17 U.S.C. § 301(c).

⁴ 17 U.S.C. § 106.

⁵ 17 U.S.C. § 107.

⁶ *Fogerty*, 510 U.S. at 526.

set of exclusive rights defined in statute allows for innovation and competition, and provides a check against the vertical integration of content producers and technology vendors to the exclusion of competitors.

Commenters in this rulemaking have characterized the proposed use of third-party devices or services to access pay-TV programming with terms such as “exploit[ing],”⁷ “repackag[ing],”⁸ “convey[ing]”⁹ copyrighted works to a third party, and creating “new uses on new platforms.”¹⁰ They imply that these activities constitute copyright infringement, or that the Commission should prevent these things *regardless* of whether they constitute infringement. These terms confuse rather than clarify the issue, because most of the activities they describe are not copyright infringement.

For example, a set-top box or other consumer device that receives TV programming in the home and displays it to the user does not inherently perform or display that programming publicly, nor does it distribute copies of the programming. While such a device is likely to make transitory, internal reproductions of programming in the process of displaying it to the user, such reproductions are not copies for purposes of the Copyright Act.¹¹

A set-top box or service might also make long-term personal copies of programming for the customer to watch later, much as a videocassette recorder does. This is firmly established as a fair use, including in systems where the recording is stored at a central facility.¹²

A box or service might also allow the user to search for and navigate to TV programming using a variety of different user interfaces, perhaps integrating reviews or recommendations from multiple sources. None of these activities alters the programming itself and thus doesn’t create a derivative work. Further, factual information about or contained within a work is explicitly non-copyrightable and free for public use.

It is, of course, possible to imagine potential features of a competitive set-top box or service that could infringe copyright. Using a feature in an infringing way would require a license from rightsholders, while doctrines of secondary liability would determine whether device manufacturers have the same obligation. For example, a device capable of substantial noninfringing uses may be sold without liability for the vendor, even if

⁷ MPAA and SAG-AFTRA comments at 4; Comcast-NBCUniversal comments at 48.

⁸ NCTA comments at 37; 21st Century Fox et al. comments at 37.

⁹ MPAA and SAG-AFTRA comments at 5.

¹⁰ NCTA comments at 36.

¹¹ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129-30 (2d Cir. 2008).

¹² *Sony*, 464 U.S. at 447-55; *Cartoon Network*, 536 F.3d at 134-40.

infringing uses do exist and users of the device would need a license to engage in those uses.

For example, a service that transmitted a cable signal received by one MVPD subscriber to multiple other customers may be making a public performance of that signal, and if so, would infringe.¹³ Other features that make permanent copies of programming might present novel questions of fair use and could ultimately be found to infringe. Such devices and service arise with some regularity, and their status is resolved either through litigation or licensing. For example, several programming providers sued Dish Networks, accusing its Hopper DVR and PrimeTime Anytime service, which skipped commercials upon playback, of causing infringement.¹⁴ After a court ruling that the core features of the device and service did not infringe,¹⁵ Dish reached settlements with most of the rightsholders in which the company agreed to limit the functionality of the service.¹⁶

Companies offering video navigation devices and services under the proposed rules will be no different from existing devices and services in this regard. A device that does not infringe is beyond rightsholders' power to ban or control. As discussed above, such a device "need merely be capable of substantial noninfringing uses."¹⁷ Nothing in the proposed rules suggests that competitive navigation devices are more likely than a TV set, home stereo, or an existing Internet video playback device to cause infringement. A device or service that does not have substantial noninfringing uses will have to obtain a license from rightsholders, or face liability. The Commission need not police this boundary in its regulations, because copyright law and its significant penalties remain in place. And the proposed rules do not, as some have claimed, create a "compulsory license."¹⁸ They simply allow new competitors to sell technology that copyright law already permits.

2. Non-Exclusive Uses Of Copyrighted Works Do Not Require a License.

In their comments, MVPDs and major content producing companies seek to preserve their ability to impose license terms to control the design and functionality of technologies that receive MVPD programming, including the user interface. A copyright holder is, of course, free to license their exclusive rights with restrictions on where and how licensees can exercise those rights. But the maker of a device or service that "uses" TV programming without reproducing, distributing, or publicly performing it is not

¹³ *American Broad. Cos. v. Aereo*, 134 S.Ct. 2498, 2513 (2014).

¹⁴ *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1066 (9th Cir. 2014)

¹⁵ *Id.* at 1066-70.

¹⁶ Eriq Gardner, "In Deal With Fox, Dish Agrees to Disable Ad-Skipping for 7 Days After Shows First Air," *The Hollywood Reporter* (Feb. 11, 2016), <http://www.hollywoodreporter.com/thr-esq/deal-fox-dish-agrees-disable-864208>.

¹⁷ *Sony*, 464 U.S. at 442.

¹⁸ *See, e.g.*, MPAA comments at 8-9; NCTA comments at 38.

subject to any license restrictions because it requires no license. Again, one can draw an analogy to TV sets. A rightsholder might prefer that its programs be viewed on a 42-inch TV or larger, but neither TV manufacturers nor customers can be held to such a condition through copyright law. A “license to watch” a TV program is never required.¹⁹

Copyright law disfavors the expansion of the enumerated exclusive rights by rightsholder fiat. For example, a publisher may license to retailers the exclusive right of distribution, but cannot condition that license on the setting of a minimum retail price.²⁰ The license restrictions on the functionality of set-top boxes that MVPDs and rightsholders seek to preserve can only be imposed on vendors of non-infringing technology through mutual agreement or through an exercise of the very monopoly power that Section 629 of the Telecommunications Act was intended to counter.²¹ Dressing these restrictions in the rhetoric of copyright law does not change the economic reality that they are harmful and anti-competitive.

Of course, a technology vendor whose products or services do not infringe copyright is free to make voluntary contractual commitments with MVPDs and rightsholders to their mutual benefit, including commitments concerning user interface design, advertising within the user interface, channel placement, and limitations on recording. It’s likely that many competitive navigation device vendors will do this in return for other consideration. But enabling technology vendors to sell navigation devices and services that work with a subscriber’s existing MVPD subscription, *without* being compelled to agree to licensing terms at the MVPD’s absolute discretion, is vital to achieving the goals of this rulemaking.

3. The Proposed Rules Are Consistent with Copyright in Both Letter and Spirit.

As described above, both existing video navigation devices and those that will be made possible by the proposed rules are subject to the same copyright law. MVPDs’ current control over the functionality of those devices is an artifact of their monopoly, not guaranteed by copyright law. The Commission is under no obligation to preserve that control simply because it is effectuated in part by copyright licenses. In fact, clearing the way for non-infringing devices that can enhance the TV-watching experience furthers the purposes of copyright law as well as the mandate of Section 629.

Respectfully submitted,

Annemarie Bridy
Professor of Law
University of Idaho College of Law

¹⁹ Copyright Alliance comment at 4.

²⁰ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 351 (1908); 17 U.S.C. § 109.

²¹ 47 U.S.C. § 549.

Affiliate Scholar, Stanford University Center for
Internet and Society

Peter Jaszi
Professor of Law
Faculty Director of the Glushko-Samuelson
Intellectual Property Clinic
American University Washington College of Law

Betsy Rosenblatt
Associate Professor of Law
Director, Center for Intellectual Property Law
Whittier Law School

Pamela Samuelson
Richard M. Sherman Distinguished Professor of Law
University of California, Berkeley

Mitchell L. Stoltz
Senior Staff Attorney
Electronic Frontier Foundation

Rebecca L. Tushnet
Professor of Law
Georgetown Law School