United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

October 24, 2016

Mitchell Stoltz
Senior Staff Attorney
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
mitch@eff.org

Dear Mr. Stoltz:

Re: FOIA Docket No. 22/2016

This is in response to the Electronic Frontier Foundation's ("EFF") September 14, 2016 Freedom of Information Act ("FOIA") request received by the U.S. Copyright Office ("Copyright Office" or "Office") on September 23, 2016. On September 27, 2016 the Office responded affirmatively to your request for expedited processing of Copyright Office records relating to "communications between USCO personnel and any other persons" and "meetings between USCO personnel and any other persons" that were "created between February 18, 2016 and the present, concerning or referring to" "the Federal Communication Commission's (FCC) 2016 rulemaking on television set-top boxes."

Responsive Records

Responsive records are being produced to you electronically as an attachment to this letter. The records are numbered USCO_FOIA_22/2016 0001-0308. These records include communications and meeting appointments with other agencies, stakeholders, congressional members and staff, and individuals. As demonstrated in the records, the Office spoke and/or met with any interested party who asked to discuss the FCC rulemaking on television set-top boxes.

Administrative Procedures

File closed if no response in 90 days. For administrative purposes, the file for this FOIA request will be closed as of the date of this letter if you do not choose to respond or otherwise contact the Office again about this request within ninety business days after that date. If you do contact the Office again about this request, please reference Docket No. 22/2016 or provide a copy of at least the first page of this letter. You may email the FOIA Requester Service Center at copfoia@loc.gov, or write to: U.S. Copyright Office, FOIA Requester Service Center, PIE, P.O. Box 70400, Washington D.C. 20024.

Dispute resolution. You also have the right to seek dispute resolution services from the Office of Government Information Services ("OGIS"). You may contact OGIS via U.S. mail at The U.S. National Archives and Records Administration, Office of Government Information Services, 8601 Adelphi Road – OGIS, College Park, MD 20740-6001, or by telephone at (202) 741-5770, or (877) 684-6448.

Right to appeal. Should you believe that this response to your FOIA request constitutes an improper denial of a valid FOIA request, you have ninety calendar days from the date of this letter to file a

written appeal. In your appeal, please reference Docket No. 22/2016 or provide a copy of at least the first page of this letter. Write "APPEAL" on the envelope in a prominently visible manner and send it to: Office of the General Counsel, Copyright GC/RRC, P.O. Box 70400, Washington DC 20024. Your letter should explain your arguments and any legal basis for your objection to a refusal to furnish the records you requested or other basis for disagreement.

Sincerely,

Abioye Mosheim
Attorney-Advisor
U.S. Copyright Office
Office of the General Counsel
abmo@loc.gov

From:	Carson, David
To:	Charlesworth, Jacqueline; Claggett, Karyn T.
Subject:	FCC Proposal on Set-Top Boxes; MB Docket No. 15-64
Date:	Friday, March 11, 2016 6:17:47 PM
Attachments:	2-12-16 FCC MB Docket 15-64 Marino Deutch Comment Letter.pdf

Hi, Jacqueline and Karyn.

We've heard that you have sent a letter on the FCC proposal regarding set-top boxes, which is also the subject of the attached letter from Reps. Marino and Deutch.

Is that true? If so, could you send me a copy?

Thanks.

David

Congress of the United States
Washington, DC 20515

February 12, 2016

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: MB Docket No. 15-64

Dear Chairman Wheeler:

We write to ask that you fully consider the impact of your announced set top box proposal on the rights of creators involved in the production of television programming. As Members of the House Judiciary Committee, we have jurisdiction over the Copyright Act, which provides creators exclusive rights in their works and thus incentivizes creativity that benefits our society as a whole. As a result, it is our responsibility to ensure that no government action weakens these incentives or undermines the exclusive rights Congress has granted.

We understand it is not, nor should it be, in the jurisdiction of the Federal Communications Commission (FCC) to regulate either the exclusive rights of copyright owners or the licensing of these rights. However, there is no doubt that telecommunications and copyright law affect one another and even overlap.[1] Therefore, it is sometimes the case that FCC actions designed either to further or implement telecommunications policy affect the rights of copyright holders.

You have acknowledged that your set top box proposal has implications for copyright protection.[2] Even proponents, in referencing the copyright fair use defense, acknowledge that your proposal has copyright implications.[3] Others, including many in the creative community, have raised concerns that your proposal may impact the rights Congress has granted to them under the Copyright Act and that an apps-based approach would better protect the rights of copyright rightsholders. Therefore, we must take seriously the potential that this proceeding, depending on the path chosen, could upset the delicate system that underlies the creation, licensing, and distribution of copyrighted television programming and potentially jeopardize efforts to prevent copyright infringement.

Production of professional motion picture and television programming is a complex undertaking that requires creative contributions from hundreds, and sometimes thousands, of creative professionals. Due to the high costs and risks associated with these productions, and the number of different copyrighted works involved, a complex system has been developed that finances production, compensates the myriad creators, and licenses rights from many

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[1] Sections 111, 119, and 122 of the Copyright Act of 1976

[2] Tom Wheeler, "It's Time to Unlock the Set-Top Box Market," *<re/code>*, January 27, 2016, http://recode.net/2016/01/27/its-time-to-unlock-the-set-top-box-market/

[3] Filing of Consumers Union, MB Docket No. 15-64 at 5 (Oct. 8, 2015) and Filing of Public Knowledge, MB Docket No. 15-64 at 15 (Oct. 7, 2015)

rightsholders. Creators often bargain to receive payments derived from the advertising revenue and subscriber fees collected by distributors of television programming. So, for example, each subsequent time a program airs on television: directors, actors, and writers may receive direct payments ("residuals" or "participations"); below-the-line film crews may receive contributions toward their pension and health care plans; and songwriters, composers, and music publishers receive performance royalties for the music synched with the television programming. Songwriters, music publishers, recording artists and record labels similarly receive performance royalties generated by cable music channels, which may also be impacted by your proposal. Producers of television programming finance production by bargaining for compensation from television distributors and often separately license rights by geography, format, and time.

Any regulatory action that threatens the revenue sources from which these myriad creators receive compensation could shift revenues to unlicensed sources or sources that pay less. This action could also facilitate copyright infringement, negatively affecting the entire creative ecosystem underpinning television programming. Enforcement of copyright law and protection of the rights granted to holders of copyrights are not subjects natural to the pursuits of the FCC. Accordingly, we urge you to ensure that your notice of proposed rulemaking (NPRM) is balanced, fully considers information related to both your announced set-top box proposal and other approaches such as an apps-based model, and gauges the impact of each on the creative community. Due to the complexity of these issues, we suggest you consult with agencies more familiar with rightsholder issues, like the USPTO and Copyright Office, both when crafting those aspects of the NPRM and as a resource for understanding the copyright issues raised during the rulemaking process.

Thank you for your careful consideration in this regard.

Sincerely,

Tom Marino
Member of Congress

Ted Deutch
Member of Congress

Cc: Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O'Reilly

From: Claggett, Karyn T.
To: "Carson, David"
Subject: RE: FCC Proposal on Set-Top Boxes; MB Docket No. 15-64
Date: Monday, March 14, 2016 12:47:00 PM

Yes, that's a no.

From: Carson, David [mailto:David.Carson@USPTO.GOV]
Sent: Monday, March 14, 2016 11:37 AM
To: Claggett, Karyn T.
Subject: RE: FCC Proposal on Set-Top Boxes; MB Docket No. 15-64

Just to be clear, did you send a letter on the FCC proposal regarding set-top boxes? I assume the answer is no.

From: Claggett, Karyn T.
Sent: Saturday, March 12, 2016 10:45 PM
To: Carson, David <David.Carson@USPTO.GOV>
Cc: Charlesworth, Jacqueline <jcharlesworth@loc.gov>
Subject: Re: FCC Proposal on Set-Top Boxes; MB Docket No. 15-64

REDACTED - not responsive

Sent from my iPhone

On Mar 11, 2016, at 8:50 PM, Carson, David <David.Carson@USPTO.GOV> wrote:

> REDACTED - not responsive
>
> Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.
>
> ---
>
> **From:** Charlesworth, Jacqueline
> **Sent:** Friday, March 11, 2016 8:17 PM
> **To:** Carson, David
> **Cc:** Claggett, Karyn T.
> **Subject:** Re: FCC Proposal on Set-Top Boxes; MB Docket No. 15-64
>
> OGC did not. But you never know what those PIA folks are up to ....
>
> Jacqueline C. Charlesworth
> General Counsel and
> Associate Register of Copyrights
> U.S. Copyright Office
> jcharlesworth@loc.gov
> 202.707.8772

On Mar 11, 2016, at 6:17 PM, Carson, David <David.Carson@USPTO.GOV> wrote:

Hi, Jacqueline and Karyn.

We've heard that you have sent a letter on the FCC proposal regarding set-top boxes, which is also the subject of the attached letter from Reps. Marino and Deutch.

Is that true? If so, could you send me a copy?

Thanks.

David

<2-12-16 FCC MB Docket 15-64 Marino Deutch Comment Letter.pdf>

From:	Jonathan Sallet
To:	Charlesworth, Jacqueline
Cc:	Natalie Martinez; Day, Brian
Subject:	RE: Connecting Up
Date:	Thursday, March 31, 2016 6:30:23 PM

Jacqueline:

Thanks very much.

The FCC recently proposed rules that would eliminate barriers to competition with the set-top boxes that most consumers today lease from their Pay-TV providers. Our goal is to give innovators, device manufacturers, and app developers access to the information they need to develop new and better technologies.

A key part of the "unlock the box" proposal would require pay-TV providers to deliver three core information streams to others:

- *Service discovery:* Information about what programming is available to the consumer, such as the channel listing and video-on-demand lineup, and what is on those channels.
- *Entitlements:* Information about what a device is allowed to do with content, such as recording.
- *Content delivery:* The video programming itself.

There's more to it than this, of course, but suffice it to say that this proposal has generated a series of questions about the potential impact of the proposal on copyright. The Chairman has been plain in saying that it is critical that copyright interests be fully protected.

Because copyright law is not within the FCC's expertise, I would appreciate discussing with you whether there is a way in which our staff could talk with staff of the Copyright Office in order that we further our understanding of the copyright issues that have been raised here.

I look forward to connecting with you.

Thanks,

Jon

From: Charlesworth, Jacqueline [mailto:jcharlesworth@loc.gov]
Sent: Thursday, March 31, 2016 4:57 PM
To: Jonathan Sallet <Jonathan.Sallet@fcc.gov>
Cc: Natalie Martinez <Natalie.Martinez@fcc.gov>; Day, Brian <bday@loc.gov>
Subject: Re: Connecting Up

Hi Jonathan --

Good to meet you by email. I'm copying my assistant to assist in setting up a time. It would be helpful if you could let me know the particular topic you'd like to discuss so I can be a bit more prepared.

Best,

Jacqueline

Jacqueline C. Charlesworth
General Counsel and
Associate Register of Copyrights
U.S. Copyright Office
jcharlesworth@loc.gov
202.707.8772

On Mar 31, 2016, at 1:22 PM, Jonathan Sallet <Jonathan.Sallet@fcc.gov> wrote:

> Jacqueline:
>
> I am the General Counsel of the Federal Communications Commission (and a fellow Brown grad). I am reaching out to see if it might be possible to arrange a telephone conversation with you to discuss copyright issues that have been raised in connection with a pending item at the FCC. (And I have copied my assistant Natalie to that end).
>
> I'd be very appreciative if this could be done,
>
> Thanks,
>
> Jon Sallet

From:	Fried, Neil
To:	Charlesworth, Jacqueline
Cc:	Day, Brian; Damle, Sarang
Subject:	RE: Set-top boxes
Date:	Thursday, March 31, 2016 11:14:44 AM

Ok. I will work with Brian on something for the week of the 11th.

From: Charlesworth, Jacqueline [mailto:jcharlesworth@loc.gov]
Sent: Wednesday, March 30, 2016 2:07 PM
To: Fried, Neil
Cc: Day, Brian; Damle, Sarang
Subject: Re: Set-top boxes

Neil, Sy and I are both out this week and have fairly hectic schedules. We can speak with you by phone but I think it will need to be next week (or the week after if you are unavailable next week) -- best option is to have our assistant, Brian, set up the call.

Jacqueline C. Charlesworth
General Counsel and
Associate Register of Copyrights
U.S. Copyright Office
jcharlesworth@loc.gov
202.707.8772

On Mar 30, 2016, at 2:01 PM, Fried, Neil <Neil_Fried@mpaa.org> wrote:

> Sy,
>
> Thanks so much for the quick response. I was really only thinking of a call in the next day or so, and I will be out of town next week. Any chance we can hop on the phone later today, tomorrow, or Friday?
>
> Neil
>
> -----Original Message-----
> From: Damle, Sarang [mailto:sdam@loc.gov]
> Sent: Wednesday, March 30, 2016 1:34 PM
> To: Fried, Neil
> Cc: Day, Brian; Charlesworth, Jacqueline; Smith, Regan; Sloan, Jason
> Subject: Re: Set-top boxes
>
> Hi Neil,
>
> We'd be happy to meet. I'm out of the office this week for spring break but I'm copying our assistant Brian Day to find a time that works on our end in the next week or two. (Brian - please include Jacqueline, Regan, Jason and me in the meeting.)

Sy

On Mar 30, 2016, at 10:16 AM, Fried, Neil <Neil_Fried@mpaa.org> wrote:

> Hope all is well.
>
> Is there a good time to talk about the FCC's set-top box proposal?

From: Sheffner, Ben
To: Day, Brian; Fried, Neil
Subject: RE: Set-top boxes
Date: Thursday, March 31, 2016 2:54:19 PM

Separate locations -- I will probably be in LA.

-----Original Message-----
From: Day, Brian [mailto:bday@loc.gov]
Sent: Thursday, March 31, 2016 11:44 AM
To: Fried, Neil <Neil_Fried@mpaa.org>
Cc: Sheffner, Ben <Ben_Sheffner@mpaa.org>
Subject: RE: Set-top boxes

Thanks Neil and Ben. I am assuming this will be a phone call? If so, will the two of you be together or calling in from separate locations? Thanks.

-----Original Message-----
From: Fried, Neil [mailto:Neil_Fried@mpaa.org]
Sent: Thursday, March 31, 2016 2:34 PM
To: Day, Brian
Cc: Sheffner, Ben
Subject: RE: Set-top boxes

Adding Ben Sheffner, who will also participate.

How about April 11 at 1pm?

-----Original Message-----
From: Day, Brian [mailto:bday@loc.gov]
Sent: Thursday, March 31, 2016 11:23 AM
To: Fried, Neil
Subject: FW: Set-top boxes

Neil,

Due to Jacqueline's busy travel schedule, I'm not able to offer any dates until the week of April 11th. Those dates/times are listed below. Let me know which one works best for you and I'll send out a meeting invite. I can also provide you with a call-in number once a date/time has been selected.

Monday, April 11: 12pm, 1pm, 4pm
Tuesday, April 12: 11am, 12pm, 1pm, 3pm, 4pm

Thanks,
Brian

-----Original Message-----
From: Damle, Sarang
Sent: Wednesday, March 30, 2016 1:34 PM
To: Fried, Neil
Cc: Day, Brian; Charlesworth, Jacqueline; Smith, Regan; Sloan, Jason
Subject: Re: Set-top boxes

Hi Neil,

We'd be happy to meet. I'm out of the office this week for spring break but I'm copying our assistant Brian Day to find a time that works on our end in the next week or two. (Brian - please include Jacqueline, Regan, Jason and me in the meeting.)

Sy

> On Mar 30, 2016, at 10:16 AM, Fried, Neil <Neil_Fried@mpaa.org> wrote:
>
> Hope all is well.
>
> Is there a good time to talk about the FCC's set-top box proposal?
>

Subject:	Discuss: Set-Top Boxes
Location:	LOC Conference 202-707-5900 Participant's Collaboration Code: 277121
Start:	Mon 4/11/2016 1:00 PM
End:	Mon 4/11/2016 2:00 PM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	Day, Brian
Required Attendees:	Charlesworth, Jacqueline; Damle, Sarang; Smith, Regan; Sloan, Jason; Neil_Fried@mpaa.org; Ben_Sheffner@mpaa.org

Conference Bridge Instructions

Instructions for participants to join

1) Dial (202) 707-5900
   Prompt: "Please enter your Collaboration Code"

2) Enter the Collaboration code **277121**
3) You will be joined to the conference

From:	Day, Brian
To:	"Fried, Neil"
Cc:	Sheffner, Ben
Subject:	RE: Set-Top Box Meeting
Date:	Monday, April 11, 2016 1:06:00 PM

You are correct. We are having difficulties on our end here. Thanks for being patient.

From: Fried, Neil [mailto:Neil_Fried@mpaa.org]
Sent: Monday, April 11, 2016 1:06 PM
To: Day, Brian
Cc: Sheffner, Ben
Subject: RE: Set-Top Box Meeting

We're on but just getting hold music. Just want to confirm that number and code are 202-707-5900 & 277121.

From: Day, Brian [mailto:bday@loc.gov]
Sent: Monday, April 11, 2016 8:47 AM
To: Fried, Neil
Cc: Sheffner, Ben
Subject: RE: Set-Top Box Meeting

OK, great. Thanks for letting me know.

From: Fried, Neil [mailto:Neil_Fried@mpaa.org]
Sent: Monday, April 11, 2016 8:31 AM
To: Day, Brian
Cc: Sheffner, Ben
Subject: Re: Set-Top Box Meeting

Nope. I can make it. That must have been a mistake. Thanks.

On Apr 11, 2016, at 8:23 AM, Day, Brian <bday@loc.gov> wrote:

> Neil,
>
> I noticed you updated your response to today's meeting as 'tentative' and wanted to inquire whether or not you would be able to make this call. If not, would you like it rescheduled?
>
> Thanks,
> Brian

From:	Alec French
To:	Claggett, Karyn T.; Roberts, William; Pallante, Maria
Subject:	FCC outreach to USCO regarding copyright implications of its set top box order
Date:	Tuesday, April 12, 2016 3:18:32 PM
Attachments:	Marino.pdf ATT00001.htm

Folks,

Based on the attached response from FCC Chairman Wheeler to Reps. Marino and Deutch, I assume FCC staff may soon be reaching out to you (if they have not already) regarding the concerns Marino and Deutch expressed about how the FCC's set top box order may impact copyright owners and the many creators whose livelihoods depend on the licensing of copyrighted works.

The concerns that Marino and Deutch raised are shared by many in the creative community, including a bunch of my clients (DGA, IATSE, ASCAP, NBCUniversal). So, if you wanted further details about these concerns, I'd be happy to share them. Or, you could talk to folks at the Copyright Alliance, which is preparing comments on behalf of many of its members.

Look forward to speaking at your convenience.

Alec French
Thorsen French Advocacy
405 1st Street SE
Washington DC 20003
Office - (202) 506-5673
Mobile - (202) 997-4453

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

April 11, 2016

The Honorable Tom Marino
U.S. House of Representatives
410 Cannon House Office Building
Washington, D.C. 20515

Dear Congressman Marino:

Thank you for your letter regarding the recent Notice of Proposed Rule Making (NPRM) seeking comment on how to better foster competition in the set-top box marketplace and Section 629 of the Communications Act, specifically regarding the impact it may have on the myriad of creators involved in the production of television programming. Your views are very important and will be considered as part of the Commission's review.

Today, there is an abundance of rich content in the television landscape. New technology is paving the way for software and apps to help consumers enjoy this content. Consumers deserve a variety of choices to view the programming they want, when they want and on the device they want. More choices often drive down consumer costs and drive up innovation.

The issue before the Commission is how to satisfy Section 629 in a world of evolving technology. I agree with you that any rules we adopt must reflect marketplace realities and ensure copyright protections, and I assure you that is a paramount concern as we consider how to meet the statutory obligation.

At the February 18th Commission meeting, we adopted a NPRM to fulfill the statutory requirement of competitive choice for consumers. Like all NPRMs, this action opens a fact-finding dialog to build a record upon which to base any final decision.

The new proposed rules would create a framework for providing device manufacturers, software developers and others the information they need to introduce innovative new technologies, while at the same time maintaining strong security, copyright and consumer protections. Nothing in this proposal changes a company's ability to package and price its programming to its subscribers, or requires consumers to purchase new boxes.

You express concerns that rules intended to achieve Section 629's mandate could diminish the viewing experience and the economic underpinnings that support investment in innovative content. The Commission's proposal preserves the same copyright protections that exist today and are honored by existing competitive navigation devices such as TiVo. In addition, the NPRM seeks comment on whether and how we should take further actions to address the concerns you raise. For instance, the item asks numerous questions about how to protect the rights and negotiated agreements of content owners. The item also specifically states

that "our regulations must ensure that Navigation Devices…cannot technically disrupt, impede or impair the delivery of services to an MVPD subscriber." In this vein, the items asks a number of questions related to advertising and copyright concerns raised by content owners.

I believe the Commission's proposal will lead to innovation that will implement the statutory mandate and improve consumer choice (including options for innovative content providers) while preserving copyright protections. It is important to emphasize that this NPRM is the stage in the process where we collect information. While we have put forth a proposal, we are seeking comment on it – including how to address any concerns it may generate. As we develop a record and explore fulfilling the statutory mandate, all entities are invited to comment on the proposal, including other Federal agencies, in order to create a balanced and well informed approach. I have asked staff to consult with the Copyright Office on the issues you note. I look forward to continuing to work with you on this important issue.

Sincerely,

Tom Wheeler

Subject:	Call w/FCC General Counsel
Location:	Register's Conf Room / Jonathan's #: 202-418-2836
Start:	Thu 4/14/2016 2:00 PM
End:	Thu 4/14/2016 3:00 PM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	Day, Brian
Required Attendees:	Charlesworth, Jacqueline; Damle, Sarang; Smith, Regan; Sloan, Jason

This will be a phone call with Jonathan Sallet, General Counsel, FCC. He provided the following in regards to the meeting

The FCC recently proposed rules that would eliminate barriers to competition with the set-top boxes that most consumers today lease from their Pay-TV providers. Our goal is to give innovators, device manufacturers, and app developers access to the information they need to develop new and better technologies.

A key part of the "unlock the box" proposal would require Pay-TV providers to deliver three core information streams to others:

- Service discovery: Information about what programming is available to the consumer, such as the channel listing and video-on-demand lineup, and what is on those channels.
- Entitlements: Information about what a device is allowed to do with content, such as recording.
- Content delivery: The video programming itself.

There's more to it than this, of course, but suffice it to say that this proposal has generated a series of questions about the potential impact of the proposal on copyright. The Chairman has been plain in saying that it is critical that copyright interests be fully protected.

Subject: Canceled: Call w/FCC General Counsel
Location: Register's Conf Room / Jonathan's #: 202-418-2836

Start: Thu 4/14/2016 2:00 PM
End: Thu 4/14/2016 3:00 PM
Show Time As: Free

Recurrence: (none)

Meeting Status: Not yet responded

Organizer: Day, Brian
Required Attendees: Charlesworth, Jacqueline; Damle, Sarang; Smith, Regan; Sloan, Jason

Importance: High

This call will be rescheduled to a day next week. As soon as I hear back from the FCC, I'll let you know.

This will be a phone call with Jonathan Sallet, General Counsel, FCC. He provided the following in regards to the meeting

The FCC recently proposed rules that would eliminate barriers to competition with the set-top boxes that most consumers today lease from their Pay-TV providers. Our goal is to give innovators, device manufacturers, and app developers access to the information they need to develop new and better technologies.

A key part of the "unlock the box" proposal would require Pay-TV providers to deliver three core information streams to others:

- Service discovery: Information about what programming is available to the consumer, such as the channel listing and video-on-demand lineup, and what is on those channels.
- Entitlements: Information about what a device is allowed to do with content, such as recording.
- Content delivery: The video programming itself.

There's more to it than this, of course, but suffice it to say that this proposal has generated a series of questions about the potential impact of the proposal on copyright. The Chairman has been plain in saying that it is critical that copyright interests be fully protected.

From:	Day, Brian
To:	"Natalie Martinez"
Subject:	RE: Connecting Up
Date:	Thursday, April 14, 2016 12:03:00 PM

Perfect! Thanks again!

From: Natalie Martinez [mailto:Natalie.Martinez@fcc.gov]
Sent: Thursday, April 14, 2016 12:03 PM
To: Day, Brian
Subject: RE: Connecting Up

Perfect. Here is the call-in info:

1-888-858-2144
Access Code: 4041815

From: Day, Brian [mailto:bday@loc.gov]
Sent: Thursday, April 14, 2016 12:00 PM
To: Natalie Martinez <Natalie.Martinez@fcc.gov>
Subject: RE: Connecting Up

You're welcome; and thanks to you as well. I'll send out an invite on our end for everyone to be on the call.

From: Natalie Martinez [mailto:Natalie.Martinez@fcc.gov]
Sent: Thursday, April 14, 2016 11:48 AM
To: Day, Brian
Subject: RE: Connecting Up

Brian, we can do a call at 4p on 4/19.

Thanks so much for all of your help to nail this down.

From: Day, Brian [mailto:bday@loc.gov]
Sent: Thursday, April 14, 2016 11:32 AM
To: Natalie Martinez <Natalie.Martinez@fcc.gov>
Subject: RE: Connecting Up

Hi Natalie,

I had just emailed you asking if we could push back to a start time of 4pm on April 19. Let me know if that works for Jonathan.

Thanks!
Brian

From: Natalie Martinez [mailto:Natalie.Martinez@fcc.gov]
Sent: Thursday, April 14, 2016 11:30 AM
To: Day, Brian
Subject: FW: Connecting Up

Good morning,

Just thought I would check on this. Today's 1p will not happen, so we are holding 4/19 ay 1:00p.

Thanks Brian!

Natalie Martinez

From: Natalie Martinez
Sent: Wednesday, April 13, 2016 1:05 PM
To: 'Day, Brian' <bday@loc.gov>
Subject: RE: Connecting Up

Hello Brian,

Let's locks this in for Tues, April 19th at 1:00pm. Please confirm if this works on your end.

Thanks,
Shannon Hyatt on behalf of Natalie M.

From: Day, Brian [mailto:bday@loc.gov]
Sent: Monday, April 11, 2016 9:20 AM
To: Natalie Martinez <Natalie.Martinez@fcc.gov>
Subject: RE: Connecting Up

Hi Natalie,

Of all the dates/times you listed below, the only date/time that doesn't work for us is:

4/20
1:00p – 3:00p

Let me know which date/time works best on your end and I'll put it on their calendars.

Thanks,
Brian

From: Natalie Martinez [mailto:Natalie.Martinez@fcc.gov]
Sent: Thursday, April 07, 2016 3:14 PM
To: Day, Brian
Subject: RE: Connecting Up

Hi Brian,

No worries, both Jon and I are very understanding. Here are some dates and times for the week of the 18th that work for Jon:

4/18
2:00p – 5:00p

4/19
10:30a – 11:30a
1:00p – 3:00p

4/20
11:00a – 11:30a
1:00p – 3:00p

If these don't work, let me know and I am more than happy to send some more.

Thanks!

From: Day, Brian [mailto:bday@loc.gov]
Sent: Thursday, April 07, 2016 8:51 AM
To: Natalie Martinez <Natalie.Martinez@fcc.gov>
Subject: RE: Connecting Up
Importance: High

Natalie,

My sincere apologies and please pass along Jacqueline's sincere apologies to Mr. Sallet, but we need to push this call to the next week. Turns out the attorney that is the most well-versed with this issue is out of the office next week and it is pertinent that she be there for this call.

Could you please send me some dates/times the week of April 18 that Mr. Sallet is available for a phone call? I'll then check calendars on this end and once a final date/time has been selected I'll let you know.

Thank you in advance for your & Mr. Sallet's understanding and flexibility.

Brian

From: Natalie Martinez [mailto:Natalie.Martinez@fcc.gov]
Sent: Tuesday, April 05, 2016 5:56 PM
To: Day, Brian
Subject: RE: Connecting Up

Brian, no worries!

How about next Thursday 4/14 at 2:00p?

She can call Jon at 202-418-2836

From: Day, Brian [mailto:bday@loc.gov]
Sent: Tuesday, April 05, 2016 5:52 PM
To: Natalie Martinez <Natalie.Martinez@fcc.gov>
Subject: RE: Connecting Up

Hi Natalie,

Sorry I haven't gotten back to you yet but just spoke with Jacqueline and she advised that she could do a call next Thursday, April 14th any time between 2pm and 5pm. Let me know what works best for you and a number she can call and I'll add it to her calendar.

Thanks,
Brian

From: Natalie Martinez [mailto:Natalie.Martinez@fcc.gov]
Sent: Tuesday, April 05, 2016 5:34 PM
To: Day, Brian
Subject: RE: Connecting Up

Hi Brian,

I was out yesterday. Any idea if our folks have nailed this down or is it still in the works?

Thanks!

From: Natalie Martinez
Sent: Thursday, March 31, 2016 5:22 PM
To: Day, Brian <bday@loc.gov>
Cc: Shannon Hyatt <Shannon.Hyatt@fcc.gov>
Subject: RE: Connecting Up

Hey there again Brian!

Thanks so much for all of your help. As soon as you have an idea of what works for Ms. Jacqueline, let me know so we can nail this down.

Thanks!

From: Charlesworth, Jacqueline [mailto:jcharlesworth@loc.gov]

Sent: Thursday, March 31, 2016 4:57 PM
To: Jonathan Sallet <Jonathan.Sallet@fcc.gov>
Cc: Natalie Martinez <Natalie.Martinez@fcc.gov>; Day, Brian <bday@loc.gov>
Subject: Re: Connecting Up

Hi Jonathan --

Good to meet you by email. I'm copying my assistant to assist in setting up a time. It would be helpful if you could let me know the particular topic you'd like to discuss so I can be a bit more prepared.

Best,

Jacqueline

Jacqueline C. Charlesworth
General Counsel and
Associate Register of Copyrights
U.S. Copyright Office
jcharlesworth@loc.gov
202.707.8772

On Mar 31, 2016, at 1:22 PM, Jonathan Sallet <Jonathan.Sallet@fcc.gov> wrote:

> Jacqueline:
>
> I am the General Counsel of the Federal Communications Commission (and a fellow Brown grad). I am reaching out to see if it might be possible to arrange a telephone conversation with you to discuss copyright issues that have been raised in connection with a pending item at the FCC. (And I have copied my assistant Natalie to that end).
>
> I'd be very appreciative if this could be done,
>
> Thanks,
>
> Jon Sallet

From:	Fried, Neil
To:	Pallante, Maria; Charlesworth, Jacqueline; Damle, Sarang
Subject:	MPAA statement on FCC set-top box proposal
Date:	Saturday, April 16, 2016 9:36:30 AM
Attachments:	Statement-from-MPAA-Chairman-CEO-Chris-Dodd-Opposing-the-FCCs-Set-Top-Box-Proposal-003-003.pdf ATT00001.htm

FYI.

FOR IMMEDIATE RELEASE:
April 15, 2016

Statement from MPAA Chairman & CEO Senator Chris Dodd on the FCC's Set-Top Box Proposal

WASHINGTON – The White House expressed support for the FCC's new set-top box proposal today. The following is a statement from MPAA Chairman and CEO Senator Chris Dodd:

"In an effort to promote set-top box alternatives, the FCC cannot take the intellectual property of one industry and give it to another. Chairman Wheeler has maintained he has no intention of doing so, but the proposal's current wording does not provide the guarantees copyright holders must have. To respect copyright and the programming agreements copyright holders have with their distributors, any FCC rules must explicitly prohibit third parties from using content without seeking permission from and compensating the copyright holders; from manipulating the content, the way it is presented, or otherwise deviating from conditions in the licensing agreement with the pay-TV provider; from selling advertising in conjunction with the programming; from monetizing the viewing habits of subscribers; or from presenting pirated content alongside licensed content. If the goal is simply to enable viewers to access pay-TV service on third-party devices and applications, meeting these requirements should not be a problem. These are the issues we will focus on as the proceeding continues."

About the MPAA
The Motion Picture Association of America, Inc. (MPAA) serves as the voice and advocate of the American motion picture, home video and television industries from its offices in Los Angeles and Washington, D.C. Its members include: Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; and Warner Bros. Entertainment Inc.

# # #

For more information, contact:

MPAA Washington, D.C.
Chris Ortman
202-293-1966
Chris_Ortman@mpaa.org

From:	Day, Brian
To:	Charlesworth, Jacqueline; Damle, Sarang; Smith, Regan; Sloan, Jason
Subject:	Call w/FCC
Start:	Tuesday, April 19, 2016 4:00:00 PM
End:	Tuesday, April 19, 2016 5:00:00 PM
Location:	Register"s Conf Room (1-888-858-2144; Access Code: 4041815)

This will be a phone call with Jonathan Sallet, General Counsel, FCC. He provided the following in regards to the meeting:

The FCC recently proposed rules that would eliminate barriers to competition with the set-top boxes that most consumers today lease from their Pay-TV providers. Our goal is to give innovators, device manufacturers, and app developers access to the information they need to develop new and better technologies.

A key part of the "unlock the box" proposal would require Pay-TV providers to deliver three core information streams to others:

- Service discovery: Information about what programming is available to the consumer, such as the channel listing and video-on-demand lineup, and what is on those channels.

- Entitlements: Information about what a device is allowed to do with content, such as recording.

- Content delivery: The video programming itself.

There's more to it than this, of course, but suffice it to say that this proposal has generated a series of questions about the potential impact of the proposal on copyright. The Chairman has been plain in saying that it is critical that copyright interests be fully protected.

From: Dow, Troy
To: Charlesworth, Jacqueline
Subject: AllVid
Date: Tuesday, April 26, 2016 5:27:17 PM
Attachments: Set Top Box Comments As Filed April 22 2016.pdf

Jacqueline, in the hopes that this is useful to you I am attaching a copy of the comments we filed on Friday with the FCC in the AllVid proceed.

My best,

Troy

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

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

COMMENTS OF 21ST CENTURY FOX, INC., A&E TELEVISION NETWORKS, LLC, CBS CORPORATION, SCRIPPS NETWORKS INTERACTIVE, TIME WARNER INC., VIACOM INC., AND THE WALT DISNEY COMPANY

Dated: April 22, 2016

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EXECUTIVE SUMMARY

The Content Companies respectfully submit these comments in response to the Commission's call for feedback on its proposal to spur competition in the marketplace for the equipment used by consumers to access video programming. The Content Companies appreciate that Section 629 of the Communications Act directs the Commission to ensure a competitive market for navigation devices. The Commission's proposed rules, however, disserve the consumer by ignoring the very requirements of Section 629 that are designed to ensure that Commission navigation device rules do not jeopardize the content experience that consumers enjoy and appreciate. The Notice also undermines innovation and the development of content for viewers, as well as conflicts with the mandates of reasoned decision-making, the protections of copyright law and contract law, and the Constitution. We therefore urge the Commission to reject the proposed rules as drafted.

The Content Companies, Who Have No Stake in Set-Top Box Revenues, Support Innovation to Enhance the Consumer Viewing Experience

The Content Companies are independent programmers with no economic stake in the revenues earned by distributors from leasing set-top boxes. Indeed, the Content Companies have a vested interest in promoting innovation in content navigation because improving consumers' ease of use makes the programming we provide more appealing and thus more valuable. The Content Companies write not in defense of set-top boxes or leased equipment, but instead to highlight that the Commission's proposal is fundamentally flawed and therefore threatens to harm the video programming marketplace and consumers.

At a time when the Content Companies already are providing the world's most highly desired content on a multitude of new platforms and devices and increasingly experimenting with innovative new business models, it would be unfortunate if a proposal initiated under

Section 629 were to dampen this emerging competition. And yet the Notice presents precisely this risk, placing the Commission on a path to undermining, rather than enhancing, an emerging marketplace in which innovation is the hallmark of the viewing experience.

The Content Companies Are Bringing Audiences More Great Content Over More Devices and Platforms

Content Companies invest enormous resources to create exceptional sports, entertainment, and news programming, with the goal of informing, entertaining, and capturing the imagination of an audience that has ever-increasing and evolving expectations. Having invested these substantial sums to create and acquire diverse, high-quality programming, the Content Companies have every incentive to work with both traditional and non-traditional distributors to ensure that programming is accessible in the broadest ways possible. Indeed, driven by innovation, investment, and our demonstrated interest in serving viewers, the Content Companies continue to expand our multi-platform offerings, which are made possible by agreements between content companies and multichannel video programming distributors (MVPDs), "over-the-top" (OTT) video providers, device makers, and a host of others.

License Agreements Are Essential to Maintaining a Positive Viewing Experience While Also Preserving Incentives to Invest in Both Content and Distribution

To ensure that our content reaches consumers in a way that enhances the consumer experience and safeguards our investment, the Content Companies negotiate detailed agreements with our distributors, both traditional MVPDs and emerging OTT providers. These necessarily complex, carefully negotiated license agreements with distributors reflect the fact that for both creators and their audience, the content is inextricably connected to features that are critical to the audience experience, indeed to the very discoverability of content, including branding, channel placement, advertising, viewer data, and other features. The distribution agreements

protect content against theft and unlawful redistribution; secure content against unauthorized uses; and represent the means by which programmers respond to evolving audience expectations about the form, discoverability, and overall receipt of content. Just as important, because programmers do not own all of the content that comprises their networks, these license agreements reflect the vastly differing scope of underlying rights and production requirements that each programmer must abide by with respect to each piece of content that it acquires. This approach has enabled the Content Companies to distribute programming over an expanding array of distributors and technology platforms, including not only cable and satellite providers but also cutting-edge services like Amazon Prime, Netflix, Sling TV, and Playstation Vue.

The Commission's Sweeping Proposal Violates the Law and Would Undermine Consumers' Ability to Continue Enjoying Diverse Content

Into this exciting and diverse dynamic, the Commission has now proposed rules with the goal of promoting new ways for subscribers to navigate multichannel video programming content. But the Commission's proposal goes far beyond its stated goal and strays far afield from its lawful authority. Rather than simply fostering a marketplace for equipment alternatives, the proposed rules would upend the video marketplace in ways destined to harm content creators and consumers, while providing unwarranted benefits to app and technology developers with little or no appreciable benefit to the public interest.

The proposal would require that content provided today to existing distributors under detailed licensing agreements be distributed to a new group of both device manufacturers and app developers, none of which would be bound by any commitments to protect and secure content. By inviting third parties to aggressively seek to profit from the Content Companies' investments without incurring any of the obligations that effectively safeguard and thereby

promote the creation of valuable programing today, the Commission's proposal reduces the incentives to continue to create the great programming that consumers enjoy.

To be sure, the interface between content and viewers can be improved. No one in the video marketplace has a greater incentive to enhance the audience experience than those who invest billions of dollars in the creation of content. That is why programmers have worked with both traditional MVPDs and new distribution platforms to experiment with new business models and audience experiences. But the one constant has been the content creators' direct contractual engagement with distribution partners, not simply about price, but about the delivery of an exceptional audience viewing experience that is the very goal of content creation.

Until recently, the Content Companies understood the Commission to recognize that nothing in Section 629 was intended to create a wholesale disintermediation of content creators from their audience, and Chairman Wheeler's public statements reinforced that understanding. Chairman Wheeler's statements, however, were not embodied in the proposed new rules. Chairman Wheeler testified before Congress, for example, that the content "the cable operator puts out [will] remain sacrosanct and untouched, and nothing in [the] proposal creates an opportunity" for threats to the security or integrity of video programming.[1] Those public statements were not surprising, given the limited scope of the statute (which in Section 629(a) is focused exclusively on set-top box "equipment"), and its command (in Section 629(b)) that the Commission not "jeopardize security of multichannel video programming" or "impede the legal rights of a provider of such [multichannel video programming] services to prevent theft of service."

[1] *Hearing on FCC Oversight Before the S. Commerce, Science, and Transportation Committees*, 114th Congr., (March 2, 2016) (statement of Tom Wheeler, Chairman, FCC).

The text of the proposed rules, however, fails to meet the Commission's statutory obligation or to live up to Chairman Wheeler's promises. Remarkably, the Notice includes no effective mechanism to ensure that navigation device and software makers adhere to the contractual obligations that bind the MVPD from which the device or software maker could demand content under the proposed rules. The Notice suggests that copyright enforcement will adequately protect against the various ways a distributor could repurpose, rebrand, reform, and generally misuse content. Copyright holders, however, justifiably rely not solely on copyright litigation, but on licensing agreements and contractual enforcement to secure their rights. These critical agreements reflect our substantial interest in working to enhance the viewing experience, meet our own contractual commitments, and ensure that the integrity of our content is protected on its way to our audiences. Relying on copyright litigation is no substitute for the entire contractual structure that supports the development and delivery of great content to consumers.

From a legal perspective, the harm to consumers and the video programming marketplace from the proposed rules is especially unwarranted. Section 629 explicitly requires the Commission to protect the "security" of content and limits the Commission's authority to enhancing competition among set-top boxes. The Administrative Procedure Act likewise requires the Commission to establish a reasoned connection between the problem identified by the Commission – navigation device competition – and the proffered solution. The Copyright Act gives content owners exclusive distribution rights and allows them to create the binding, enforceable contracts that currently protect those rights. And the First and Fifth Amendments protect against compelled speech and government appropriation of intellectual property without just compensation. The proposal cannot withstand scrutiny under any of these legal frameworks.

In sum, the rules as drafted would undermine consumers' ability to continue enjoying the diverse, high-quality content that they expect and demand today, and would violate the law on several fundamental grounds. Accordingly, the Content Companies urge the Commission to reject the proposal and instead carefully evaluate the current marketplace and emerging competitive trends before acting hastily to promulgate new rules.

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

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

COMMENTS OF 21ST CENTURY FOX, INC., A&E TELEVISION NETWORKS, LLC, CBS CORPORATION, SCRIPPS NETWORKS INTERACTIVE, INC., TIME WARNER INC., VIACOM INC., AND THE WALT DISNEY COMPANY

21st Century Fox, Inc. ("Fox"), A&E Television Networks, LLC ("A&E"), CBS Corporation ("CBS"), Scripps Networks Interactive, Inc. ("Scripps"), Time Warner Inc. ("Time Warner"), Viacom Inc. ("Viacom"), and The Walt Disney Company ("Disney") (collectively, the "Content Companies") respectfully submit these comments in response to the Commission's Notice of Proposed Rulemaking (the "Notice") in the above-captioned proceeding.[2]

The Content Companies have a unique perspective on the proposed rulemaking. As independent programmers, the Content Companies have no economic interest in the revenues attributable to set-top boxes leased by MVPDs. The Content Companies support the overall goal of fostering the development of a competitive market for set-top boxes and for innovative, user-friendly ways for audiences to enjoy their favorite shows and networks. While the Content Companies recognize that Section 629 authorizes the Commission to promote additional options

[2] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. 14,033 (Mar. 16, 2016).

for set-top boxes, the Content Companies are deeply concerned that the proposal in the Notice risks substantial harm to today's vibrant content marketplace, and thus the viewing public.

Specifically, the Commission's proposals as structured would allow third parties to appropriate, monetize, and distribute content without undertaking any of the risks or expenses associated with the creation of that content and without being bound by any of the duties or obligations that distributors agree to in order to obtain distribution rights. Were the Commission to mandate such a dramatic change in program distribution relationships, it would negatively impact the economic underpinnings of the creation and distribution of content as well as the rich and diverse viewing choices available to consumers. As the Content Companies previously submitted, this would threaten their "ability to meet evolving consumer demand" and have a "negative impact on the development of programming and innovation in distribution," to the detriment of consumers and today's vibrant programming marketplace.[3]

In these comments, the Content Companies provide an overview of today's programming marketplace and highlight the ways in which programmers offer their content to consumers. These comments also provide a detailed overview of the licensing agreements that help foster that marketplace by protecting content and ensuring a positive viewer experience.

The Content Companies then highlight how the Commission's proposals would fall outside Section 629. First, the Notice's proposals exceed the Commission's authority under the narrow provisions of Section 629(a) by going beyond the mere facilitation of competition among set-top boxes and instead mandating the transmission of programming to device makers with no assurance that they will comply with key licensing terms. Second, the proposals are contrary to

[3] *See* Letter from A&E Television Networks, LLC, AMC Networks, Inc., Discovery Commc'ns, Inc., NBCUNIVERSAL, Scripps Networks Interactive, Inc., The Walt Disney Co. & ESPN, Inc., Time Warner Inc., 21st Century Fox, Inc., & Viacom Inc. to Marlene H. Dortch, Sec'y, FCC, MB Docket 15-64, at 3-4 (Jan. 14, 2016).

Section 629(b), which instructs the Commission not to "jeopardize security," by disregarding essential licensing terms and addressing security only in vague and undefined terms. In addition, the Notice proposes no sufficient enforcement mechanisms to ensure content security, either with respect to copy or output control or compliance with the key contractual terms that establish the parameters that govern the usage and monetization of the content, which presents still another core violation of Section 629(b). Third, the Commission's broad assertion of authority to mandate distribution of Content Companies' programming to third parties – without limitations on how they exploit it for their own economic benefit – violates Section 629(f) which explicitly reinforces the narrow nature of the Commission's authority under Section 629.

The Notice also suffers from other fundamental flaws. The Commission's failure to recognize and account for the proposed rule's harm to programmers, as well as numerous other erroneous assumptions and propositions contained in the Notice, reflects a lack of reasoned decision-making. The Notice further would conflict with the Copyright Act by either (i) permitting device makers to violate copyright law or (ii) impermissibly creating the effective equivalent of a compulsory license for the use of programmers' content. And, finally, the proposed rules raise serious problems under the First Amendment and Fifth Amendment.

I. THE CONTENT COMPANIES SUPPORT THE GOAL OF PROMOTING INNOVATIVE WAYS FOR AUDIENCES TO ENJOY THEIR FAVORITE VIDEO PROGRAMMING AND PROGRAM NETWORKS

Audiences are enjoying more compelling, high-quality video programming and content than ever before, over an expanding array of devices, applications, and services. Consumer demand for programming has spurred new business models for the distribution of video programming on a variety of distribution platforms. As a result, consumers have increasing access to linear and on-demand options for viewing compelling, high-quality video content

online. This demand already incentivizes the Content Companies and other programmers to make content available on new distribution platforms, just as it promotes investment in new and original content by competing distributors hoping to differentiate themselves.

The newer entrants are distinguishing their digital platforms from traditional distributors with original content and library content presented in new ways that appeal to consumers. The Content Companies have entered into agreements with many of these distributors to make their content available across a number of devices and services. For instance, in 2014, Sony announced the launch of its PlayStation Vue TV service, which offers access to scores of linear programming networks, including linear content from CBS, Disney, ESPN, FOX, Scripps, Time Warner, and Viacom. This and many other emerging platforms (*e.g.*, Roku and SlingTV) now feature the Content Companies' programming. These offerings are supplemented by an assortment of on-demand, Internet-based options that enable consumers to view tens of billions of hours of programming through distributors such as Netflix and Hulu.[4] Collaboration with these services is the latest in a long line of steps taken by the Content Companies to make their content more widely available to consumers using a variety of platforms. The Content Companies routinely negotiate with these and other potential distributors to further disseminate their programming. The Content Companies also work with MVPDs to provide authenticated subscribers with the ability to access their content out-of-home on a variety of devices.

Specific examples of new content offerings from the Content Companies include:

- Disney offers an array of TV Everywhere products – including for ESPN, Disney Channel, Disney XD, Disney Junior, Freeform and the ABC Owned Television Stations. ESPN's and Disney's authenticated networks also are available on Microsoft X-Box, Apple TV, and Roku. ESPN, ESPN2, Disney Channel and

[4] *See By the Numbers: 70 Amazing Netflix Statistics & Facts*, DMR (Jan. 21, 2016), http://expandedramblings.com/index.php/netflix_statistics-facts.

Freeform are on the Sling stand-alone service. Just this year, Disney reached a deal to include the ESPN and Disney networks, as well as ABC, on Sony Vue. Most recently, Disney announced that two of its digital distribution deals are structured to permit accelerated inclusion by non-owned ABC Affiliates.

- Fox recently added to its long history of making content available through alternative means by expanding its already robust Internet services to include live linear streaming of sports content through FOX Sports GO, an interactive sports programming website and application that simulcasts the linear streams of Fox Sports 1, Fox Sports 2, FOX College Sports and FOX Deportes, as well as select sporting events airing on the FOX broadcast network and Fox's regional sports networks.

- CBS has been introducing a number of digital video services in a variety of business models for almost a decade. Most recently, CBS announced its innovative distribution platform, CBS All Access, which is a multi-platform subscription service that gives subscribers access to the live broadcast signals of CBS owned-and-operated CBS Television Network stations and 132 local affiliates of the CBS Television Network, and on-demand programming from the CBS Television Network and CBS's vast library. In addition, Showtime, one of CBS' subsidiaries, launched a stand-alone streaming service for its Showtime programming last year, which brings the network's library of original series, movies, specials, and documentaries to viewers without requiring a traditional cable or satellite TV subscription.

- Time Warner last year launched a stand-alone online video service for its HBO programming called HBO NOW. The service offers every episode of the best HBO original series for streaming on an on-demand basis, along with comedy specials, movies, sports programs, and documentaries. Time Warner also has played a leadership role in making TV Everywhere products available, incorporating both live and on-demand viewing over mobile devices for several of its Turner networks, including CNN, Cartoon Network, TNT, and TBS. Time Warner also offers authenticated apps for its HBO and CINEMAX networks.

- As pioneers in the lifestyle space, Scripps Networks Interactive has long offered a full complement of TV Everywhere websites, and iOS and Android apps for HGTV, Food Network, Travel Channel, DIY Network and Cooking Channel. In Fall 2015, Scripps continued to expand platform availability by launching its TV Everywhere apps on the three most popular in-home connected devices: Amazon Fire TV, Roku, and Apple TV. Scripps video content can also be found on Netflix, SlingTV, Sony Vue, Snapchat ,and Apple News.

- Viacom has authenticated apps featuring content from MTV, Comedy Central, Spike, Nickelodeon, CMT, and TV Land. It has also launched Noggin, a mobile subscription app for preschoolers featuring award-winning shows, music, and

educational videos. The service is available direct to consumers and contains hundreds of episodes of safe and ad-free children's programming.

- A&E Networks distributes content on a variety of alternative platforms. Its A&E, History, Lifetime, Viceland and FYI TV Everywhere applications are available as branded websites and mobile applications for phones and tablets on iOS, Windows, Android and Amazon Kindle platforms and on streaming media devices including Roku, Amazon Fire TV, and Apple TV. The A&E Networks portfolio of A&E, History, Lifetime, FYI, LMN, and Viceland are included in the line-up for DISH Network's Sling TV. In addition, A&E has licensed short-form content on YouTube and long-form content on Netflix, Amazon and Hulu and has introduced direct-to-consumer SVOD products "Lifetime Movie Club" through iOS, Roku, and Amazon Prime and "HISTORY Vault" through Roku and Amazon Prime.[5]

Thus, the Content Companies have been leaders in making programming available to consumers over new devices and networks and have done so without sacrificing the viewing experience. Indeed, they have done so with a goal of *enhancing* the viewing experience, which is critical to attracting and retaining both viewers and distributors. This is the result of their painstaking focus on ensuring the content is presented in a compelling way in their own video applications and, as discussed below, maintaining quality content presentation through detailed agreements with all licensed distributors – whether traditional cable or satellite TV providers, Internet-based carriers, or new entrants.

II. LICENSING AGREEMENTS BETWEEN PROGRAMMERS AND DISTRIBUTORS ENSURE A POSITIVE VIEWING EXPERIENCE AND PRESERVE INCENTIVES FOR INVESTMENT IN CONTENT

A. Carefully Negotiated Terms in Program Licenses Safeguard Content Against Theft and Protect Critical Branding and Presentation Elements

Agreements between the Content Companies and distributors, including traditional MVPDs and alternative platforms, ensure that audiences enjoy a wealth of curated, high-quality

[5] For a description of offerings by Content Companies, *see, e.g.*, Comments of The Walt Disney Co., 21st Century Fox, Inc., & CBS Corp., MB Docket No. 14-261, at 2-5 (filed March 3, 2015).

programming, presented in an appealing and consistent manner. These carefully negotiated agreements reflect requirements associated with rights acquisitions and production commitments, as well as individualized decisions of the Content Companies regarding the manner in which they reach their audiences and present their content. These agreements benefit consumers by allowing viewers to differentiate among the wide array of available programming, facilitating the navigation and selection of content, protecting them from over-commercialization and inappropriate advertising, and enabling them to enjoy their programming without alteration or confusion.

These agreements also define the rights granted by each Content Company. They establish the scope of each license and describe how the distributor is permitted to exploit those rights when it creates commercial retail offerings for viewers. Importantly, the agreements also detail ways in which the distributor *cannot* disseminate or commercially exploit content. These restrictions also may be necessary because a programmer is not the copyright owner for all of the content on its network, and therefore does not have certain rights to grant. Importantly, linear programmers simply may not possess the full scope of rights from the copyright holder, especially with respect to sports or high-quality programming. There may also be specific marketplace reasons for not including certain rights as part of a particular distribution agreement. For example, agreements often specify that distributors may make particular content available only in certain geographic regions or markets, or on some other exclusive basis. Similar provisions limit the types of devices that can be used to view content, as some copyright owners may restrict distribution through, for example, mobile phones because they sell those rights separately in the marketplace.

Agreements between programmers and distributors may include numerous terms related to security and programming integrity,[6] such as the following:

(1) Scope of License – These provisions may detail the platforms, technologies, and territories covered by the distribution rights as well as other conditions of distribution, including:
   - The extent of the distributor's obligation to carry the content in its entirety, without modification, deletion, disruption, interruption, substitution, insertion into, or alteration (which may include ancillary materials, such as metadata, security watermarks, images, graphics, and logos);
   - The amount of content distributed to consumers, the timing of delivery, and whether it may be made available on-demand; and
   - Who is permitted to access content; where they can access the content (*e.g.*, territorial and retransmission restrictions); when they may access it (*e.g.*, whether time-shifting is permitted); and how (*e.g.*, with or without fast forwarding).

(2) Permitted Devices – These provisions vary based on concerns about security risks posed by certain devices, or the content provider's – or underlying copyright holder's – market-based decision to sell distribution rights to different devices separately.

(3) Terms Negotiated with Copyright Owners for Content that a Programmer Licenses from Others – A distributor must abide by any restrictions contained in the license that a program network receives from a copyright owner (*e.g.*, networks license live sports content from sports leagues, which, as the copyright owners, provide various restrictions on the networks).

(4) Content Protection – These provisions may detail various security measures, such as the implementation of certain security or authentication protocols.

(5) Advertising – These provisions may include terms regarding the alteration or replacement of advertising, as well as the type of ads allowed.
   - The distributor may or may not be allotted advertising availabilities to sell during commercial breaks.

(6) Placement – These terms may include the tier on which content is carried, channel position and neighborhood restrictions, as well as commitments with respect to brand and channel location, and appearance in electronic program guides.

[6] *See, e.g.*, Letter from Lawrence E. Strickling, Admin'r, Nat'l Telecomms. & Info. Admin. to Tom Wheeler, Chairman, FCC, MB Docket 16-42, at 4 (Apr. 14, 2016) (emphasizing the importance of "respecting the security and integrity of MVPD programming").

(7) Navigation, Search, and Recommendation – Such provisions may detail how consumers will see and navigate to content and how content will be treated in search and recommendation engines. They may also include provisions relating to auto-tuning to other channels and/or auto-directing consumers to other content at the conclusion of a given program.

(8) Signal Quality – These provisions detail delivery obligations to ensure that consumers receive the best possible picture and sound.

(9) Data – These terms govern the collection, sharing, and use of viewer data, including methods for tracking viewership of programs with advertising (*e.g.*, Nielsen, Rentrak).[7]

These agreements do not impede the ability of competitive navigation device makers to develop and market their devices. Nor are they designed to limit the distribution of content to new platforms. As described above, the Content Companies have incentives to distribute their content to new platforms and are working hard to do so. The agreements are instead focused on protecting the security and integrity of content and the underlying content license.

The distribution agreements Content Companies enter into with new distribution platforms contain similar protections. However, those agreements often contemplate fundamentally different consumer offerings, such as smaller packages or lower advertising loads. These packages enable new entrants to offer consumers a truly differentiated service, spurring the type of competition that the Commission desires. Were the Commission's rules to take effect, as discussed below, OTT platforms would have less incentive to negotiate licenses for content, since they could obtain programming from MVPDs for free, without any additional commitments.

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[7] The specific terms of these agreements, as the Commission is aware, are confidential and proprietary. *See, e.g.*, *CBS Corp. v. FCC*, 785 F.3d 699, 701 (D.C. Cir. 2015) (characterizing programming distribution agreements as "proprietary business material"); *see also News Corp. & Liberty Media Corp.*, 22 FCC Rcd. 12797, 12798-804 (2007); *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd. 24816, 24831 (1998).

In any case, by detailing each of these issues as a condition of granting distribution rights, the agreements reflect a concept of "security" that encompasses not only compliance with copy control requirements (*e.g.*, copy once, copy never), but also compliance with the terms of the license. This concept of security – as encompassing all of the protections embedded in the licensing agreements – safeguards the integrity of the content created, acquired, and packaged into channels by the Content Companies. It also ensures programmers' direct involvement (as copyright owners and licensees) over how, when, and where their content is distributed and displayed.

The rights licensed by the Content Companies through these agreements derive and flow from copyright law, which grants copyright holders the right to license – or not to license – their content as they deem appropriate. The Copyright Act grants the owners of copyrighted works the exclusive right to determine how their content will be distributed, reproduced, and publicly performed. Collectively, this bundle of rights ensures that the owner of a work, if it chooses, can decide how its content will ultimately appear to the consumer.

In addition to establishing a shared understanding as to how content can be presented, distributed, and monetized, licensing agreements also detail the required copy control and piracy protections that must accompany various categories of programming. In particular, agreements may require the implementation of certain security or authentication protocols by the distributor. If a distribution method proves unsafe or threatens the security of content, the Content Companies and distributors rely on agreed-upon procedures set forth in their contracts to resolve any issues. This is especially the case for some of the highest value content that viewers enjoy and demand, including pay-per-view or video-on-demand programming. Keeping this content

secure ensures that content providers can continue to invest in creating this vibrant and diverse programming.

B. The Notice Poses Risks to Content Companies' Ability to Continue Providing Audiences a Diverse Array of Compelling, High-Quality Content

Several weeks before adoption of the Notice, a number of the Content Companies raised concerns regarding the approach being contemplated by the Commission.[8] These concerns were centered on the potential impacts of the proposed rule on today's dynamic programming marketplace. In particular, the Content Companies cautioned that the Commission should carefully consider the effects its proposed actions would have on existing licensing agreements, the incentives of programmers to develop high-quality content, and the copyright framework under which content providers make their content available to consumers.

Despite these concerns, the Commission adopted the Notice and proposed changes that go far beyond the goal of improving the commercial availability of set-top boxes.[9] As proposed, the broad scope of the rules would harm consumers and reduce the incentives to invest in content because:

- The proposals impede the Content Companies' ability to negotiate and enforce private contractual agreements with third-party navigational interface providers that carefully manage branding, presentation, and other aspects of how their content will be distributed and discovered. The proposals offer no alternative enforcement mechanism that would substitute for these contract terms. The proposals also would abrogate the Content Companies' private contractual agreements with MVPDs.

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[8] *See* Letter from A&E Television Networks, LLC, AMC Networks, Inc., Discovery Commc'ns, Inc., NBCUNIVERSAL, Scripps Networks Interactive, Inc., The Walt Disney Co. & ESPN, Inc., Time Warner Inc., 21st Century Fox, Inc., & Viacom Inc. to Marlene H. Dortch, Sec'y, FCC, MB Docket 15-64 (Jan. 14, 2016).

[9] The Notice notes that content providers "raised concerns" that a competitive navigation solution would lead to breach of the terms of licensing agreements, but then completely fails to address the substance of those concerns. *See* Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,046.

- The proposals contain insufficient protections – or leave key details of protections wholly absent or unresolved – that are necessary to ensure that the security provisions contained within the distribution agreements would flow through to the third-party devices. The proposal for an "Open Standards Body" to determine the appropriate security protocols is particularly unavailing and falls far short of the Commission's statutory obligation to protect the security of content.

- The proposals would allow third parties to alter, substitute, and otherwise dilute the advertising that helps support investment in high-quality content.

- The proposals would allow third-party navigation device and software makers to change, remove, rearrange, or disaggregate content from the distinct channels and on-demand portals created by the Content Companies.

- The proposals would give non-MVPD distributors little incentive to negotiate content licenses for innovative services if they can demand the content at no cost, and without contractual obligations, directly from MVPDs.

Each of these aspects of the Notice would undermine programmers' intellectual property rights and increase the economic risks of investing in content. The Notice increases the likelihood that third-party navigation device makers will fail to secure content, weaken the appeal or value of the content to consumers, or otherwise negatively impact content providers' ability to derive economic returns from investing in content. By weakening content providers' ability to earn returns on content investments, the FCC's proposal as drafted decreases their incentives and ability to produce more of the great programming audiences love. As drafted, the Commission's proposals would thus undermine, rather than expand, consumers' ability to continue enjoying the diverse, high-quality content that the Content Companies provide over a variety of distribution platforms.

III. THE PROPOSALS IN THE NOTICE EXCEED THE COMMISSION'S STATUTORY MANDATE

The Content Companies appreciate and support the Commission's desire to provide consumers with additional options for set-top boxes. Section 629 grants the Commission authority to spur competition in the set-top box market, but in doing so the Commission must

adhere to the unambiguous terms of the statute.[10] The terms of Section 629 are, in reality, quite narrow. They allow the Commission to promote competition in the market for set-top boxes, but they do not give the Commission power to force programmers to pass on their content to third-party developers – a problem exacerbated because those developers are not obliged to abide by the terms of programmers' licensing agreements. The statute also requires the protection and security of content, including preservation of the contractual terms meant to keep content secure. The Notice, however, far oversteps these bounds.

A. The Commission's Authority Under Section 629 Is Limited to Promoting the Commercial Availability of Set-Top Boxes

Section 629 authorizes the Commission to pursue a narrow solution to a specific problem: the lack of competition in the MVPD set-top box marketplace. Section 629(a) provides the Commission with limited authority to promote the availability of devices made by companies unaffiliated with MVPDs as alternatives to MVPD-leased set-top boxes. The carefully cabined nature of Section 629 is clear from the statute's text, structure, and legislative history.

1. *Section 629(a) sets forth a clear statutory command.*

Under Section 629(a), the Commission may "adopt regulations to assure the commercial availability . . . of *converter boxes*, interactive communications *equipment*, and *other equipment* used by consumers to access multichannel video programming . . . from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor."[11] This provision is unambiguous. Contrary to the Commission's expansive interpretation of the statute

[10] *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006).

[11] 47 U.S.C. § 549(a) (emphasis added).

– which would cover not only hardware but also software[12] – the text of the statute refers only to the availability of converter boxes and other *equipment*. The term "equipment" refers to a physical device and does not include software.[13] And under the principle of *noscitur a sociis*, which provides that "additional neighbors" in a statute can help determine the meaning of a particular statutory term, "other equipment" must mean something similar to a converter box.[14] This clear statutory text underscores Congress's narrow goal of ensuring that set-top boxes would be available from multiple, competitive vendors.

The legislative history confirms that this directive was intended to be narrow and straightforward. Although the House originally proposed a bill that would have affected all manner of "telecommunications subscription service[]" technology, the "scope of the regulations [was] narrowed to include only equipment used to access services provided by multichannel video programming distributors."[15] That is, the law as passed ultimately covers only the commercial availability of set-top boxes and similar equipment – not any conceivable technology that could be used in conjunction with MVPD service.

In previous proceedings, the Commission itself agreed that Section 629(a)'s mandate was limited to set-top boxes. In 1998, for example, the Commission noted that "[t]he purpose of Section 629 . . . is to expand opportunities to purchase . . . *equipment* from sources other than the

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[12] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,037 (software can be considered "a navigation device separate and apart from the hardware on which it is running").

[13] *See, e.g.*, BLACK'S LAW DICTIONARY 654 (10th ed. 2014) (defining "equipment" as the "articles or implements used for a specific purpose or activity"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 423 (11th ed. 2004) (defining "equipment" as "the set of articles or physical resources serving to equip a person or thing").

[14] *See, e.g.*, *Bullock v. BankChampaign, NA*, 133 S. Ct. 1754 (2013).

[15] S. REP. NO. 104-230, at 181 (1996) (Conf. Rep.).

service provider."[16] In both its CableCARD and its AllVid proposals, the Commission never strayed beyond the bounds of converter boxes and other physical equipment. The nature of the proposed intervention here is, by contrast, broad, novel, and unsupported by the statutory text or legislative history.

2. *Section 629(b) protects the security of content, including the security of licensing terms*.

Section 629(b) further carefully and explicitly limits the Commission's authority by demanding that actions taken to promote set-top box competition do not undermine the security of content. Section 629(b) provides that the "Commission shall not prescribe regulations . . . which would jeopardize security of multichannel video programming and other services offered over multichannel video programming systems."[17] It also states that the Commission may not "impede the legal rights of a provider of such [multichannel video programming] services to prevent theft of service."[18]

The legislative history of Section 629(b) emphasizes what the plain language requires: that the Commission may not pursue a competitive set-top box marketplace at the expense of the security of programming. The Commerce Committee Report on Section 629 stresses the protection of those who "have a valid interest, *which the Commission should continue to protect*, in system or signal security and in preventing theft of service."[19] The Report further observes

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[16] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report & Order, 13 FCC Rcd. 14775, 14776 (1998) (emphasis added).

[17] 47 U.S.C. § 549(b).

[18] *Id*.

[19] H.R. REP. NO. 104-204, at 112 (1995) (referring to the original draft of what later became Section 629) (emphasis added).

that Section 629 "directs the Commission to take this interest into account in developing its regulations."[20]

The statute and the legislative history also clearly state that Section 629 requires the Commission to protect the rights that *owners* of programming have in their content. Section 629 specifically prohibits the Commission from adopting regulations that would, in any way, "jeopardize security of multichannel video *programming*."[21] In the floor debates over Section 629, Senator Snowe confirmed this point by stating that "the FCC has the responsibility and obligation to consider the legitimate needs of *owners and distributors* of cable programming to ensure system and signal security, and to prevent theft of programming or services."[22] As owners and licensees of programming, the Content Companies' interests in the security and protection of their programming are of central importance to Section 629(b).

Importantly, Section 629(b) protects programmers in two different ways, as reflected in its use of the terms "theft" and "security." Of course, 629(b) guards against the "theft" of service, and hence the theft of programmers' content. But it also protects the "security" of programming. Under the ordinary rules of statutory interpretation, "security" must mean something different from the mere prevention of theft. Congress easily could have used the term "theft" alone if that was all it intended.[23] Instead, it referred to "security" as distinct from "theft," and the plain language of "security" means something broader: "freedom from risk or

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[20] *Id*.

[21] 47 U.S.C. § 549(b).

[22] 141 CONG. REC. S7992 (daily ed. June 8, 1995) (statement of Sen. Snowe) (emphasis added).

[23] *Keene Corp. v. United State*s, 508 U.S. 200, 208 (1993) ("where Congress includes particular language in one section of a statute but omits it in another . . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

danger; safety."[24] In other words, the Commission has an obligation to protect the integrity of programming from the risk of alteration and other dangers. Read against the background of intellectual property law, this protection of "security" must extend not only to the protection from piracy but also to the entire realm of exploitation and presentation issues covered by the Content Companies' licenses.

3. *Section 629(f) confirms that the Commission's authority is limited*.

Section 629(f) underscores the fact that the Commission's authority is narrowly circumscribed. Section 629(f) explicitly provides that "[n]othing in [Section 629] shall be construed as expanding or limiting any authority that the Commission may have under law . . .."[25] In other words, Section 629(f) directs the Commission and courts to read Section 629's directive narrowly. The existence of Section 629(f) confirms that Section 629, as a whole, was not meant to radically disrupt the status quo beyond 629(a)'s stated purpose: to enhance competition for set-top boxes by ensuring that non-MVPD competitors could manufacture and deploy similar equipment. Courts reading Section 629 have agreed: the scope of Section 629 is limited and does not "empower[] the FCC to take any action it deems useful in its quest to make navigation devices commercially available."[26]

B. The Proposal Exceeds the Commission's Statutory Mandate by Enabling Third Parties to Sidestep the Contractual Terms that Govern the Grant of Content to MVPDs

Given its narrow purpose and carefully cabined language, Section 629 does not permit regulations that would interfere with the Content Companies' contracts or intellectual property

[24] THE AMERICAN HERITAGE DICTIONARY 1575 (4th ed. 2006).

[25] 47 U.S.C. § 549(f).

[26] *EchoStar Satellite, L.L.C. v. FCC*, 704 F.3d 992, 999-1000 (D.C. Cir. 2013).

rights. Chairman Wheeler has recognized that fact. He indicated publicly that the Notice would (or should) safeguard content consistent with programmers' underlying agreements. The Chairman's Fact Sheet stated that "[e]xisting content distribution deals, licensing terms, and conditions will remain unchanged" under the new rule.[27] The Chairman later reiterated this reassurance to Congress, claiming "that which the cable operators put out should remain sacrosanct and untouched."[28] The Notice itself states that the contracts between programmers and MVPDs should not be jeopardized. One of the Commission's goals, according to the Notice, is to "ensure that negotiated licensing terms imposed by content providers on MVPDs are passed through to Navigation Devices."[29] The Commission tentatively concludes that it should withhold advertising information from Service Discovery Data to ensure advertising is not replaced or altered, but adopts no other rules to implement this or to protect other program licensing terms.[30]

These statements by the Chairman and Commission make sense in light of Section 629's limited statutory mandate. Section 629(a) does not give the Commission the authority to interfere with programmers' contractual rights, and Section 629(b) explicitly protects the

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[27] *FCC Chairman Proposal to Unlock the Set-Top-Box: Creating Choice & Innovation* 2 (Jan. 27, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0127/DOC-337449A1.pdf ("Chairman's Fact Sheet").

[28] *Oversight of the FCC: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 114th Cong. 23 (2016) (testimony of Tom Wheeler, Chairman, FCC).

[29] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,044.

[30] *In re Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking, FCC 16-18, MB Docket No. 16-42, CS Docket No. 97-80 (rel. Feb. 18, 2016) ¶ 80 n.232 ("NPRM") ("We note that in paragraph 38 above, we tentatively conclude that Service Discovery Data need not include descriptive information about the advertising embedded within the program, to ensure that competitive Navigation Devices do not use that data to replace or alter advertising.").

"security" of content, which is embedded in the licensing and distribution agreements. Indeed, these statements seem to reflect that the Commission is cognizant of its legal obligations.

Nonetheless, as currently structured, the proposed rules contain no mechanism to ensure that "negotiated licensing terms" are "passed through to Navigation Devices." Indeed, the Notice specifically *disclaims* any intention of imposing regulations to protect important licensing terms, stating that it is "unnecessary . . . to propose any rules to address" device makers' ability to "disrupt elements of service presentation (such as agreed-upon channel lineups and neighborhoods), replace or alter advertising, or improperly manipulate content."[31] The Notice's mandate that content be passed along to third parties, without the protection of programmers' negotiated license terms, would clearly exceed the scope of authority provided to the Commission under Section 629.

The deficiencies of the Notice under Section 629 are twofold: It both abrogates contracts between programmers and MVPDs and would require – by regulatory fiat – that MVPDs further sub-distribute the underlying content without a negotiated license. MVPDs would be mandated to pass along programming to third parties who are not bound by the terms that govern the MVPDs' rights to content. The import of the FCC's proposal, as currently drafted, is that selected benefits of private contracts would be extended to third parties, without any of the accompanying burdens, covenants, and conditions that were integral to the content owners' agreement to provide the content in the first instance. The Notice's proposals would also negatively affect the rights of third-party copyright holders and the other original content owners from whom the Content Companies license content.

[31] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,046.

Such a drastic change in the video program distribution marketplace goes beyond any reasonable view of what Congress enacted in Section 629. The widespread derogation of privately negotiated contractual rights that would be effectuated by the proposed rules falls outside the limited statutory mandate to promote competition for set-top box equipment. To be sure, if Congress had desired to effectuate changes so fundamental to the way that content is licensed and distributed, it could have and would have said so clearly and directly. It would not have buried the sweeping overhaul of an industry by then-unknown technology in an obscure provision of law relating to set-top equipment. As the Supreme Court has noted, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[32] This is especially true when Congress specifies that it intends for a regulatory provision to be read narrowly, as it did in Section 629(f).

C. The Proposal Falls Far Short of Enforcing Security Protections as Required Under Section 629(b)

The Notice repeatedly acknowledges the Commission's obligation to secure programming under Section 629(b), but then fails to address many considerations that are essential to security. This failure harms both the quality of consumers' viewing experience and the Content Companies' ability to continue investing in new content. As explained above, the use of the term "security" indicates Congress's desire to protect programmers' rights not only to keep their content safe from piracy, but also more broadly to enforce key licensing terms related to the protection, exploitation, and presentation of content. The proposed rules, as drafted,

[32] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also, e.g., Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (one would expect "Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance'"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").

would fail to require device manufacturers either to take adequate steps to prevent piracy and theft or to enforce the Content Companies' licensing terms, both of which would be inconsistent with the requirements of Section 629(b).

Perhaps the most glaring potential deficit in this regard relates to the security architecture laid out in the proposed rules. As discussed above, Section 629(b) commands the Commission not to "jeopardize [the] security of multichannel video programming" or "impede the legal rights of a provider of such [multichannel video programming] services to prevent theft of service."[33] However, the Notice's security proposals fail to meet Section 629(b)'s requirements to maintain security.

The proposed rules effectively create an entirely new content distribution ecosystem in which content will be transmitted to devices or other services by means of three "Information Flows" in formats specified by "Open Standards Bodies;"[34] purportedly secured through a "Compliant Security System" licensed to third-party device makers and service providers;[35] and managed by a "Trust Authority" responsible for maintaining certificates and keys for those devices.[36] However, despite the Commission's attempts to delineate the roles played by each new player in this marketplace, the proposed rules ultimately fail to assign sufficient security responsibilities to any of these three critical components.

According to the Notice, an Open Standards Body is responsible for determining what limitations are capable of being placed on the transmission, protection, and use of content, but

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33 47 U.S.C. § 549(b).

34 Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,039.

35 *Id*. at 14,042.

36 *Id*.

the Content Companies that own that content are not assured of any role within that body.[37] Based on their extensive experience developing content transmission policies and protocols and their strong incentive to keep content safe, the Content Companies are in the best position to develop specifications that accurately encode the granted permissions. If the proposed rule were to proceed as drafted, however, the underlying content would likely be transmitted using security protocols that differ from those set forth in licensing arrangements or that Content Companies would otherwise deem inadequate under such arrangements.[38]

Moreover, an Open Standards Body cannot lawfully take on this critical security role, for multiple reasons. First, it is inconsistent with the express language of Section 629(a), which contemplates that the Commission will adopt regulations "in consultation with" a standards-setting body.[39] Rather than merely proposing consultation with an Open Standards Body, however, the rules as drafted would delegate the Commission's authority on key questions of security to this yet-to-be-determined entity. However, Section 629(b) makes the *Commission* responsible for ensuring that security is not jeopardized. Second, as was true in *United States Telecom Ass'n v. FCC*,[40] "[i]t is clear here that Congress has not delegated to the FCC the

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[37] At best, the Content Companies will be one voice among many clamoring for greater access to their content, given its composition: "A standards body (1) whose membership is open to consumer electronics, multichannel video programming distributors, content companies, application developers, and consumer interest organizations, (2) that has a fair balance of interested members, (3) that has a published set of procedures to assure due process, (4) that has a published appeals process, and (5) that strives to set consensus standards." *Id.* at 14,039.

[38] In fact, there is no evidence in the record or the Notice to support the proposition that the parameters contained in licensing agreements are even capable of being transmitted to competitive navigation device makers via the three Information Flows. Moreover, as noted in n.7, *supra*, the terms of licensing agreement reflect confidential business information.

[39] 47 U.S.C. § 549(a); *see, e.g.*, *Bayou Lawn and Landscape Servs v. Sec'y of Labor* , 713 F.3d 1080, 1084 (11th Cir. 2013) (holding that a statute that instructs an agency "to consult with the 'appropriate agencies of the Government'" in rulemaking does not grant those agencies rulemaking authority, because other agencies "cannot bootstrap that supporting role into a co-equal one").

[40] 359 F.3d 554 (D.C. Cir. 2004).

authority to subdelegate to outside parties."[41] After all, "[a] general delegation of decision-making authority to a federal administrative agency does *not*, in the ordinary course of things, include the power to subdelegate that authority beyond federal subordinates."[42] Third, the Commission's proposed rules would conflict with settled Constitutional principles that prohibit agencies from delegating rulemaking authority to outside parties.[43]

Compliant Security Systems, meanwhile, must be "licensable on terms that require licensees to comply with robustness and compliance rules."[44] While this license is the single specific contractual obligation placed on device manufacturers in the proposed rules, the Notice includes no specific robustness or compliance rules. In other words, a device security system can be "compliant" without satisfying any specific obligations related to the security of content – a result that would be inconsistent with the obligations of Section 629(b). In addition, the proposed rules do not describe any concrete technical means through which Compliant Security Systems would ensure content is protected.[45]

Finally, the Trust Authority, which the Commission seems to envision will serve a critical role in securing content, is hardly mentioned in the proposed rules. The Notice includes no rules governing the selection and operation of the Trust Authority, and its role is left

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41 *Id*. at 566.

42 *Id*.

43 *See, e.g*., *Carter v*. *Carter Coal Co*., 298 U.S. 238, 311 (1936).

44 Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,051.

45 The Commission even acknowledges that one of the technical approaches in its toolkit for securing content streams proposed in the Notice – link protection – "would create too much potential for vulnerability" for large swaths of programming. *Id*. at 14,042.

remarkably unclear.[46] Adoption of the proposed rules as drafted thus would be inconsistent with the obligation not to jeopardize security under 629(b). In fact, as noted more fully below, the Notice has offered so little detail regarding the Trust Authority that the Content Companies currently have insufficient notice of its role to provide comment on what they understand to be a key aspect of the Commission's proposed security infrastructure.

Moreover, even outside of the proposed security architecture, the new regime proposed in the Notice would have unforeseen side effects that would negatively impact security and conflict with the security mandates in Section 629(b). First, the Commission included no measures to address (or even acknowledge) the potential security concerns presented by software-based solutions. However, as many experts have noted, software-based solutions present content owners with less robust options for protecting and securing their content.[47] Even if Section 629(a) authorized the Commission to allow software-based navigation solutions, Section 629(b) would not permit it to do so unless it ensures that such solutions sufficiently protect content. Second, although the Commission expresses interest in encouraging streaming to mobile systems, including app-based systems, it also ignores the unique security concerns within mobile

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[46] *Compare* NPRM ¶ 50 n.146 (suggesting the Trust Authority will issue "keys"), *with* Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,042 (suggesting it will issue "certificates and keys" and asking whether its role is sufficiently clear).

[47] "Stronger security assurances may be possible by grounding security mechanisms in roots of trust. Roots of trust are highly reliable hardware, firmware, and software components that perform specific, critical security functions. Because roots of trust are inherently trusted, they must be secure by design. As such, many roots of trust are implemented in hardware so that malware cannot tamper with the functions they provide." Nat'l Inst. of Standards & Tech., *Hardware Roots of Trust* (last updated May 7, 2015), http://csrc.nist.gov/projects/root-trust. Thus, as the Commission has recently been told: "The use of a software-based module instead of a hardware security module increases the risk associated with the capture and reverse engineering of . . . [a] device." FCC TAC Cybersecurity Working Group, Applying Security to Consumer IoT Devices Subcommittee, *Technical Considerations White Paper*, Rel. V.1.117 (Dec. 4, 2015), https://transition.fcc.gov/oet/tac/tacdocs/reports/2015/FCC-TAC-Cyber-IoT-White-Paper-Rel1.1-2015.pdf.

environments.[48] The Commission should not be preparing to adopt lower security thresholds at the same time content is increasingly moving to higher-risk software-based and mobile environments.

IV. THE PROPOSAL FAILS TO PROVIDE EFFECTIVE MECHANISMS FOR THE ENFORCEMENT OF PROGRAMMER RIGHTS TO SECURE CONTENT OR COMPLIANCE WITH VARIOUS CONSUMER PROTECTION OBLIGATIONS

A. The Commission Eliminates the Existing Enforcement Mechanisms in Licensing Agreements Without Proposing any Effective Alternatives

The proposed rules jeopardize the security of programming not only by failing to establish protections for content, but also by effectively eliminating the existing rights of the Content Companies to enforce the agreement terms that protect that content. It is those contractual rights – and not copyright litigation generally – that form the primary basis by which the Content Companies enforce their rights. The Content Companies submit that the Commission's proposal fails to recognize the importance of these licensing agreements as enforcement mechanisms. The Commission is very clear about its intention to leave issues "such as channel placement and treatment of advertising to marketplace forces."[49] But the Commission ignores the fact that, with regard to the third parties who now will enjoy new compelled access to Content Companies' content, it has effectively dismantled the very "marketplace"-established agreements that otherwise protect that content.[50]

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[48] "Many mobile devices are not capable of providing strong security assurances to end users and organizations." NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, GUIDELINES ON HARDWARE-ROOTED SECURITY IN MOBILE DEVICES (Draft), SP 800-164, at v (2012).

[49] NPRM ¶ 2.

[50] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. 14,043.

Moreover, in making this change, the proposed rules do not offer any replacement for the protections built into licensing agreements or offer any plausible alternative enforcement procedure. The Notice fails to specify how the Commission, MVPDs, or the Trust Authority could act in the event a navigation device or service is shown to be insecure. The Notice does not detail how any party or the Commission would even discover such insecurity – an oversight that could potentially permit vulnerabilities affecting not only the security of transmitted content but consumers' home networks more broadly to fester for long periods of time. Nor does the Commission propose or even suggest any means to rescind certificates or keys, revoke manufacturers' licenses or suspend the stream of content to non-compliant devices. In many respects, the Commission appears to assume that third-party device manufacturers will simply follow the rules in all cases. With no functional alternative to contractual privity between programmers and navigation device manufacturers, the Commission's enforcement regime would be effectively toothless. Such an inadequate enforcement mechanism would not comply with Section 629(b).

B. By Failing to Propose Effective Licensing Enforcement Mechanisms, the Notice Ensures Other Important Commission Priorities Will Remain Unenforced

Licensing agreements have served as one of the primary means by which the Content Companies ensure compliance with various Commission policy objectives. Agreements often contain commitments by content distributors to comply with various congressional and Commission priorities, including protecting children, maintaining accessibility and closed captioning, and delivering emergency messages. The Notice proposes to require competitive device makers to self-certify that they will comply with Commission rules. Under the Commission's proposal, the Content Companies would still be obligated to comply with the underlying rules, but the Commission would have no effective means to ensure end-user device

compliance. Indeed, the Commission does not identify any steps that could be taken if device makers fail to comply with these certifications. As such, this approach is almost certain to fail, with important Commission priorities accordingly going unaddressed and consumers without a remedy.

V. IF ADOPTED, THE NOTICE WOULD VIOLATE THE COMMISSION'S OBLIGATION TO ENGAGE IN REASONED DECISION-MAKING

The Administrative Procedure Act requires the Commission to engage in reasoned decision-making. The agency's regulations may be deemed unlawful if its actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[51] Thus, the Commission must closely examine relevant facts and base its decision on the record before it. In particular, the Commission may not adopt an approach if the "record before the agency does not support the agency action"[52] or if the agency has "entirely failed to consider an important aspect of the problem."[53] By refusing to protect programmers' content or licensing terms and otherwise ignoring the negative impacts the Notice might have on programming, the Commission has acted arbitrarily and unreasonably.

The Notice, as currently drafted, relies on faulty logic and erroneous assumptions about the state of the video marketplace to reach the conclusion that it need not adopt any limitation *at all* on the manner and methods by which third parties may monetize programmers' content.

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[51] 5 U.S.C. § 706(2)(A) (directing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[52] *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

[53] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Contrary to the facts presented to the Commission by the Content Companies and others,[54] the Commission suggests that no rules are needed to protect content against manipulation by device makers. Instead, the Notice posits that copyright litigation is an adequate tool to protect content against third-party misuse. This assertion starkly conflicts with the requirement of reasoned decision-making, since it is belied by not only the record before the Commission but also common sense.[55]

To begin with, the Notice's proposal is based on incorrect factual assumptions. The Notice deems the Content Companies' concerns about third parties monetizing their content outside of the scope of the underlying licenses "speculative."[56] It specifically notes that the Commission is "encouraged" by the absence of allegations against retail navigation devices currently on the market concerning such issues.[57] Despite the statements in the Notice, however, the existing CableCARD regime – which for more than a decade has allowed consumers to access MVPD content with third-party equipment – has already been a source of the very concerns the Content Companies have raised. For example, various navigation device makers have already been placing ads over linear programming.[58] A number of CableCARD-compatible

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54 *See, e.g.*, Letter from A&E Television Networks, LLC, AMC Networks, Inc., Discovery Commc'ns, Inc., NBCUNIVERSAL, Scripps Networks Interactive, Inc., The Walt Disney Co. & ESPN, Inc., Time Warner Inc., 21st Century Fox, Inc., & Viacom Inc. to Marlene H. Dortch, Sec'y, FCC, MB Docket 15-64 (Jan. 14, 2016).

55 *See, e.g.*, *Fla. Power & Light Co.*, 470 U.S. at 744.

56 Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. at 14,046.

57 *Id.* at 14,045.

58 Deborah Yao, *More Ads Coming to TV Even to One-Time Havens*, ABCNEWS.COM, http://abcnews.go.com/Technology/story?id=8237990&page=1 (last visited Apr. 20, 2016) ("TiVo, the creator of the digital video recorder that panicked the TV business by making it simple to skip ads, now flashes banners on TV screens when users pause, fast-forward or delete shows," including "layering an ad on top of" programming.); *see also* Michael Hiltzik, *TiVo Finally Tells TV Broadcasters to Stuff It*, L.A.TIMES, Oct 5, 2015, http://www.latimes.com/business/hiltzik/la-fi-mh-tivo-finally-tells-tv-broadcasters-20151005-

(cont'd)

Smart TVs also place ads over programming without content owners' consent.[59] These practices have grown so common (and frustrating to viewers) that consumer electronics websites now provide tutorials explaining how to disable such advertisements.[60] Some navigation devices also insert tags at the beginning and end of commercial breaks to automatically skip all commercials aired during a program.[61] None of the Content Companies has granted these device makers the right to place advertisements over their content or tag commercials. Yet device makers are already openly defying programmers' contractual licensing terms under the CableCARD regime.[62]

The Commission's proposal as drafted would exacerbate these problems. Indeed, the Commission's goal is to create a market for competitive boxes where it believes only limited competition exists. Therefore, the Commission must assume that the harms under the current, more limited market will multiply with the entry of additional devices and competition. Moreover, given that new device makers will not receive subscription revenues for the content they are transmitting (which MVPDs will continue to collect), the Commission must consider how third parties will profit from offering these new devices or services. Potential sources of

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(cont'd from previous page)
column.html (noting that one service offered on TiVo's new Bolt unit is its Quick Mode service, "which allows playback of recorded shows 30% faster, with the audio electronically tweaked").

[59] *See* Meghan Neal, *You're Going to Need an Ad Blocker for Your Next TV*, MOTHERBOARD (Jan. 21, 2016), http://motherboard.vice.com/read/youre-going-to-need-an-ad-blocker-for-your-next-tv.

[60] *See* Dan Graziano, *How to Block In-App Ads on Your Samsung Smart TV*, CNET (Feb. 19, 2015), http://www.cnet.com/how-to/samsung-smart-tv-app-ads-plex.

[61] Associated Press, *New TiVo DVR Will Skip Through Entire Commercial Break*, CNBC.COM (Sept. 30, 2015), http://www.cnbc.com/2015/09/30/new-tivo-dvr-will-skip-through-entire-commercial-break.html

[62] In addition, the Commission ignored a number of important differences between the CableCARD regime and the approach proposed in the Notice. At the outset, the CableCARD regime only addressed hardware-based navigation devices, not software-based solutions. In addition, the technology and licensing behind the CableCARD was controlled largely by MVPDs, who have significant incentives to protect programming content. Perhaps most fundamentally, very few devices today use CableCARD technologies, whereas the Notice is premised on the assumption that its approach will be widely adopted.

profit for device makers naturally include additional advertising, and for the Commission to ignore those market incentives – if not realities – would be unreasonable.

There is ample evidence of problems with the CableCARD system. Indeed, many third parties supporting the Commission's proposal have expressly stated that they have *no intent* to comply with programmers' carefully negotiated licensing terms. For example, one competitive device maker has "made clear that competitive device providers are not and should not have to be bound to programming contracts entered into by MVPDs to which they were not party."[63] Similarly, Public Knowledge agrees that device makers would be "answerable to the marketplace, not to network operators or programmers."[64] Given these explicit admissions – which already appear in the Commission's docket – it would be arbitrary and unreasonable for the Commission to fail to address the Content Companies' concerns regarding licensing protections.[65]

It also would be arbitrary and capricious for the Commission to rely on faulty logic in its refusal to protect programmers' licensing terms. The Notice points to the lack of competition among set-top boxes when arguing in favor of the drastic changes that would be wrought by the proposed rules, and concludes that this lack of competition warrants the demise of the CableCARD regime. On the other hand, however, it points to the "lack of harm" from the CableCARD regime to support its refusal in the new rules to prohibit specific types of conduct that would contravene licensing terms. But even if the Notice were correct about the supposedly innocuous nature of the CableCARD regime, it would be unreasonable to rely on the "current

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[63] *See* Letter from Devendra T. Kumar, Counsel for TiVo, to Marlene H. Dortch, Sec'y, FCC, MB Docket 15-64, at 1 (Jan. 13, 2016).

[64] *See* Comments of Public Knowledge, MB Docket No. 15-64, at 15 (filed Oct. 7, 2015).

[65] *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43.

marketplace" as evidence of the absence of harm, when this very proceeding is premised on the finding that *no marketplace for CableCARD compatible set-top boxes has developed*.

The Notice's assertion that copyright law currently serves – and can effectively serve in the new marketplace – as the sole method of protecting programmers' rights is also misplaced. Copyright litigation is lengthy and resource-intensive for all parties, and limiting programmers to that remedy alone would supplant exclusive rights defined in licensing agreements, including the right to enforce those rights via contract law. Indeed, many contractual provisions designed to secure programmers' content are not covered by copyright. The serial trips to court mandated by copyright litigation would be even more difficult for smaller programmers with fewer resources, for whom lawsuits may not be a realistic option. And all programmers would confront an environment in which they are forced to play "whack-a-mole" – repeatedly having to fight to undo damaging violations after the fact each and every time a third party attempts to commercialize content (perhaps in the guise of "innovation") by ignoring programmers' rights. In short, the potential remedy of copyright litigation does not begin to approximate the essential controls and protections that can be secured through licensing between parties in privity, and so has always been considered a last resort, not a first line of defense, against infringement. Ignoring this reality would be irrational.

All of this begs the question: Why is there such reluctance to include an explicit prohibition on the types of conduct that would alter or jeopardize content? All record evidence points to the conclusion that the Content Companies concerns are not speculative and that a prohibition is warranted. In the face of these facts, it would be unreasonable for the Commission to claim that the enforcement of licensing terms should be left to the marketplace.

In addition, the Notice contains several other flaws that indicate a lack of reasoned decision-making. For example, as discussed above, the proposal provides so little detail regarding the identity and function of the "Trust Authority" that it has deprived the Content Companies of any meaningful opportunity for notice and comment regarding that aspect of the proposed rule.[66] Indeed, the same argument could be made regarding essentially any element of the Notice's proposed security scheme.

Moreover, the Commission has stated that its rules are engineered to ensure parity between MVPDs and navigation device developers.[67] But in reality, developers would be getting the better bargain. They may access programming without complying with licensing terms, while MVPDs must adhere to their contracts with Content Companies. Similarly, the Notice would lead to unfair and arbitrary disparities between programmers whose content is distributed through MVPDs and programmers whose content is available primarily through broadband-based services. Content owners who distribute content via broadband outside of the MVPD environment would not be subject to the same requirement to have their content redistributed in contravention of their licenses' terms. This is another unaddressed contradiction in the Notice.

Beyond that, the proposal permits a whole host of third parties – the provider of a device or app with whom the Content Companies have no relationship – to insert themselves between content creators and their audiences. By permitting this new layer between audiences and programmers, the proposed rules ensure further intermediation between the Content Companies

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[66] *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (a rule "violates the APA's notice requirement where interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule") (internal quotation marks and citation omitted).

[67] *Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, 81 Fed. Reg. at 14,043.

and their audiences instead of bringing them closer. This cannot possibly lead to better, more responsive and targeted content that viewers want today. The Commission should examine options that further integrate programmers into the content delivery process, rather than pushing them further from their audience.

The Content Companies submit that the Commission needs to examine the record carefully before promulgating any final rule. As outlined above, the text of the rule is clear: the Commission's authority does not extend beyond creating competition in the set-top box market. The Content Companies are agnostic as to the brand of physical set-top boxes that their viewers use. The Content Companies do note, however, that the Commission has not provided any economic analysis demonstrating that its proposed remedy would actually address the problem that the statute is attempting to solve – *i.e.*, introducing competition and lowering the price of set-top boxes.[68]

Of course, the Notice goes far beyond this objective, seeking to stimulate growth in the market for navigation devices and content delivery in general. This is impermissible under the statute. But if the Commission is committed to regulating navigation devices or content delivery generally, it must show that there is a failure in this different, broader market. In so doing, it must assess the current availability of a wide variety of content on third-party devices. The Notice's approach of disrupting the current programming market is unjustified, given the lack of evidence in the record to support the idea that there is a failure in the overall content distribution market.

[68] It bears noting, as others have argued, that the Notice will not necessarily result in lower prices for consumer, since MVPDs may simply raise their rates to cover any lost revenue. If so, this entire undertaking would appear to be arbitrary.

VI. THE NOTICE EXCEEDS THE COMMISSION'S AUTHORITY AND EXPERTISE BY DEPRIVING CONTENT OWNERS AND PROGRAMMERS OF THEIR INTELLECTUAL PROPERTY RIGHTS

The proposed rules promote wholesale violations of copyright law, an area where the Commission has neither jurisdiction nor expertise. The Copyright Act confers upon the creators of copyrighted works a variety of exclusive rights to promote innovation and spur "the Progress of Science and useful Arts."[69] Chief among these are "the exclusive rights to do and to authorize" the reproduction of copyrighted works, the preparation of derivative works from copyrighted works, the distribution of copies of copyrighted works, and the public performance of copyrighted works.[70]

It is thus a fundamental premise of the Copyright Act that content creators determine whether, when, and how to reproduce, distribute, and publicly perform their works. As discussed above, however, the Notice instead requires that MVPDs grant navigation device manufacturers and service operators access to the copyrighted works of content creators. Those manufacturers and operators then have power to determine how to reproduce, distribute, and publicly perform content, notwithstanding the express limitations within the licenses between MVPDs and content owners.

By requiring content to be sub-distributed by MVPDs in a manner that exceeds the underlying license granted by the content owners, the Commission is either (i) enabling a copyright violation or (ii) creating the equivalent of a compulsory license. If it is encouraging copyright violations – and by offering up copyright law as a solitary enforcement mechanism,

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[69] U.S. Const. art. 1, § 8, cl. 8.

[70] 17 U.S.C. § 106(1)-(4).

the Notice appears to make that suggestion[71] – then the Commission is essentially dismantling the carefully established framework of contracts and licenses that arise out of the regime established by the Copyright Act. If it intends to in effect grant compulsory licenses, the Commission is far exceeding its authority under Section 629, and ignoring important considerations traditionally associated with compulsory licenses and uniquely suited for congressional – not administrative agency – balancing. Unless the terms of sub-distribution are limited to those reflected in the underlying distribution agreement, one result or the other is necessarily entailed.

A. The Proposed Rules Would Encourage Copyright Violations, Placing the Proposal in Conflict with the Copyright Act

1. The proposed rules would infringe upon the rights granted to content owners under the Copyright Act.

As the Supreme Court has made clear in *American Broadcasting Cos. v. Aereo, Inc.*,[72] the exclusive right of video programming owners to publicly perform their works is violated any time a third party – acting without the copyright owner's authorization – "transmits" a performance of a copyrighted work to the public "by any device or process whereby images or sounds are received beyond the place from which they are sent."[73] The Court has emphasized that copyright is infringed in such cases even if the third party's behavior is intended to "simply

[71] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,046 ("Accordingly, we believe these concerns [regarding improper content manipulation] are speculative, and while we believe at this time it is unnecessary for us to propose any rules to address these issues, we seek comment on this view. We also seek comment on the extent to which copyright law may protect against these concerns, and note that nothing in our proposal will change or affect content creators' rights or remedies under copyright law.").

[72] 134 S. Ct. 2498 (2014).

[73] *Id.* at 2505-06 (citing 17 U.S.C. § 101).

enhance[ ] viewers' ability to receive . . . television signals."[74] While the Court addressed only the specific technologies before it in *Aereo*, it nevertheless made clear that many future technologies that transmit to the home are likely to be considered to transmit to "the public," as "'the public' need not be situated together, spatially or temporally."[75]

It is also axiomatic in copyright law that exceeding the scope of rights granted under a licensing agreement is a breach of the underlying rights of the copyright owner to limit distribution of the work and the creation of derivative works. For example, in *Gilliam v. American Broadcasting Cos.*,[76] the Second Circuit found that the broadcast of an edited version of the Monty Python program in America should be considered a violation of the license granted by Monty Python writers to broadcast the original British version of the program.[77] According to the court, while a distributor may be licensed to "vend or distribute [a] derivative work to third parties," that distributor's use "may not exceed the specific purpose for which permission was granted."[78] Depending on the technology used, competitive device makers would also likely be making additional copies of copyrighted material without the owners' authorization – which is also prohibited under the Copyright Act.[79]

The regime established under the Notice would promote the violation of copyright law by creating a new mandate obligating MVPDs to transmit copyrighted content to third parties

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74 *Id*.

75 *Id*. at 2509-10.

76 538 F.2d 14 (2d Cir. 1976).

77 *Id*. at 23, 26.

78 *Id*. at 20.

79 *See, e.g., MAI Systems Corp. v. Peak Compu., Inc.*, 991 F.2d 511 (9th Cir. 1993). Depending on the specifics of that underlying technology, the creation of those copies could be construed to be either directed or induced by the device makers – not by cable subscribers. *See Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("Cablevision"); *see also Aereo, Inc.*, 134 S. Ct. 2498.

without the authorization of the copyright owner. Indeed, the Commission appears to recognize as much because it directs copyright holders to pursue their remedies via litigation. The proposed rules enable unlicensed public performances or reproductions by navigation device manufacturers and service operators, permitting them to transmit MVPDs' underlying content to millions of members of the public. At the same time, the proposed rules allow those same device manufacturers to receive MVPD content and provide it to consumers without enforcing licensing restrictions. The FCC's proposal thus motivates and incentivizes copyright violations, while at the same time abrogating programmers' contractual enforcement rights.

2. The Commission cannot ignore the conflicts with the Copyright Act.

In compelling this access to content, the Commission would effectively abrogate the protections granted to Content Companies by the Copyright Act. Taking such action would be outside of the Commission's limited statutory grant of authority and inconsistent with its responsibility to engage in reasoned decision-making for two reasons: the Commission has an obligation to consider both (i) the ensuing negative results with respect to the market for copyrighted content and (ii) the inevitable conflicts with the Copyright Act.

As noted above, the Commission's proposal does not contain any assurances that the same security controls put in place through licensing agreements remain in place, and thus fails to protect bargained-for presentation and branding elements under copyright licensing agreements. Such activities would severely impair content owners' right to determine for themselves how their content should best be presented for the benefit of consumers. Nothing in the proposed rules would stop a third party from repackaging content, stripping it of its branding, placing it in a different channel neighborhood, replacing or supplementing its advertising, or otherwise prioritizing some programming at the expense of other content.

Both content owners and consumers would pay the price for improper content manipulation by device manufacturers that runs afoul of the underlying copyright licenses. Permitting search prioritization, to provide one example, would allow a device manufacturer to promote its own content ahead of that of others, or to force content owners to pay for prioritization. This would be particularly challenging for smaller programmers. Permitting device manufacturers to surround programming with advertising, to provide another example, would degrade the integrity of the content, risk exposing viewers to excessive and inappropriate advertising, and detract from the uniform viewing experience across MVPD platforms that viewers expect. Derogation of content owners' copyrights produces bad results for content owners *and* for consumers.

The Chairman has suggested that programmers should not be concerned about breaches of the terms of their licensing agreements with MVPDs because "copyright law remains in place."[80] But the rules conflict with and therefore undermine the enforcement regime contemplated under the Copyright Act. The Copyright Act provides exclusive rights precisely so that the right to copy, distribute or display content can be bargained for and then enforced as a property right licensed under contract. However, under the Commission's proposed approach, content owners would be deprived of the ability to use licenses or other agreements to enforce their rights against infringing device makers. Instead, they would have to pursue device makers and service operators in court while the infringing activity continues.

[80] *Hearing on FCC Oversight Before the S. Commerce, Science, and Transportation Committees*, 114th Congr., (March 2, 2016) (statement of Tom Wheeler, Chairman, FCC).

B. The Proposed Rules Would Effectively Create a New Compulsory License, Which is Beyond the Commission's Authority

The proposed rules would in practice compel the transfer of intellectual property to third parties. As discussed above, this aspect of the proposal involves the creation of copyright violations. However, if the Commission maintains that such transfers of intellectual property are in fact lawful, then the FCC is effectively creating a compulsory license. The third parties authorized by the Commission to acquire, redistribute, and manipulate copyrighted programming would not be governed by any contractual restriction. The Commission does not have the authority to create such compulsory licenses or the expertise required to manage them.

First, the Commission has proposed rules that in effect would permit navigation device manufacturers and service operators to leverage a *de facto* compulsory license to access MVPD content and further monetize that content – including the Content Companies' works – at no additional cost. However, the Commission does not have the authority to fashion such a zero-rate compulsory license. Congress gave no hint of any desire to permit the Commission to use Section 629 as a vehicle for creating a compulsory copyright license for navigation device manufacturers or services. The Commission also has not considered how compulsory licenses are traditionally structured. Congress has historically provided for compulsory licenses only in rare circumstances through specific statutory grants. In those limited instances where Congress has created statutory licenses to serve as an exception to copyright owners' exclusive rights, it has said so in clear and explicit terms, and has historically included language restricting content manipulation and mandating compensation payments to content owners.[81]

[81] *See* 17 U.S.C. § 111 (compulsory license for cable operators); 17 U.S.C. § 119 (compulsory license for satellite operators to transmit distant programming); 17 U.S.C. § 122 (compulsory license for satellite operators to transmit local programming).

Second, if anything, Section 629(f) reinforces the Commission's obligation *not* to go beyond its limited scope of authority and insert itself into the realm of copyright. As the Commission has repeatedly acknowledged, copyright questions are typically reserved for the Copyright Office or for Congress.[82] The Commission historically has been very careful to defer to other agencies on the copyright aspects of communications policies that require compulsory licenses.[83] The most prominent such agency, the Copyright Office, has in turn suggested that such licenses have proven a poor replacement for market forces:

> [P]rivate negotiations between content providers and all types of distributors have given consumers the programming they desire. Statutory licensing has not been needed to provide millions of hours of local and national television content. A new video marketplace has developed free from government regulation and with the ability to quickly respond to consumer demand.[84]

Under the proposal, the Commission would assume responsibility in the copyright field that it has not been granted, and in so doing, would disregard the considered conclusions of the agency with specific expertise on point.

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[82] *See, e.g.*, *In re Inquiry into the Existence of Discrimination in the Provision of Superstation & Network Station Programming*, Second Report, 6 FCC Rcd. 3312, 3321 (1991) ("This Commission does not have authority to enforce the Copyright Act."); *In re Compulsory Copyright License for Cable Retransmission*, 4 FCC Rcd. 6711, 6711 (1989) (recognizing that despite the intimate relationship between copyright and communications law, (a) "Congress is the body with the authority and the responsibility for making copyright policy," (b) enforcement of copyright law is "primarily the task of the judicial system," and (c) the expertise of the FCC is "in the area of communications policy, not in the area of copyright").

[83] FCC, RETRANSMISSION CONSENT AND EXCLUSIVITY RULES: REPORT TO CONGRESS PURSUANT TO SECTION 208 OF THE SATELLITE HOME VIEWER EXTENSION & REAUTHORIZATION ACT OF 2004, at 40 (2005), https://apps.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf. ("As Congress has asked that we evaluate communications policy, and not copyright law, in this proceeding, we . . . defer to the Copyright Office's expertise in these areas.").

[84] U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION & REAUTHORIZATION ACT, SECTION 109 REPORT 87 (2008).

VII. THE PROPOSED RULES RAISE SERIOUS CONSTITUTIONAL CONCERNS

Any attempt by the Commission to proceed with the proposed rules would raise serious constitutional problems, including First and Fifth Amendment concerns.

A. The Proposed Regulations Raise Troubling First Amendment Concerns

The proposed rules would violate the First Amendment. To begin with, the analysis in the Notice is fundamentally misguided, as it considers the First Amendment rights *only* of MVPDs. The Notice fails to address – or even mention – the First Amendment rights of programmers. But the vibrant programming produced by the Content Companies is undoubtedly First Amendment protected speech.[85]

As such, the Content Companies have a right to determine when, where, and with whom they will speak.[86] Yet the proposed rules would compel the Content Companies to speak with navigation companies and through navigation devices that may distort their message. The Content Companies have a right not to do so.[87] This forced speech is not justified by a compelling or important government interest. In addition, the Notice also wholly ignores the fact that programmers have a vital First Amendment interest in the manner in which their content is assembled and presented, which lies at the heart of free expression.[88]

Without even reaching the question of any actual First Amendment violation, however, the Commission should strive to avoid promulgating regulations that raise serious First

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[85] *See, e.g.*, *Turner Broad.Sys. v. FCC* ("*Turner I*"), 512 U.S. 622 (1994); *Turner Broad. Sys. v. FCC* ("*Turner II*"), 520 U.S. 180 (1997).

[86] *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 782 (1988).

[87] *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254 (1974).

[88] *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 723 (2011) (it is a "fundamental rule of protection under the First Amendment[] that a speaker has the autonomy to choose the content of his own message") (internal quotation marks omitted).

Amendment questions. Congress has already expressed its preference that the Commission avoid implementing regulations that create doubts under the First Amendment.[89] The Commission should avoid that serious, and very sensitive, pitfall here.

B. The Proposed Regulations Raise Significant Fifth Amendment Questions

The Notice, if adopted, also would violate the Fifth Amendment. As discussed above, the Commission's proposals effectively create a compulsory license. That would violate the Takings Clause, since the proposed rules seize content owners' intellectual property without just compensation.[90] Even if the Commission's proposed rules are not viewed as a compulsory license, they take content owners' intellectual property and give it to navigation device companies for their own profit and revenue exploitation. The Constitution prohibits this taking of intellectual property, just as it would prohibit the taking of physical property.[91]

Lastly, the FCC should follow the principle of constitutional avoidance, especially given the limited mandate of Section 629, and adopt a narrower proposal that avoids these constitutional problems.

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[89] *See, e.g.*, 47 U.S.C. § 544(f) ("Any Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter").

[90] *See, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015) (intellectual property "cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser" (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882))).

[91] In addition, programmers' intellectual property is being seized solely to benefit private parties, *i.e.*, device developers, not for any public purpose. This also would constitute a Fifth Amendment violation. *See Kelo v. New London*, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.").

VIII. CONCLUSION

The Content Companies are already engaged in efforts to make their programming available on a multitude of devices. Before turning their content over to MVPDs and other distribution platforms, though, the Content Companies enter into agreements to ensure that consumers obtain their content securely and receive a high-quality viewing experience. The proposed rules would abrogate these agreements and turn programming over to third parties without any licensing protections. Those rules, as currently drafted, threaten to violate the terms of Section 629 as well as numerous other provisions of law. Accordingly, the Commission must fundamentally rethink its proposed approach to enhancing competition in the set-top box marketplace.

Respectfully submitted,

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/s/

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April 22, 2016

From: Smith, Regan
To: Charlesworth, Jacqueline
Cc: Damle, Sarang
Subject: Re: Admin professionals day is today
Date: Wednesday, April 27, 2016 3:10:52 PM

No, I'm in David's office and will be exiting soon.

> On Apr 27, 2016, at 3:10 PM, Charlesworth, Jacqueline <jcharlesworth@loc.gov> wrote:
>
> Is Sy with you?
>
> Jacqueline C. Charlesworth
> General Counsel and
> Associate Register of Copyrights
> U.S. Copyright Office
> jcharlesworth@loc.gov
> 202.707.8772
>
>
> -----Original Message-----
> From: Smith, Regan
> Sent: Wednesday, April 27, 2016 3:08 PM
> To: Charlesworth, Jacqueline
> Cc: Damle, Sarang
> Subject: Re: Admin professionals day is today
>
> Yes I can.
>
>> On Apr 27, 2016, at 3:05 PM, Charlesworth, Jacqueline <jcharlesworth@loc.gov> wrote:
>>
>> Just learned that I need you guys at a 3:30 AllVid meeting with Viacom -- not sure where you are but hope you can make it!
>>
>> Jacqueline C. Charlesworth
>> General Counsel and
>> Associate Register of Copyrights
>> U.S. Copyright Office
>> jcharlesworth@loc.gov
>> 202.707.8772
>>
>>
>> -----Original Message-----
>> From: Smith, Regan
>> Sent: Wednesday, April 27, 2016 2:46 PM
>> To: Charlesworth, Jacqueline
>> Cc: Damle, Sarang
>> Subject: Re: Admin professionals day is today
>>
>> REDACTED - not respsonsive
>>
>>> On Apr 27, 2016, at 2:45 PM, Charlesworth, Jacqueline <jcharlesworth@loc.gov> wrote:
>>>
>>> REDACTED - not responsive
>>>

>>> Jacqueline C. Charlesworth
>>> General Counsel and
>>> Associate Register of Copyrights
>>> U.S. Copyright Office
>>> jcharlesworth@loc.gov
>>> 202.707.8772
>>>
>>> -----Original Message-----
>>> From: Smith, Regan
>>> Sent: Wednesday, April 27, 2016 2:35 PM
>>> To: Damle, Sarang; Charlesworth, Jacqueline
>>> Subject: Admin professionals day is today
>>>
>>> REDACTED - not responsive

From: Fried, Neil
To: Charlesworth, Jacqueline; Damle, Sarang
Subject: MPAA set-top box reply
Date: Tuesday, May 24, 2016 3:37:41 PM
Attachments: 160523 MPAA AllVid reply final.pdf

Jacqueline and Sy,

I hope all is well. Here's a copy of the reply we filed last night in the FCC set-top box proceeding, in case you're curious.

Is there a good time in the coming days for a call to circle back on this topic?

Thanks.

Neil

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

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

Reply Comments of the Motion Picture Association of America and SAG-AFTRA

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May 23, 2016

Executive Summary

We appreciate Chairman Wheeler's commitment to honor copyright law, the agreements between programmers and multichannel video programming distributors, and the security of content in his effort to promote set-top box competition. Unfortunately, the proposal itself falls short of that commitment, abrogating the rights of copyright holders and jeopardizing the creation of high-value programming.

The Motion Picture Association of America and SAG-AFTRA are committed to encouraging the availability of content to audiences through a wide variety of platforms and distributors. We file these reply comments to urge that in pursuit of its goal of increasing consumer choice in the video marketplace, the FCC not undermine the production and distribution of the very content audiences are endeavoring to watch.

Our ask is straightforward: that in seeking to ensure set-top box competition, the FCC not give third parties our content without our permission and without compensation, not put our content at risk of theft, and not threaten the economics underpinning the creation of programming that is fostering a Second Golden Age of Television.

And in addition to being our ask, it's the law.

The Copyright Act grants copyright holders the exclusive rights to reproduce, distribute, publicly perform, or publicly display copyrighted works, as well as to prepare derivative works based on copyrighted works. Yet the proposal would compel MVPDs to transmit disaggregated streams of copyright holders' works to all third-party set-top box, Internet application, and web service providers, for those providers to use and manipulate without the copyright holders' permission.

Section 629 of the Communications Act prohibits the FCC, when promoting set-top box competition, from jeopardizing content security or impeding programmers' rights to prevent content theft. Yet the proposal would force copyright holders to allow third-party set-top box,

Internet application, and web service providers to use content outside of the license agreements necessary to effectively administer and enforce content protection. It would limit the content protection systems copyright holders may use. It would eliminate safeguards that prevent an influx of Internet piracy into the MVPD world. And it would make it easier for devices and applications that traffic in pirated content to interact with MVPD programming and flourish.

The First Amendment guarantees the right of speakers to determine what to say and how to say it. Yet the proposal would force programmers to allow third-party set-top box, Internet application, and web service providers not only to convey their programming, but also to alter the content and the way it is presented.

The Fifth Amendment prohibits the government from taking property without just compensation. Yet the proposal would force programmers to allow third-party set-top box, Internet application, and web service providers to use and manipulate their content for no compensation.

These are among the reasons the overwhelming majority of the creative community has expressed reservations about the proposal, and among the reasons more than 150 Republicans and Democrats from the House and Senate have sent letters of concern to the FCC. The National Telecommunications and Information Administration flagged similar issues in FCC comments it filed. It stated that the final rule should "ensure[] the security of multichannel video programming," and observed that license agreements "typically include a variety of provisions beyond price—issues such as brand protection, advertising, program availability windows, and duration—that are important to enabling parties to defray the costs of producing, acquiring, and distributing that programming."

In attempting to refute the argument that the proposal abrogates copyright holders' rights, proponents focus on potential violations by the third-party set-top box, Internet application, and web service providers. They argue either that the providers' conduct would not violate copyright

holders' exclusive rights or, if it does, that copyright holders are not harmed because the proposal does not disrupt their rights and remedies, allowing them still to bring suit.

This overlooks that—before we even analyze whether third-party conduct violates copyright holders' exclusive rights—the FCC would already have abrogated copyright holders' exclusive rights by adopting the proposed rules. The proposal would compel MVPDs to transmit licensed programming to third parties for manipulation in ways not permitted by the license agreements, creating a zero-rate compulsory license, something the FCC does not have authority to grant. It would interfere with the ability of copyright holders to enter into exclusive arrangements or windowing agreements. And it would jeopardize the ability of copyright holders to adopt technical protection measures.

Their argument also misses the point that a main purpose of copyright law and license agreements is to promote the creation and dissemination of content by preventing misappropriation of another's work; litigation is an after-the-fact remedy. The proponents' position is tantamount to arguing that forcing people to leave open their doors and let strangers in would not infringe their rights or cause them harm because if someone damaged or walked off with their things they could still sue for theft.

Proponents argue that the proposal merely allows third-party devices and applications to render programming, and that consumer use of device or application functions never entails a public performance in violation of a copyright holder's exclusive rights. This overlooks that the proposal does not involve passive rendering of programming, but transmissions of copyrighted works that the FCC compels to be made in ways not authorized by the copyright holder, as well as similarly unauthorized manipulation of content. It also ignores the lessons of the Supreme Court's *Aereo* decision, which held that facilitating device or application functions through unlicensed transmission of copyrighted works to a broad array of subscribers can be a public performance,

regardless of the precise technology employed and even if the transmissions are received or initiated by the viewer.

The fair use doctrine is also unavailing. First, the issue is the compelled transmission by the FCC, as well as the exploitation and manipulation of content by commercial entities, not the mere provision of third-party devices, applications and services, or the conduct of the viewers. Courts have rejected commercial entities' attempts to stand in the shoes of their customers making noncommercial uses. Second, fair use cannot be definitively determined until adjudicated by a court, based on the specific facts of the case after the conduct has already occurred. The doctrine cannot be used anticipatorily to bless all manner of potential encroachments on content owners' rights. And third, the Copyright Office has repeatedly concluded that existing precedent does not establish space- and format-shifting as fair uses.

Perhaps the easiest way to understand that the proposal abrogates copyright holders' exclusive rights is to recognize that, today, an Internet application or web service provider would not be able to obtain a movie or television programming for distribution without entering into a license agreement with the copyright holder. But if the FCC adopts these rules, an Internet application or web service provider would be able to obtain without a license agreement any content that an MVPD happens to carry, when serving viewers who also happen to subscribe to that MVPD. This is a large universe of content, and the intent of some Internet application and web service providers to avoid entering into license agreements may well underlie their support for the proposal.

Even if the proposal did not abrogate copyright holders' exclusive rights under copyright law, Section 629 of the Communications Act does not give the FCC the authority to adopt it. Section 629(a) grants the FCC limited power to ensure the availability from third parties of the equipment that subscribers to MVPD services may choose to access the MVPD service in a secure

manner. It does not authorize the FCC to require MVPDs to transmit content to third parties in a form that the third parties can manipulate as inputs into a different service, or to facilitate the use of Internet applications and web services, as opposed to devices.

High-quality and innovative programming is expensive to produce, and license and advertising revenue it what funds production and acquisition. Allowing third parties to use that programming at zero cost—as well as to monetize and manipulate it in ways contrary to the license agreements that protect advertising and other programmer revenues—would jeopardize the creation of the programming in the first place. Thus, the proposal would make it harder to raise the capital needed to produce quality content, and reduce profits that might otherwise be invested into the next production. Exacerbating matters, the decrease in production and drop in revenues would reduce the compensation available to directors, artists, and crew; jeopardize their livelihood, making it harder to find talent for production of the next project; and further decrease production and revenues, creating a non-virtuous circle for creators and audiences alike.

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I. Compelling MVPDs to Transmit Disaggregated Streams of Licensed Programming to all Third-Party Set-Top Box, Internet Application, and Web Service Providers for Their Exploitation and Manipulation Without Copyright Holders' Permission Would Abrogate Copyright Holders' Exclusive Rights

We appreciate Chairman Wheeler's commitment—in his effort to promote set-top box competition—to honor copyright law, the agreements between programmers and multichannel video programming distributors, and the security of content,[1] as we said in our initial comments.[2] Unfortunately, the proposal itself falls short of that commitment, abrogating copyright holders' rights and jeopardizing the creation of high-value programming.

Indeed, copyright issues and harm to the programming ecosystem are among the reasons the overwhelming majority of the creative community has expressed reservations about the proposal,[3] and among the reasons more than 150 Republicans and Democrats from the House and

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[1] *See* Statement of Chairman Tom Wheeler at 2, *In re* Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42, *NPRM*, FCC 16-18 (rel. Feb. 18, 2016) (stating that the proposal "will not interfere with the business relationships or content agreements between MVPDs and their content providers or between MVPDs and their customers" nor "open up content to compromised security"). *See also* Remarks of Jon Sallet, General Counsel, FCC, "20th Anniversary of the Telecom Act," *as prepared for delivery at* Incompas 2016 Policy Summit, Newseum, Washington, D.C. (Feb. 10, 2016), *at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-337681A1.pdf (stating that "[i]t is always critical that copyright be protected, not just as a matter of law, but in recognition of its role in powering innovation, investment and, of course, the creative arts. The Chairman's proposal fully respects the copyright interests of content creators."); *NPRM* at ¶¶ 17, 80 (stating that the proposal's "goal is to preserve the contractual arrangements between programmers and MVPDs, while creating additional opportunities for programmers, who may not have an arrangement with an MVPD, to reach consumers," and that "nothing in [the] proposal will change or affect content creators' rights or remedies under copyright law.").

[2] *See* MPAA and SAG-AFTRA comments at i, 4.

[3] Creative community parties expressing concern include 21st Century Fox; A&E Television Networks; the American Association of Independent Music; the American Federation of Musicians; C-SPAN; CBS Corporation; the Copyright Alliance; Creative Future; Crossings TV; the DGA; Feel Good TV; Freemind Ventures; Hola! LA, Latin Heat Media; the Independent Film & Television Alliance; Creators of Color, including: Val Benning, Roger Bobb, Bailey Brown,

Senate have sent letters of concern to the FCC.[4] The National Telecommunications and Information Administration flagged similar issues in FCC comments it filed, stating that the final rule should "respect[] the security and integrity of MVPD programming,"[5] as well as "permit[] continued innovation in the development and distribution of that programming."[6] The NTIA

Holly Carter, Devon Franklin, Tamra Goins, Rob Hardy, Elijah Kelley, Rasheena Nash, Elrick Williams; the International Alliance of Theatrical Stage Employees; Manteca Media; Mnet America; the MPAA; the National Music Publishers Association; Perfect Day Media; the RIAA; Revolt Media and TV; SAG-AFTRA; Scripps Network Interactive; SoundExchange, Inc; Stateless Media; The Walt Disney Company & ESPN; Time Warner; TV One; Viacom; and VMe TV.

Creative community parties expressing support include BLQBOX; Fandor; GFNTV; iSwop Networks; Kweli TV; the National Black Programming Consortium; New England Broadband; The Townsend Group; UnifyMe.TV; Urban Broadcasting Company; and the Writers Guild of America, West.

4 *See, e.g.*, Letter from Rep. Yvette Clark *et al*. to FCC Chairman Tom Wheeler (Dec. 1, 2015) (expressing concerns of 30 members of the Congressional Black Caucus); Letter from Senate Commerce Committee Ranking Member Bill Nelson to FCC Chairman Tom Wheeler (Feb. 12, 2016); Letter from Reps. Tom Marino and Ted Deutch to FCC Chairman Tom Wheeler (Feb. 12, 2016); Letter from Rep. Tony Cardenas *et al.* to FCC Chairman Tom Wheeler (Feb. 16, 2016) (expressing concerns of 25 members of the Congressional Hispanic Caucus and House moderates); Letter from Reps. Doug Collins, Judy Chu., *et al*. to the FCC (Feb. 16, 2016) (expressing concerns of five Republicans and Democrats on the House Judiciary Committee); Letter from Reps. Jerry McNerney, Joe Barton, and Renee Ellmers to FCC Chairman Tom Wheeler (Feb. 17, 2016); Letter from House Subcommittee on Communications and Technology Chairman Greg Walden and Rep. Yvette Clark to GAO (April 1, 2016) (seeking a study on the potential harms of the proposal); Letter from Senate Commerce Committee Chairman John Thune to FCC Chairman Tom Wheeler (April 22, 2016); Letter from House Subcommittee on Courts, Intellectual Property and the Internet Chairman Darrell Issa to FCC Chairman Tom Wheeler (April 22, 2016); Letter from Reps. Doug Collins, Ted Deutch, *et al.* to FCC Chairman Tom Wheeler (April 22, 2016) (expressing concern of 23 House Republicans and Democrats); Letter from House Judiciary Committee Chairman Bob Goodlatte and Ranking Member John Conyers to FCC Chairman Tom Wheeler (April 29, 2016); Letter from Reps. Kevin Cramer, Kurt Schrader, *et al.* to FCC Chairman Tom Wheeler (May 5, 2016) (expressing concern of 60 House Republicans and Democrats); Letter from Sen. Orin Hatch to FCC Chairman Tom Wheeler (May 18, 2016); Letter from Sen. Robert Menendez to FCC Chairman Tom Wheeler (May 19, 2016); Letter from Senate Judiciary Committee Chairman Charles Grassley to FCC Chairman Tom Wheeler (May 23, 2016). *See also* Written Statement of Sen. Patrick Leahy, Ranking Member, Senate Judiciary Committee, Hearing Before the Senate Judiciary Subcommittee on Privacy, Technology and the Law on "Examining the Proposed FCC Privacy Rules," at 2 (May 11, 2016).

5 NTIA comments at 4.

6 *Id.* at 2.

observed that license agreements between program producers and MVPDs "typically include a variety of provisions beyond price—issues such as brand protection, advertising, program availability windows, and duration—that are important to enabling parties to defray the costs of producing, acquiring, and distributing that programming."[7]

Even a few stakeholders supporting the proposal have emphasized the importance of respecting copyright and programming agreements.[8] In some cases, however, they appear to be construing "copyright" narrowly to include just the right of copyright holders to secure content, and not their rights over how to disseminate it.[9]

The Motion Picture Association of America, as the voice and advocate of the American motion picture, home video, and television industries, and SAG-AFTRA, as the representative of approximately 160,000 actors, announcers, broadcast journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists and other media professionals, are committed to encouraging the availability of content to audiences through a wide variety of platforms and distributors. We file these reply comments to urge that in pursuit of its goal of increasing consumer choice in the video marketplace, the FCC not undermine the production and distribution of the very content audiences are endeavoring to watch.

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7 *Id.* at 4 (citing MPAA Comments a 7, *In re* Request for Comment by the Media Bureau on the Report of the Downloadable Security Technology Advisory Committee, MB Docket No. 15-64 (filed Oct. 8, 2015)).

8 *See* Amazon comments at 5; Google comments at 4; DiMA comments at 5; Writers Guild of America, West comments at 11-12.

9 *See* Amazon comments at 5-6, 8-9; DiMA comments at 5; Google comments at 4-5.

A. Proposal Proponents Overlook that the FCC's Action Would Abrogate Copyright Holders' Exclusive Rights

Many parties expressed concern in the initial comments that the proposal would abrogate copyright holders' exclusive rights under the Copyright Act.[10] In attempting to refute that argument, proponents concede that the Commission does not have authority to alter copyright law, but argue that the proposal does not alter copyright holders' rights and remedies.[11] Consequently, they claim, copyright holders can still sue third parties that violate their exclusive rights, and so are not harmed by the proposal.[12] This misses the point that a main purpose of copyright law and license agreements is to promote the creation and dissemination of content by preventing misappropriation of another's work; litigation is an after-the-fact remedy. The proponents' position is tantamount to arguing that forcing people to leave open their doors and let strangers in would not infringe their rights or cause them harm because if someone damaged or walked off with their things they could still sue for theft.

This argument also ignores that the primary way copyright holders exercise and protect their rights is through license agreements, not litigation, as we explained in our comments.[13] Prospective tailoring of license agreements enables copyright holders to negotiate distribution deals specifically designed to the economic and technical realities of a potential partner's particular

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10 *See* MPAA and SAG-AFTRA comments at 4-12; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 35-41; AT&T comments at 77-82; ATR comments at 1; Comcast and NBCUniversal comments at 47-51, 76; C-Span comments at 1-2; CWA comments at 3-4; EchoStar and DISH comments at 23; Free State Foundation comments at 3, 13-14; ICLE comments at 28-30; IFTA comments at 3-5; Intellectual Property Law Scholars comments at 4-5; IPI comments at 3-4; ITTA comments at 21-24; MMTC *et al*. comments at 2-3; NCTA comments at 33-40, 53-54, 58, 93, 167-68; Small Business & Entrepreneurship Council comments at 2-3; TechFreedom and CEI comments at 39-42; TPA *et al*. comments at 3-4; U.S. Chamber of Commerce comments at 2.

11 *See* EFF comments at 3.

12 *See* CCIA comments at 24.

13 *See* MPAA and SAG-AFTRA comments at 17-18.

business model. Limiting options to after-the-fact copyright litigation against parties with whom the copyright holder has no contractual relationship prevents such tailoring. Litigation is also expensive and time consuming, especially when the plaintiff has no prior relationship with the opposing party, and it could be difficult to sue some third parties, particularly if they are abroad. Moreover, forcing years of uncertainty tied to litigation will only impede, not foster, innovation, as well as slow the development of competition.

Most fundamentally, however, proponents' argument overlooks that—before we even analyze whether particular third-party conduct under the proposal would violate copyright law—the FCC would have already abrogated copyright holders' exclusive rights by adopting the proposed rules.

The Copyright Act grants copyright holders the exclusive rights to reproduce, distribute, publicly perform, publicly display, or prepare derivative works of, copyrighted works.[14] Thus, before an MVPD may transmit copyrighted content, it must obtain the necessary licenses from programmers. Those licenses are memorialized in license agreements that specify the manner in which MVPDs may transmit the programming, and include terms on matters such as compensation, content manipulation, program presentation, channel placement, advertising, and security. The MVPD may not transmit that programming in another way, or to another party for use in that party's own commercial services, except as allowed by the license agreement.

Under the proposal, however, the FCC would compel MVPDs to transmit to all third-party set-top box, Internet application, and web service providers all the content that copyright holders' license to MVPDs, and allow those third parties to use and manipulate the content in ways not

14 *See* 17 U.S.C. § 106.

authorized by the license agreements—without the copyright holders' permission and without compensating them.[15] In that regard, the proposal shares the salient, programming-related flaw of the FCC's ill-fated, 2010 AllVid proposal[16]—which was so called because it mandated MVPDs to pass through to third parties "all the video" they licensed—despite proposal proponent's attempts to distinguish the two.[17] What the proposal would require would abrogate copyright holders' exclusive rights and is tantamount to an unrestricted, zero-rate compulsory license, something the FCC does not have the authority to grant, as we explained in our initial comments to this proceeding.[18]

Copyright holders' exclusive rights under the Copyright Act also allow them to enter into exclusive license arrangements, making particular distributors the sole sources of their content, either altogether, for a limited time, in a particular territory, on a particular platform, or on a particular device.[19] The proposal, however, imposes a parity requirement mandating that MVPDs

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15 *See NPRM* at ¶¶ 1-2, 11, 21-22, 24, 35-37, 40.

16 *See In re* Video Device Competition, MB Docket No. 10-91, *Notice of Inquiry*, FCC 10-60 (rel. April 21, 2010).

17 *See* CCIA comments at 16-17.

18 *See* MPAA and SAG-AFTRA comments at 4-9.

19 *See Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (stating that "[t]he owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property."); *In re Indep. Serv. Organizations Antitrust Litig.*, 85 F. Supp. 2d 1130, 1176 (D. Kan. 2000) (stating that "[a] copyright gives its holder the right to refuse to license its original expression to others."). *Cf. Orson Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3rd Cir. 1999) (partially pre- empting a Pennsylvania statute restricting a motion picture distributor from entering into an exclusive first-run exhibition agreement with an exhibitor because it violated the distributor's rights under the Copyright Act); *Syufy Enterprises v. National General Theatres*, 575 F.2d 233, 236 (9th Cir. 1978) (supporting proposition that a movie distributor may license a movie exclusively); *Naumkeag Theatres Co. v. New England Theatres, Inc.*, 345 F.2d 910, 912 (1st Cir. 1965) (supporting proposition that a movie distributor is under no obligation to make its motion picture available in all markets at the same time); *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101, 124 (5th Cir. 1954) (stating that "a distributor has the right to license or refuse to license his film to any exhibitor, pursuant to his own reasoning, so

enable all third parties to offer all the programming the MVPDs have licensed and in all the formats and to all the devices the MVPDs may offer, and prohibits "discrimination" based on affiliation of the device.[20] This means once a copyright holder has allowed a particular MVPD to offer a movie or television show to a viewer in a particular way, it must allow an unlimited range of third parties to do the same. As we explained in our comments, this would impermissibly treat copyright holders like common carriers and violate their rights to enter into exclusive arrangements or windowing agreements.[21]

This interferes with the copyright holders' rights to decide whether and how to license content to particular distributors. At the same time, it potentially interferes with any of the copyright holders' existing license agreements that grant other distributors exclusivity. The NPRM similarly contemplates interfering with license agreements themselves when it asks whether the Commission should prohibit copyright holders from negotiating provisions regarding the devices on which MVPDs may display content,[22] as we also pointed out in our comments.[23] Some proposal proponents also suggest that the FCC should place limits on content license terms,[24] a clear attempt to abrogate copyright holders' rights and something beyond the authority of the FCC.

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long as he acts independently"); *Westway Theatre Inc. v. Twentieth Century Fox Film Corp.*, 30 F. Supp. 830, 836-37 (D. Md.) (stating "it is clearly the established law that the distributors have the right to select their customers, and therefore the plaintiff has no absolute right to demand exhibition rights for the pictures of any of the distributors") (citations omitted), *aff'd*, 113 F.2d 932 (4th Cir. 1940).

20 *See NPRM* at ¶¶ 63, 66-68.

21 *See* MPAA and SAG-AFTRA comments at 9-11.

22 *See NPRM* at ¶ 18.

23 *See* MPAA and SAG-AFTRA comments at 11.

24 *See* TiVo comments at ii, 20-21.

Finally, we observed that the proposal conflicts with Section 1201 of the Digital Millennium Copyright Act.[25] Section 1201 recognizes and buttresses copyright holders' rights to secure their works with the technological protection measures of their choice by making it unlawful to circumvent those protection measures or to traffic in technologies, products, services, or devices aimed primarily at circumventing them.[26] The proposal, however, would prohibit an MVPD—when securing content transmitted through third-party devices, Internet applications, and web services—from using a content protection measure negotiated with a copyright holder if the measure was not FCC "compliant."

To be compliant, a content protection measure must be licensed under FCC-acceptable terms, "independently controlled" by an organization not affiliated with MVPDs, and have an unaffiliated trust authority.[27] This restricts the content protection measures copyright holders can implement for content transmitted through third-party devices, Internet applications, and web services, and may even mean that copyright holders have little or no input into the content protection measures these third parties use, despite contractual conditions with MVPDs to the contrary. Congress chose to give copyright holders protection against circumvention of technological protection measures and created a process for providing exemptions: the triennial rulemaking.[28] The proposal would rewrite Section 1201 for third-party set-top box, Internet application, and web service providers when they are offering copyright holders' video programming.

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25 *See* MPAA and SAG-AFTRA comments at 11-12.

26 *See* 17 U.S.C. § 1201(a)(1)(A), (a)(2).

27 *See NPRM* at ¶¶ 2, 50, 58-60.

28 *See* 17 U.S.C. § 1201(a)(1)(C).

Proponents try to counter arguments that the proposal would abrogate copyright holders' rights by pointing out that Congress passed both the Copyright Act and the Communications Act, that one does not trump the other, and thus that no rule the FCC adopts under Section 629 can conflict with copyright law.[29] They further claim that license provisions restricting whether and how MVPDs may transmit programming to third parties are not enforceable: 1) because, by definition, third parties are not parties to the agreements with MVPDs;[30] and 2) because the provisions amount only to ancillary contractual requirements, not an exercise of rights under the Copyright Act, and that such ancillary contractual requirements could not take precedence over Section 629 of the Communications Act and the FCC's new rules.[31]

Proponents are correct that the Communications Act and Copyright Act do not trump one another, but that means that the Communications Act can no more trump the Copyright Act than the Copyright Act can trump the Communications Act. Absent explicit language, the two must be read in concert. Because the Communications Act does not authorize the FCC to alter copyright law, the FCC may not read Section 629 as altering the rights of copyright holders, and the FCC may not adopt rules under Section 629 that do so. Requiring MVPDs to provide copyrighted content to third parties in a manner not permitted by their licenses would abrogate core copyright holder rights, because the permitted scope of distribution of a copyrighted work falls squarely within the exclusive rights set forth in Section 106 of the Copyright Act, as we explained above and in our initial comments.[32]

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29 *See* Public Knowledge comments at 10-11.

30 *See* TiVo comments at ii, 19-20

31 *See* Public Knowledge comments at 12; EFF comments at 4-5.

32 *See* MPAA and SAG-AFTRA comments at 4-8.

Additionally, license terms regarding content retransmission, manipulation of content, program presentation, content security, and permissible devices are material conditions that underpin a copyright holder's decision whether to license content to a given distributor, and thus connect directly to the copyright holder's right "to do and to authorize"[33] the exercise of its exclusive rights.[34] And the fact that the device, application, and service providers are not parties to the programming agreements with MVPDs is precisely why it is inappropriate to compel access to content outside such agreements.

Consequently, proponents have it exactly backwards: the license provisions would not impermissibly take precedence over Section 629 of the Communications Act; the new rules would impermissibly take precedence over the Copyright Act.

The FCC regulation cannot change copyright law, as proposal proponents have conceded.[35] Had Congress wanted copyright law to operate differently in Section 629 matters, it either would have explicitly said the FCC could take action notwithstanding the provisions of the Copyright Act, or created a complementary compulsory license, as it has for cable and satellite retransmission of local broadcast signals and satellite retransmission of distant broadcast signals into local markets.[36] And even in the case of those cable and satellite compulsory licenses, Congress still prohibited alteration of the programming or advertisements.[37]

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33 17 U.S.C. § 106.

34 *See* Nimmer and Dodd, *Modern Licensing Law* § 6.5 (Westlaw 2015); *Foad Consulting Group v. Musil Govan Azzalino*, 270 F.3d 821, 827 (9th Cir. 2001).

35 *See* EFF comments at 3.

36 *See* 17 U.S.C. §§ 111, 119, 122.

37 *See id.* §§ 111(c)(3), 119(a)(5), 122(e).

Cannons of legislative construction require interpreting statutes to avoid conflict with each other wherever possible, and the far simpler reading is that Congress intended the FCC to find ways to promote set-top box competition under Section 629 without interfering with the exclusive rights the Copyright Act grants to copyright holders. This is especially true in light of Section 629(f), which states that "[n]othing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996,"[38] as we explained in our initial comments.[39]

B. The Proposal Does Not Require the Mere Rendering of Content on Third-Party Devices, But Rather the Transmission and Manipulation of Licensed Content for Use in a Different Service

Proponents also argue that the proposal does not raise copyright concerns because it does not allow third parties to engage in unauthorized copying, distribution, or performances of copyrighted works in violation of copyright holders' exclusive rights under Section 106 of the Copyright Act.[40] In particular, they argue that provision and consumer use of device or application functions never implicate the exclusive rights of a copyright holder because they do not amount to a public performance.[41] But this ignores the role the proposal would have in facilitating unauthorized use by third-party devices, Internet applications, and web services. Indeed, the

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38 47 U.S.C. § 549(f).

39 *See* MPAA and SAG-AFTRA comments at 13.

40 EFF comments at 3-4; Public Knowledge comments at 11.

41 EFF comments at 3 (citing *Fortnightly*, 392 U.S. 390, 398; *Sony*, 464 US 417, 456 (1984); *Cartoon Network*, 536 F.3d 121 (2d. Cir. 2008)); Public Knowledge Comments at 11-12.

proposal is doing more than merely enabling third parties to render programming, as we and other commenters pointed out.[42]

First, rather than third parties simply passively receiving programming in the way the MVPDs would otherwise transmit it, the FCC would be compelling MVPDs to provide special, disaggregated transmissions to third parties—pursuant to particular, yet-to-be-developed open standards and security protocols—for the third parties to use as components of their own services. Second, the proposal explicitly refuses to prohibit third parties from changing "service presentation (such as agreed- upon channel lineups and neighborhoods), replac[ing] or alter[ing] advertising, or improperly manipulat[ing] content."[43] Manipulating content and altering program presentation without the permission of the copyright holder directly implicates the copyright holder's exclusive rights.[44] Third, the proponents are ignoring the lessons of the Supreme Court's decision in *Aereo*, which demonstrates that facilitating device or application functions through unlicensed transmission of copyrighted works to a broad array of subscribers can be a public performance,

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42 *See* MPAA and SAG-AFTRA comments at 6-8; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 11-12; ANA comments at 4; AT&T comments at 37-45; Comcast and NBCUniversal comments at 10, 48, 74, 76-79, 85; C-SPAN comments at 1-2; ICLE comments at 20; IFTA comments at 6-8; MMTC *et al.* comments at 2, 8; NCTA comments at 41-47; PRA comments at 3; Small Business & Entrepreneurship Council comments at 2; TV One comments at 7-13; U.S. Chamber of Commerce comments at 4.

43 *See NPRM* at ¶ 80 & n.231.

44 *See, e.g., New York Times v. Tasini*, 533 U.S. 483, 503-04 (2001) (concluding that licensees that had licenses to distribute individual copyrighted works as parts of collected works violated the copyrights in the individual copyrighted works when they permitted third parties to distribute the works individually, as well as manipulate the formatting and presentation of the works, and that the third parties violated the underlying copyrights as well).

regardless of the precise technology employed, and even if the transmissions are received or initiated by the viewer.[45]

Proponents claim the proposal does no harm because copyright holders and MVPDs will continue to be able to enter into contracts with each other with respect to channel placement, user interface, and advertising.[46] This ignores, of course, both that copyright encompasses more than just rights to channel placement, user interface, and advertising, and that copyright holders would lose their ability under the proposal to ensure compliance regarding even those terms with respect to any third party the moment they license their content to an MVPD.

The fair use doctrine would also not exonerate the FCC or third parties, despite claims of proposal proponents.[47] First, the issue is the compelled transmission by the FCC, as well as the exploitation and manipulation of content by commercial entities—not the mere provision of the third-party devices, applications and services, or the conduct of the viewers. Under the fair use doctrine, "[t]he courts have … properly rejected attempts by for-profit users to stand in the shoes of their customers making nonprofit or noncommercial uses."[48] Second, fair use is an affirmative defense to a claim of copyright infringement. It cannot be definitively determined until adjudicated

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45 *See ABC v. Aereo*, 134 S. Ct. 2498, 2506-10 (2014) (stating that "the concep[t] of public performance … cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public") (quoting H.R. Rep. No. 94-1476, at 63; 2-8 Nimmer on Copyrights § 8.11(B)(4)(d) (stating that under the 1976 Copyright Act, "[t]he distribution right accorded by Section 106(3) is to be interpreted broadly, consonant with the intention expressed by its drafters" and that "it extends to [any] offer to the general public to make a work available for distribution without permission of the copyright owner")).

46 *See* EFF comments at 5, Public Knowledge comments at 45-47; CCIA comments at 24.

47 EFF comments at 4 (citing *Cartoon Network*, 536 F.3d at 140; *Fox v. DISH*, 2015 WL 1137593, at *21 (C.D. Cal. Jan. 20, 2015)).

48 *Princeton Univ. Press v. Michigan Document Serves., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (quoting Patry, Fair Use in Copyright Law, at 420 n. 34).

by a court based on the specific facts of the particular case after the conduct in question has occurred, and after carefully analyzing the factors set forth in Section 107 of the Copyright Act.[49] It therefore cannot be used anticipatorily to bless all manner of potential encroachments on copyright holders' rights. And third, the Copyright Office has consistently found that there is "insufficient legal authority to support the claim that [space- and format-shifting] are likely to constitute fair uses under current law," a finding it reaffirmed in its most recent detailed analysis of the types of uses proposed here.[50]

Proponents also continue to insist that the proposal does nothing more than enable viewers to access content to which they are already entitled, and that copyright holders are trying to double charge.[51] This is faulty logic, as we and others explained in the initial comments.[52] The proposal both mandates dissemination to third parties and allows manipulation of content by those third parties. Moreover, copyright holders do not sell content directly to television viewers. Rather, they license content to distributors, who in turn make it available to viewers in exchange for some combination of subscription fees, advertising revenue, or other compensation. Just because a copyright holder has licensed programming for a particular MVPD to disseminate to a viewer in a particular way, does not mean a different company may disseminate that same programming to that same or other viewers in that or any other way. For example, a decision by Sony Pictures Entertainment to grant Comcast a license to make an episode of *Breaking Bad* available to a

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49 *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) ("The task [of fair use analysis] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").

50 *See Section 1201 Rulemaking: Sixth Triennial Proceeding October 2015, Recommendation of the Register of Copyrights*, at 109 (October 2015), *available at* http://copyright.gov/1201/2015/registers-recommendation.pdf.

51 *See* EFF comments at 3; Public Knowledge comments at 45; CVCC comments at 6, 9, 32; TiVo comments at 13.

52 MPAA and SAG-AFTRA comments at iii, 16; Copyright Alliance comments at 4.

Comcast subscriber, does not allow Netflix to make that episode available as part of its own service—even to that same Comcast subscriber—unless Netflix strikes its own license agreement with Sony Pictures Entertainment.

Similarly, even though a viewer may be entitled to access a broadcast program over the air, cable and satellite operators may not retransmit that same program to that same viewer absent a copyright license. Congress has granted such permission in limited circumstances through compulsory copyright licenses,[53] but copyright permission to retransmit programming could also be obtained through a negotiated license.[54] Here, third-party set-top box, Internet application, and web service providers would have neither a congressionally created compulsory copyright license nor one negotiated in the marketplace.

Perhaps the easiest way to understand that the proposal abrogates the exclusive rights that the Copyright Act grants copyright holders is to recognize that, today, an Internet application or web service provider would not be able to obtain a movie or television programming for distribution without entering into a license agreement. But if the FCC adopts these rules, an Internet application or web service provider would be able to obtain—without a license agreement with the copyright holders—any content that an MVPD happens to carry, when serving viewers who also happen to subscribe to that MVPD. That is a large universe of content, and the intent of some Internet application and web service providers to avoid entering into license agreements may well underlie their support for the proposal.

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53 *See* 17 U.S.C. §§ 111, 122.

54 *See* Government Accountability Office, *Statutory Copyright Licenses: Stakeholders Views on a Phaseout of Licenses for Broadcaster Programming* 1-3, 17-26 (May 2016), *at* http://www.gao.gov/assets/680/676935.pdf.

II. Compelling MVPDs to Transmit Disaggregated Streams of Programming to Third-Party Set-Top Box, Internet Application, and Web Service Providers for Use and Manipulation in Those Providers' Services Without the Permission of Programmers Would Exceed the FCC's Authority

Even if the proposal did not abrogate the rights of copyright holders, the FCC would still need authority under the Communications Act before it could compel MVPDs to transmit disaggregated streams of programming to third parties for use and manipulation in those third parties' services without the permission of programmers. The Communications Act provides no such authority.

A. Neither Sections 629, 624A, or 335 of the Communications Act, nor the Satellite Television Extension and Localism Act Reauthorization, Authorize the FCC to Compel MVPDs to Transmit Disaggregated Streams of Programming

Proposal proponents claim that the FCC would have authority to implement the proposal under sections 629,[55] 624A,[56] and 335[57] of the Communications Act, as well as the 2014 Satellite Television Extension and Localism Act Reauthorization provisions under which the FCC created the Downloadable Security Technology Advisory Committee.[58] Their arguments are unavailing.

Section 629(a) of the Communications Act gives the FCC limited power to ensure the availability from third parties of the equipment that consumers of MVPD services may choose to

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55 *See* Public Knowledge comments at 4-10; CVCC comments at 5, 8, 11-13, 25, 27; CFA Comments at 3-6; CCIA Comments at 6-7; Incompas comments at 8-9; Writers Guild of America, West comments at 11; TiVo comments at 10.

56 *See* Public Knowledge comments at 6-7; CVCC comments at 24-25, 29; CFA comments at 5 n.11; Incompas comments at 10; TiVo comments at 11-12.

57 *See* CFA comments at 5 n.11; CVCC comments at 24-25.

58 *See* Public Knowledge Comments at 7, 11; CVCC comments at 11, 21, 22, 26, 30; CCIA comments at 6-7; Incompas comments at 9; TiVo comments at 10-11.

access the MVPD service in a secure manner.[59] It does not authorize the FCC to require MVPDs to transmit disaggregated streams of content to third parties in a form that the third parties can manipulate as inputs into a different service, or to facilitate the use of Internet applications and web services, as opposed to devices, as we and others pointed out in the initial comments.[60] Congress knows how to mandate disaggregation of facilities and services when it wants to.[61] It did not provide for such disaggregation here. "To read §629 in this way would leave the FCC's regulatory power unbridled—so long as the agency claimed to be working to make navigation devices commercially available," something the D.C. Circuit has said is beyond the pale.[62] Section 629 does not allow the FCC to justify a regulation merely because it believes the regulation will remove a "stumbling block" to the retail availability of set-top box alternatives.[63]

Proposal proponents cite the "shall … adopt regulations to assure" language of Section 629(a) to support their claim that inaction is not an option and the FCC must adopt this proposal.[64] That claim is dubious, as the FCC could certainly conclude that prior navigation device rules, other existing rules, or the marketplace have assured or are assuring competitive availability of

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59 *See* 47 U.S.C. § 549(a).

60 *See* MPAA and SAG-AFTRA comments at 12-13; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 13-17; ACA comments at 13, 59, 68-71; ARRIS comments at 6-7; AT&T comments at 59-74; CenturyLink comments at 4-12; Cisco comments at 13; Comcast and NBCUniversal comments at 33, 38-44; CWA comments at 2-3; Frontier comments at 17-18; MMTC *et al*. comments at 1, 6; NCTA comments at 161-66; NTCA comments at 26-27; Roku comments at 14-15; Tech Freedom and CEI comments at 10-28; Tech Knowledge comments at 3-4; USTelecom Association comments at 15-16.

61 *See* 47 U.S.C. § 251(c)(3).

62 *EchoStar v. FCC*, 704 F.3d 992, 997 (D.C. Cir. 2013).

63 *Id.* at 998.

64 Public Knowledge comments at 5.

navigation devices. This is particularly true in light of Section 629(e), which allows the FCC to sunset the rules.[65] And even if the FCC concludes additional action is necessary, nothing requires the FCC to adopt this proposal, as opposed to other approaches, especially considering the complications and legal questions, including the fact that the proposal jeopardizes content security in violation of Section 629(b), as discussed below.

Section 624A of the Communications Act is similarly unavailing. All Section 624A provides is that the FCC shall ensure compatibility of televisions and cassette recorders with cable systems for the purpose of watching the programming on the cable system and enjoying the features of the television, as well as to promote the competitive availability of converter boxes and remote controls.[66] It is by its terms technology specific. It does not authorize the FCC to require MVPDs to transmit content to third parties in a form that the third parties can manipulate as inputs into a different service, or to facilitate the use of Internet applications and web services, which are not contemplated by Section 624A, as we and other commenters explained.[67]

Proponents make much of the language in Section 624A(d)[68] that the FCC must "modify the regulations issued pursuant to [Section 624A] … to reflect improvements and changes in cable systems, television systems, television receivers, video cassette recorders, and similar technology."[69] But this language does not expand the scope of the FCC's authority delineated in the rest of the section. It merely indicates that the FCC shall modify whether and how it ensures

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65 *See* 47 U.S.C. § 549(e).

66 *See* 47 U.S.C. § 544a(b)(1), (c)(2)(C).

67 *See* MPAA and SAG-AFTRA comments at 13-14; ACA comments at 60, 71-73; AT&T comments at 74-76; Comcast and NBCUniversal comments at 42, 45; NCTA comments at 163-64; Tech Freedom and CEI comments at 29-31.

68 *See* TiVo comments at 11-12.

69 47 U.S.C. § 544a(d).

compatibility and commercial availability of televisions, cassette recorders, converter boxes, and remote controls as technology changes.

Section 335 only applies to satellite operators, and makes no mention of facilitating the devices or services of third parties, as a number of commenters pointed out.[70] Indeed, Section 335 imposes carriage-type obligations on satellite operators, such as those governing political broadcasting, localism, and non-commercial channel set-asides, and thus has nothing to do with transmission-type, wholesale obligations.[71]

The Satellite Television Extension and Localism Act Reauthorization of 2014 also does not grant the FCC the authority to adopt this proposal, as a number of parties observed.[72] Section 106(d) of the reauthorization merely directs the FCC to create a technical working group, not adopt rules. Moreover, it instructs the working group simply "to identify, report, and recommend performance objectives, technical capabilities, and technical standards of a not unduly burdensome, uniform, and technology- and platform-neutral software-based downloadable security system designed to promote the competitive availability of navigation devices in furtherance of Section 629 of the Communications Act of 1934."[73]

Thus, Section 106(d) does not direct the working group to recommend just any performance objectives, technical capabilities, or technical standards that allegedly further the goals of Section 629. It directs the working group to recommend only those performance objectives, technical capabilities, and technical standards related to designing a downloadable

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70 *See* ACA comments at 60, 71-73; AT&T comments at 74-76; TechFreedom and CEI comments at 31-32.

71 *See* 47 U.S.C. § 335.

72 CenturyLink comments at 12-14.

73 Pub. L. No. 113-200, 128 Stat. 2059, 2063, § 106(d) (2014) (emphasis added).

security system that further the goals of Section 629. Congressmen Robert Latta and Gene Green—the authors of the amendment that led to the inclusion of set-top box issues in the satellite reauthorization—explained this very point in a bipartisan, 2015 letter to the FCC.[74] Congress did not empower the working group to do anything beyond that. Nor did Congress authorize the FCC to adopt regulations, whether involving non-security related programming issues or otherwise. Indeed, a Senate amendment that would have required the working group to propose and the FCC to adopt a "methodology for access to a system's programming, features, functions, and services" was withdrawn for lack of support.[75]

This is consistent with the narrow scope of the set-top box-related provisions of the satellite reauthorization. The satellite reauthorization's set-top box provisions only ended the FCC's integration ban prohibiting cable operators from incorporating security functionality within their set-top boxes, and left untouched the FCC's compatibility requirements.[76]

The current proposal goes far beyond security issues into programming matters and involves rules rather than just a report. The proposal is also unduly burdensome, as discussed below. It therefore goes beyond the remit of the satellite reauthorization.

Some proponents claim the FCC can find authority in the White House's recent executive order asking agencies to seek ways of promoting competition,[77] but an executive order does not

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74 Letter from Reps. Robert Latta and Gene Green to Chairman Tom Wheeler, FCC (June 18, 2014).

75 *See* Amendment of Sen. Edward Markey to the Satellite Television Access and Viewer Rights Act, S. 2799 (2014).

76 *See* Pub. L. No. 113-200, 128 Stat. 2059, 2063, § 106(a)-(c) (2014).

77 *See* CFA comments at 4, 6-7 (citing Executive Order, *Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy* (April 15, 2016), *at* https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.

confer authority on an independent agency.[78] And while the executive order "strongly encourages" independent agencies to comply,[79] a previous executive order also states that independent agencies should engage in cost-benefit analyses before adopting regulations.[80] The FCC has engaged in no such cost-benefit analysis here. Moreover, the executive order asks agencies to seek out both regulatory and *deregulatory* ways of promoting competition.[81] Lastly, the NTIA said in its comments on behalf of the Administration that the Commission should protect content security, be careful not to stifle programming innovation, and be mindful of license agreements.[82]

Proponents also argue that the proposal is consistent with the FCC's 1968 *Carterfone* decision requiring Ma Bell to allow connection of non-harmful devices to the telephone network.[83] Ma Bell, however, was a common carrier, and *Carterfone* did not implicate video programming and the attendant copyright and First Amendment issues, as parties pointed out in the initial comments.[84]

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78 *See Executive Order, Steps to Increase Competition*, Sec. 2 (directing that "*[e]xecutive departments and agencies* with authorities that could be used to enhance competition (agencies) shall, where consistent with other laws, use those authorities to promote competition") (emphasis added).

79 *Id.*, Sec. 3(b).

80 Executive Order 13579—*Regulation and Independent Regulatory Agencies*, at Sec. 1 (July 11, 2011).

81 *Executive Order, Steps to Increase Competition* at Sec. 2.

82 NTIA comments at 2, 4.

83 *See* CFA comments at 11, 14-16, 17-19, 23-24; CCIA comments at 29-30; Google comments at 2; Incompas comments at 8; Public Knowledge comments at 7-9; TiVo comments at i, 2-3; Writers Guild of America, West comments at 1-2.

84 *See* NCTA comments at 155-59; USTelecom Association comments at 15-16.

B. The Proposal is Fundamentally Different than the CableCARD Regime

Some proponents argue that the proposal must be within the FCC's jurisdiction and consistent with copyright policy because it is comparable to the existing CableCARD regime.[85] The NPRM also says that use of CableCARDs has not raised content manipulation, program presentation, or advertising issues, making it unnecessary to adopt rules to address such issues as part of this new proposal.[86] Neither position is accurate, as we and others pointed out in the opening comments.[87]

The CableCARD regime is fundamentally different than the current proposal.

- CableCARDs enable unidirectional services, not two-way, Internet-based services.
- The CableCARD enables use of alternative consumer electronics equipment; it does not facilitate the provision of cable service over Internet applications or web services.
- The CableCARD and associated FCC rules merely implement for third parties the security functionality that enables third-party devices to render the cable service; they do not require the cable operator to transmit disaggregated streams of content and data to third parties in a form that the third parties can manipulate as inputs into a new service.
- The Dynamic Feedback Arrangement Scrambling Technique license by which CableLabs authorizes third parties to use CableCARDs is only a license for the security functionality; it is not a content license that authorizes third parties to make their own, different uses of programming. If a third party asks CableLabs for permission to use the content in a different way, CableLabs responds that is something it cannot authorize.[88]
- The DFAST license is a contract-based mechanism for addressing the security of third-party set-top boxes; the proposal prohibits contract-based security relationships between MVPDs and third-party navigation device providers.

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85 Public Knowledge comments at 10, 12; CVCC comments at 27-28, 32-33, 41-42.

86 *NPRM* at ¶ 80.

87 *See* MPAA and SAG-AFTRA comments at 14-15; NCTA comments at 60-62.

88 *See, e.g.*, Letter from Judson D. Cary, Deputy General Counsel, CableLabs to Jim Denney, Vice President, TiVo. Inc. (March 13, 2015).

- Third parties using CableCARDs are contractually bound to comply with terms on service presentation and content manipulation; the current proposal refuses to require that third parties that are provided with the three streams abide by terms on service presentation and content manipulation.

- CableLabs is an organization affiliated with the cable industry, and thus would likely not qualify to provide the security solution envisioned by the proposal, which requires that the solution be provided by an entity "not substantially controlled by an MVPD or by the MVPD industry."[89]

Because of all this, the proposal raises far more concerns regarding FCC authority, copyright, and content security. There is also evidence suggesting TiVo is manipulating advertising and other content under the CableCARD regime,[90] undermining the FCC's rationale for not adopting prohibitions on content manipulation.

III. The Proposal Violates Section 629 of the Communications Act by Jeopardizing Content Security and Impeding Programmers' Rights to Prevent Content Theft

The proposal would restrict copyright holders' ability to secure their content, as we and other parties explained in the initial comments, which would violate Section 629.[91] Section 629 prohibits the FCC from jeopardizing content security or impeding programmers' rights to prevent content theft.[92] The FCC impermissibly does both, however, by: A) mandating content use outside

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89 See NPRM at ¶ 50. *See also id.* at ¶¶ 2, 58-60.

90 *See* MPAA and SAG-AFTRA comments at 15; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 29; Comcast and NBCUniversal comments at 81; NAB comments at 11.

91 *See* MPAA and SAG-AFTRA comments at 20-28; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 11-12, 16-25; ACA comments at 42, 49-40; ANA comments at 8; ARRIS comments at 13-15; AT&T comments at 45-47; CenturyLink comments at 15-16; Cisco comments at 6-13; Comcast and NBCUniversal comments at 86-91; Copyright Alliance comments at 15; CreativeFuture comments at 4, 6-7; DGA and IATSE comments at 2, 6; IFTA comments at 3, 9-10; IPI comments at 4; ITTA comments at 25; NCTA comments at 20-21, 60-62, 93-106, 165; RIAA comments at 5-6.

92 *See* 47 U.S.C. § 549(b); MPAA and SAG-AFTRA comments at 20-21 (explaining that the statute and legislative history indicate that Section 629 addresses jeopardy to the security of both

license agreements; B) requiring MVPDs to support at least one "compliant" content protection system licensed under FCC-acceptable terms, "independently controlled" by an organization not affiliated with MVPDs, and having an unaffiliated trust authority; C) eliminating safeguards against an influx of Internet piracy into the MVPD world; and D) facilitating businesses based on piracy.

Proponents argue that by making content more readily available, the proposal will diminish incentives to steal content and thus reduce, rather than increase, piracy.[93] But content is already readily available through lawful online sources. Today there are more than 120 legal online video services,[94] and U.S. audiences used those services to access 8.4 billion movies and 76.1 billion TV episodes in 2015, alone.[95] The figures are expected to grow to 111.1 billion and 12.7 billion by 2020,[96] without any government mandate.

As long as programming costs more than zero, illicit enterprises will always have a built-in profit margin when offering stolen content, and thus will continue to have an incentive to make a business out of content theft. And to the extent this proposal will enable thieves to make their services look more legitimate, viewers may not even realize that what they are watching is not coming from a legitimate source. Regardless how high the incentives are for illicit businesses to steal, the FCC has a statutory obligation not to make it easier to do so—an obligation that this proposal does not meet.

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content and MVPD service, as well as to limitations on the rights of both programmers and MVPDs to prevent theft).

93 *See* Public Knowledge comments at 3, 47-50 & n.66; CCIA comments at 22.

94 *See* www.WhereToWatch.com.

95 Underlying data available from IHS. *See* https://www.ihs.com/.

96 *Id.*

A. Mandating Access to Content Outside License Agreements Would Jeopardize Content Security and Impede Programmers' Rights to Prevent Content Theft

Securing content is more complex than selecting a particular content protection technology and committing to adhere to a narrow set of rules and policies. Content security cannot effectively be implemented or enforced outside a license agreement, as we and others explained in our initial comments.[97] Security requires implementing details that determine the robustness of solutions for a variety of use cases. Copyright holders must consider the value of—and how much they have invested in—particular content, the size of the intended audience and potential revenue stream, the particular technology and business model of each potential distribution partner, the security risks the technology and business model may present, and the level of trust with the partner.

Relevant factors include the resolution of the content, the distribution technology, functionality of the distribution service and receiving device, the features and interactivity available to the viewer, the revenue models of the programmer and the distributor, any windowing or exclusivity offered to the potential partner or others, and the portability of the content. These are the types of issues that content providers must examine, with the resulting analysis guiding the decisions on what devices and device types to deliver content to and how. Consequently, copyright holders often tailor security solutions to particular partners in conjunction with—and dependent upon—other terms in the relationship.

Discussions with respect to security are part of the negotiation of any deal, often involving technology testing to explore potential business models and security solutions along with their attendant risks, and compliance with negotiated terms extends beyond execution of an agreement through auditing and other compliance procedures. Copyright holders embody and implement

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97 *See* MPAA and SAG-AFTRA comments at 21-22; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 11-12, 25-26; AT&T comments at 45-47; Copyright Alliance comments at 15; CreativeFuture comments at 7.

these arrangements through rigorously negotiated license agreements that incorporate provisions on distribution technology, security solutions, testing, auditing, remediation, and redress. Agreements and security solutions can vary by studio, as well as within a given studio depending on the content, distributor, and distribution technology. The content provider typically reserves a unilateral right to require a service to take down content in the event of an identified security breach. This can only be achieved through a license agreement.

Similarly, preventing abuse and fraud can only be assured through license terms, such as limits on the number of devices onto which a movie or television show can be downloaded, or on the number of simultaneous streams allowed per account. Without such agreements, content could be downloaded to 100 different devices or streamed to 1,000 different users using a single subscriber's credentials, improperly turning one subscription into many.

By mandating content use outside of license agreements, the proposal hinders specialized content protection discussions and negotiations, jeopardizing the security of the programming. Mandating access outside of license agreements similarly would impede programmers' rights to prevent content theft, because it is the agreements that enable them to create and enforce the content security they deem necessary.

The proposal tries to compensate by creating a regulatory regime to develop the security solutions that will apply to third parties, as well as the mechanism for imposing and enforcing the solutions. Such a regime cannot account, however, for the complexity and variety of security solutions that negotiated licenses can, and trying to create and manage the different solutions needed through a one-size-fits-all regulatory process will produce fundamentally weaker security. Enforcing that regulatory security regime will also be far more complex, difficult, and time consuming. And during whatever protracted proceedings are available to address gaps, problems

with, or violations of the security regime, programming will be vulnerable and programmers will be reluctant to make new content and new content formats available.

B. Requiring MVPDs to Support a "Compliant" Content Protection System Under FCC-Restricted Terms, "Independently Controlled" by an Organization Not Affiliated with MVPDs, and Having an Unaffiliated Trust Authority, Would Jeopardize Content Security

The proposal would jeopardize the security of multichannel video programming by requiring each MVPD to support, for the benefit of third parties, at least one "compliant" content protection system, as we and others explained in the initial comments.[98] To be compliant, the system must be licensed under FCC-restricted terms, "independently controlled" by an organization not affiliated with MVPDs, and have a trust authority unaffiliated with MVPDs.[99]

Securing content involves a "chain of trust" that follows a trust model managed by a trust authority. An effective trust model includes a complex compliance and robustness framework that helps ensure the content protection system will behave in the expected manner with a sufficient level of resistance to attacks. It will list viewer authentication methods, specify the provisioning methods for cryptographic material, define the expected response to a breach, and rely on both software and hardware implementations.

The trust authority authenticates a viewer and a device before granting access to the "keys" for viewing content. It must define the compliance and robustness regime, usually in negotiation with copyright holders. It must enforce this compliance and robustness regime using license terms. It must then generate and securely distribute cryptographic material to licensees, manage revocation and respond to hacks, and manage the timely evolution of the security solution. For

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98 *See* MPAA and SAG-AFTRA comments at 22-26; AT&T comments at 82; Copyright Alliance comments at 15; CreativeFuture comments at 7.

99 *See NPRM* at ¶¶ 2, 50, 58-60.

content owners to preserve an environment in which they can secure their content, recoup their investments, and experiment with new distribution models, they must be intimately involved in these decisions, including the selection of the trust authority itself.

By limiting the entities that may design and manage the system, interfering in the relationship with the trust authority, and constraining the terms under which content protection systems may be licensed, the proposal restricts the options available to copyright holders for securing their content. Copyright holders may even end up having little or no input into the initial content protection measures third parties use to secure the copyright holders' own content, either because they are denied an opportunity to participate in the process or because their views are not adequately reflected in the final specifications.

The proposal also makes it more difficult to ensure changes to the system as programming, services, devices, and business models evolve; as content security technologies improve; and when existing security systems suffer a breach. Compliance and robustness rules change as frequently as once a year based on new services, new technologies, and new threats. Today, MVPDs have end-to-end control over the security system, subject to their license agreements with programmers, which facilitates evolution of security solutions. Under the proposal, however, control is split between the MVPD and one or more unaffiliated entities. Moreover, there is no license agreement, making the relationship between programmers, MVPDs, and those designing and managing the content security system unclear.

As a result, any security changes must be run through consensus-based standards bodies and unaffiliated entities. This will take time and provide programmers no assurances that security updates needed to protect their content will receive approval in a timely manner or at all. The parity requirement exacerbates this problem, as MVPDs cannot implement any security solution unless and until they can do so for all third parties. Absent license agreements, delineation of

responsibilities will be unclear, and when problems arise, the odds are good there will be an enforcement gap. Moreover, open standards groups are inherently ones of compromise, which will dilute security solutions to least common denominators rather than let different parties adopt the security solutions that best serve their purposes.

This also means that one or maybe a few centralized entities will be developing security solutions, rather than a distributed network of parties each working bilaterally on a variety of approaches. This is ironic, because the Internet was built on the philosophy that distributed, non-regulatory efforts are typically more resilient and more fruitful. The proposal also sets out to "assure competitors and those considering entering the market that they can build to what is likely to be a limited number of content protection standards."[100] Proposal proponents echoed that sentiment.[101] For security to be resilient, it must be diverse and redundant. To the extent the proposal limits the number of security technologies third parties might implement for a particular MVPD, and produces a uniform third-party security solution for a particular MVPD or across MVPDs, it weakens security and runs the risk of creating a single point of failure.

It is true that the proposal allows MVPDs to use one or more content protection systems of their choosing in addition to those they support for third parties.[102] There will, however, always be at least one restricted content protection system for third parties to access programmers' content, providing a weak link.

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100 *See NPRM* at ¶ 59.

101 *See, e.g.,* TiVo comments at 18-19.

102 *See NPRM* at ¶ 58.

C. Eliminating Safeguards Against an Influx of Internet Piracy Into the MVPD World Would Jeopardize Content Security

Proponents claim that one of the proposal's most salutary effects is to promote "universal" or "cross-platform" searches of content from the various providers.[103] But cross-platform search capability exists today in varying forms,[104] including from AppleTV, Roku, and the MPAA's own WhereToWatch.com. Currently, such cross-platform search occurs consistent with license agreements, which provide safeguards to ensure that the searches do not present unlicensed material. By allowing third-party set-top box, Internet application, and web service providers to use disaggregated content streams outside of license agreements, the proposal eliminates those safeguards, allowing an influx of Internet piracy into the MVPD world, as we and others pointed out in the initial comments.[105]

Indeed, while there already is a substantial problem with search engines directing consumers to unlicensed or pirated content on the Internet, today's MVPD environment is free from piracy due, in part, to license agreements. Once third-party set-top box, Internet application, and web service providers have access to disaggregated content streams outside of license agreements, there is little to stop them from prominently displaying to MVPD subscribers pirated content from the Internet alongside authorized MVPD content in "cross-platform searches" and "recommendation engines."

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103 *See* Amazon comments at 4, 5; Google comments at 3-4; Incompas comments at 7; TiVo comments at 6-7, 15.

104 *See* NCTA comments at 66-67.

105 *See* MPAA and SAG-AFTRA comments at 26-27; CreativeFuture comments at 8; CIF comments at 5-6; IFTA comments at 3, 9-10; IPI comments at 4; PRA comments at 4; RIAA coments at 5-6.

This will increase the potential for viewers to see pirated content, which ultimately affects the incentives to create the very content that the viewer is trying to access. According to *Walking Dead* producer Gale Anne Hurd, this "would spell disaster for those [creators] who are trying to figure out how to keep making the movies and TV shows audiences love."[106] For example, when MVPD subscribers search for specific content on their MVPD service using a third-party device, application, or web service, they may be presented with an opportunity to view a pirated version of a show or movie for free right next to an authorized version for a fee.

Absent a license agreement or contractual relationship, third-party set-top box, Internet application, and web service providers may be indifferent to such occurrences, especially if they garner revenue from advertising in conjunction with the search and recommendation results. This will increase the consumption of pirated programming by MVPD users, who may not even be aware of the pirated nature of the show or movie.

To be clear, we do not impose cross-platform search or recommendation engines, so long as they are implemented responsibly, and abide by copyright law and license agreements. And the FCC certainly should not abrogate copyright holders' rights under the Copyright Act, or their license agreements, as a means of promoting them.

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106 Gale Anne Hurd, *Stop Piracy Apocalypse: 'Walking Dead' Producer—FCC Proposal Would Make Zombies of Your Favorite TV Shows*, USA Today (April 12, 2016), *at* http://www.usatoday.com/story/opinion/2016/04/12/fcc-set-top-box-proposal-cable-internet-piracy-walking-dead-zombies-gale-hurd-column/82919704/.

D. Facilitating Businesses Based on Piracy Would Jeopardize Content Security

"Black-market" boxes and applications that aggregate pirated content from the Internet are a growing concern, especially abroad.[107] Today, such boxes and applications are an Internet problem. By mandating that MVPDs allow third-party boxes and applications to connect to their systems using constrained and unaffiliated security systems outside of licensing agreement, and by allowing them to use disaggregated "information flows," the proposal will make black-market devices and applications an MVPD problem, as we and others explained in the initial comments.[108]

Devices and applications to facilitate piracy exist today, but the proposal would make them more attractive and more harmful. They would become more attractive because they could co-mingle authorized content from MVPD service with pirated content from the Internet, offering viewers "one-stop shopping." They would become more harmful because they could both import into the MVPD world pirated content from the Internet, and unlawfully export to the Internet authorized content from MVPD systems.

While the proposal would allow MVPDs to deny the information flows to such black-market devices, applications, and services, it is unclear how they will discover and track them down, especially if they are fly-by-night device or application providers on the Internet. Moreover, discontinuing such flows might stop that particular instance of harm from continuing, but would do nothing to compensate programmers for the harm that has already occurred. And the harm could continue for quite some time, in light of suggestions by some commenters that MVPDs must not

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107 *See* Troy Dreier, *CES Report: Irdeto Highlights Ease and Growth of Set-Top Piracy* (Jan. 6, 2015), *at* http://www.streamingmedia.com/Articles/Editorial/Featured-Articles/CES-Report-Irdeto-Highlights-Ease-and-Growth-of-Set-Top-Piracy-101362.aspx.

108 *See* MVPD and SAG-AFTRA comments at 27-28; CreativeFuture comments at 8, 12, 14, 18.

discontinue the information flows until after an extensive process and notice period in order to minimize harm to viewers relying on the third-party devices, applications, or services.[109]

Programmers would ordinarily have a license agreement to fall back on for remediation and remuneration. By contrast, it is unclear under the proposal what authority the FCC would have to fine such entities, let alone to award damages to programmers, especially if the entities are located abroad, are an application or web service provider rather than a device manufacturer, or are simply a middle man that loaded software onto an otherwise lawful device.

IV. The Proposal is Infeasible, Harmful to Innovation, and Unduly Burdensome

Proponents argue that the proposal enables "permissionless innovation" for third parties.[110] They overlook, however, that the proposal denies such permissionless innovation to the content community. The sheer complexity of the proposal makes it infeasible, harmful to innovation, and unduly burdensome, as we and others explained in the initial comments.[111]

MVPD service is an intricate amalgam of licensed content, disparate networks, different security and content protection measures, hardware, software, licensed metadata, diagnostics, application data synchronized with content, interactivity, user interfaces, advertising, ad reporting, and audit paths, among other items. The proposal's two-year deadline for the open standards process offers an unrealistically short timeline. Even in the best of circumstances, video-related standards can take five years or more to develop, let alone deploy widely. The standards needed

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109 *See* CVCC comments at 43; EFF comments at 6-7; Incompas comments at 22.

110 *See* CFA comments at 9; TiVo comments at i, 13, 15-17.

111 *See* MPAA and SAG-AFTRA comments at 28-32; ACA comments at 9, 13, 41-42, 46-50; ARRIS comments at 9-12; AT&T comments at 19-28; Cisco comments at 10-11; Comcast and NBCU comments at 61-66, 70, 98-99, 103-07; DLNA comments at 2; EchoStar and DISH comments at 8-11, 15-18; ITTA comments at 11-12, 25; NCTA comments at 52-53, 71-73, 85-90, 106-13, 119-26, 130; NTCA comments at 18-20; USTelecom Association at 12-15; WTA comments at 4.

to implement this proposal will be extraordinarily complex, including mandates for the rendering of the information required in each of the three data flows, for which there is no existing format that will translate from distributor to distributor, device to device, content type to content type, and business model to business model.

The proposed self-certification regime, or certification to the MVPD, is also insufficient. In 2006, MPAA purchased and tested about 100 products subject to "self-certification" in the CSS license for DVDs. All of the products failed to comply with at least one content security rule. It took 10 lawsuits and about 30 other legal settlements to materially enhance the compliance level. Moreover, no such certification can fully test today's complex systems and even if a device passes certification, the device manufacturer, application provider, or end user can change the software the next day. That is why video-related license agreements ordinarily include auditing and testing provisions to verify compliance with security requirements, and provide programmers either a role in assessing compliance, rights against a third party that has failed to comply adequately, or both. Indeed, even the EFF recognizes that navigation devices are high-value targets, that independent security testing is needed, and that pre-release testing is insufficient.[112]

License agreements change continually to accommodate new technology, business models, and content formats. The current model allows each copyright holder and each distributor to decide when to negotiate new license terms to accommodate these types of changes. Requiring MVPDs to provide service discovery, entitlement, and content delivery data to third parties pursuant to open standards and constrained security solutions without the benefit of license agreements, however, will prevent roll out of new content, formats, features, business models, and security

112 *See* EFF comments at 7-8.

solutions until the associated standards are developed. And third parties will have an incentive to stall the open standards process so they can trigger the proposed default standard[113] or benefit from the new content, formats, features, and business models before MVPDs can,[114] hindering programmers' distribution channels.

The proposal also does not comply with the Downloadable Security Technology Advisory Committee's remit to produce a downloadable security solution that is "not unduly burdensome."[115] Programmers will need to revisit all their license agreements, either to ensure compliance with the new rules or to try to fill gaps the rules leave behind, assuming those gaps can even be filled. They will need to participate on potentially multiple open standards bodies to design protocols for and implement the three information flows. They will similarly need to work with potentially multiple unaffiliated organizations to design and implement new security protocols. The proposal's own provisions expect this to take two years, although realistically it will take quite longer than that.

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113 *See NPRM*, at ¶ 43. *See also* MPAA and SAG-AFTRA comments at 30; NCTA comments at 127-28; NTCA comments at 19.

114 *See Allied Tube v. Indian Head*, 486 U.S. 492, 500 (1988) (observing that open standards bodies are traditionally subject to antitrust scrutiny because of members' economic incentives to use them to restrain competition).

115 *See* Satellite Television Extension and Localism Reauthorization of 2014, Pub. L. No. 113-200, 128 Stat. 2059, 2063, § 106(d) (2014).

V. Compelling MVPDs to Transmit Disaggregated Streams of Programming to Third-Party Set-Top Box, Internet Application, and Web Service Providers for Use and Manipulation Without Seeking the Permission of Programmers or Compensating them Would Violate the First and Fifth Amendments

We also pointed out that forcing MVPDs to transmit disaggregated streams for use and manipulation by third parties without seeking the permission of the copyright holders and compensating them would violate the First and Fifth Amendments.[116]

Under the First Amendment, content creators have a right to determine what they say and how they say it.[117] As a number of commenters explained, forcing MVPDs to transmit streams of programming for use by third parties without the content creators' consent violates this right, especially if the third parties alter the content or programming presentation.[118] Congress has been careful to minimize the Communication Act's impact on speech,[119] and is explicit when it wants the FCC to regulate in ways that bear upon the First Amendment.[120] Thus, to avoid potential First Amendment issues, the FCC must not interpret provisions of the Communications Act as

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116 *See* MPAA and SAG-AFTRA comments at 18-20.

117 *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988) (stating that "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it").

118 *See* AT&T comments at 87-92; Comcast and NBCUniversal comments at 55-56; Comments of 21st Century Fox, A&E, CBS, Scripps, Time Warner, Viacom, and the Walt Disney Company at 41-42; NCTA comments at 166; Free State Foundation comments at 4, 15-16; Tech Knowledge comments at 11-31

119 *See, e.g.*, 47 U.S.C. § 326 (providing that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication"); 47 U.S.C. § 544(f) (providing that "[a]ny Federal agency ... may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title").

120 *See, e.g.*, 18 U.S.C. § 1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."); 47 U.S.C. § 315 (governing provision of broadcast time to candidates for public office); 47 U.S.C. § 399 ("No noncommercial educational broadcasting station may support or oppose any candidate for political office.").

authorizing regulation of speech in the absence of express statutory language.[121] Because nothing in Section 629 specifically authorizes the FCC to compel speech, the FCC may not construe it in a manner that does so.

Proponents argue that the proposal does not affect the content of programming, prevent programmers from speaking, or force them to speak or endorse messages they do not agree with, and that the First Amendment does not let speakers decide who may listen.[122] But the proposal does affect the content of programming and force them to speak messages. As discussed above, after mandating transmission to third-party set-top box, Internet application, or web service providers of all the licensed content, the proposal does not prohibit them from changing "service presentation (such as agreed- upon channel lineups and neighborhoods), replac[ing] or alter[ing] advertising, or improperly manipulat[ing] content."[123]

Programmers are not trying here to determine who may "listen" to their content. The same viewers will have access to the programming whether they watch it over an MVPD-provided device or one from a third party. The issue is that the FCC is trying to compel programmers to allow third parties to distribute their speech.

A number of commenters also agreed with us that the proposal would violate the Fifth Amendment prohibition on government takings of property without compensation.[124] The Supreme Court has made clear that government action conveying someone's intellectual property

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121 *See MPAA v. FCC*, 309 F. 3d 796 (D.C. Cir. 2002) (holding that the First Amendment precluded the FCC from imposing video description rules absent a direct Congressional authorization to do so).

122 Public Knowledge comments at 13, CVCC comments at 34.

123 *See NPRM* at ¶ 80 & n.231.

124 AT&T comments at 93-95; Comments of 21st Century Fox, A&E, CBS, Scripps, Time Warner, Viacom, and the Walt Disney Company at 42; USTelecom Association comments at 17.

to another in violation of his or her reasonable, investment-backed expectation runs afoul of the Takings Clause.[125] Programmers have a reasonable investment-backed expectation that the government will not appropriate their content for public use. Indeed, the government assures them of that expectation by recognizing copyright in the first place, which gives them the confidence to invest hundreds of millions of dollars in their movies and television shows.

Forcing MVPDs to allow third parties to use the programmers' content without licensing it from the programmers and paying a negotiated royalty, as well as to generate their own revenue through fees, advertising, or other means, deprives programmers the benefit of their intellectual property. That remains true even though the programmers may still be able to license the content to others, as the economic value of intellectual property is the ability to competitively benefit from it over others that are not the creators.[126]

VI. Allowing Third-Party Set-Top Box, Internet Application, and Web Service Providers to Use and Manipulate Content Without Seeking the Permission of Programmers and Compensating Them Would Harm Production of Television Content

High-value programming is expensive to produce. Allowing third parties to use and manipulate it without seeking the permission of and compensating the creators would jeopardize the economic underpinnings that enable the creation of that content in the first place, as we and others pointed out in the initial comments.[127]

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125 *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (ruling that the EPA violated the Fifth Amendment when it required a chemical company to submit intangible property for use by commercial competitors).

126 *Id.* at 1012.

127 *See* MPAA and SAG-AFTRA comments at i-iii, 26, 33; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 11-12; Advanced Communications Law & Policy Institute at New York Law School comments at 9; ANA comments at 1; AT&T comments at 37-47; Comcast comments 76, 83; Copyright Alliance comments at 2, 12-14; Creators of Color comments at 1-2; C-Span comments at 1-2; Frontier

License and advertising revenue help fund the production and acquisition of innovative programming. A major motion picture costs on average $100 million and today's television programming can cost millions of dollars *per episode*. These are up-front costs. A content creator and a programming network are far less likely to invest in high-value content or take a risk on anything other than mass appeal programming unless they believe there is a reasonable likelihood it will generate enough license and advertising revenue to cover their costs, plus a reasonable return on their investments. And because purchasers of programming have a higher likelihood of recouping their investment through programming fees and advertising if the audience for the content is not divided among multiple distributors, they are often willing to pay a premium for exclusivity based on time, territory, or platform. For reasons such as these, the FCC has long held that "the ability to show programs on an exclusive basis is generally recognized as a valuable and legitimate business practice in the television and cable industries."[128]

By allowing third parties to use content for their own services without licensing it, the proposal deprives copyright holders of license revenue. As discussed above, allowing third parties to use and manipulate content outside a license agreement also makes it harder to secure the content, and thus also hurts license revenue. And by restricting the ability of copyright holders to enter into exclusive arrangements and windowing agreements, the proposal's parity requirement

comments at 7; ICLE comments at 20, 25-26; IFTA comments at 6-8; MMTC *et al.* comments at 2, 4, 8-15; NCTA comments at 20, 31, 41-47, 55-58; NetCompetition comments at 22; PPI comments at 4; PRA comments at 3; Small Business & Entrepreneurship Council comments at 2; TPA comments at 3-4; TV One comments at 10-18; U.S. Chamber of Commerce comments at 4; Verizon comments at 5, 8.

[128] *In re* Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Gen. Docket No. 87-24, *Report and Order*, 3 FCC Rcd 5299, 5300 ¶ 5 (1988).

prevents copyright holders from earning a premium from distributors, further reducing license revenue.

Allowing third parties to change "service presentation (such as agreed- upon channel lineups and neighborhoods), replace or alter advertising, or improperly manipulate content"[129] takes an additional financial toll. If third-party set-top box, Internet application, and web service providers can drop programming and remove commercials, programmers lose eyeballs along with the license fees and advertising revenues that go with them. And if third-party set-top box, Internet application, and web service providers can insert advertising in and around content streams, menus, search results, and "recommendations," as well as monetize viewer watching habits, copyright holders must compete for advertising dollars within their own programming. Advertisers will pay less for advertising if there is a risk their ads will be dropped or overlaid, the programming their ads are in will be dropped or given less prominence, or if multiple parties can suddenly place their ads on the exact same programming being viewed by the exact same viewers.

All of this makes it harder to raise the capital needed to produce quality content in the first place, and also reduces profits that might otherwise be invested into the next production.

Diminishing the number of productions, and reducing the profit from those productions that do get made, also jeopardizes the livelihoods of directors, artists, and crew. As the Directors Guild of America, the International Alliance of Theatrical Stage Employees, and the Copyright Alliance explain in their comments, their members earn a living not just from the paychecks for each movie or television show they make, but also indirectly from the productions' revenues, which are the source of their residuals, as well as retirement and health benefits.[130] If directors, artists, and crews are having a harder time earning a living, studios in turn will have a harder time

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129 *See NPRM* at ¶ 80 & n.231.

130 *See* DGA and IATSE comments at 2; Copyright Alliance comments at 5-7.

finding the talent to produce high-value movies and shows. With fewer high-value movies and shows in production, directors, artists, and crews will continue having a harder time earning a living, creating a non-virtuous circle, harming creators and audiences alike.

Proponents argue that the proposal will increase the ways viewers can access content and give programmers more avenues for distribution.[131] That's questionable, as viewers must already have access to both MVPD service and broadband to benefit from the proposal, and programmers already can and do distribute their content over the Internet. Indeed, there are already more than 120 legal online video services,[132] and U.S. audiences used those services to access 8.4 billion movies and 76.1 billion TV episodes in 2015, alone.[133] The figures are expected to grow to 111.1 billion and 12.7 billion by 2020,[134] without any government mandate. The overwhelming majority of the creative community believes that the proposal will do far more harm to existing business models and the ability to reach viewers than it will open up new avenues of discovery.[135]

VII. Conclusion

Increasing MVPD set-top box competition is certainly a laudable goal. What concerns the MPAA, SAG-AFTRA, and the overwhelming majority of the creative community, however, is that in the service of that goal the proposal would: 1) abrogate rights that the Copyright Act grants to copyright holders; 2) exceed the authority of the FCC; 3) jeopardize content security and

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131 *See* Amazon comments at 4; Google Comments 2-4; Greenlining Institute comments at 5; Incompas comments at 7, 15-17; ITIC comments at 6; Public Knowledge comments at 13; TiVo comments at i, 6-7, 15; Writers Guild of America, West comments at 2-3, 14, 16-17.

132 *See* www.WhereToWatch.com.

133 Underlying data available from IHS. *See* https://www.ihs.com/.

134 *Id.*

135 *See* MPAA and SAG-AFTRA comments at i-iii, 26, 33; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 11-12; Creators of Color comments at 1-2; C-Span comments at 1-2; DGA and IATSE comments at 1-8; IFTA comments at 6-8; MMTC *et al.* comments at 2-4, 8-15; TV One comments at 10-18.

programmers' rights to prevent content theft; 4) impose infeasible, anti-innovation, and unduly burdensome obligations on content creators; 5) violate the First and Fifth Amendments; and 6) undermine the economics of program production.

No matter how laudable the goal, this cannot be the answer.

Respectfully Submitted,

Neil Fried
[x] Neil Fried

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May 23, 2016

Appendix: Party Abbreviations

ACA:	American Cable Association
AFTRA:	American Federation of Television and Radio Artists
ANA:	Association of National Advertisers
ATR:	Americans for Tax Reform
CCIA:	Computer & Communications Industry Association
CEI:	Competitive Enterprise Institute
CFA:	Consumer Federation of America
CIF:	Center for Individual Freedom
CVCC:	Consumer Video Choice Coalition
CWA:	Communications Workers of America
DGA:	Directors Guild of America
DiMA:	Digital Media Association
DLNA:	Digital Living Network Alliance
EFF:	Electronic Frontier Foundation
ICLE:	International Center for Law and Economics
IFTA:	Independent Film & Television Alliance
IPI:	Institute for Policy Innovation
ITIC:	Information Technology Industry Council
ITTA:	Independent Telephone & Telecommunications Alliance
MMTC:	Multicultural Media, Telecom, and Internet Council
MPAA:	Motion Picture Association of America
NAB:	National Association of Broadcasters
NCTA:	National Cable & Telecommunications Association
NTCA:	National Telephone Cooperative Association
NTIA:	National Telecommunications and Information Administration
PPI:	Progressive Policy Institute
PRA:	Property Rights Alliance
RIAA:	Recording Industry Association of America
SAG:	Screen Actors Guild
TPA:	Taxpayers Protection Alliance

From:	Charlesworth, Jacqueline
To:	"Fried, Neil"; Damle, Sarang; "Fried, Neil"; Damle, Sarang
Cc:	Day, Brian; Day, Brian
Bcc:	Charlesworth, Jacqueline
Subject:	RE: MPAA set-top box reply
Date:	Tuesday, May 24, 2016 4:34:41 PM

Thanks, Neil. Next week should work for a call. Copying my assistant, Brian, to propose some times.

Jacqueline C. Charlesworth
General Counsel and
Associate Register of Copyrights
U.S. Copyright Office
jcharlesworth@loc.gov
202.707.8772

From: Fried, Neil [mailto:Neil_Fried@mpaa.org]
Sent: Tuesday, May 24, 2016 3:35 PM
To: Charlesworth, Jacqueline; Damle, Sarang
Subject: MPAA set-top box reply

Jacqueline and Sy,

I hope all is well. Here's a copy of the reply we filed last night in the FCC set-top box proceeding, in case you're curious.

Is there a good time in the coming days for a call to circle back on this topic?

Thanks.

Neil

From:	Day, Brian
To:	"Fried, Neil"
Cc:	Sheffner, Ben
Subject:	RE: Conference Call w/USCO
Date:	Wednesday, May 25, 2016 1:08:00 PM

Thanks, Neil. I'll send out a meeting invite shortly. Did you have a number the group could call you and Ben or should I arrange for a conference call-in number? Thanks.

From: Fried, Neil [mailto:Neil_Fried@mpaa.org]
Sent: Wednesday, May 25, 2016 1:03 PM
To: Day, Brian
Cc: Sheffner, Ben
Subject: Re: Conference Call w/USCO

Thanks Brian,

Let's try for May 31 at 4:00. I have added my colleague Ben Sheffner, who may also join.

Neil

On May 25, 2016, at 10:03 AM, Day, Brian <bday@loc.gov> wrote:

> Good Morning Neil,
>
> I've listed some dates/times below that Jacqueline and her staff would be available for a phone call next week to discuss the MPAAs FCC set-top box reply. Please let me know which date/time works best for you as well as a number you can be reached at and I'll send out a formal meeting invite for everyone's calendar. If there are others from the MPAA that you would like to invite, provide me their email addresses and I'll include them in the meeting invite.
>
> Tuesday, May 31: 1pm/2pm/3pm/4pm
> Wednesday, June 1: 11am
> Thursday, June 2: 11am/12pm/1pm/3pm/4pm
>
> Regards,
> Brian
>
> **Brian Day**
> **Assistant to the General Counsel**
> **United States Copyright Office**
> **Library of Congress**
> **202-707-7892 (d)**
> **202-707-8380 (o)**
> **202-707-8366 (f)**
> **www.copyright.gov**

Subject:	Conf. Call: MPAA & USCO (Set-top box reply to DOJ)
Location:	Call-In Number TBD
Start:	Tue 5/31/2016 4:00 PM
End:	Tue 5/31/2016 5:00 PM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	Day, Brian
Required Attendees:	Charlesworth, Jacqueline; Damle, Sarang; Smith, Regan; Sloan, Jason; Neil_Fried@mpaa.org; Ben_Sheffner@mpaa.org

From:	Jonathan Sallet
To:	Charlesworth, Jacqueline
Cc:	Damle, Sarang; Smith, Regan; Sloan, Jason; John Williams
Subject:	RE: Set-top box proposal
Date:	Monday, June 06, 2016 9:15:09 AM
Attachments:	Bass STB.PDF

Jacqueline:

Thank you for your very helpful note. We very much appreciate your willingness to aid us in identifying copyright issues that may arise. And I apologize for the delay.

As we have thought more about the proceeding, we have begun to identity means by which any risk to copyright can be eliminated. Much of that centers on clarification of the Chairman's intent. Given the nature of an NPRM, which by definition does not decide issues, there is always room for interpretations that, although not within the scope of the Chairman's thinking, could give rise to concerns. Of course, the goal of the final item will be, and we appreciate your assistance in this regard, to ensure that the actual decisions made by the Commission fully protect copyrights.

And that is the reason for our delay in getting back to you. Rather than identifying a series of hypotheticals, that might or might not reflect the Chairman's thinking, we think it will be most productive to meet with you to explain how we are now thinking about moving forward in a manner that fully protects copyright. And, of course, to have a discussion about that approach. We expect that we'd be prepared to have that meeting in the next two weeks and we'd be happy to come to your offices for the conversation.

In the meantime, I thought that you might like to see the attached letter that the Chairman sent on Friday to Congresswoman Bass outlining his approach to copyright issues (please note that it will not be released publicly until June 10, 2016).

I look forward to meeting you in person and, again, thank you.

Jon

From: Charlesworth, Jacqueline [mailto:jcharlesworth@loc.gov]
Sent: Tuesday, May 31, 2016 9:27 PM
To: Jonathan Sallet <Jonathan.Sallet@fcc.gov>
Cc: Damle, Sarang <sdam@loc.gov>; Smith, Regan <resm@loc.gov>; Sloan, Jason <jslo@loc.gov>
Subject: Set-top box proposal

Dear Jonathan:

I hope you enjoyed the holiday weekend.

I'm writing to follow up on the call between our respective offices several weeks ago regarding the

FCC's set-top box proposal. During that call, you and your staff reviewed the pending proposal with us in some detail and indicated that you wanted the Copyright Office to provide advice concerning whether it presents any copyright issues and, if so, how they might be addressed.

Based on what we understand so far, it seems that the proposed rule may in fact implicate some rather serious copyright concerns. That said, to ensure that the Office offers meaningful advice, it would be useful to understand how the FCC envisions that the rule would be applied in practice. We had understood from our call that your office would be providing us with some representative scenarios—for example, specific types of hardware and software applications that the rule might enable—so that we could better focus our analysis. I thought I would check in to see when we might expect to receive these hypotheticals, and also as to whether there had been any change in the expected schedule for the FCC's consideration of the rule.

Best regards,

Jacqueline

Jacqueline C. Charlesworth
General Counsel and
Associate Register of Copyrights
U.S. Copyright Office
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202.707.8772

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

June 3, 2016

The Honorable Karen Bass
U.S. House of Representatives
408 Cannon House Office Building
Washington, D.C. 20515

Dear Congresswoman Bass:

Thank you very much for your letter expressing your concerns about how the Commission's proposal for better fostering competition in the set-top box and navigation app marketplace might impact the legal rights of copyright owners and creators. I take your concerns seriously and assure you that they will receive careful consideration. The purpose of this proceeding is to fulfill the statutory mandate to give consumers a meaningful choice in the video navigation device and app market, while respecting and protecting the exclusive rights the Copyright Act gives to content creators.

The FCC's authority to regulate communications has always existed alongside content owners' rights to control the duplication, distribution, or performance of their works. The co-existence of intellectual property and communications laws reflect Congress' effort to maintain a balance between the "interests of authors and inventors in the control and exploitation of their writings and discoveries" on the one hand, and on the other hand, "society's competing interest in the free flow of ideas, information and commerce."[1]

Starting with broadcast, and continuing with cable, satellite and the Internet, the FCC has for more than 80 years regulated networks that content owners use to transmit their works to the public. In these activities, the Commission has always recognized the statutory rights of content owners and has pursued policies that encourage respect for these rights. In addition, several FCC-related statutes explicitly prohibit the alteration of broadcasts or the theft of cable transmissions that contain copyrighted works.

I am confident that these FCC-specific authorities and well-practiced contractual arrangements will safeguard the legitimate interests of all of the participants in the video ecosystem. We have seen this work in the cases of the statutory regime governing must carry and of the essentially contractual regime governing retransmission consent, for example. Specifically, I can assure you that, as you suggest, third party competitors should not be "making commercial use of or modifying copyrighted programming" as a result of this action to fulfill the statute's directive.

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[1] *Sony Corp. v. Universal City Studios*, 464 U.S. 416, 429 (1984).

Section 629 of the Communications Act, adopted by Congress in 1996, requires the Commission to promote competition in the market for devices that consumers use to access their pay-television content. The Commission has executed and will continue to execute this law in a manner that is consistent with the legal rights of copyright owners. The Notice of Proposed Rulemaking we adopted earlier this year proposes updating our rules implementing section 629 to allow device manufacturers and other innovators to develop devices or software that will give pay-television subscribers new ways to access the content they have purchased. We took this action because consumers have few alternatives to leasing set-top boxes from their pay-television providers. The statutory mandate is not yet fulfilled. This lack of competition has meant few choices and high prices for consumers. In a recent Rasmussen Report Study, 84 percent of consumers felt their cable bill was too high. Included in every bill is a no-option, add-on fee for set top box rental. According to a congressional study, consumers spend, on average, $231 in rental fees annually. Even worse for consumers, these rental fees continue to increase.[2]

The goal of this rulemaking is to promote competition, innovation and consumer choice. It will not alter the rights that content owners have under the Copyright Act; nor will it encourage third parties to infringe on these rights. All of the current players in the content distribution stream, including cable and satellite companies, set-top box manufacturers, app developers, and subscribers, are required to respect the exclusive rights of copyright holders. The rulemaking will require any companies that enter this market subsequent to our action to follow the same requirements. For guidance about what these requirements entail, all market participants can consult a series of Federal court decisions made over the past several decades that have carefully distinguished non-infringing uses of copyrighted video content from infringing uses.

While the protection of artistic work and the promotion of technological innovation may be presented as conflicting values, I believe that in many situations these two important policy goals can complement each other. While many people feared that the Sony Betamax would harm the ability of content owners to earn money through films and television, it actually created a brand new and profitable market – the videocassette and later the DVD market – for content owners. Our rulemaking will ensure that this rapidly-changing industry continues to strike the proper balance between property rights and consumer choice. None of us can predict exactly what the video marketplace will look like 10 or 20 years from now, but the goal of this rulemaking is that it will be a healthy ecosystem that supports a wide variety of diverse content and gives consumers many convenient ways to purchase and view this content.

I believe the Commission's proposal will lead to competition that will improve consumer choice while respecting and protecting the exclusive rights of content creators. This is also the opinion of the Writers Guild West, who concluded the following in one of its filings in this proceeding: "[t]he proposed rules for a competitive navigation device market are a logical and necessary next step in giving consumers more choice and further opening the content market to

---

[2] One recent analysis found that the cost of cable set-top boxes as risen 185 percent since 1994 while the cost of computers, television and mobile phones has dropped by 90 percent during that same time period.

competition. While fears of piracy have been raised in this proceeding, the WGAW's careful analysis is that the Commission's rules can promote competition *and* protect content."[3]

As we develop a record and explore fulfilling our statutory mandate, I look forward to continuing to work with you on this important consumer issue.

Sincerely,

Tom Wheeler

[3] Writers Guild of America, West Reply Comments, MB Docket No. 16-42, CS Docket No. 97-80, at 15 (May 23, 2016).

From:	Charlesworth, Jacqueline
To:	"Jonathan Sallet"; "Jonathan Sallet"
Cc:	Damle, Sarang; Smith, Regan; Sloan, Jason; "John Williams"; Damle, Sarang; Smith, Regan; Sloan, Jason; John Williams
Bcc:	Charlesworth, Jacqueline
Subject:	RE: Set-top box proposal
Date:	Monday, June 06, 2016 11:59:25 AM

Thank you, Jonathan. We look forward to hearing from you about a future meeting.

Jacqueline C. Charlesworth
General Counsel and
Associate Register of Copyrights
U.S. Copyright Office
jcharlesworth@loc.gov
202.707.8772

From: Jonathan Sallet [mailto:Jonathan.Sallet@fcc.gov]
Sent: Monday, June 06, 2016 9:12 AM
To: Charlesworth, Jacqueline
Cc: Damle, Sarang; Smith, Regan; Sloan, Jason; John Williams
Subject: RE: Set-top box proposal

Jacqueline:

Thank you for your very helpful note. We very much appreciate your willingness to aid us in identifying copyright issues that may arise. And I apologize for the delay.

As we have thought more about the proceeding, we have begun to identity means by which any risk to copyright can be eliminated. Much of that centers on clarification of the Chairman's intent. Given the nature of an NPRM, which by definition does not decide issues, there is always room for interpretations that, although not within the scope of the Chairman's thinking, could give rise to concerns. Of course, the goal of the final item will be, and we appreciate your assistance in this regard, to ensure that the actual decisions made by the Commission fully protect copyrights.

And that is the reason for our delay in getting back to you. Rather than identifying a series of hypotheticals, that might or might not reflect the Chairman's thinking, we think it will be most productive to meet with you to explain how we are now thinking about moving forward in a manner that fully protects copyright. And, of course, to have a discussion about that approach. We expect that we'd be prepared to have that meeting in the next two weeks and we'd be happy to come to your offices for the conversation.

In the meantime, I thought that you might like to see the attached letter that the Chairman sent on Friday to Congresswoman Bass outlining his approach to copyright issues (please note that it will not be released publicly until June 10, 2016).

I look forward to meeting you in person and, again, thank you.

Jon

From: Charlesworth, Jacqueline [mailto:jcharlesworth@loc.gov]
Sent: Tuesday, May 31, 2016 9:27 PM
To: Jonathan Sallet <Jonathan.Sallet@fcc.gov>
Cc: Damle, Sarang <sdam@loc.gov>; Smith, Regan <resm@loc.gov>; Sloan, Jason <jslo@loc.gov>
Subject: Set-top box proposal

Dear Jonathan:

I hope you enjoyed the holiday weekend.

I'm writing to follow up on the call between our respective offices several weeks ago regarding the FCC's set-top box proposal. During that call, you and your staff reviewed the pending proposal with us in some detail and indicated that you wanted the Copyright Office to provide advice concerning whether it presents any copyright issues and, if so, how they might be addressed.

Based on what we understand so far, it seems that the proposed rule may in fact implicate some rather serious copyright concerns. That said, to ensure that the Office offers meaningful advice, it would be useful to understand how the FCC envisions that the rule would be applied in practice. We had understood from our call that your office would be providing us with some representative scenarios—for example, specific types of hardware and software applications that the rule might enable—so that we could better focus our analysis. I thought I would check in to see when we might expect to receive these hypotheticals, and also as to whether there had been any change in the expected schedule for the FCC's consideration of the rule.

Best regards,

Jacqueline

Jacqueline C. Charlesworth
General Counsel and
Associate Register of Copyrights
U.S. Copyright Office
jcharlesworth@loc.gov
202.707.8772

From: Marla Grossman
To: Pallante, Maria
Subject: "Hawaii Five-0" Executive Producer Op-Ed in The Wall Street Journal
Date: Thursday, June 09, 2016 9:34:45 AM

Op-ed by *Hawaii Five-0* Executive Producer Peter Lenkov in *The Wall Street Journal* opposing the FCC's set-top box proposal.

Here is a link to the article:
http://www.wsj.com/articles/the-fcc-hoists-the-jolly-roger-on-your-cable-box-1465338921?cb=logged0.07213475102441036

From:	Natalie Martinez
To:	Day, Brian
Cc:	John Williams
Subject:	RE: Meeting with USCO
Date:	Tuesday, June 14, 2016 3:43:39 PM

Hi Brian,

Thank you for the message. You can go ahead and send a scheduler and I will send it to those in our office that will need it, that way if any changes are made, Jon will receive them.

I would greatly appreciate any information Jon will need on this day.

Thanks again!

From: Day, Brian [mailto:bday@loc.gov]
Sent: Tuesday, June 14, 2016 12:26 PM
To: Natalie Martinez <Natalie.Martinez@fcc.gov>
Cc: John Williams <John.Williams2@fcc.gov>
Subject: RE: Meeting with USCO

Hi Natalie,

Thanks for responding. Yes, Thursday, June 30th 10:00am – 11:00am will work for us here at the USCO. Would you like for me to send a meeting invite for John's calendar or will you be taking care of that? Also, I can provide information regarding our location for the meeting.

Thanks,
Brian

From: Natalie Martinez [mailto:Natalie.Martinez@fcc.gov]
Sent: Monday, June 13, 2016 5:16 PM
To: Day, Brian
Cc: John Williams
Subject: Meeting with USCO

Hi Brian,

I am helping John Williams with the scheduling of this meeting.

As of now, our office can do Thursday, June 30th, 2016 10:00a – 11:00a.

Thanks.

Natalie Martinez
202-418-7376

From: Day, Brian [mailto:bday@loc.gov]
Sent: Friday, June 10, 2016 1:01 PM
To: John Williams <John.Williams2@fcc.gov>
Cc: Charlesworth, Jacqueline <jcharlesworth@loc.gov>; Damle, Sarang <sdam@loc.gov>
Subject: Meeting with USCO

Good Afternoon Mr. Williams,

My name is Brian Day and I am Jacqueline Charlesworth's assistant. She asked that I reach out to you to schedule a meeting with her and her staff at the U.S. Copyright Office during the week of June 27. I have listed some dates/times below that they are available. Please let me know which one(s) work best for you and your schedule and I'll send out a formal meeting invitation for everyone's calendars.

Tuesday, June 28: any time from 1pm – 6pm
Thursday, June 30: any time from 11am – 6pm

The duration of the meeting is expected to be around 1.5 hours (+/-). I look forward to hearing back from you.

Regards,
Brian

Brian Day
Assistant to the General Counsel
United States Copyright Office
Library of Congress
202-707-7892 (d)
202-707-8380 (o)
202-707-8366 (f)
www.copyright.gov

From: Damle, Sarang
Sent: Wednesday, June 15, 2016 2:03 PM
To: Charlesworth, Jacqueline; Smith, Regan
Subject: FW: Any interest in a set-top box demo?

See below – do we have any interest in this?

Sarang (Sy) Damle
Deputy General Counsel
U.S. Copyright Office
Phone: (202) 707-3572
Email: sdam@loc.gov

From: Fried, Neil [mailto:Neil_Fried@mpaa.org]
Sent: Monday, June 13, 2016 2:40 PM
To: Damle, Sarang
Subject: RE: Any interest in a set-top box demo?

We demonstrate what's happening today through app-based delivery of programming and cable service on third-party devices, and illustrate how the FCC proposal would undermine it.

From: Damle, Sarang [mailto:sdam@loc.gov]
Sent: Monday, June 13, 2016 2:37 PM
To: Fried, Neil <Neil_Fried@mpaa.org>
Subject: Re: Any interest in a set-top box demo?

Possibly - I'll ask around. What would this be a demo of, exactly? The sorts of things that are being done through licensed arrangements? Or is this a demo of things that could be done without licenses under the rule?

Sy

On Jun 13, 2016, at 2:34 PM, Fried, Neil <Neil_Fried@mpaa.org> wrote:

> Sy,
>
> Do you think you, Jacqueline, and the rest of your team would be interested in seeing a set-top box/apps demo that we've put together at NCTA. We of course would welcome Maria, as well, if she's available.
>
> Neil

From: Charlesworth, Jacqueline
Sent: Friday, June 17, 2016 6:27 PM
To: Claggett, Karyn T.
Cc: Pallante, Maria
Subject: Re: Rep. Deutch letter to CO

Strange -- in every meeting in which I have participated on this topic, we have indicated that this is NOT something we wish to invite.

Jacqueline C. Charlesworth
General Counsel and
Associate Register of Copyrights
U.S. Copyright Office
jcharlesworth@loc.gov
202.707.8772

On Jun 17, 2016, at 4:52 PM, Claggett, Karyn T. <kacl@loc.gov> wrote:

> FYI, I don't know where she's getting that from. I'm out Monday and Tuesday but could chat by phone.
>
> **From:** McLaren, Ellen [mailto:Ellen.McLaren@mail.house.gov]
> **Sent:** Friday, June 17, 2016 4:46 PM
> **To:** Claggett, Karyn T.
> **Subject:** Rep. Deutch letter to CO
>
> Karyn,
> Do you or someone on staff have time early next week to sit down with me to run through an idea my boss had about writing to the Register to ask for her thoughts and comments on the FCC STB proceeding?
>
> Basically, my boss had been told that she expressed a willingness to weigh in on the set top box issue if she was directly asked to do so by a Member. So I wanted to walk through what if anything would be a productive approach. I'm including a draft of what he was thinking for an opening that would then be followed by more specific questions to give you a sense of context. But before we ask any specifics on policy, I was hoping to chat with you guys more broadly about it all.
>
> Thanks!
> Ellen
>
> Ellen McLaren
> Deputy Chief of Staff
> **Office of Rep. Theodore E. Deutch**
> 2447 Rayburn House Office Building
> Washington, D.C. 20515
> 202-225-3001 (office) 202-226-8597 (direct)
>
> Dear Register Pallante,

A broad array of creative community representatives, including the Copyright Alliance, motion picture industry guilds and unions, TV programmers and motion picture studios, record labels and recording artists, and music publishers and songwriters, have expressed concerns about the FCC's proposed rule on TV set-top boxes. In response to these widespread concerns, I recently sent FCC Chairman Tom Wheeler several letters asking him to consider the impact of his proposed TV set-top box order on the creative community. Because the FCC has neither expertise nor regulatory authority regarding the creation, protection, or licensing of copyrighted works, I also recommended that Chairman Wheeler reach out to the Copyright Office to draw on your expertise.

Based on the responses I have received from Chairman Wheeler, I am concerned that the FCC has not fully considered the complexity of this marketplace and potential downstream effects of a ruling. The April 11, 2016 response stated that "The Commission's proposal preserves the same copyright protections that exist today." The June 3, 2016 response stated that the proposed rule "will not alter the rights that content owners have under the Copyright Act; nor will it encourage third parties to infringe on these rights." Since the Chairman committed in his April 11 letter to consult with the Copyright Office, I want to make sure that the Copyright Office aware of the creative community's concerns and understand what of those concerns you share.

From: Claggett, Karyn T.
Sent: Tuesday, June 21, 2016 11:47 AM
To: McLaren, Ellen
Cc: Charlesworth, Jacqueline
Subject: Re: Rep. Deutch letter to CO

Hi Ellen,

At the Register's request our General Counsel's office is actually working closely on an interagency basis with the FCC on this issue.

Can I give you a call?

Thanks,
Karyn

Sent from my iPhone

On Jun 17, 2016, at 3:47 PM, McLaren, Ellen <Ellen.McLaren@mail.house.gov> wrote:

> Karyn,
> Do you or someone on staff have time early next week to sit down with me to run through an idea my boss had about writing to the Register to ask for her thoughts and comments on the FCC STB proceeding?
>
> Basically, my boss had been told that she expressed a willingness to weigh in on the set top box issue if she was directly asked to do so by a Member. So I wanted to walk through what if anything would be a productive approach. I'm including a draft of what he was thinking for an opening that would then be followed by more specific questions to give you a sense of context. But before we ask any specifics on policy, I was hoping to chat with you guys more broadly about it all.
>
> Thanks!
> Ellen
>
> Ellen McLaren
>
> Deputy Chief of Staff
> **Office of Rep. Theodore E. Deutch**
> 2447 Rayburn House Office Building
> Washington, D.C. 20515
> 202-225-3001 (office) 202-226-8597 (direct)
>
> Dear Register Pallante,
> A broad array of creative community representatives, including the Copyright Alliance, motion picture industry guilds and unions, TV programmers and motion picture studios, record labels and recording artists, and music publishers and songwriters, have expressed concerns about the FCC's proposed rule on TV set-top boxes. In response to these widespread concerns, I recently sent FCC Chairman Tom Wheeler several letters asking him to consider the impact of his proposed TV set-top box order on the creative community. Because the FCC has neither expertise nor regulatory authority regarding the

creation, protection, or licensing of copyrighted works, I also recommended that Chairman Wheeler reach out to the Copyright Office to draw on your expertise.

Based on the responses I have received from Chairman Wheeler, I am concerned that the FCC has not fully considered the complexity of this marketplace and potential downstream effects of a ruling. The April 11, 2016 response stated that "The Commission's proposal preserves the same copyright protections that exist today." The June 3, 2016 response stated that the proposed rule "will not alter the rights that content owners have under the Copyright Act; nor will it encourage third parties to infringe on these rights." Since the Chairman committed in his April 11 letter to consult with the Copyright Office, I want to make sure that the Copyright Office aware of the creative community's concerns and understand what of those concerns you share.

From: Alec French
To: Charlesworth, Jacqueline
Subject: Re: Following up...
Date: Wednesday, June 22, 2016 7:00:14 PM

Got it. So, do you go by Jacqueline, and not any abbreviation thereof?

If so, apologies for calling you Jacqui in the past. I'm constantly called Alex, so I know how annoying it can be.

Best,

Alec French
Thorsen French Advocacy
405 First Street SE
Washington DC 20003
Office - (202) 506-5673
Mobile - (202) 997-4453

On Jun 22, 2016, at 6:35 PM, Charlesworth, Jacqueline <jcharlesworth@loc.gov> wrote:

> Thanks for the heads up – I have some knowledge of the proposal but will let you know if we see the need for more information.
>
> Jacqueline
>
> Jacqueline C. Charlesworth
> General Counsel and
> Associate Register of Copyrights
> U.S. Copyright Office
> jcharlesworth@loc.gov
> 202.707.8772
>
> ---
>
> **From:** Alec French [mailto:Alec@Thorsen-french.com]
> **Sent:** Wednesday, June 22, 2016 5:10 PM
> **To:** Charlesworth, Jacqueline
> **Subject:** Following up...
>
> Jacqui (or do you spell it Jackie?),
>
> I had that conversation with the FCC folks about the meeting with the FCC GC next week. In the course of the discussion, they noted that the apps-based alternative proposed by MVPDs last week is under active consideration as an alternative to the previously proposed rule, and thus the FCC would also likely want to understand the

copyright/creative community implications of that apps-based proposal. Since that proposal was only unveiled days ago, and there is no public record of creative community reaction to it, I'm not sure you have had the chance to give it much thought yet, and so wanted to give you a head's up.

If you haven't had the chance yet to dig into the substance of the apps-based alternative, it might behoove you to talk to some of the proponents of that alternative, like Comcast NBCUniversal. We (DGA and IATSE) are talking to them and others as we try to understand how this proposal may impact the creative community.

Best,

Alec French
Thorsen French Advocacy
405 First Street SE
Washington DC 20003
(w) (202) 506-5673
(c) (202) 997-4453
http://www.thorsen-french.com

From:	Smith, Regan
To:	"Buono, Frank"
Cc:	"mitch.rose@nbcuni.com"; Alec French
Bcc:	Smith, Regan
Subject:	RE: Call
Date:	Monday, June 27, 2016 6:04:00 PM

Hi Frank –

I apologize for missing you today. We could set up a time to speak tomorrow - windows from 12-2, or 3-4 work for us, if you are also avialable. Thanks,

Regan

From: Buono, Frank [mailto:Frank_Buono@comcast.com]
Sent: Monday, June 27, 2016 3:23 PM
To: Alec French; Smith, Regan
Cc: Rose, Mitch
Subject: RE: Call

Hi Regan. I left you a voice mail earlier this afternoon. 3:30 works well and I can call you then if that is still convenient for you.

Frank

Francis M. Buono
Senior Vice President, Legal Regulatory Affairs
& Senior Deputy General Counsel
Comcast Corporation
300 New Jersey Avenue, N.W.
Suite 700
Washington, D.C. 20001
202 524 6426

From: Alec French [mailto:Alec@Thorsen-french.com]
Sent: Monday, June 27, 2016 3:21 PM
To: Smith, Regan <resm@loc.gov>
Cc: Buono, Frank <Frank_Buono@comcast.com>; Rose, Mitch <mitch.rose@nbcuni.com>
Subject: Re: Call

Regan,

Thanks for getting back to me.

If Frank and Mitch have not already connected with you, I'm Cc'ing them here so they can connect with you directly.

Alec French
Thorsen French Advocacy
405 First Street SE
Washington DC 20003
Office - (202) 506-5673
Mobile - (202) 997-4453

On Jun 27, 2016, at 1:27 PM, Smith, Regan <resm@loc.gov> wrote:

> Hi Alec,
>
> I apologize for not getting back to you Friday – we could be available for a call this afternoon after 3:30 if it still works, or else perhaps tomorrow.
>
> Thank you,
>
> Regan A. Smith
> Associate General Counsel
> U.S. Copyright Office
> resm@loc.gov
> 202-707-0214

From: Smith, Regan
To: "Fried, Neil"
Cc: Damle, Sarang; Day, Brian
Subject: RE: Set-top box demo
Date: Monday, June 27, 2016 12:59:38 PM

Hi Neil,

Yes we are still good. We are planning on having a relatively large crew: Jacqueline, Sy, myself, and other OGC attorneys Cindy Abramson and Jason Sloan. Thank you for putting this together.

Regan

From: Fried, Neil [mailto:Neil_Fried@mpaa.org]
Sent: Monday, June 27, 2016 12:56 PM
To: Smith, Regan
Cc: Damle, Sarang; Day, Brian
Subject: Re: Set-top box demo

We still good for tomorrow at 10? Do you have a sense who will be coming?

On Jun 17, 2016, at 7:57 AM, Fried, Neil <Neil_Fried@mpaa.org> wrote:

> June 28 at 10:00 it is.
>
> On Jun 16, 2016, at 5:34 PM, Smith, Regan <resm@loc.gov> wrote:
>
> > How about right at 10?
> >
> > Regan
> >
> > On Jun 16, 2016, at 3:51 PM, Fried, Neil <Neil_Fried@mpaa.org> wrote:
> >
> > > We have a window June 28 from 10:00 to 1:00. What works best on your end?
> > >
> > > ---
> > >
> > > **From:** Smith, Regan [mailto:resm@loc.gov]
> > > **Sent:** Thursday, June 16, 2016 10:34 AM
> > > **To:** Fried, Neil <Neil_Fried@mpaa.org>
> > > **Cc:** Damle, Sarang <sdam@loc.gov>; Day, Brian <bday@loc.gov>
> > > **Subject:** RE: Set-top box demo
> > >
> > > Neil,
> > >
> > > June 28th looks generally good for the team. Will that work? If not, perhaps the afternoon of the 23. Thanks for

reaching out to us.

Regan

From: Fried, Neil [mailto:Neil_Fried@mpaa.org]
Sent: Wednesday, June 15, 2016 9:22 PM
To: Smith, Regan
Cc: Damle, Sarang; Day, Brian
Subject: Re: Set-top box demo

Are there particularly good days/times in the next couple of weeks? NCTA hosts the demo at their offices: 25 Mass. Ave NW, Suite 100. With Q & A the demo takes 45 mins to an hour. We demonstrate video applications in the marketplace today, where the market is going, and the problems that the FCC proposal raises.

On Jun 15, 2016, at 5:27 PM, Smith, Regan <resm@loc.gov> wrote:

> Hi Neil:
>
> Sy forwarded your offer to provide a demonstration put on at NCTA in connection with the set-top box proceeding and we think some members of the Copyright Office would be interested in seeing this. Please let us know how we can go forward in setting this up. Thanks,
>
> Regan
>
> Regan A. Smith
> Associate General Counsel
> U.S. Copyright Office
> resm@loc.gov
> 202-707-0214

Subject:	View set top box demo at NCTA - travel together from office
Location:	25 Massachusetts Ave NW #100, Washington, DC 20001
Start:	Tue 6/28/2016 9:30 AM
End:	Tue 6/28/2016 11:15 AM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	Smith, Regan
Required Attendees:	Damle, Sarang; Sloan, Jason; Abramson, Cindy; Charlesworth, Jacqueline (jcharlesworth@loc.gov)

From:	Day, Brian
To:	"Natalie Martinez"
Subject:	RE: USCO & FCC
Date:	Wednesday, June 29, 2016 2:34:00 PM

No problem, Natalie. We will see everyone tomorrow morning!

Brian

From: Natalie Martinez [mailto:Natalie.Martinez@fcc.gov]
Sent: Wednesday, June 29, 2016 2:28 PM
To: Day, Brian
Subject: RE: USCO & FCC

Hi Brian,

After speaking to our CARS department, they said this won't be necessary – but thank you. We all appreciate it. The driver is unknown for now, and they will not need to park as they will come back to HQ's until 11:00a when Jon will need to be picked up.

Thanks much!!

From: Day, Brian [mailto:bday@loc.gov]
Sent: Wednesday, June 29, 2016 8:04 AM
To: Natalie Martinez <Natalie.Martinez@fcc.gov>
Subject: RE: USCO & FCC

Hi Natalie,

Yes, we are good to go for tomorrow and the event is indeed happening at the address listed below. Sounds like you will require parking. I can secure you a space in our Jefferson Building parking lot (located across the street from the Madison Building, where the meeting is being held) and will need the following info:

Name of driver
Make/model of vehicle
License plate info (state & number)

Thanks,
Brian

From: Natalie Martinez [mailto:Natalie.Martinez@fcc.gov]
Sent: Tuesday, June 28, 2016 6:19 PM
To: Day, Brian
Subject: RE: USCO & FCC

Hi Brian,

Just making sure we are good to go with this for Thursday. Also, the event will be happening at the address below, correct? Setting up a car for Jon now.

Thanks!

-----Original Appointment-----
From: Day, Brian [mailto:bday@loc.gov]
Sent: Thursday, June 16, 2016 10:33 AM
To: Day, Brian; Jonathan Sallet; Charlesworth, Jacqueline; Damle, Sarang; Sloan, Jason; Abramson, Cindy; John Williams; Natalie Martinez
Subject: FW: USCO & FCC
When: Thursday, June 30, 2016 10:00 AM-11:00 AM (UTC-05:00) Eastern Time (US & Canada).
Where: LM-403 (Register's Conference Room)

-----Original Appointment-----
From: Day, Brian [mailto:bday@loc.gov]
Sent: Wednesday, June 15, 2016 9:25 AM
To: Day, Brian; Charlesworth, Jacqueline; Damle, Sarang; Sloan, Jason; Abramson, Cindy; John Williams; Natalie Martinez
Subject: USCO & FCC
When: Thursday, June 30, 2016 10:00 AM-11:00 AM (UTC-05:00) Eastern Time (US & Canada).
Where: LM-403 (Register's Conference Room)

We are located in the Madison Building:

101 Independence Ave, SE
Washington, DC 20540
Room: LM-403 (Green Core)

Please don't hesitate to call me if you have any questions/concerns.

Brian
202.707.7892

From:	Day, Brian
To:	Charlesworth, Jacqueline; Damle, Sarang; Smith, Regan; Abramson, Cindy; Sloan, Jason; "Marc.Paul@fcc.gov"
Subject:	FCC & USCO
Start:	Thursday, June 30, 2016 11:30:00 AM
End:	Thursday, June 30, 2016 12:30:00 PM
Location:	Room LM-403 (Register"s Conference Room)

We are located in the Madison Building:

101 Independence Ave, SE

Washington, DC 20540

Room: LM-403 (Green Core)

Please don't hesitate to call me if you have any questions/concerns.

Brian

202.707.7892

Subject:	USCO & FCC
Location:	LM-403 (Register's Conference Room)
Start:	Thu 6/30/2016 10:00 AM
End:	Thu 6/30/2016 11:00 AM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	Day, Brian
Required Attendees:	Charlesworth, Jacqueline; Damle, Sarang; Sloan, Jason; Abramson, Cindy; john.williams2 @fcc.gov; Natalie Martinez (Natalie.Martinez@fcc.gov)

We are located in the Madison Building:

101 Independence Ave, SE
Washington, DC 20540
Room: LM-403 (Green Core)

Please don't hesitate to call me if you have any questions/concerns.

Brian
202.707.7892

From: Flint, Charles <Charles.Flint@mail.house.gov>
Sent: Friday, July 08, 2016 4:22 PM
To: Claggett, Karyn T.
Cc: Charlesworth, Jacqueline
Subject: Re: Copyright Office call

Yes. That time works well.

Thank you for coming in.

Charles Flint
Legislative Director and Counsel
Rep. Marsha Blackburn (TN-07)
2266 Rayburn
202-225-2811

Sent from my iPhone

On Jul 8, 2016, at 4:08 PM, Claggett, Karyn T. <kacl@loc.gov> wrote:

> Hi Charles,
>
> If it would work for you, 2:30pm on Monday July 11th would work for us.
>
> Thanks,
> Karyn

From: Claggett, Karyn T.
Sent: Friday, July 08, 2016 3:56 PM
To: 'charles.flint@mail.house.gov'
Cc: Charlesworth, Jacqueline
Subject: Copyright Office call

Charles,

I head policy and international affairs for the U.S. Copyright Office and work closely with members of Congress and their staff on copyright related questions. I called your office a bit earlier to see if you might be available for a call. They noted that it would be best to shoot you an email to arrange.

Please let me know if you might be available for a call.

Best regards,
Karyn

Karyn Temple Claggett
Associate Register of Copyrights and
Director of Policy and International Affairs
United States Copyright Office
Library of Congress

101 Independence Ave SE
Washington, D.C. 20559-6003
202.707.7845 (direct)
kacl@loc.gov

Subject:	Meeting w/Marsha Blackburn
Location:	2266 Rayburn Building
Start:	Mon 7/11/2016 2:15 PM
End:	Mon 7/11/2016 3:30 PM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	Day, Brian
Required Attendees:	Charlesworth, Jacqueline; Damle, Sarang; Claggett, Karyn T.

The start and end times reflect the walking time to/from Rayburn as well as if the meeting runs longer than 30 mins.

From: Fried, Neil
To: Charlesworth, Jacqueline
Subject: Hearing
Date: Tuesday, July 12, 2016 12:59:29 PM

Rep. Blackburn made only a high-level reference that you had concerns, and said she has asked for a written follow up. Commissioner Rosenworcel confirmed unsolicited that her office had a similar briefing and also took away that you had concerns.

From:	Hendel, John
To:	Charlesworth, Jacqueline
Cc:	Claggett, Karyn T.; Swann, Syreeta
Subject:	RE: Copyright Office inquiry
Date:	Tuesday, July 12, 2016 4:10:40 PM

Thanks, Jacqueline, and good to know. We've been following the FCC set-top box proceeding very closely, so if you would ever want to elaborate on any concerns, we'd love to have a better idea about them.

All the best,

John Hendel
Communications Daily

-----Original Message-----
From: Charlesworth, Jacqueline [mailto:jcharlesworth@loc.gov]
Sent: Tue 7/12/2016 3:53 PM
To: Hendel, John
Cc: Claggett, Karyn T.; Swann, Syreeta
Subject: Copyright Office inquiry

John:

Your inquiry regarding this morning's FCC hearing was referred to me for response. I wanted to let you know that the Copyright Office has no comment at this time.

Best regards,

Jacqueline

Jacqueline C. Charlesworth
General Counsel and
Associate Register of Copyrights
U.S. Copyright Office
jcharlesworth@loc.gov<mailto:jcharlesworth@loc.gov>
202.707.8772

From: Flint, Charles <Charles.Flint@mail.house.gov>
Sent: Friday, July 15, 2016 10:54 AM
To: Claggett, Karyn T.
Subject: Letter
Attachments: Copyright Office request.pdf

Karyn –

Please see the attached letter from Reps. Blackburn, Butterfield, Collins and Deutch.

Thank you. Please let me know if you have questions.

- Chuck

Charles Flint
Legislative Director and Counsel
Rep. Marsha Blackburn (TN-07)
2266 Rayburn
202-225-2811

MARSHA BLACKBURN
7TH DISTRICT, TENNESSEE

DEPUTY WHIP

COMMITTEE ON
ENERGY AND COMMERCE
VICE-CHAIRMAN

COMMITTEE ON
THE BUDGET

Congress of the United States
House of Representatives
Washington, DC 20515–4207

WASHINGTON OFFICE:
2266 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
TELEPHONE: (202) 225–2811

DISTRICT OFFICES:
305 PUBLIC SQUARE, SUITE 212
FRANKLIN, TN 37064
TELEPHONE: (615) 591–5161

128 N. 2ND STREET, SUITE 202
CLARKSVILLE, TN 37040
TELEPHONE: (931) 503–0391

July 15, 2016

Maria Pallante
Register of Copyrights
United States Copyright Office
Library of Congress
101 Independence Avenue SE
Washington, DC 20559-6003

Dear Register Pallante:

We ask that the Copyright Office, as the expert agency responsible for administering the Copyright Act and advising Congress on copyright law and policy, provide us a written analysis of the potential copyright implications of the FCC's pending "set-top box" proposal[1] including an explanation of the general copyright principles at issue.

Please respond within thirty days of receipt of this correspondence. Thank you for your attention to this matter.

Sincerely,

Marsha Blackburn
Member of Congress

G. K. Butterfield
Member of Congress

Doug Collins
Member of Congress

Ted Deutch
Member of Congress

[1] In re Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42, Notice of Proposed Rulemaking, FCC 16-18 (rel. Feb. 18, 2016), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1.pdf.

From: Claggett, Karyn T.
Sent: Thursday, July 21, 2016 4:22 PM
To: Swann, Syreeta; Damle, Sarang
Cc: Charlesworth, Jacqueline
Subject: RE: Quick call: regarding FCC MVPD NPRM

I think Sy and I can go ahead a call them back tomorrow.

From: Swann, Syreeta
Sent: Thursday, July 21, 2016 4:06 PM
To: Damle, Sarang; Claggett, Karyn T.
Cc: Charlesworth, Jacqueline
Subject: RE: Quick call: regarding FCC MVPD NPRM

Excellent. Will you wait until Monday to call?

Best Regards,
Syreeta Swann
202-707-8052

From: Damle, Sarang
Sent: Thursday, July 21, 2016 3:45 PM
To: Claggett, Karyn T.; Swann, Syreeta
Cc: Charlesworth, Jacqueline
Subject: RE: Quick call: regarding FCC MVPD NPRM

Fine by me but JCC is out until Monday.

Sarang (Sy) Damle
Deputy General Counsel
U.S. Copyright Office
Phone: (202) 707-3572
Email: sdam@loc.gov

From: Claggett, Karyn T.
Sent: Thursday, July 21, 2016 3:44 PM
To: Swann, Syreeta; Damle, Sarang
Cc: Charlesworth, Jacqueline
Subject: RE: Quick call: regarding FCC MVPD NPRM

Unless others disagree would suggest telling her that head of policy and GC will be jointly returning the call.

From: Swann, Syreeta
Sent: Thursday, July 21, 2016 3:38 PM
To: Claggett, Karyn T.; Damle, Sarang
Cc: Charlesworth, Jacqueline
Subject: FW: Quick call: regarding FCC MVPD NPRM

Please see below and let me know who will make contact.

Thank you.

Best Regards,
Syreeta Swann
202-707-8052

From: Ott, Kathleen
Sent: Thursday, July 21, 2016 2:58 PM
To: Swann, Syreeta
Subject: FW: Quick call: regarding FCC MVPD NPRM

Dear Syreeta,

Please see the following email to which I referred on the phone.

REDACT - not responsive

Could you please let me know who will be responding to Anderson and when, and whether it will by email or phone.

Please let me know if you have questions.

Thanks,
Kathy

From: Heiman, Anderson (Finance) [mailto:Anderson_Heiman@finance.senate.gov]
Sent: Thursday, July 21, 2016 2:44 PM
To: Ott, Kathleen
Cc: Peisch, Greta (Finance)
Subject: Quick call: regarding FCC MVPD NPRM

Hi Kathleen,

I hope this note finds you well. We were recently informed that the USCO may be considering weighing in with the FCC regarding the FCC's multichannel video programming distributors proposed rule (aka, the cable box or set top box rule). If so, would you be able to quickly touch base? My boss is following the issue closely.

Best,
Andy
Direct: 202-224-0808

Anderson Heiman
Senior Advisor for Technology and Trade
Senate Finance Committee
Senator Ron Wyden
219 Dirksen Senate Building
(202) 224-4515

From: Wender, Joseph (Markey) <Joseph_Wender@markey.senate.gov>
Sent: Monday, July 25, 2016 1:57 PM
To: Claggett, Karyn T.; 'Wilson, Scott'; Hull, ZJ
Cc: Charlesworth, Jacqueline; Damle, Sarang
Subject: RE: Call on Set Top Boxes

3pm on Wednesday is good by me.

Joseph Wender
Senior Policy Advisor
Office of Senator Edward J. Markey
255 Dirksen Senate Office Building
(202) 224-2742
Joseph_Wender@markey.senate.gov

From: Claggett, Karyn T. [mailto:kacl@loc.gov]
Sent: Monday, July 25, 2016 12:39 PM
To: 'Wilson, Scott'; Hull, ZJ; Wender, Joseph (Markey)
Cc: Charlesworth, Jacqueline; Damle, Sarang
Subject: RE: Call on Set Top Boxes

Thanks, yes 3pm on Wednesday works for us.

From: Wilson, Scott [mailto:Scott.Wilson@mail.house.gov]
Sent: Monday, July 25, 2016 12:34 PM
To: Claggett, Karyn T.; Hull, ZJ; Wender, Joseph (Markey)
Cc: Charlesworth, Jacqueline; Damle, Sarang
Subject: RE: Call on Set Top Boxes

How about the same time on Wednesday, 3:00 or 3:30?

From: Claggett, Karyn T. [mailto:kacl@loc.gov]
Sent: Monday, July 25, 2016 12:33 PM
To: Hull, ZJ; Wender, Joseph (Markey)
Cc: Wilson, Scott; Charlesworth, Jacqueline; Damle, Sarang
Subject: RE: Call on Set Top Boxes

We here at the USCO could do 3pm Tuesday, but I see that Scott may be unavailable. So, let me know if there are good times on Wednesday.

From: Hull, ZJ [mailto:ZJ.Hull@mail.house.gov]
Sent: Monday, July 25, 2016 10:52 AM
To: Wender, Joseph (Markey)
Cc: Wilson, Scott; Claggett, Karyn T.; Charlesworth, Jacqueline; Damle, Sarang
Subject: Re: Call on Set Top Boxes

That works for me too

ZJ Hull | Legislative Counsel | Rep. Zoe Lofgren
Sent from my mobile

On Jul 25, 2016, at 10:48 AM, Wender, Joseph (Markey) <Joseph_Wender@markey.senate.gov> wrote:

I could do 3 or 330 on Wednesday-

Joseph Wender
Senior Policy Advisor
Office of Senator Edward J. Markey
255 Dirksen Senate Office Building
(202) 224-2742
Joseph_Wender@markey.senate.gov

From: Wilson, Scott [mailto:Scott.Wilson@mail.house.gov]
Sent: Monday, July 25, 2016 10:38 AM
To: Wender, Joseph (Markey); Claggett, Karyn T.
Cc: Hull, ZJ; Charlesworth, Jacqueline; Damle, Sarang
Subject: RE: Call on Set Top Boxes

Tomorrow is pretty tricky for me, unfortunately, but my Wednesday is wide open if that works for everybody.

From: Wender, Joseph (Markey) [mailto:Joseph_Wender@markey.senate.gov]
Sent: Monday, July 25, 2016 10:05 AM
To: Claggett, Karyn T.; Wilson, Scott
Cc: Hull, ZJ; Charlesworth, Jacqueline; Damle, Sarang
Subject: Re: Call on Set Top Boxes

Tomorrow between 2-4 is best for me.

From: Claggett, Karyn T.
Sent: Monday, July 25, 2016 10:02 AM
To: 'Wilson, Scott'
Cc: Wender, Joseph (Markey); Hull, ZJ; Charlesworth, Jacqueline; Damle, Sarang
Subject: RE: Call on Set Top Boxes

Hi Scott,

Due to some external meetings, it looks like this afternoon won't work. Are you all available sometime tomorrow morning?

Thanks,
Karyn

From: Wilson, Scott [mailto:Scott.Wilson@mail.house.gov]
Sent: Friday, July 22, 2016 3:29 PM
To: Claggett, Karyn T.
Cc: Wender, Joseph (Markey); Hull, ZJ
Subject: Call on Set Top Boxes

Hi Karyn,

We haven't had a chance to connect since I left Senator Leahy's office and came over to the House side to work for Congresswoman Eshoo. I must have started a trend because Alex followed me closely out the door and now Garrett is all alone!

My colleagues, Joey from Senator Markey's office and ZJ from Congresswoman Lofgren's, were hoping you might have some time Monday afternoon to chat with us on the phone about the FCC's set-top box proceeding. There were a lot of representations made at the recent Energy and Commerce FCC oversight hearing about where the Copyright Office stands on this issue. We would appreciate the opportunity to hear directly from you about any analysis you're conducting on it.

If you happen to have time at 3:00 on Monday, that would work best for us.

Thanks!

Scott

Scott Wilson
Senior Technology Policy Advisor
Congresswoman Anna Eshoo, CA-18
202-226-4581

From: Claggett, Karyn T.
Sent: Tuesday, July 26, 2016 1:28 PM
To: 'Hull, ZJ'; Wilson, Scott; Wender, Joseph (Markey)
Cc: Charlesworth, Jacqueline; Damle, Sarang
Subject: RE: Call on Set Top Boxes

Hi all,

Dial in information for tomorrow at 3pm:

202-707-5900 Passcode 714863

From: Hull, ZJ [mailto:ZJ.Hull@mail.house.gov]
Sent: Monday, July 25, 2016 3:02 PM
To: Claggett, Karyn T.; Wilson, Scott; Wender, Joseph (Markey)
Cc: Charlesworth, Jacqueline; Damle, Sarang
Subject: RE: Call on Set Top Boxes

Great, looks like we are set for 3pm on Wednesday then.

Karyn, can you provide us with a call-in number? Thanks.

-ZJ

From: Claggett, Karyn T. [mailto:kacl@loc.gov]
Sent: Monday, July 25, 2016 12:39 PM
To: Wilson, Scott; Hull, ZJ; Wender, Joseph (Markey)
Cc: Charlesworth, Jacqueline; Damle, Sarang
Subject: RE: Call on Set Top Boxes

Thanks, yes 3pm on Wednesday works for us.

From: Wilson, Scott [mailto:Scott.Wilson@mail.house.gov]
Sent: Monday, July 25, 2016 12:34 PM
To: Claggett, Karyn T.; Hull, ZJ; Wender, Joseph (Markey)
Cc: Charlesworth, Jacqueline; Damle, Sarang
Subject: RE: Call on Set Top Boxes

How about the same time on Wednesday, 3:00 or 3:30?

From: Claggett, Karyn T. [mailto:kacl@loc.gov]
Sent: Monday, July 25, 2016 12:33 PM
To: Hull, ZJ; Wender, Joseph (Markey)
Cc: Wilson, Scott; Charlesworth, Jacqueline; Damle, Sarang
Subject: RE: Call on Set Top Boxes

We here at the USCO could do 3pm Tuesday, but I see that Scott may be unavailable. So, let me know if there are good times on Wednesday.

From: Hull, ZJ [mailto:ZJ.Hull@mail.house.gov]
Sent: Monday, July 25, 2016 10:52 AM
To: Wender, Joseph (Markey)
Cc: Wilson, Scott; Claggett, Karyn T.; Charlesworth, Jacqueline; Damle, Sarang
Subject: Re: Call on Set Top Boxes

That works for me too

ZJ Hull | Legislative Counsel | Rep. Zoe Lofgren
Sent from my mobile

On Jul 25, 2016, at 10:48 AM, Wender, Joseph (Markey) <Joseph_Wender@markey.senate.gov> wrote:

> I could do 3 or 330 on Wednesday-
>
> Joseph Wender
> Senior Policy Advisor
> Office of Senator Edward J. Markey
> 255 Dirksen Senate Office Building
> (202) 224-2742
> Joseph_Wender@markey.senate.gov
>
> **From:** Wilson, Scott [mailto:Scott.Wilson@mail.house.gov]
> **Sent:** Monday, July 25, 2016 10:38 AM
> **To:** Wender, Joseph (Markey); Claggett, Karyn T.
> **Cc:** Hull, ZJ; Charlesworth, Jacqueline; Damle, Sarang
> **Subject:** RE: Call on Set Top Boxes
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> Tomorrow is pretty tricky for me, unfortunately, but my Wednesday is wide open if that works for everybody.
>
> **From:** Wender, Joseph (Markey) [mailto:Joseph_Wender@markey.senate.gov]
> **Sent:** Monday, July 25, 2016 10:05 AM
> **To:** Claggett, Karyn T.; Wilson, Scott
> **Cc:** Hull, ZJ; Charlesworth, Jacqueline; Damle, Sarang
> **Subject:** Re: Call on Set Top Boxes
>
> Tomorrow between 2-4 is best for me.
>
> **From:** Claggett, Karyn T.
> **Sent:** Monday, July 25, 2016 10:02 AM
> **To:** 'Wilson, Scott'
> **Cc:** Wender, Joseph (Markey); Hull, ZJ; Charlesworth, Jacqueline; Damle, Sarang
> **Subject:** RE: Call on Set Top Boxes
>
> Hi Scott,
>
> Due to some external meetings, it looks like this afternoon won't work. Are you all available sometime tomorrow morning?
>
> Thanks,
> Karyn

From: Wilson, Scott [mailto:Scott.Wilson@mail.house.gov]
Sent: Friday, July 22, 2016 3:29 PM
To: Claggett, Karyn T.
Cc: Wender, Joseph (Markey); Hull, ZJ
Subject: Call on Set Top Boxes

Hi Karyn,

We haven't had a chance to connect since I left Senator Leahy's office and came over to the House side to work for Congresswoman Eshoo. I must have started a trend because Alex followed me closely out the door and now Garrett is all alone!

My colleagues, Joey from Senator Markey's office and ZJ from Congresswoman Lofgren's, were hoping you might have some time Monday afternoon to chat with us on the phone about the FCC's set-top box proceeding. There were a lot of representations made at the recent Energy and Commerce FCC oversight hearing about where the Copyright Office stands on this issue. We would appreciate the opportunity to hear directly from you about any analysis you're conducting on it.

If you happen to have time at 3:00 on Monday, that would work best for us.

Thanks!

Scott

Scott Wilson
Senior Technology Policy Advisor
Congresswoman Anna Eshoo, CA-18
202-226-4581

From: Schwartz, Robert
To: Smith, Regan
Cc: Day, Brian; Dave Kumar
Subject: RE: Who to see re House letter on FCC & set-top boxes
Date: Tuesday, July 26, 2016 10:10:50 PM
Attachments: CVCC-exparte-7-7-16.pdf
16-42 CVCC Reply Comments Final.pdf

Regan –

Re materials, while there has been a lot of back and forth, the two attached documents should provide a baseline of the copyright-related positions taken by the "Consumer Video Choice Coalition" of which TiVo is a part (and in which I actually act for a smaller independent manufacturer, Hauppauge – but I've also worked for TiVo in a variety of legal contexts for a long time and continue to do so). I'm copying Dave Kumar, a telecom attorney colleague in another firm, who is active for TiVo within the CVCC.

- The CVCC (or "Coalition") Reply Comments on the NPRM, in addition to extensive discussions of content security and protection, have a "security" and "entitlement" chapters and a Copyright chapter. The NPRM itself did not propose addressing channel lineup preservation, ad obfuscation, or privacy by regulation. The Coalition, however, as expressed in the Reply Comments, has agreed that the FCC rules can and should assure the preservation in-tact of channel lineups and advertising, and conformance with published privacy policies. (It will be in dialog with the FCC on exactly how.) The Coalition view, however, is that this is a matter of contract expectation and consumer interest, extending beyond the scope of copyright exclusive rights.

- The July 7 Coalition ex parte letter (which I signed, for the Coalition, as Hauppauge counsel), takes on explicit assertions of copyright interest in purportedly preserving every aspect of an MVPD unified "service" as a matter of content owner exclusive right – so that offering consumers options of choice within the rights to which they have subscribed would "disaggregate" the defined "service," so as to compromise underlying content owner rights as licensed to the MVPD. In the Coalition's view, any such asserted "right" is not found in and goes beyond the exclusive rights reserved to owners by Section 106, by extending to *personal uses in viewing* that involve neither reproduction nor public performance. There are also *Feist* issues as to whether factual program-location metadata is subject to copyright.

There of course has been interim back and forth, but these are decent bookends to the discussion, and provide cites to the documents filed by MVPDs and content companies expressing the views with which the Coalition disagrees. What Matt Zinn can provide as his practical experience and perspectives, from a career of negotiation with all sides – TiVo, in addition to providing its "retail" product, is a leading supplier of DVR STBs and support systems to smaller cable companies. TiVo today is essentially a software company (indeed, it's in the process of being acquired by Rovi).

I'll have only my phone with me the next few days (in my other life as a jazz performer I'll be at a local "music camp") but can have colleagues forward you anything else that may prove helpful, and

I'll relay any info on Matt's availability.

Thanks and regards to all,

Bob

From: Smith, Regan [mailto:resm@loc.gov]
Sent: Tuesday, July 26, 2016 5:57 PM
To: Schwartz, Robert
Cc: Day, Brian
Subject: RE: Who to see re House letter on FCC & set-top boxes

Bob,

Thanks for the additional information and it is good to hear of your long involvement on these issues. We are happy to set up a meeting for TiVo to meet with members of the USCO Office of General Counsel. I am copying Brian Day, who can coordinate logistics for the meeting. However, I will warn you that our General Counsel is out of the office the week of August 8, so next week may work best if Mr. Zinn has returned from his travels. Meanwhile, please feel free to point us to specific comments or other materials that you or TiVo believe may aid our continuing review in advance of the meeting.

Best,

Regan

From: Schwartz, Robert [mailto:rschwartz@constantinecannon.com]
Sent: Tuesday, July 26, 2016 4:42 PM
To: Smith, Regan
Cc: Amer, Kevin; Moore, Andrew
Subject: RE: Who to see re House letter on FCC & set-top boxes

Thanks, Regan. My client is Matt Zinn, Sr. VP & General Counsel of TiVo. He's currently out of the country but on return (1 week+ I think) would be interested in visiting, if appropriate. TiVo pioneered the DVR functionality in "navigation devices" (set-top boxes) and is the major implementer of the current "CableCARD" technology and license regime for operating independently sourced navigation devices on MVPD systems. TiVo has been active in both the current FCC docket, previous dockets, and in the legislative discussions leading to the SHIVERA provision that kicked off the current round of FCC activity. (I've been involved in this issue, one way or another, since 1991, initially as an outgrowth of work on copyright policy issues.)

If it helps, call me any time for further background …..

Bob

From: Smith, Regan [mailto:resm@loc.gov]
Sent: Tuesday, July 26, 2016 4:33 PM
To: Schwartz, Robert
Cc: Amer, Kevin; Moore, Andrew
Subject: RE: Who to see re House letter on FCC & set-top boxes

Hi Bob,

Thanks for contacting us. Can you provide us with a little more information as to your client and what issues they wish to discuss in regards to the proceeding? Then I will look into this request and respond promptly. Thank you,

Regan

Regan A. Smith
Associate General Counsel
U.S. Copyright Office
resm@loc.gov
202-707-0214

From: Schwartz, Robert [mailto:rschwartz@constantinecannon.com]
Sent: Tuesday, July 26, 2016 3:49 PM
To: Amer, Kevin; Smith, Regan; Moore, Andrew
Subject: Who to see re House letter on FCC & set-top boxes

Greetings,

Sorry to burden you with question but would one of you know who is handling the CO processing of letter from Reps. Blackburn and others on the FCC "set-top box" proceeding? I have a client who's GC is interested in coming in about it, if appropriate. (I've left a phone message for Kevin.) With thanks for past courtesies,

Bob

Robert S. Schwartz
Constantine Cannon LLP
1001 Pennsylvania Av., N.W.
Suite 1300 North
Washington, D.C. 20004
202-204-3508 office
202-253-7526 cell
202-204-3501 fax
RSchwartz@constantinecannon.com

July 7, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

Re: *In the Matter of Expanding Consumers' Video Navigation Choices, Commercial Availability of Navigation Devices*, MB Docket No. 16-42, CS Docket No. 97-80

Dear Ms. Dortch:

NCTA's latest attempt[1] to divert the Commission's Notice of Proposed Rulemaking ("NPRM")[2] is based on a false rendition of copyright law and the limited exclusive rights that the Copyright Act grants.[3] NCTA seeks to inflate those rights at the expense of the public by assuming rights that its members and their program suppliers were not granted, and trampling on rights that the law has reserved to their customers. No contract between a content owner and a content distributor can create *rights that were not granted by the Copyright Act in the first place*. In this ex parte letter, the Coalition debunks the assumptions on which NCTA and its allies base their arguments.

---

[1] Letter from Paul Glist, Davis Wright Tremaine LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80, submitting "Rebuttal Comments of the National Cable & Telecommunications Association," (June 30, 2016) ("NCTA Rebuttal").

[2] *In the Matter of Expanding Consumers' Video Navigation Choices, Commercial Availability of Navigation Devices*, MB Docket No. 16-42, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 16-18, at 2, ¶ 1 (rel. Feb. 18, 2016) ("NPRM").

[3] *See* Comments of MPAA *et al*., MB Docket No. 16-42, at i (filed Apr 22, 2016) ("Under copyright law, someone may not use copyrighted content without the permission of the copyright holder."); *see also id.* at 16, 17. *Contra* Reply Comments of CCIA, MB Docket No. 16-42 at 16-17 ("Many uses of copyrighted content may occur without the permission or authorization of the rights-holder because (a) they do not exercise any of the copyright-holder's exclusive rights (to reproduce, perform publicly, etc.,) or (b) any exclusive rights they do exercise are nonetheless non-infringing, due to doctrines limiting the scope of copyright like fair use.") (citing 17 U.S.C. § 106).

Time and again, NCTA mistakenly claims that the NRPM's proposed approach grants rights to "unlicensed parties," when in fact the NPRM simply gives consumers meaningful choices in how they access and view the MVPD programming packages they have paid ever-growing amounts to subscribe to. NCTA's misleading and incorrect arguments distract from its own attempts to restrict consumer choice and limit consumer-friendly features such as home recording and fast-forwarding available to subscribers today.

Empowering Subscribers to View The Content They Pay For Is Not Copyright Infringement

NCTA's claim that a content owner has, and thus can license, a complete monopoly over the *use* of a copyrighted work is incorrect, and the arguments built on such an assumption are fictitious. Copyright owners are not granted control over most personal uses of copyrighted programming. The Copyright Act carefully enumerates the exclusive rights[4] of a copyright owner. This list does not include control over the personal use of content as contemplated in the NPRM, and does not constrain device makers from providing tools to enable that use.

- When a consumer subscribes to programming, the consumer acquires it lawfully. The law does not empower a content owner or an MVPD, under license from the owner, to control the program's use, unless the subscriber reproduces it (home recording is a fair use under *Sony*[5]) or performs it publicly. In seeking to constrain a subscriber's viewing and home recording of subscribed content, NCTA is claiming for its members and program suppliers exclusive rights that neither of them was ever granted under the Copyright Act.[6]

- The exclusive rights of a content owner or of an MVPD distributor are not engaged or infringed when a subscriber acquires and uses a device to choose the order or sequence in which content will be enjoyed. Hence, an MVPD has no right under copyright law to compel a consumer to access or view content *only in a particular prescribed way* – no more than a record company may force a CD purchaser to listen to the songs in a particular order, or a

[4] 17 U.S.C. § 106.

[5] *See, e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony*"); *see also Fox Broad. Co., Inc. v. Dish Network LLC*, 747 F.3d 1060 (9th Cir. 2014).

[6] *See* Reply Comments of Copyright Law Scholars and the Electronic Frontier Foundation at 1 – 4. *See also* CVCC Comments at 15-16, 31-32; CVCC Reply Comments at 48-59.

magazine publisher can require a subscriber to read front-to-back all articles and advertisements.[7]

- While rights-holders can place conditions on the licensing of their legitimate rights, their freedom of contract does not extend to limiting consumers' rights to personal use and home recording. Neither does freedom of contract allow them to override telecommunications statutes, FCC regulations, or copyright law. Subscribers have lawful rights under copyright law to access and use the MVPD interface, as well as to access, view, and copy the underlying programming for personal use.[8] The NPRM simply assures consumers that they retain the right of personal use to index, search, view, and home-record the content that, as MVPD subscribers, they have *already paid to acquire*.

- In sum, there is *no* "zero rate compulsory license" being extended to anyone when a subscriber uses a TiVo, Hauppauge, or any other device to view or store lawfully acquired programming. *You can't "license" an exclusive right that you don't have.*

No Evidence Is Presented About How Any Rights Could Be Infringed.

NCTA fails to establish how the rights an MVPD does possess could be infringed by the FCC's proposal. Even if an MVPD were able to show that merely assigning channel numbers shows sufficient originality to justify a claim to copyright protection, an offer of an alternative program guide does not infringe that right. Once that number has been assigned, it is merely a fact in a database: HBO is on Comcast 300, and "Game of Thrones" airs on Sunday nights. Such individual facts have no copyright protection, and can be manipulated by or for a subscriber in any manner without valid claim of infringement.[9] Even if NCTA could establish that the copyright inheres in the "selection, coordination, and arrangement" of these facts in the MVPD's

[7] *See* Reply Comments of CCIA at 17 ("Contrary to the MPAA's suggestion, a consumer's use of their own device to access their own content does not implicate Section 106 rights."); *See ABC v. Aereo*, 134 S. Ct. 2498, 2510 (2014) (stating that the definition of public performance "does not extend to those who act as owners or possessors of the relevant product").

[8] *See Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1132 (9th Cir. 2015) ("Fair use is not just excused by the law, it is wholly authorized by the law.").

[9] "'No one may claim originality as to facts.' . . . This is because facts do not owe their origin to an act of authorship." *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1990) (citations omitted).

interface, there still can be no infringement. A competitive navigation device's use of an alternative interface merely establishes a consumer's right *not* to use any MVPD copyrighted work. Copyright law does not compel anyone to use a particular copyrighted work.

MVPD Subscribers Do Not Sacrifice the Right to Utilize Alternative Sources To Find Content.

NCTA and its allies also seem to assert that by choosing to subscribe to receive content from an MVPD, a consumer surrenders the right to find alternative sources for the same content, at a better price or in better quality.

There is no exclusive right in the Copyright Act that gives an MVPD the power to require subscribers to forfeit their First Amendment rights to find the same or other programming from competitive sources.[10] Nor does the Act give an MVPD or anyone else the right to determine or decide in advance whether a consumer's choice of devices to find or record content from alternative sources is limited to lawfully available sources.[11]

MVPDs Cannot Create Rights They Don't Have By Claiming a "Collective Work"

Just as a content owner through license cannot create an exclusive right that it was not granted by the Copyright Act, an MVPD cannot create non-existent rights by claiming authorship it does not possess. Any copyright in a collective work or compilation is limited only to any authorship contributed by the collector/compiler.[12] An MVPD cannot claim or exercise any right in the underlying "compiled" programming; that right is owned by the program

[10] *See* Copyright Scholars at 5.

[11] *See Sony*, 464 U.S. at 456. "One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible."

[12] NCTA's citation to *definitions* in the Copyright Act ignores the limited nature of the rights they claim. "Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole ,,, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work… ." 17 U.S.C. § 201. "The copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material." 17 U.S.C. § 103(b).

producer. Nor can an MVPD claim any right to scheduling choices which, if copyrightable at all as a compilation or collective work, would be a copyright of the broadcaster or programming network that created the schedule, not the MVPD.[13]

Conclusion

NCTA's latest attack on the NPRM is based on claims to rights that are held by others – the subscribers who buy access to programming for personal viewing and recording, and the public at large to factual data that the Supreme Court has ruled to be in the Public Domain. In a free market and as instructed by Congress in Section 629,[14] innovators have the right to sell devices that allow consumers to view and store content for personal use. This was the Supreme Court's holding in *Sony*. And, this is the right that NCTA and some content companies *now seek to reduce or eliminate by acquiring exclusive control over consumers' viewing and home recording*.

This letter is being provided to your office in accordance with Section 1.1206 of the Commission's rules.

Respectfully submitted,

Consumer Video Choice Coalition

/s/ Robert S. Schwartz
Constantine Cannon LLP
Counsel to Hauppauge Computer Works, Inc.

[13] Accordingly, it is unclear exactly what an MVPD's "collective" copyright claim is. Is it the selection or grouping together of channels in a channel line-up? Various networks claim this as *their* right, in accordance with contractual requirements that they impose on the MVPDs—and so cannot be original authorship of an MVPD.[13] Is it the compilation of a program schedule? That database consists largely of material licensed from other companies. Individual facts from that database cannot be protected by copyright.

[14] 47 U.S.C. § 549.

Cc:
Gigi B. Sohn
Jessica Almond
Scott Jordan
Bill Lake
Michelle Carey
Martha Heller
Mary Beth Murphy
Brendan Murray
Matthew Berry
Robin Colwell
David Grossman
Marc Paul

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

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

REPLY COMMENTS OF THE CONSUMER VIDEO CHOICE COALITION

May 23, 2016

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SUMMARY

Ending the set top box monopoly in favor of unleashing competition, choice and lower prices is an economic imperative that can no longer be delayed. Over 100,000 consumers, editorial boards around the nation, the White House, device manufacturers, content creators and independent programmers have called for ending a broken system that punishes consumers. The cable set top box monopoly costs consumers a total of $20 billion a year (an average of $231), stifles innovation and protects the revenue streams of large incumbent corporations. The FCC has the power to end it with free market competition, and they should.

The opposing sides in this debate could not be more clear. Those seeking to protect their monopoly with rent-a-boxes that cost consumers $20 billion per year, and closed apps hope to hold onto the past, block and control Internet content, and keep prices skyrocketing as they have for the past two decades. Those seeking to unlock the box want to replicate the open, interoperable standard that has brought lower prices and unleashed innovation in device markets for computers, TV's, apps and smart phones, where the same copyright and privacy protections exist and prices have fallen 90 percent over the past two decades.

Rather than provide constructive input on how to facilitate consumer choice, the large MVPD and content incumbents double down on proprietary apps that were considered and rejected by the FCC and NTIA as not providing the competition from unaffiliated sources as required by Section 629. A competitive market for navigation devices, as required by Section 629, is one in which consumers have a realistic option to use retail devices or competitive applications instead of an operator-supplied set-top box or app. In an app-based approach, MVPDs retain control over all aspects of a customer's viewing experience. Apps remain a

walled garden where consumers would only be able to access MVPD service offerings on MVPD-approved devices.

Alleged "copyright arguments" against the proposed rules are factually or conceptually mistaken. Arguments that the FCC's proposal would "disaggregate" MVPD services or be "tantamount to granting third parties a zero-rate compulsory copyright license" misunderstand the distinction between services and devices. The proposed rules allow users who have paid for MVPD programming to watch it using the device of their choice. They do not allow third parties to "repackage and stream" programming, or to "disaggregate" it. This is distinct from allowing third parties to "distribute" or publicly perform programming in a way that may implicate the exclusive rights granted to copyright holders under Section 106 of the Copyright Act.

Consumer privacy protections likely will be bolstered under the proposed rules. A competitive navigation device market gives consumers greater choice among device manufacturers' privacy practices and records, and navigation device manufacturers have strong incentives to compete on privacy excellence. Moreover, competitive navigation devices are and will continue to be subject to federal and state laws and enforcement. The Federal Trade Commission — the primary federal agency tasked with protecting consumers' privacy — has weighed in with clear instructions on how to ensure that retail navigation device manufacturers are subject to the FTC's jurisdiction. The FTC explained how retail navigation device manufacturers and developers could be required to make enforceable consumer-facing statements certifying compliance with obligations to protect consumer privacy. The FTC stands ready to ensure that manufacturers abide by their commitments to consumers.

The FCC's proposal will not result in intrusive advertisements. Today, through the CableCARD regime, manufacturers have numerous ways to provide innovative advertisements that would make competitive navigation opponents cry foul. However, none of them have come into use with CableCARDs, and there is no reason to expect the practices to come to fruition under the proposed rules. If new advertising methods materialized, however, consumers finally could choose among various retail or leased navigation devices to access MVPD subscriptions and would almost certainly would vote with their pocketbooks against devices piling on advertisements or interrupting programming. In addition, the proposed rules do not promote removing and replacing ads from the programming stream. While possible, this practice has not occurred with CableCARDs. Nevertheless, if the Commission decides to attempt to assuage programmers' concerns, it could prohibit third-party navigation devices from removing advertisements in programming streams and replacing them with their own.

Finally, the FCC proposal would be a boon to diverse and independent programming. A competitive market for navigation devices benefits the video marketplace from both sides: it would be easier for new and diverse programmers to reach their target audiences, and the visibility of that content to consumers would be elevated. The increased array of competitive devices would enhance consumers' ability to search for and locate content they may not have otherwise found in incumbent gatekeepers' walled-gardens.

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REPLY COMMENTS OF THE CONSUMER VIDEO CHOICE COALITION

The Consumer Video Choice Coalition ("CVCC" or "Coalition") hereby files these reply comments in support of the Commission's proposed rules in the above-captioned Notice of Proposed Rulemaking. Members of the Consumer Video Choice Coalition include Common Cause; the Computer & Communications Industry Association (CCIA); Consumer Action; Google, Inc.; Hauppauge; INCOMPAS; New America's Open Technology Institute; and Public Knowledge. Consumers Union is not part of the CVCC but joins these reply comments.

I. INTRODUCTION.

Ending the set top box monopoly in favor of unleashing competition, choice and lower prices is an economic imperative that can no longer be delayed. Over 100,000 consumers, editorial boards around the nation, the White House, device manufacturers, content creators and independent programmers have called for ending an illegal, broken system that punishes consumers. The cable set top box monopoly costs consumers $231 dollars a year, stifles innovation and blocks new Internet streaming content. The FCC has the power to end it with free market competition, and they should.

The reply comments from the Consumer Video Choice Coalition offer a substantive and technical guide for the FCC to follow in order to bring about the competitive market envisioned by the bipartisan Telecommunications Act of 1996, which made competition the law of the land. The reply comments also offer detailed rebuttals to misleading arguments raised by large cable companies, the programmers they own and the trade associations they control.

Following the Comcast/NBCUniversal megamerger, the old lines that separated large cable companies and large Hollywood studios have blurred into meaninglessness. Comcast's commanding presence in the Motion Picture Association of America and the Recording Industry Association of America helps put into context the misleading and bogus copyright and piracy claims raised by the cable giant.

Comcast is not totally alone; another spawn of a monster merger, AT&T/Direct TV, has joined them in attempting to muddy the waters with misinformation and overheated arguments.

The opposing sides in this debate could not be more clear. Those seeking to protect their monopoly with rent-a-boxes that cost consumers $20 billion per year, and closed apps hope to hold onto the past, block and control Internet content, and keep prices skyrocketing as they have for the past two decades. Those seeking to unlock the box want to replicate the open, interoperable standard that has brought lower prices and unleashed innovation in device markets for computers, TV's, apps and smart phones, where the same copyright and privacy protections exist and prices have fallen 90 percent over the past two decades.

The *Wall Street Journal* reported 84 percent of customers believe cable prices are too high, rising 39 percent in the past five years to an average of almost $100 per month. The cost of a rent-a-box has risen a shocking 185 percent since 1995. In addition, 69 percent said they want

competition to bring the prices down. The FCC has the power to end the long consumer nightmare, unlock the box and set innovation free.

II. MANY COMMENTERS NOT AFFILIATED WITH LARGE INCUMBENT PAY-TV PROVIDERS SUPPORT NAVIGATION DEVICE COMPETITION.

The Commission's proposals to stoke competition in the retail navigation device market have been endorsed by the Obama Administration,[1] major publications,[2] and industry experts.[3] The chorus of support to "unlock the box" also continues to grow among consumers. More than 125,000 consumers filed supportive comments with the Commission.[4] These comments broadly call upon the Commission to act now to ensure that consumers can enjoy new and innovative choices in the retail market for navigation devices at a fraction of the price they currently pay MVPDs to rent set-top boxes.

With consumer support for the proposed rules widespread, it is logical that the set-top box is "the exemplar" for the Obama Administration's Executive Order to increase competition and better inform consumers of market choices.[5] Calling the set-top box a "stand-in for what happens when you don't have the choice to go elsewhere," the Administration encourages the Commission "to open set-top cable boxes to competition" and give American families "options

[1] Jason Furman & Jeffrey Zients, *Thinking Outside the Cable Box: How More Competition Gets You a Better Deal*, WHITE HOUSE BLOG (Apr. 15, 2016), https://www.whitehouse.gov/blog/2016/04/15/ending-rotary-rental-phones- thinking-outside-cable-box.

[2] *See* Consumer Video Choice Coalition Comments, MB Docket No. 16-42 (filed Apr. 22, 2016) ("CVCC Comments"), at 17-19 (indicating that the Editorial Boards from the N.Y. Times, USA Today, Los Angeles Times, Chicago Tribune, Boston Globe, and Buffalo News support the Commission's proposal to "unlock the box").

[3] *Id*. at 19-20, 51-52 (including the National Hispanic Media Coalition, the Writers Guild of America West, a consumer technology reporter for the Washington Post, Wired, and independent programmers like Robert L. Johnson, Eric Easter, and Stephen Davis).

[4] John Eggerton, *Consumer Voices Speak Up for FCC's Set-Top Proposal*, BROADCASTING & CABLE (Apr. 29, 2016, 12:48 PM), http://www.broadcastingcable.com/news/washington/consumer-voices-speak-fccs-set-top-proposal/156069.

[5] Exec. Order No. 13,725, *Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy* (Apr. 15, 2016), *available at* https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.

to own a device for much less money that will integrate everything they want . . . in one, easier-to-use gadget."[6] With the President's endorsement in place, the Commission should seize this opportunity to promote competition and "free up essential [navigation device] technologies so that big incumbent companies can't crowd out their competitors."[7]

Widespread support for expanding consumers' choices is evident throughout the record. The Electronic Frontier Foundation explains that "[c]ompetition means more than just lowering prices . . . [i]t drives innovation in features at every level: in hardware, software, user experience, energy efficiency, security, and cost."[8] Based on its own analysis of the current market structure, the Consumer Federation of America concludes "that the Commission's decision to open up the set-top box market to competition will result in increased innovation, consumer sovereignty, and consumer savings."[9] Likewise, the Digital Media Association asserts that "[i]njecting competition and choice into the navigation device market will bring it into alignment with more modernized, parallel communications service markets."[10] Referencing the evolution of the telephone, music, and mobile device markets, the Information Technology Industry Council acknowledges the "new opportunities" that "would provide a greater number of companies the prospect of competing in this market, driving investment and innovation, and ultimately benefitting the consumer through increased choice."[11]

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[6] Furman & Zients, *supra* note 1.

[7] *Id*.

[8] Comments of Electronic Frontier Foundation, MB Docket No. 16-42 (filed Apr. 22, 2016), at 2 (insisting that competition "allows consumers to vote with their dollars along many dimensions of preference: ease of use, sophistication of search, recommendation, and program discovery features, integration of multiple sources of programming, respect for privacy, and security, including the ability of third parties to perform security audits").

[9] Comments of the Consumer Federation of America, MB Docket No. 16-42 (filed Apr. 22, 2016), at 7.

[10] Comments of Digital Media Association, MB Docket No. 16-42 (filed Apr. 22, 2016), at 4.

[11] Comments of Information Technology Industry Council, MB Docket No. 16-42 (filed Apr. 22, 2016), at 5 (further explaining that opening up the market to competition would allow for navigation solutions that could be integrated into TVs without the need for a set-top box or additional consumer equipment).

Organizations representing consumer interests laud potential benefits of a competitive navigation device market. Discussing grassroots outreach efforts conducted with consumers, Consumer Action emphasizes that "[c]onsumers, without question, feel a lack of choice when it comes to pay-TV content, and they are feeling it in their wallets."[12] The organization decries the "one-size, take-it-or-leave-it approach" that pay-TV providers have subjected customers to, and encourages the Commission to "let consumers choose how they want to watch TV."[13] Noting that "MVPD-provided solutions so far have . . . fallen short of the vision of Section 629," Public Knowledge explains that a competitive video navigation market will save consumers money, reduce the devices needed to access video programming, ensure access to diverse programming, and protect consumer privacy better than the current MVPD-driven model.[14]

Many trade associations also support navigation device competition. The Computer & Communications Industry Association ("CCIA") posits that adopting new rules "could finally foster a competitive market for set-top boxes" and unleash competition by improving consumer experiences, saving them money, and facilitating more efficient navigation devices.[15] The Writers Guild of America West ("WGAW") declares that content creators also would benefit from navigation device competition.[16] WGAW observes that market competition "would reduce the gatekeeper power of television networks and MVPDs over video programming" and even the playing field between independent and MVPD-affiliated content sources.[17] INCOMPAS envisions small MVPDs using innovative solutions to differentiate their services from those of

[12] Comments of Consumer Action, MB Docket No. 16-42 (filed Apr. 20, 2016), at 1.
[13] *Id*. at 1, 3.
[14] Comments of Public Knowledge, MB Docket No. 16-42 (filed Apr. 22, 2016), at 3.
[15] Comments of Computer & Communications Industry Association, MB Docket No. 16-42 (filed Apr. 22, 2016), at 32.
[16] Comments of Writers Guild of America West, MB Docket No. 16-42 (filed Apr. 22, 2016), at 2.
[17] *Id*. at 2-3.

large incumbents.[18] A competitive navigation device market would allow small providers to offer "consumers with the unique viewer experience that would otherwise allow them to increase their share of the video and broadband markets."[19] And, as the National Association of Broadcasters asserts, "loosening MVPDs' grip on the navigation device marketplace holds great promise for consumers."[20]

Editorial boards and columnists nationwide also praise the Commission's proposals. *Bloomberg View*'s Editorial Board calls President's Obama's endorsement of the Commission's action "worth the effort," noting that the proposal is a "small but smart step in an inevitable march toward greater competition."[21] A *Mercury News* editorial suggests that consumer electronics makers and the pay-TV industry would benefit along with consumers.[22] In particular, "by rethinking the interface and making it easier for consumers to find programs they want to watch, . . . new-age set-top boxes could actually benefit the traditional industry. Happy consumers are more likely to be loyal ones."[23]

Writing jointly in the *Wall Street Journal*, former Senators Trent Lott (R-MS) and John Breaux (D-LA) call the Commission's plan to infuse competition in the navigation device market

[18] Comments of INCOMPAS, MB Docket No. 16-42 (filed Apr. 22, 2016), at 5.
[19] *Id*.
[20] Comments of the National Association of Broadcasters, MB Docket No. 16-42 (filed Apr. 22, 2016), at 1-2.
[21] The Editorial Board, *Cheaper Cable TV Starts With A Better Box*, BLOOMBERG VIEW (Apr. 20, 2016, 1:49 PM), https://www.bloomberg.com/view/articles/2016-04-20/cheaper-cable-tv-starts-with-a-better-box.
[22] Troy Wolverton, *Don't Be Fooled; FCC's Set-Top Box Rules Good for Consumers, Industry*, MERCURY NEWS (May 6, 2016, 9:13 PM), http://www.mercurynews.com/tv/ci_29860859/wolverton-dont-be-fooled-fccs-set-top-box; *Cf.* Joe Brown, *Thinking Outside the Cable Box*, THE TAMPA TRIBUNE (Apr. 24, 2016, 6:01 AM), http://www.tbo.com/list/columns-jbrown/thinking-outside-the-cable-box-20160424/ (equating the current cable television market to a "Ma Bell-like period" and contending that free-market competition "will work even better . . . when we no longer have to rent a set-top box from the cable provider and can buy our own").
[23] Troy Wolverton, *Don't Be Fooled; FCC's Set-Top Box Rules Good for Consumers, Industry*, MERCURY NEWS (May 6, 2016, 9:13 PM), http://www.mercurynews.com/tv/ci_29860859/wolverton-dont-be-fooled-fccs-set-top-box.

"an economic imperative" and "a good idea and sound policy."[24] Senators Lott and Breaux correctly observe that consumer electronics "have changed dramatically for the better in pretty much every device market except the set-top box space."[25] The high potential for innovation in the navigation device marketplace neutralizes pay-TV providers' privacy and copyright arguments. As Senators Lott and Breaux argue, the same technical model allowing mobile devices and tablets to carry cable and OTT content "should transfer to devices that feed the big screen in your living room."[26]

Commission attempts to "empower consumers to choose how they wish to access the multichannel video programming to which they subscribe" are clearly in the public interest.[27] Twenty years after Congress called for competition in the navigation device market, the Commission should give consumers control over how they interact with the video programming of their choice.

III. PROPRIETARY APPS DO NOT CREATE NAVIGATION DEVICE COMPETITION.

Availability of proprietary applications that allow customers to access parts of their multichannel video programming on third-party devices, mobile handsets, and tablets does not create a competitive navigation device market.[28] The narrative that an app-based economy

[24] Trent Lott & John Breaux, *Busting the Cable Box Is Overdue*, WALL ST. J. (May 8, 2016, 4:19 PM), www.wsj.com/articles/busting-the-cable-box-monopoly-is-overdue-1462738795.
[25] *Id*.
[26] *Id*.
[27] *Expanding Consumers Video Navigation Choices; Commercial Availability of Navigation Devices*, MB Docket No. 16-42, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 16-18 (rel. Feb. 18, 2016), at 2 ("NPRM").
[28] *See generally* Comments of National Cable & Telecommunications Association ("NCTA"), MB Docket No. 16-42 (filed Apr. 22, 2016), at 11-14; see also Comments of AT&T, MB Docket No. 16-42 (filed Apr. 22, 2016), at 6.

provides "a path for eliminating set-top boxes" is false.[29] Apps are not a "substitute for video navigation devices because they do not provide the same functionality and level of service."[30] MVPDs continue to require subscribers to install and lease a set-top box to view their programming. Despite the insistence that apps will permanently replace video navigation devices in the near-term, Comcast announced its plans to place the X1 video navigation device in "close to 50%" of its 22.3 million subscribers' homes by the 2016 Olympic Games.[31]

Given the failures of the CableCARD regime to open the video navigation device market to increased competition, nearly 99 percent of Americans remain forced to rent a set-top box from an incumbent video provider.[32] The average consumer pays a pay-TV provider $231 per year to lease set-top boxes for their home. These "captive customers" pay rental fees long after device costs have been covered. The device-leasing model contributes nearly $19.5 billion annually to MVPDs' bottom lines. With new rules, consumers could retain their current MVPD-provided set-top boxes or abandon them in favor of innovative, third-party solutions.

This proceeding is about competition and consumer choice. As TiVo indicates, a "truly competitive market for navigation devices, as required by Section 629, is one in which consumers have a realistic option to use a retail device or competitive application instead of an operator-supplied set-top box or app."[33] In an app-based approach, MVPDs retain control over all aspects of a customer's viewing experience. Apps "remain a closed universe—a walled

[29] Comments of NCTA at 16.
[30] See Comments of CCIA, MB Docket No. 16-42 (filed Apr. 22, 2016), at 7.
[31] Rob Pegararo (@robpegararo), Twitter (May 16, 2016, 8:56 AM), https://twitter.com/robpegoraro/status/732238341085757443 (quoting Comcast CEO Brian Roberts's announcement at NCTA's Internet & Television Expo).
[32] NPRM at ¶ 13 (quoting a 2015 study conducted by Senators Markey and Blumenthal on competition in the video navigation device market). MVPDs did not submit financial data on the price these companies pay for set-top boxes compared to the rate at which they lease those devices as the Commission requested. *See* NPRM n.44. Instead, most companies compare the cost of their devices to current third-party offerings.
[33] Comments of TiVo, MB Docket No. 16-42 (filed Apr. 22, 2016), at 5.

garden—where consumers would only be able to access MVPD service offerings on MVPD-approved devices."[34] A proprietary app solution would "maintain MVPD control and thwart the potential for innovations that simply occur first outside the MVPD bubble[,]" such as TiVo's development of the DVR, which was later adopted in devices leased by MVPDs.[35]

Comcast's recent partnerships with Roku and Samsung to provide a proprietary programming app to their platforms demonstrates how Comcast's offerings would remain closed to outside influence.[36] Open systems, however, allow third-party manufacturers to enhance the consumer viewing experience in unimagined ways while yielding instant benefits like an integrated search of linear programming, OVD services, and lawful content found online. The proposed rules create the possibility of an open ecosystem by requiring MVPDs to provide programming through the three information flows.

Opening a closed system to competition provides robust consumer benefits, including lower prices and more innovative devices. Before the *Carterfone* decision, AT&T held monopoly control over customer premises equipment ("CPE") and required customers to lease telephone receivers.[37] The stagnated market for CPE contributed to the general customer dissatisfaction with telephone service. The *Carterfone* decision unleashed competition and led to a series of breakthroughs that changed the face of telephony and communications. For the first time, consumers could choose the devices they wanted to attach to the network, including cordless phones, fax machines, innovative features (i.e. caller ID), and modems, which in turn,

[34] Comments of CCIA at 10.
[35] *Id*.
[36] Jared Newman, *Comcast's Roku and Samsung TV Apps Will Free Customers from Cable Boxes*, TECHHIVE (Apr. 21, 2016, 7:57 AM), http://www.techhive.com/article/3060112/streaming-media/comcast-s-roku-and-samsung-tv-apps-will-free-customers-from-cable-boxes.html (noting that Comcast is readying "Roku and Samsung TV apps as it tries to prevent a truly *open* cable box market") (emphasis added).
[37] *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968).

precipitated the Internet's growth. *Carterfone* "demonstrates that the public interest is best served when consumers have a wide array of equipment choices and are not limited to equipment supplied by a bottleneck network operator."[38]

In the same way, navigation device competition through CableCARD has forced MVPDs to respond to innovative third-party device offerings. TiVo has pioneered innovative search, storage, and viewing technologies (including the DVR),[39] and consumers have benefited when MVPDs adopted these technologies in their leased devices. If *Carterfone* is any indication, the innovation in navigation devices currently may be unimagined, but rapid benefits would be generated by enhanced competition.

Opponents have spewed a parade of trumped up horribles that allegedly could materialize from device competition.[40] But consumer costs would not rise, content security would remain strong, privacy and other consumer protections would remain intact, and intellectual property rights and content licensing agreements would remain in effect. These arguments stem not from fear of new navigation technology, but from an interest in halting the evolving content distribution market in the age of the Internet. All of the "supposedly scary" hypothetical scenarios cited already are possible today using the CableCARD standard, but have not materialized.[41]

[38] Comments of TiVo, Inc., MB Docket No. 16-42 (filed Apr. 22, 2016), at 2.
[39] *See* Comments of TiVo at 4.
[40] THE FUTURE OF TV COALITION, BROKEN PROMISES: CHAIRMAN WHEELER'S GOOGLE GIVEAWAY IS WORSE THAN FEARED 1 (2016).
[41] *See* Comments of Consumers Action at 3 ("As to the 'sky is falling' arguments we have heard from opponents of expanding consumers' video navigation choices, competitive retails devices and smart TVs exist today under the CableCARD standard. Despite the grip of the MVPDs on CableCARDs, none of the dire predictions for copyright, privacy and advertising by opponents have come to pass.").

For instance, protections in effect today would guard against navigation devices creating "manual or automated permanent copies of recordings authorized only for streaming."[42] Similar protections would be available under the proposed rules. The Commission should disregard concerns that simply "arise from discomfort with the potential for piracy presented by any device that connects to the Internet."[43]

Opening the video navigation device market to competition would spark an exciting era of innovation and growth that can be enjoyed by video programmers, content developers, third-party device manufacturers, and most importantly, consumers. And, notably, in a competitive navigation device market, MVPDs also would retain their ability to innovate.

IV. PROPRIETARY APPS DO NOT FOSTER A COMPETITIVE MARKET FOR RETAIL NAVIGATION DEVICES.

A. Proprietary Apps Merely Extend the Status Quo.

While MVPDs' proprietary apps may be a "step in the right direction for consumers", they "have not assured a competitive retail market for devices from unaffiliated sources as required by Section 629."[44] Proprietary apps "do not always provide access to all of the programming that a subscriber pays to access,. . . may limit features like recording [and] . . . "do not offer consumers viable substitutes to a full-featured, leased set-top box."[45] As the Commission observes, proprietary apps are purely at an MVPD's discretion and, "to date, have

[42] Comments of the Recording Industry Association of America, the National Music Publishers Association, American Association of Independent Music, American Federation of Musicians, Screen Actors Guild – American Federation of Television and Radio Artists, and Soundexchange, Inc., MB Docket No. 16-42 (filed Apr. 22, 2016), at 8-9.

[43] Letter from Public Knowledge, to Marlene H. Dortch, Fed. Commc'ns Comm'n Sec'y, MB Docket No. 16-42, at 2 (May 9, 2016), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001841033.

[44] NPRM at 10, ¶16.

[45] *Id.*

only provided access to the MVPD's user interface rather than that of the competitive device."[46] NTIA similarly notes that MVPD "subscribers still typically have limited competitive choice in the ways they may access or navigate programing or integrate complementary features and services."[47] Thus, "although the proliferation of MVPD-provided applications does produce significant consumer benefits, it does not address — let alone resolve — the competitive concerns at the heart of Section 629."[48]

MVPDs' app approach is partial, proprietary, and discretionary.[49] It is partial because proprietary apps typically offer only a subset of programming for which subscribers have paid, and often at lower resolutions.[50] It is proprietary because it creates a "walled garden" approach to presenting fully MVPD-controlled content, leaving no room for innovation in search, service discovery, storage, and user interfaces. Proprietary apps also do not allow consumers to search across MVPD and OTT content sources or locally record programming for later viewing, are not portable across different MVPDs, and would not work on another provider's network if a consumer switches.[51] Finally, the app approach is discretionary because MVPD apps work on only platforms that the MVPD chooses to support and not a larger array of devices available to consumers.[52] MVPDs can withdraw support for apps at any time at their discretion, leaving

[46] *Id.*
[47] NTIA Letter at 3.
[48] *Id.*
[49] PK Comments at 17-19, 21-22; CCIA Comments at 7-13; TiVo Comments at 4-6.
[50] PK Comments at 21; TiVo Comments at 5 n.9.
[51] PK Comments at 21; CCIA Comments at 9-10; TiVo Comments at 5 n.9.
[52] PK Comments at 17-19, 21-22. For example, Charter will not authenticate certain apps for the Nvidia Shield, an Android device, even though it will authenticate other Android apps, with the apparent difference being that the Nvidia Shield is connected to a TV. *See* Letter from NVIDIA to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-149 (Feb. 17, 2016). Comcast also has refused to authenticate apps on the Apple TV and from Starz. PK Comments at 18-19.

consumers in the lurch and searching for other means to access MVPD content for which they have paid.[53]

By industry estimates, more than 56 million MVPD apps have been downloaded to date, but 99 percent of MVPD subscribers still lease a set-top box, spending almost $20 billion per year in rental fees. Proprietary apps are not replacing MVPD-leased set-top boxes, but merely are extending MVPDs' walled gardens. Despite MVPDs' claims that apps would enable a transition to a box-less world, there are no signs of MVPDs moving past the set-top box. For example, Comcast reportedly deploys 40,000 X1 set-top boxes per day,[54] and aims to deploy X1 set-top boxes to half of its 22 million video subscribers by the end of 2016.[55]
Comcast discusses its Xfinity TV Partner Program in the record and promises to abide by certain apps-related principles.[56] While these developments may be welcome news for Comcast subscribers, they do not come close to enabling retail competition as envisioned in Section 629. Comcast would still control the user interface, the apps would offer access only to Comcast's services and would not be portable across MVPD services, and the apps would not enable innovative and user-friendly searches across multiple sources. Thus, Comcast's proposal exhibits the same flaws that led the Commission and NTIA to conclude that proprietary apps do not address competitive concerns at the heart of Section 629. And, if past is prologue, the

[53] CCIA Comments at 11-13 (citing numerous examples of MVPDs pulling support of their own apps); PK Comments at 19 and n.29 (same); TiVo Comments at 5 n.9 (same).
[54] Jeff Baumgartner, Comcast Accelerates X1 Rollout, Multichannel News (Oct. 27, 2015), http://www.multichannel.com/news/content/comcast-accelerates-x1-rollout/394854.
[55] Reinhardt Krause, *Comcast Ramps X1 Set-Top Boxes As FCC Plans Market Makeover*, Investor's Business Daily (Feb. 22, 2016), *at* http://www.investors.com/news/technology/comcast-ramps-x1-set-top-boxes-as-fcc-plans-market-makeover/.
[56] Comcast Comments at 25-32.

Commission should be skeptical of MVPD promises to voluntarily introduce competition in the retail navigation device market.[57]

B. The Commission Cannot Rely Upon Industry Promises That Proprietary Technologies Will Support Interoperability.

Past promises by MVPDs to ward off Commission action to implement Section 629 have not resulted in consumer choice or device competition. In 2005, its legal appeal of common reliance having failed,[58] the NCTA sought a postponement from the FCC of the July 1, 2006 date for CableCARD reliance, which already had been postponed for 18 months in exchange for "Plug & Play" CableCARD support promises.[59] The industry claimed that this further delay would allow work on a fully downloadable ("DCAS") replacement for CableCARDs. The FCC delayed common CableCARD reliance until July 1, 2007, on the condition NCTA file interim reports attesting to progress by the industry consortium working on the project. The FCC said postponement was worth it so that the cable industry could focus on a "boxless" CableCARD replacement, stating the "potential benefit of a common security technology with significantly reduced costs justifies a limited extension of the deadline for phase-out of integrated devices."[60]

Despite NCTA's assurances to the Commission, the proprietary DCAS replacement for CableCARD never appeared. In a required interim report from November 30, 2005, the NCTA told the FCC that it expected a "***national rollout of a downloadable security system by July 1,***

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[57] Brian Barrett, *Cable Boxes Suck. One Day They'll Die. Until Then We Have To Fix Them*, Apr. 22, 2016, *at* http://www.wired.com/2016/04/cable-box-dying-still-needs-fixed/ ("[W]hen we do fix the cable box, let's not leave that reform up to the people who've profited from them for years.").

[58] *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000).

[59] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926 (2003).

[60] Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, 20 FCC Rcd 6794 (rel. Mar. 17, 2005). After July 1, 2007, MVPDs subject to the rule are prohibited from supplying new integrated boxes to subscribers directly or indirectly, including through third-party retailers. *See* 47 C.F.R. § 76.1204(a)(1) (prohibiting MVPDs from "plac[ing] in service new [integrated] navigation devices for sale, lease, or use") (internal citation).

2008."[61] Furthermore, NCTA claimed that the cable industry was "***committed to the implementation of this system for its own devices as well as for DCAS-compliant retail devices.***"[62]

The Commission invited public comment on postponing the "integration ban" until July 1, 2007. In response to filings to the contrary, the NCTA asserted that downloadable security was "feasible" and "preferable to the existing separate security configuration."[63] The NCTA also flagged the cable industry's commitment to ***"implement DCAS for its own devices and for those purchased at retail***."[64]

No interoperable DCAS solution to replace CableCARDs for retail devices was announced by NCTA or fielded by any cable operator in 2008 or thereafter. Rather, on June 17, 2009, it was announced that the industry consortium had been abandoned, its offices shuttered, and its project "taken over" by CableLabs. As Kevin Leddy, Time Warner Cable executive vice president of technology policy and product management, explained at the time, "[a]t this point the cost to a television set for a CableCard slot is a couple of bucks. To put the more complex technology into the television to do downloadable security will probably add more cost."[65]

The NCTA's Appendix D CableCARD "timeline" ignores its broken promise of an interoperable CableCARD replacement and the ensuing developments discussed above. That timeline also omits important information about why the one generation of CableCARD-reliant

[61] CS Docket No. 97-80: Report of the National Cable & Telecommunications Association on Downloadable Security, Nov. 30, 2005.
[62] *Id.* (emphasis added).
[63] CS Docket No. 97-80, Reply Comments of the National Cable & Telecommunications Association, Feb. 6, 2006 (emphasis added).
[64] *Id.*
[65] Todd Spangler, *CableLabs Takes Over DCAS Project From PolyCipher*, Multichannel News, June 17, 2009; *see also,* Jeff Baumgartner, *MSOs Closing PolyCipher Headquarters*, LightReading, June 5, 2009, http://www.lightreading.com/cable-video/msos-closing-polycipher-headquarters/d/d-id/668307.

televisions was delayed, never adequately supported, and vanished *before* common reliance on CableCARDs was finally required on July 1, 2007:

- **1998 - 1999.** The first First Report & Order and the Order on Reconsideration[66] require major cable operators to offer "POD Modules" (later called "CableCARDs")[67] by Jan. 1, 2000, and to rely on CableCARDs in their own devices fielded after Jan. 1, 2005.

- **2000.** Manufacturers and retailers seeking to deploy CableCARD-reliant devices are frustrated by lack of clear specifications, CableLabs requirements, and license demands beyond those allowed by Sections 76.1201 through 76.1205 of the FCC's rules.[68]

- **2002.** Under congressional and FCC pressure, CableLabs negotiates the "Plug & Play" deal and interface specifications for "one-way" operation of the two-way CableCARD interface, and agrees on a model DFAST license that lacks objectionable restrictions on retail device operation and guide. Pointing to the one-way deal, the cable industry asks FCC to extend the Jan. 1, 2005 date for its own devices to rely on CableCARDs.

- **2003. The** FCC adopts regulations based on the one-way deal. Industry supplier General Instrument, joined by NCTA, files suit challenging the common reliance provision and loses.[69] The cable industry lobbies for postponement of common reliance, citing good faith and continued work to implement plug-and-play. The FCC postpones common reliance to July 1, 2006. The certification wave for CableCARD-reliant TVs begins at CableLabs, but the test CableCARDs provided by CableLabs are not sufficiently uniform or stable, requiring manufacturers to fine-tune their own products to work with the non-uniform CableCARDs provided.

- **2004.** DFAST-licensed CableCARD-reliant TVs are introduced. Operator field staffs are not sufficiently trained; operators do not automate support or track CableCARD provenance. Field issues result in non-promotion of the CableCARD feature.

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[66] Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices, Report and Order, 13 FCC Rcd 14775, 14792-14809 (1998); Order On Reconsideration (rel. May 14, 1999).

[67] Early cable removable security cards were called Point-of-Deployment (POD) modules. CableLabs later coined the term CableCARD.™ "These are two names for the same thing." See CableLabs, *OpenCable™ – CableCARD™ Primer*, http://www.cablelabs.com/opencable/primer/cablecard_primer.html (post has been taken down but is preserved by the Internet Archive as last visited on Oct. 11, 2013, http://web.archive.org/web/20131011042033/http://www.cablelabs.com/opencable/primer/cablecard_primer.html); Second Report and Order, 18 FCC Rcd at 20894, ¶19 n.45 ("According to NCTA, PODs will now be referred to as CableCARDs for marketing purposes.").

[68] CS Docket No. 97-80, *Response of the Consumer Electronics Retailers Coalition to the July 7, 2000 Cable Industry Status Report* at 1 - 7 (Aug. 2, 2000); *ex parte* letter of Jennifer L. Blum on behalf of RadioShack Corporation and Circuit City Stores, Inc. and appended material, July 12, 2001; *CERC Reply To NCTA Attempt To Further Escape Commission Deadlines And Expectations For Competition And Interoperability* at 18 (Aug. 1, 2002).

[69] *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000).

- **2005.** In reliance on an NCTA/CableLabs promise to field a DCAS replacement for CableCARD nationwide by July 2008, the FCC postpones CableCARD common reliance until July 1, 2007, but says it will not consider further requests for postponement. Charter sues the FCC on the latter point and loses.[70]

- **2007.** A Comcast petition for a waiver of common reliance for certain set-top boxes is denied. Comcast sues the FCC and loses in 2008.[71] Common reliance on CableCARDS finally goes into effect on July 1, 2007. ***By this date, there are no CableCARD-reliant TVs remaining on the market.***

- **2008.** Cable industry consortium does not announce any national DCAS solution for supporting retail devices to succeed CableCARDs, and none is fielded by any operator.

- **2009.** Cable industry DCAS consortium is dissolved and ported to CableLabs. ***No further public announcement of, or reporting on, this project occurs.***

Given this history of promises made and then broken, the Commission should view MVPD promises in the record with great skepticism and avoid attempts to delay creation of navigation device competition

V. OPPONENTS LEVEL INCORRECT OR MISLEADING ARGUMENTS AGAINST ENABLING DEVICE COMPETITION.

Opponents of device competition are actually embracing the types of technologies enabled by the Commission's proposed rules, but conveniently forgetting to note this on the record. MVPDs attacking the Commission's "three flows" proposal are using or planning to use similar means, for example VidiPath, RVU or the XFinity Partner Program, to distribute service offerings in their own systems. In denouncing alleged security problems involved with enabling device competition, major content owners ignore or are unaware of the fact that competitive devices would rely on the same suites of technologies and licenses protecting security of their

[70] *Charter Commc'ns, Inc*. v. FCC, 460 F. 3d 31 (D.C. Cir. 2006). As Judge Garland noted, "Citing submissions from the consumer electronics industry, the FCC also expressed 'concern … about evidence that cable operators are not adequately supporting CableCARDS'." *Id.* at 40-41.

[71] *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008).

content today. Among commenting MVPDs, only Verizon acknowledges that service provider competition, device provider competition, and consumer choice all could flourish under the proposed rules.

Most MVPDs remain comfortable with the idea of locking consumers into device leasing arrangements. These MVPDs have doubled down on their DSTAC proposals that only proprietary "apps," which promise no independent guide, search, or storage features, should be the wave of the future. These MVPDs reveal, however, that they intend to rely on essentially the same data flows and security technologies that the FCC proposes for competitive products – with the glaring exception of an independent user interface.

With the exception of Verizon, MVPDs and major content owners paint the simple as complex and the efficient as wasteful through incorrect or misleading comments and declarations:

- NCTA consultant Sidney Skjei's declaration assumes an environment of "fixed interfaces," and that competitive devices would require a "trusted application execution environment" beyond the entitlement and security technologies already relied upon by leased devices. The NPRM does not prescribe any technology that would amount to a "fixed interface." Through IP software interfaces for the three flows, it ensures flexibility and adaptability over time. Current marketplace technologies such as iOS and Android also demonstrate that proper content security and protection can be achieved without a "trusted application execution environment."
- Skjei overlooks secure link and downstream home network protection already in use for cable, DBS, and IP delivery, or the licenses that assure security of the delivered content;

for how EAS and closed captioning information are and will be delivered; or for accessibility requirements that already apply to devices receiving competitive IP-delivered content. Nor does Skjei evince familiarity with means of codec support already in common use.

- Similarly, the AT&T, Comcast, and DISH/EchoStar submissions are based on limiting and misleading assumptions about current and prospective options for efficient search, discovery, transmission, and security for MVPD and competitive devices and apps alike. In particular, Comcast's Xfinity Partner Program[72] foretells MVPD reliance on a set of technologies overlapping those foreseen in the NPRM and Coalition comments.
- MPAA-SAG/AFTRA, the Content Companies, and the RIAA ignore techniques and licenses that secure content in delivery and in the home network. Their comments ignore the fact that technologies discussed in DSTAC and in the NPRM rely on technical protections already deployed to secure delivery of MVPD and "app" programming. The licenses for this technology require that home network and portable devices that receive the content must maintain a specified level of security and functionality ("compliance and robustness rules") as a condition for being able to decrypt and output the content.[73]
- Based on such incorrect assumptions and ungrounded fears, many MVPDs and content industry commenters insist that providing a nationally interoperable, Internet Protocol-based software interface to support competitive navigation devices and consumer choice

[72] *See* https://developer.xfinity.com/cableapp.

[73] Other purported "copyright" concerns are not about unlawful access to or copying of programming and are discussed *infra*.

will lead to suppressed innovation, higher costs, and increased energy usage. But, they offer no credible basis for any such conclusion.

CVCC's Technical Appendix provides a picture of an actual standards-based environment and lists the common tools for MVPD and competitive program search, discovery, delivery, and security. This suite of standards and RAND-licensed technologies can comprise a "default" system that sets the bar for a competitive and interoperable implementation by MVPDs and device and app providers. The Commission can rely on this default, rather than on specious arguments from NPRM opponents, in expeditiously enacting the proposed rules and igniting navigation device competition.

A. A Standards-Based Interface Would Stoke Innovation Without Raising New or Novel Issues.

Supporting competitive devices and apps would not require "re-architecting," would not depart from a "trusted execution environment," and would efficiently use bandwidth and power.

i. Implementation of the proposed rules is feasible and similar to existing practices.

Alone among major MVPDs, Verizon welcomes the rulemaking and offers several laudable recommendations:

- The MVPD's own programming and data flow should not be disrupted.[74]
- Third party devices need not be empowered as "gatekeepers."[75]
- Universal search should be encouraged.[76]
- Effective customer service should be expected.[77]

[74] Verizon comments at 2-5, 7-8.
[75] *Id.* at 2, 8-11.
[76] *Id.* at 3, 11-12.
[77] *Id.* at 3, 12-14.

The Coalition agrees. As previously explained,[78] subject to consumer volition, the Coalition "would not oppose steps to prevent advertising contained in MVPD programming delivered to subscribers from being replaced or obscured in the course of program delivery to a subscriber." The same should apply to other integral elements of the "three flows."

Promotion of consumer viewing choices should be key among the Commission's objectives in this proceeding. As noted by Verizon, in an Internet Protocol context, both MVPDs and designers of third party devices should enjoy flexibility.[79] Like Verizon, Coalition DSTAC members endorsed universal search as a consumer benefit that MVPDs have no right to restrict when offered in a competitive device. In this regard, increased consumer awareness of program offers based on universal search does not implicate any exclusive legal right reserved to copyright owners or MVPDs. As Verizon explains, the FCC should expect MVPDs to provide effective non-discriminatory customer service, and this proceeding does not impede achievement of that goal.

ii. Three flows comprise a software, not a fixed hardware, interface.

Requiring a software interface is within the scope of Section 629[80] and implementation of the three flows would not call for a "new hardware" interface.[81]

Since 1996, major technical advances have transferred hardware functions to software. Even in 1996, interfaces and devices used to receive digitally transmitted programming, including CableCARDs, relied heavily on software. Hence, "equipment" referred to both a device's software and hardware components. Without its software component, none of the

[78] Letter of Hauppauge counsel Robert S. Schwartz on behalf of CVCC, May 13, 2016.
[79] Verizon Comments at 2, 5-6.

[80] Content Companies Comments at 14, ACA Comments at 60 66.
[81] Skjei Declaration at 24, 31-32, TIA Comments at 9.

devices referenced in Section 629 could function. Thus, it is technically and legally erroneous to claim that Section 629 did not envision software interfaces running on hardware devices. In passing STELAR, Congress obviously agreed, referring to "downloadable" security, which is comprised of software running on the hardware for which it has been designed to be compatible and secure. Moreover, there is no basis on which to expect that Congress in passing STELAR thought of hardware as completely devoid of software components to enable its function.

iii. Wireline MVPDs can offer the three flows without disruption to their networks.

MVPDs would not need to "re-architect" their networks, and operators moving to Internet Protocol distribution would not be burdened by navigation device competition.

a. MVPDs that have not moved to IP delivery can utilize efficient gateways, including outputs from their set-top devices.

The proposed rules would not require a new "fixed interface"[82] or novel gateway device.[83] For instance, no radical departure is necessary from Comcast's approach in its X1 set-top with VidiPath support. Section 76.640(b)(4)(iii) of the Commission's rules already requires this sort of standards-based home network support, and the necessary software is available. Inclusion of an integrated MVPD UI would complicate this interface, while the example set forth in the CVCC's Technical Appendix is easier to implement.

The proposed rules also do not put "fixed network interfaces into the middle of these architectures." MVPDs retain flexibility as to the location of the software interface for competitive devices; no common reliance would be required. MVPDs retain judgment on location and implementation of the translation from MVPD-specific protocols and transports into

[82] Skjei Declaration at 2, 30.
[83] Comcast Comments at 67.

a standardized format accessible by third party devices. MVPDs would not be inhibited from innovating with their own architectures or devices.

b. MVPDs moving to IP delivery have the option of secure cloud delivery.

NCTA consultant Sidney Skjei asserts[84] that the proposed rules effectively would require new in-home devices because cloud delivery would necessitate simulcasting of incompatible transmissions via a "translate box." Comcast's XFinity Partner Program announcement, however, proves that this is incorrect.[85] MVPDs like Comcast are presently ready or preparing for boxless cloud delivery, using techniques contemplated in this rulemaking. Although not all MVPDs may begin with a boxless solution, their commitment to apps would facilitate one.

Some MVPDs also suggest that cloud delivery through interoperable technologies may not be as secure[86] or flexible due to format obsolescence.[87] As noted *infra*, DTCP link protection is readily adaptable, and is being adapted, for cloud delivery.[88] Furthermore, cloud delivery would not be hindered by improvements in format and codec technologies. The primary constraint on MVPD adoption of compression formats and codecs is the capacities of fielded set-top boxes. Home networks have proven more adaptable to such innovations in format and compression. To the extent operators move to updated receivers rather than entirely to the cloud, these receivers would contain home network interfaces capable of IP content delivery.[89]

c. Existing and announced "app" architectures demonstrate compatibility of the standards-based interface with technologies now in use.

[84] Skjei Declaration at 45-46.
[85] *See* https://developer.xfinity.com/cableapp.
[86] Werner Declaration at 9-10, Skjei Declaration at 47.
[87] Skjei Declaration at 2, 24, 32.
[88] See TIA Comments at 5-6. See also CVCC Comments at 38-40.
[89] Consumer-owned devices on their home network are generally more capable than the least-capable MVPD-provided devices, with respect to codecs and formats.

Present streams are "compliant" streams and need not be "replaced."[90] The "streams" themselves are already in standardized formats, and presently processed by retail and MVPD CableCARD devices, DirecTV Ready TVs and VidiPath compatible TVs. Nothing in the rulemaking requires that they be replaced or modified. Existing and announced "app" architectures demonstrate the feasibility and efficiency of cloud as well as gateway delivery to home network clients. "Boxless" solutions from MVPDs and others rely on IP delivery of content and information. Moving toward a box-less solution is a cornerstone of this rulemaking, which offers a variety of options and resources for MVPD innovation.

One option is for an MVPD to use an in-home device to proxy IP delivery of content. This allows retention of current content delivery models in MVPD networks. MVPDs already provide or specify modems and routers that can control IP distribution and can include a software proxy server to ensure proper management of IP content delivery at scale, as Comcast will do in its XFinity Partner Program. It is inconsistent to claim that a proprietary "app future" would avoid national infrastructure problems, but that a competitive version cannot.

d. Efficiencies of multicast delivery would not be lost.

IP multicast is not a "fatal flaw" of supporting competitive devices.[91] Skjei observes incorrectly that CableCARDs – used today in tens of millions of MVPD-leased devices to order Video On Demand and other two-way services -- have not supported switched digital transmission in retail devices because the CableCARD interface "was only designed to support linear broadcast cable television channels."[92] Thus, Skjei wrongly posits that if "fixed interfaces

[90] ACA Comments at 49.
[91] Skjei Declaration at 35.
[92] *Id.* at 35. The actual reason that SDV, where supported in retail devices, has been supported by other means is that the DFAST license limits retail devices to only one-way operation through the *two-way* CableCARD interface.

are mandated for the delivery of video and entitlements, it would necessitate standardization on a common multicast protocol"[93] MVPDs, however, can provide or specify a software proxy server in modems or routers that converts the IP multicast to unicast (and requests to receive it, if the network requires such a request). Comcast clearly envisions such a solution in its XFinity Partner Program.

MVPDs also could control the number of streams delivered to individual homes. Well-established technologies for adaptive streaming rates utilizing formats such as DASH or HLS can control bitrate usage. While these technologies utilize two-way communication (a fundamental part of TCP/IP), all of the bandwidth selection logic resides in the client, which is best-suited to determine available bandwidth. Bandwidth selection can be done properly by independent device manufacturers. In fact, not doing so properly would result in a poor user experience, making competitive success less likely. The server can limit the available bandwidth options presented to the client for cases where there are external factors, beyond the client's own downstream bandwidth capabilities, that would drive the stream rates the client should be receiving.

iv. Standards-based flows need not consume more bandwidth or utilize more power.

Competitive devices would not consume more bandwidth[94] or more power.[95]

a. Bandwidth use need not be expanded.

Claims that more bandwidth would be required for competitive devices ignore the options and efficiencies available, as well as operators' present and announced practices. Comcast

[93] *Id.* at 36

[94] Comcast Comments at 68, Werner Declaration at 4-5, Skjei Declaration at 12-13, ACA Comments at 49.
[95] Skjei Declaration at 50-54, Dulac Declaration ¶ 44.

assumes that unicast in an in-home network requires that the out-of-home delivery network must also be unicast. This ignores present industry practice for MVPDs' leased devices of relying on an in-home gateway device to translate QAM delivery to IP. As noted above, a proxy server deployed in software on a modem or router can convert multicast to unicast (or broadcast QAM to unicast IP). Comcast's XFinity Partner Program needs to rely on one of these techniques to achieve a box-less solution for the three flows over an IP network. According to Comcast's Xfinity Partner Program announcement, this solution will be deployed *this year*.

According to ACA,[96] cloud-based delivery would require "MVPDs to duplicate streams (i.e., linear TV channels, VOD and other content) from the headend to customer premises. Because every video stream sent to every customer requires dedicated bandwidth, this approach would require large amounts of bandwidth, which are not available in practice." ACA, however, ignores the availability of IP multicast, which avoids bandwidth duplication across customers. This well-known technology is in wide use by IPTV MVPDs.

b. Standard flows provide options for both MVPD and consumer devices to reduce power usage below present levels.

The Commission has an opportunity to create an environment where a single thin client can operate in any network, reducing power consumption by not requiring multiple thin clients or the resources to enable them to function. Greater numbers of "boxless" homes would be supported through cloud distribution, software support in modems, and client software in smart TVs. Elaborate claims and calculations by some MVPDs rely on suppositions of requirements for boxes, hardware interfaces, duplicate streams, and dedicated conversion devices that ignore industry standards and practices already announced or in use. Enabling a standards-based

[96] ACA Comments at 49.

interface to support existing home network devices need not use more power than present-day leased boxes or even future "app" plans. The software-enabled interface to the home network can facilitate home network servers and clients, in lieu of a status quo of separate, proprietary implementations that vary by MVPD and almost universally rely on leased set-top boxes. There is every reason to expect that less energy would be required. This holds true as well for major MVPDs' projections of higher costs.[97]

v. The standards-based interface is familiar to and compatible with DBS systems.

Even though DBS systems are unidirectional, there is no technical reason why DBS cannot support a competitive navigation device. The IP delivery to the competitive device can be done directly from the DBS receiver, if the receiver has an IP connection to the home network. The three information flows would be standardized, and would not present themselves in different ways for cable versus DBS. There are also no hardware requirements; the three flows are enabled via software. All of the home network communication – i.e., everything after the satellite-specific receiver – is Internet Protocol.

Arguments about the "one-way" or "unique" elements of DBS[98] are refuted by the nature of the very delivery systems being implemented, which embrace IP delivery. The gateway (VidiPath, RVU) and "app" implementations do not require that a third party device store VOD or advertising; they support all services delivered over IP, as well as EAS. DBS gateway demonstrations have shown that it's possible to convert the one-way service into two-way IP

[97] *See, e.g.,* ACA Comments at 49-53. *See also* TIA Comments at 7.
[98] DISH/EchoStar Comments at 26-27, Dulac Declaration at 7.

within the home, without requiring the third-party client device to store VOD or advertising.[99] Well-established specifications are available on how to achieve EAS requirements, including forced tuning in a common format regardless of any diversity in network specifics.[100] CableCARD has supported this since the start across several diverse network types with no issues. The EAS message indicates where to tune, pointing to one of the channels defined in the CableCARD service discovery information flow.

A DBS or cable MVPD network does not require that unique elements be incorporated into every client device or interface; a translator can be included in hardware or software. For a cable system this may be incorporated into a cable modem; for IPTV, an optical terminal; for DBS, a receiver with gateway capacity, as presently implemented for VidiPath or RVU. The technologies referenced in the CVCC Technical Appendix can easily be integrated into existing DirecTV set top boxes that run as an RVU server, which share the same UPnP base technology and use the same streaming and content protection techniques. The RVU server has the information necessary to provide all of the other metadata for the three flows, because it uses that information to synthesize the UI it is exposing over RVU. Without a mandated and integral UI, this is less complex than present implementations that require such integration. For example, a complexity of VidiPath involves the assurance that the operator's UI will operate correctly on a third-party device. A standards-based solution without this requirement is technically easier, because only the information flows need to be defined. Therefore, references about the time,

[99] As DISH/EchoStar points out, for VOD it is necessary that some DBS content be locally stored. See DISH/EchoStar Comments at 8-9, 12. Thus, the MVPD-supplied receiver delivering the three flows would need an HDD in its case. It does not follow that a third-party home network client would require one.

[100] *See* Dulac Declaration at 14; *see also* ACA Comments at 43. The standard for EAS (ANSI J-STD-42-B, also known as CEA-814-B and ANSI/SCTE 18) contains parameters to handle forced tuning and other EAS cases.

effort, and expense to create and test VidiPath and RVU[101] do not support predictions that the solution proposed in the rulemaking would involve similar time, effort, or expense.

DISH/EchoStar's and AT&T's[102] concerns about resource management also do not reflect any new impediment. If a server lacks additional tuners, it cannot stream additional content to a client device. Device protocols negotiate and advise consumers with respect to availability, as per present practice. These are not novel specification references.

B. Entitlement Management Would Use Familiar Technologies And Techniques.

MVPDs could retain their entitlement servers and would not risk compromising consumer privacy[103] or losing visibility into in-home compliance through the "entitlements data" flow.[104] It would not be necessary to "identify" particular apps or devices to prevent authentication or enable termination.[105] And, concerns about ensuring compliance with entitlement requirements,[106] awaiting action by standards bodies,[107] or creating a "public private keying system"[108] that may be vulnerable to an MTM ("Man-In-The Middle") attack are specious.[109]

i. No change is necessary to entitlement servers.

Where an MVPD has not moved to IP delivery, data on entitlements are carried via existing security systems to a device at or near the home, where they are delivered to competitive devices via Internet Protocol. In-home clients do not need to interface directly to existing

[101] AT&T Comments at 23, Dulac Declaration at 22-23.
[102] DISH/EchoStar Comments at 15, Dulac Declaration at 12.
[103] Werner Declaration at 4.
[104] RIAA Comments at 9.
[105] Skjei Declaration at 13-14, Dulac Declaration at ¶ 31.
[106] Comcast Comments at 79.
[107] Skjei Declaration at 31.
[108] *Id.* at 43.
[109] *Id.* at 44.

MVPD backends; MVPDs need only provide a bridge/proxy/translator to communicate fundamental information that is common across systems. There is no reason to expect any interruption or diversion of the entitlement data flow, which is passed on to third-party devices as required by licensed content security systems.

vi. Program search, discovery, and receipt would be securely associated with the subscriber's account without needing standards body action.

MVPDs deliver content to the subscriber's premises and may apply their own conditional access before transferring the content to the home network via link protection, preserving entitlement rights. DRM technologies apply license requirements and can authenticate the client using the same techniques used for proprietary apps, or via a home network localization technique as required where link protection is interposed between the operator network and home network devices. There is flexibility for indicating, via free form text, what rights would be enabled through a specific purchase. The system then would update what content can be accessed based on the MVPD's actual backend implementation of those entitlements. The subscriber would be aware of the content available and the usage rules for it. The actual entitlement access is controlled by the MVPD as the entity delivering the content to the third-party device. It would be technically infeasible for a client device to be able to violate the entitlement mechanism.

vii. No public-private keying system is necessary, and no "MTM" attack is enabled.

Within the architecture of the three flows, entitlement is an informative stream only. The MVPD controls distribution of the actual keys required to limit decryption to properly authorized devices. There would be no way for a device to request and receive entitlements for which it is not authorized or for which a bad actor seeks to impersonate an authorized device, unless the

MVPD is not enforcing or properly securing its entitlements. Nor are such attacks enabled by link protection, which is subject to appropriate downstream license requirements. No example of an exploitable hole in DRM or link protection has been provided.[110]

viii. Many Veramatrix proposals are overbroad or unnecessary.

Some suggestions from Veramatrix are reasonable, but others are unnecessary or unsuitable:

- MVPDs could limit access to services on a device without sufficient content protection. Veramatrix's proposed text[111] (i.e., "limited by the capabilities") is unnecessarily broad and could constrain the ability to render, e.g., a remote user interface.
- Transport Layer Security ("TLS")[112] is unsuitable for authentication of clients in this environment. TLS requires the client to have a "private key" that is stored where it cannot be accessed by others. This requirement would preclude downloadable software application from being a client for the three flows. It is not possible to secure a "private key" inside of a downloadable application that the user can execute and then utilize in application-accessible memory on existing platforms such as Android or iOS. Thus, the appropriate device authentication is only that of the Content Security System, which can be abstracted away from applications into a separate secure layer.

The proposed modifications[113] to "Certificate" through the insertion of "valid cryptographic" should be rejected. This would preclude downloadable software applications

[110] General complaints about security for web services overlook the fact that these types of services are already provided by MVPDs by the same means. Even where an API to access a web program or service is known, the risk of attack is not increased. Security by obfuscation is the least effective kind of security.
[111] Veramatrix Comments at 14.
[112] *Id.* at 12.
[113] *Id.* at 20.

through limitations similar to those entailed by TLS. Similarly, Verimatrix's proposals for device certification[114] and authentication[115] assume the necessity of a digital certificate with a private component, which would preclude use of downloadable software apps as a client.

C. Current Security Technologies For Network and Home Interfaces Provide The Same Degree Of Security As Those Proposed in the NPRM.

The security technologies required by the NPRM are in widespread use or in development. But, based on incorrect assumptions, the Content Companies falsely assert that a new "content distribution ecosystem" would be required, through action by open standards bodies, requiring management by a new trust authority.[116] The Content Companies likewise wrongly claim that this new regime would lack compliance and robustness rules.[117] And, contrary to MPAA's arguments, effective revocation would not need to occur on a universal, rather than a device- or model-specific, basis.[118]

Comcast claims that RAND terms would limit its options and that gaps would emerge in the "chain of trust."[119] Claims that proprietary app security is superior, DRM vendors would be limited, and that asset security would depend on "respect for metadata" are incorrect.[120] The Commission should discount complaints of lack of a "trusted execution environment" and claims that any authentication and audit trail would be lacking.[121] AT&T and MPAA dismiss DTCP as a solution in some circumstances, but TIA affirms that it is an option. Overall, the NPRM

[114] *Id.*
[115] *Id.* at 23.
[116] Content Companies Comments at 21.
[117] *Id.* at 23.
[118] MPAA Comments at 22-23.
[119] Werner Declaration at 9 - 10.
[120] Skjei Declaration at 37.
[121] *Id.* at 6, 10-14. Skjei goes on to claim that a NIST Cybersecurity "inventory" would be necessary. *See* Skjei Declaration at 37. This suggestion is orthogonal to the issues at hand.

provides a lot of flexibility with MVPDs choosing a Compliant Security System and sufficient options currently exist and are in widespread use that would meet the necessary requirements.

i. A compliant security system should support renewability, revocation, and secure software updates.

A Compliant Security System should support renewability, revocation, and secure software updates.[122] In general, only Navigable Services need be exposed to competitive devices. However, with respect to Service Discovery Data, addition of the phrase of "can be authenticated"[123] would be overly restrictive; it would require application-level authentication for downloadable software applications, which cannot be done securely.[124] It also is not necessary that Content Delivery Data be encoded by a Common Encryption Standard in all cases for content transport.[125]

ix. Proposed security technologies are already in use.

MVPDs use security systems approved by the content companies. Today, many MVPDs employ DRM technologies (such as Widevine and PlayReady) to distribute content to various apps running on consumer devices. Content companies use the same DRM systems in their own apps or websites. While the Content Companies and MPAA argue that DTCP may be insufficient, its use is approved by CableLabs and MovieLabs, and it is the protection technology

[122] Verimatrix Comments at 10.
[123] *Id.* at 12.
[124] This observation about security does not apply to the security of a content protection system, which can be secured as part of a platform, separate from the downloadable software apps.
[125] While Common Encryption has useful applications, neither VidiPath nor RVU has required that their implementations of DTCP-IP enable it, although it would not be difficult.

used in Vidipath and RVU. Moreover, further adaptations of DTCP would meet future needs, including secure cloud end-to-end distribution and protection.[126]

x. Renewal or revocation will continue to occur on a device- or model- specific basis.

Certificate revocation and renewal are common tools to ensure the effectiveness of security technologies. If there is a breach in a content security system that is specific to a single MVPD, that MVPD can address it at the server end. The overall root of trust to that security system would not be revoked. Security technology licenses require and contain tools to address breaches on model- and device-specific bases, through certification renewal and revocation.

xi. No security gaps need be created in the chain of trust.

A "trusted application execution environment" is not needed to secure content. Content security is easily maintained with a "trusted execution environment" for the component that handles the content itself. This is a core component of chipsets utilized for protected content handling in current retail devices. The trust environment does not need to be extended all the way up to the application level. Hence, there is no "gap" created when this is not required. Present retail devices including Android, iOS, Roku and various SmartTV platforms maintain security at the level of the video/audio decryption, decoding, and output subsystems that provide application execution environments to third-party applications, yet maintain proper protection and output requirements on the protected content that they handle.

Cable MVPDs, through CableLabs, approve DTCP-IP in DFAST Compliance and Robustness rules. DTCP-IP provides automatic authorization to any device with a DTCP-IP

[126] TIA Comments at 5-6 (explaining that the DTLA "works with copyright holders to evaluate whether another output or recording protection technology provides technological and license protections that are at least as stringent as those for DTCP to assure that each link in the chain of protection is sufficiently robust against unauthorized interception, retransmission, or copying. The DTLA is developing 'DTCP-HE,' which will provide robust content protection delivered from a service provider's cloud server to a subscriber's client device.").

certificate on the same local network (via TTL and RTT restrictions). MVPDs also use web-based authentication to provide authorizations to access content via TV Everywhere services and their own applications. The same techniques are outlined in the CVCC Technical Appendix as a consistent and secure support for the three flows.

The "apps" themselves are not a part of the security regime.[127] While apps interact with video displays and output and audio controls, they do not handle output protection settings. This is part of the trusted DRM component as it operates, for example, with respect to the application platform. There is a clear separation in these systems between the application layer and the lower-level platform components that handle DRM and content protection. Complaints[128] that there is no "trusted environment" for proprietary and unique elements unrelated to the program or security miss the point. The Navigable Services requiring protection (remaining subject to consumer protection and accessibility requirements) are linear and on-demand programming.[129]

xii. Relevant licenses already contain the same Compliance and Robustness rules that apply to content received by leased devices.

Security technologies employed by MVPDs have their own trust requirements that apply as content is passed on to and through the home network. As the NPRM notes, in the retail device context, this system has successfully supported CableCARD-reliant devices. It is also how secure media handling, DRM protection, and output subsystems are secured in the Android and iOS environments. In these contexts, the MVPD sets the security rules, which are carried forward as required by the technology license. Such licenses would not provide less security

[127] Skjei Declaration at 6.
[128] *Id.* at 10-11.
[129] To the extent it may be technically possible to interfere with the delivery of MVPD advertising, such interference also should be constrained.

when offered on a RAND basis. Furthermore, there is no evidence that such licenses have been less secure.

D. App Parity Will Enable Innovation.

The server component of app development is generally not platform dependent.[130] A RAND-licensed DRM solution is not required for proprietary and competitive apps,[131] and available security solutions would not be software-only.[132] MVPDs would not be impaired by losing a "trusted application execution environment"[133] in moving to a "boxless" solution.[134]

APIs in the context of the three flows are done at a network level. The client devices employ IP networking; thus, those APIs should be common. The client software running on the different platforms abstracts the differences between platforms such as iOS and Android. MVPDs would provide the three information flows through software implemented on a server, which can then be accessed by an arbitrary platform on the client side. Supporting an app on an additional platform would not change anything about the three information flows as supported by the MVPD's. Use of platform-independent network-level APIs both aid a competitive solution and help an MVPD's proprietary apps reach additional platforms.

Apps receiving the three flows need not utilize a software-based protection system. Various Android implementations provide clear examples in which software apps can be built on top of an open system that has a hardware root of trust and protected video paths that have hardware-level content protection. The proposed rules also would not require an MVPD to use a RAND DRM in its proprietary apps. The rules only would require that a RAND DRM be

[130] Werner Declaration at 7-8.
[131] Skjei Declaration at 34.
[132] Dulac Declaration ¶ 35.
[133] Skjei Declaration at 30.
[134] *Id.* at 33.

available for third-party devices. Given the availability of Common Encryption (CENC), this does not even require the MVPD to store multiple encoded copies of the same content. As discussed above,[135] predictions of greater bandwidth usage are also meritless.

MVPDs' innovation is not impeded by app parity. Proprietary or competitive apps do not need to be any less extensible to new formats and codecs.[136] The three flows enable access to content and its associated metadata and do not relate to specific "features" an MVPD would like to add. Resolutions are easily signaled within the content itself with no changes or new standards necessary. Signaling a new format or codec such as HEVC, once identified, is not difficult. Existing technologies, such as VidiPath, deal with identical issues.

E. Competitive Device Technologies Would Comply With Existing Accessibility Obligations.

Competitive devices would enable closed captioning, "talking guides," video description, and availability of accessible emergency information. Not only are these features legally required for competitive devices, but the rules are even stronger than those for MVPD-leased devices.

i. MVPDs do not have an obligation to monitor and verify caption display.

Skjei suggests that MVPDs must have a "technical means to monitor" closed caption decode and display functionality.[137] He suggests that MVPDs want to verify that "captions are being presented as required by the rules,"[138] and that customers can "customize" the caption display.[139] To the contrary, MVPDs are not legally required to monitor and verify captioning

[135] *See* Section IV.A.4.
[136] Comcast Comments at 69.
[137] Skjei Declaration at 18.
[138] *Id.*
[139] *Id.*

performance of devices outside of their control. MVPDs are required only to deliver "closed captioning data intact in a format that can be recovered and displayed,"[140] and to "maintain and monitor their equipment … to ensure that the captioning … reaches the consumer intact."[141] Conversely, existing law and rules require that "all digital apparatus designed to receive or play back [television]" (including competitive navigation devices) be capable of decoding closed captioning.[142]

xiii. Captions would appear on programming on competitive devices as required.

A user could watch captioned programming on either a leased or a competitive device. Skjei asserts that competitive devices could offer both MVPD and over-the-top ("OTT") programming side-by-side, even when the OTT programming competing with the MVPD's programming is not captioned (when it is not required to be).[143] When a consumer who requires or prefers captions, is presented with this situation, she will opt to watch the program with the captions. Nothing in the proposed rules impairs this. Existing rules describe what programming must be captioned[144] and competitive navigation devices would decode and display captions consistent with the rules.[145]

xiv. Talking Guides do not require a trusted execution environment.

[140] 47 CFR § 79.1(c)(1).
[141] *Id.* § 79.1(c)(2).
[142] 47 CFR § 79.103(a).
[143] Skjei Declaration at 18.
[144] *See* 47 CFR § 79.4(b); *see also Notice of Effective Date of Rules Governing Closed Captioning of IP-Delivered Video Clips*, Public Notice, DA-14-1141, MB Docket No. 11-154 (rel. Aug. 6, 2014); *In the Matter of Closed Captioning of Internet Protocol-Delivered Video Programming*, Second Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 8687 (2014).
[145] 47 CFR § 79.103(a).

The "talking guide" rules for MVPDs do not require "access to a trusted application execution environment."[146] Section 79.108 requires *both* manufacturers of devices "purchased by consumers" and those leased by MVPDs to provide the same "talking guide" features.[147] The rulemaking would require that certain guide data be provided that enables competitive navigation devices, for example, to audibly present "on-screen text menus and guides."[148] But, there is no requirement that an MVPD replace the "talking guide" feature of a retail device that furnishes its own guide, and no need for the trusted application execution environment.[149]

xv. Video description and emergency information would be supported.

Competitive devices would provide features included in the secondary audio stream. Section 79.105 of the Commission's rules requires that "all apparatus … have the capability to decode and make available the secondary audio stream."[150] Section 79.106 includes a similar requirement, limited to *recording* devices, which "must enable the presentation or the pass through of the secondary audio stream".[151] Thus, competitive devices would support video description and Emergency Information ("EI") transmitted in the secondary audio stream.[152]

xvi. CVAA obligations on competitive devices exceed or equal obligations on MVPD-supplied devices.

The Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA") directed the Commission to adopt rules for "digital apparatus"[153] and "navigation

[146] Skjei Declaration at 19.
[147] 47 CFR § 79.108(a)(1).
[148] *See* NPRM at 48; *see also* 47 CFR § 79.108(a)(1).
[149] Indeed, there is no need for *any* execution environment for program guide presentation.
[150] 47 CFR § 79.105(a).
[151] 47 CFR § 79.106(b) (describing the obligation of *recording devices*).
[152] Id. at 19.
[153] Pub. L. 111-260, 124 Stat. 2773, Sec. 204.

devices."[154] Fundamentally, devices sold on the open market as digital apparatus must have an accessible user interface (and other features) *at all times*,[155] whereas "navigation devices" must have an accessible user interface (and other features) *upon request*.[156] Thus, MVPDs must implement accessibility features only when a subscriber requests a device with those features, rather than on every leased device.[157] But "digital apparatus" sold on the open market always must implement accessibility features.[158] No matter how the FCC ultimately defines "navigation devices,"[159] CVAA accessibility requirements for competitive navigation devices always equal or exceed the requirements imposed upon MVPDs.

F. Further Standardization Should Not Be Difficult Or Time-Consuming.

Standards development to enable competitive navigation devices could occur on an expeditious basis. DLNA estimates that standards acceptance would take almost twice as long as the Commission would allow for in the NPRM.[160] The three flows described in the NPRM, however, are consistent with existing DLNA guidelines. Any necessary testing or certification for this aspect of the technology would be easier than programs referenced by DLNA to derive its estimate of 36 months, plus-or-minus a year, for standards setting. Based on DLNA's experience, the timeframe posited by the FCC requirement seems not only appropriate, but conservative.

Development of VidiPath was much more complicated than would be necessary for the NPRM's approach. VidiPath included specifying a remote user interface mechanism, and

[154] Pub. L. 111-260, 124 Stat. 2773, Sec. 205.
[155] 47 CFR § 79.107.
[156] *Id.* § 79.108.
[157] *Id.* § 79.108(a)(1).
[158] *Id.* § 79.107(a)(1).
[159] NPRM at 24.
[160] DLNA Comments at 1-3.

identifying and developing a process to issue trusted cryptographic certificates used by a server to verify that the client had implemented the remote user interface. The technology in the CVCC's Technical Appendix is much simpler to standardize, building upon available DLNA specifications. VidiPath development also included drawn-out discussions of desired CVP-2 features. No such discussions are necessary for the proposed rules.

VI. COMPETITIVE NAVIGATION DEVICES DO NOT JEOPARDIZE COPYRIGHT.

A. Concerns About Programming Are Actually Concerns About Enabling Competition.

Some MVPDs understand that a more competitive market for navigation devices would improve their services and save them money, and some programmers welcome a world where fewer barriers stand between creators and viewers. For other MVPDs, however, competition in navigation devices jeopardizes control of revenues from set-top box leases. And, some programmers do not welcome the prospect of consumers being able to more easily access new online video competitors. These critics of the proposed rules would rather the FCC simply do nothing and leave the market controlled by MVPDs. With them, there is little room for compromise.

On the other hand, some commenters have offered constructive critique about unanswered questions due to the Commission's deliberate decision to avoid imposing specific tech mandates, or issues of concern to them. Without endorsing any specific criticism, the Coalition notes that the notice and comment process is intended to help the Commission identify and, if need be, address just these types of issues.

For example, Verizon wants the Commission to ensure that consumers receive their full MVPD service and that competitive apps or devices do not "disrupt elements of the MVPD's programming content and/or presentation of that content."[161] Verizon provides elaborates that:

> [T]he potential ... exists for third-party navigation devices to modify or disrupt important elements of an MVPD's programming service presentation, such as overwriting the advertising that MVPDs insert to help fund the service, degrading video quality, obscuring or displacing independent or diverse programming, or not delivering PEG programming to consumers. MVPDs also use channel placement to benefit and protect their subscribers' interests, e.g., not placing child-friendly video-on-demand channels next to adult programming channels, and they may have contractual obligations to content providers about how content is positioned within the channel line-up.[162]

Verizon use of the word "presentation" does not refer to every element of a competitive device and how it displays programming, but to more narrow concerns related to the integrity of programming itself. It wants to be sure that customers simply get the MVPD package they pay for, that the channel line-up be respected, and that competitors do not somehow interfere with a programmer's ability to show advertisements.

The NAB raises similar points. Among other things, it asks the FCC to "hold that broadcaster advertising and other promotional matter may not be altered, replaced or sold against by navigation devices absent a separate agreement with a television broadcast station" and to "specify that 'channel information' must include a station's negotiated channel position, neighborhood and/or tier...."[163] Although such interference seems unlikely,[164] as we indicate in Section IV.A. above, the Coalition would not oppose reasonable provisions securing core

[161] Verizon Comments at 3.
[162] *Id.* at 7-8.
[163] NAB Comments at 3.
[164] *See* TiVo Comments at 29 – 30.

Navigable Service programming and information, including, and subject to consumer volition, maintaining advertising prior to rendering or storage.

Channel Line-Up

Any device technically capable of displaying to consumers an MVPD's channel line-up of programming could be required to do so, with the channels in their numerical position. This should not be the *only* way, however, that competitive apps and devices can display MVPD programming, just as MVPD devices themselves have search features and integrate MVPD programming with other content. For instance, a competitive app or device should not be barred from displaying only family-friendly content.

Blocking of Programming

Consumers should be able to determine what programming is available on their devices, and they should be able to purchase devices or apps that, by default, filter out programming they find objectionable. With those caveats, the Commission could require competitive apps and devices to make all MVPD channels to which a viewer subscribes available to them.

Integrity of Programming

Consumers should have the right to interact with programming as they see fit. They may want to use on-screen apps in conjunction with watching a TV show (e.g., to view show-related tweets). They may want to watch multiple programs at once or have a program showing as a picture-in-picture. They may want to see a live preview of a channel in a program guide before switching to it. For there to be a truly competitive marketplace, competitive apps and devices should be able to offer consumers these kinds of features.

Some programmers have expressed concern that competitive apps and devices would have the technical ability to overlay ads on top of MVPD programming or even to replace live ads wholesale. While these are unlikely hypotheticals, it would not be inconsistent with the Commission's goals for it to specify that competitive apps or devices should not interfere with advertisements on live programming, replace programmer advertisements with their own, or overlay advertisements on top of programming without user interaction when the viewer is watching a program. The Commission, however, should not seek to prevent competitive apps or devices from offering viewers features already available on MVPD-leased devices, such as the ability to skip or fast-forward through advertisements on *recorded* programming or insertion of advertisements into the user interface separate from the video stream.

* * *

The Commission should be open to ways to assure programmers and MVPDs that competitive apps and devices would simply give customers more options to access their programming and services. If necessary, the Commission could require third-party devices to present a subscriber's complete MVPD programming package, that programs be presented with integrity, and that a channel guide of MVPD programming be available to viewers as an option in the user interface. The Commission should resist calls, however, to regulate the design and features of competitive apps and devices, insert itself into how consumer electronics companies run their app stores, or require that certain programming be promoted over other programming in the recommendation and search functions of competitive devices and apps. Consumer demand and competition, however, should guide the precise contours of what a competitive app and device market would look like.

B. Competitive Devices Do Not Jeopardize Rights Conferred Under Copyright Law.

Alleged "copyright arguments" against the proposed rules are factually or conceptually mistaken. For example, the MPAA wrongly claims that the proposed rules are "tantamount to granting third parties a zero-rate compulsory copyright license" for copyrighted programming.[165] Competitive devices and apps, however, do not touch any of the exclusive rights granted to copyright holders under Section 106 of the Copyright Act; specifically, they do not distribute or publicly perform copyrighted works.[166] Below, we debunk similar misconceptions.

i. The FCC Cannot Rewrite Copyright Law.

Arguments that the proposed rules would "force distributors who have paid for the right to disseminate content through their own platforms to make their content streams available to non-paying third parties who can then repackage and stream the content to their users"[167] misunderstand the distinction between services and devices. The proposed rules allow users who have paid for MVPD programming to watch it using the device of their choice. They do not allow third parties to "repackage and stream" programming, or to "disaggregate" it. This is distinct from allowing third parties to "distribute" or publicly perform programming in a way that may implicate copyright. Under the proposed rules, MVPDs, who actually distribute copyrighted programming, will still pay programmers for that privilege.

A device that facilitates the rendering, display, or viewing of programming does not violate creators' rights. Manufacturers of FM radios do not obtain licenses from ASCAP and

[165] MPAA Comments at i, 8-9.

[166] Some competitive devices may offer DVR functionality. While this involves reproduction, it is not an infringement. Courts have repeatedly held that home recording is a fair use. *See, e.g.*, *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984); *Fox Broad. v. Dish Network*, 723 F. 3d 1067 (9th Cir. 2013). "[T]he fair use of a copyrighted work … is not an infringement of copyright." 17 U.S.C. § 107. *See also Lenz v. Universal Music Corp.*, 801 F. 3d 1126, 1132-33 (9th Cir. 2015) (fair use is permitted by law, not an "affirmative defense that excuses conduct.").

[167] Copyright Alliance Comments at 12.

BMI; radio stations and public fora do. MVPDs, not television set or CableCARD device manufacturers, negotiate with programmers for rights to distribute content. Manufacturers of mobile phones or web browser developers do not negotiate with each website they can access, or with the creators of all media they display. In market after market, the distinction between distribution (which calls for a license) and rendering is crystal clear. Consumer device choice has not impeded creators' ability to negotiate with actual distributors. By attempting to eliminate the distinction between viewing and distribution, the Copyright Alliance and others supporting its view are supposing that makers of end-user devices must negotiate directly with programmers before they can allow subscribers to watch MVPD programming to which they have subscribed. The FCC lacks authority to radically change copyright law this way.

Users have the right to view content as they wish – and to obtain devices and apps that allow them to do so. Viewers should be able to use technology to filter out offensive content, to set "favorites," or to search shows by genre. They should be able to compare and search across offerings from different services. None of these actions implicates copyright. A device or app maker is not distributing, reproducing, or publicly performing copyrighted programming when it is simply providing viewers with the ability to find, compare, and view programming. Copyright is important, and very powerful, which is why the Commission should resist arguments that transform it from a set of statutorily-defined exclusive rights to one that grants major programmers and MVPDs the right to control every aspect of how viewers discover and view programming.

ii. Specific Contractual Terms Are Not the Same as "Copyright."

Changes to how the MVPD marketplace works do not automatically violate copyright because certain licensing terms may become moot or unnecessary. The Commission's proposal could change the legal and factual landscape to some extent. But, a copyright holder's exclusive rights under Section 106 of the Copyright Act do not include a right of absolute control over the manner in which a viewer accesses programming. Moreover, a copyright holder cannot change the legal or factual backdrop in which it operates simply by conditioning its licensing of rights it does have. Finally, the proposed rules do not affect the tiering of content by MVPDs, bundles, the rates paid by MVPDs to programmers, and other matters regarding MVPDs' and programmers' relationships

Presently a major programmer may negotiate with a cable TV provider for preferential treatment on its set-top box. The programmer's offerings might appear as recommendations over content more suited to viewers' interests or be given priority in search results. Cable MVPDs, of course, cannot guarantee that consumers will see these kinds of promotions. CableCARD devices allow manufacturers and subscribers to customize the user experience, irrespective of contracts between programmers and MVPDs that demand special placement. Non-cable MVPDs, who have tighter control over the end-user experience, currently could give some programmers preferential treatment on the device that all their subscribers use. The FCC's proposal allows devices to offer distinct user interfaces and does not require that competitive devices give some programming preferential treatment.

However, this is the status quo today. Competitive CableCARD devices already exist and offer differentiated user experiences that neither programmers nor MVPDs control. More fundamentally, the fact that a programmer and MVPD could agree between themselves that they

would like the marketplace or law to be a particular way does not confer upon them the authority to bring it about via private contracts or as license conditions. Privately-negotiated agreements also do not supersede FCC rules. For instance, if a studio demanded that a movie theater turn off its emergency exit signs during a film as part of its license to the theater, the theater could not legally comply. This is not an abrogation of the studio's copyright. Likewise, while the FCC's rules could change the factual backdrop to negotiation, it would not expand or remove a programmer's right to negotiate or eliminate its exclusive rights under the Copyright Act. An MVPD cannot agree to legally impossible contractual provisions, such as refusing to provide certain programming to competitive set-top boxes. Nor could an MVPD agree with a programmer to block emergency alerts or to display programming only on ACME brand televisions. Under the proposed rules, an MVPD would not be able to specify to programmers in advance the precise manner in which its content will be displayed, because competitive devices and apps would offer distinct user experiences.

Programmers or MVPDs could request that certain requirements relating to channel positioning or live ads be placed on competitive apps or devices. The best way for the Commission to address these issues is with consistent rules that apply to all MVPDs and programmers--not by requiring and unworkable system where specific contractual terms vary from MVPD to MVPD, from programmer to programmer, and over time are passed along to third parties not party to the contract or license. This is particularly true insofar as opponents of device and app competition could place terms into agreements to make competitive navigation devices ineffective. Instead, to the extent that the Commission wants to provide certain assurances to programmers, broadcasters, or MVPDs, it should promote sensible rules. For

instance, it could require that competitive devices and apps, where technically feasible, offer consumers the option to explore the MVPD channel line-up in its MVPD-determined, numerical order.

iii. Familiar and Established Copyright Protection Technologies Would Be Used In The Competitive Navigation Device Market.

Piracy of cable content would not increase due to the proposed rules. For example, Creative Future argues that the rules would force programmers and MVPDs to "use 'least common denominator' digital rights management technologies that may be less robust than those already used in the marketplace."[168] The proposed rules, however, would allow MVPDs to continue using the same content protection technologies already used in their own devices.[169] Indeed, with respect to content protection technology, the proposed rules are not materially different from the CableCARD regime. Unless commenters can adequately explain why technologies that already widely-deployed are inadequate, claims that the proposed rules would facilitate piracy of MVPD content should be disregarded.

iv. Creators Would Enjoy Similar Copyright Protections As With CableCARD.

Attempt to distinguish CableCARD from the proposed rules for the purposes of copyright fall flat. For example, the MPAA claims that "[t]he CableCARD is a unidirectional solution that facilitates security functionality so a third party device can render the subscriber's MVPD service. The CableCard regime is not a two-way, Internet-based solution that facilitates manipulation of content so device or application providers can offer a different service from the one the subscribers obtain from their MVPD."[170] Nearly every phrase underlined in MPAA's

[168] Creative Future Comments at 7.
[169] *See* CVCC Comments at 38.
[170] MPAA Comments at ii-iii.

filing demonstrates a misunderstanding of the technology and the proposed rules. CableCARDs are two-way appliances, but retail devices are presently not allowed by license to connect to the pins that enable upstream communication. All this means is that where retail device upstream communication *is* allowed to request Video On Demand programming, as it is on several systems today, it is enabled by other means.[171] How this relates to potential copyright infringement is unclear. The proposed rules would facilitate third-party apps, as well as devices, and would enable consumers to avoid needing a separate "box" solely devoted to watching MVPD programming--a goal shared even by opponents of the rulemaking such as Commissioner Pai.

CableCARD, *like the FCC's current proposal*, simply allows third-party devices to "render" MVPD service. After the CableCARD provides proper authentication, the programming is decrypted by the CableCARD and made available to the device for rendering, storage, or sharing on the home network to the extent permitted by Compliance and Robustness rules. The device must comport with these Compliance and Robustness rules, according to license. The device, however, can integrate online content and present custom user interfaces and differentiated features, such as advanced DVR and home recording options. "Manipulation of content" would not be enabled in a competitive device any more than it would be in a CableCARD device.

The proposed rules are not "Internet-based" as MPAA claims. Rather, the proposal is that MVPDs provide access to their services, as delivered over their existing specialized video delivery networks, not over the Internet. The best way for devices and apps to talk to each other

[171] For example, TiVo devices operating on Comcast and some other systems that enable two-way communication convey user requests for on-demand programming through "out of band" signaling over the Internet because CableLabs specifications and licensing preclude connection to the CableCARD pins provided for that purpose.

within a consumer's home involves use of Internet Protocol, but use of the Internet Protocol does not mean programming is being delivered over the "Internet." Just as consumers can subscribe to cable service today without a broadband connection, consumers could take advantage of competitive navigation devices without a broadband connection. While devices may work better with broadband connectivity to retrieve the weather and sports scores or to give viewers access to online programming, this does not open up MVPD services to some kind of novel "Internet" distribution. The only scenario discussed in the NPRM where the programming is delivered over the Internet is with regard to parity with MVPD apps that currently receive programming delivered over the Internet. This does not add a new type of Internet delivery to the content; it merely uses what already exists.

Third party consumer electronics and software could not create "new services" in the sense being implied. They do not distribute or publicly perform programming, but merely allow viewers to watch programming for which they are already paying from their MVPD service. MPAA's reasoning would redefine television sets, speakers, mobile devices, and radios as "services." While services can be tied to devices and apps, devices and apps themselves are not services. The MPAA's attempt to invent a distinction between the proposed rules and the established and uncontroversial CableCARD system by creating a new definition of "service" has no support in the law, the dictionary, or common sense.

CableCARD devices today are not limited to providing programming just on one "device." CableCARD "gateway" devices can make cable programming available to various devices on a customer's home IP network, without the need for a separate CableCARD installed

in each viewing device.[172] The proposed rules do not fundamentally permit things not already technologically and legally possible with CableCARD. Rather, it is CableCARD done right.

v. The FCC's Proposal Will Discourage Piracy.

Open devices and competitive device and app markets do not "encourage" piracy. The proposed rules would not "allow technology and platform providers and pirate box manufacturers to import the piracy problem into the pay-TV services environment for the first time. . ."[173] Competitive devices would be of interest only to paying MVPD subscribers; competitive app and device makers have no incentives to promote piracy.

A purchaser of a competitive device is unlikely to turn to unlawful sources, because this person, by definition, is an MVPD subscriber. As long as lawful content is convenient and available, users are likely to seek out lawful sources. Piracy will be less likely, because lawful content will be more accessible and convenient to MVPD subscribers. The potential for piracy also will be less common among non-MVPD subscribers, who will have new reasons to purchase MVPD services. Many customers would be more interested in paying for compelling programming often available only through MVPDs if they could use devices and apps of their choice.[174] Thus, even if a competitive navigation market could somehow enable piracy, competitive app and device users have fewer reasons to engage in piracy than nearly any other types of TV viewer.

Piracy is not rampant on Internet-connected TV devices today. No "pirate box" would meet the Compliance and Robustness license requirements necessary to obtain secured content, and nothing in the NPRM would enable it to do so, technologically or legally. Innovations from

[172] See e.g., SiliconDust's HD HomeRun PRIME, https://www.silicondust.com/products/hdhomerun/prime/.
[173] Creative Future Comments at 8.
[174] *See generally* Comments of the Consumer Video Choice Coalition, MB Docket No. 15-64 (filed Oct. 8, 2015).

companies like Apple, Sony, Microsoft, Nvidia, and Amazon comprise the vast majority of the TV-connected market today and offer no such "pirate-oriented features." Furthermore, competitive apps and devices would be part of the MVPD ecosystem. Their success is intertwined with the success of MVPD services, giving them no incentive to undermine the MVPD ecosystem.

VII. CONSUMER PRIVACY WILL BE PROTECTED AND ENFORCED.

Consumer privacy protections likely will be bolstered under the proposed rules.[175] A competitive navigation device market gives consumers greater choice among device manufacturers' privacy practices and records, and navigation device manufacturers have strong incentives to compete on privacy excellence.[176] Moreover, competitive navigation devices are and will continue to be subject to federal and state laws and enforcement.[177] Numerous commenters — including groups protective of consumer privacy such as Public Knowledge and the Electronic Frontier Foundation — agree that privacy protections would remain intact.[178]

Most importantly, the Federal Trade Commission — the primary federal agency tasked with protecting consumers' privacy — weighed in with clear instructions on how to ensure that

[175] CVCC Comments at 44-46.

[176] *See id.* at 44; *see also* Public Knowledge Comments at 32-33 ("[C]ompetition alone can help provide more privacy-conscious alternatives for viewer. While the Commission must ensure a baseline of privacy protection that applies to all apps and devices, a competitive market will present consumers with a variety of different choices, some of which may have stricter controls on the collection and use of viewing data, than MVPD customers have access to now."); Consumer Federation of America Comments at 13 ("[A] competitive marketplace that unbundles the set-top box devices might develop competition around privacy. Privacy is a shrouded attribute of the bundle of services and network operators have a stronger incentive to hide it than an independent, third-party provider."); Google Comments at 8 ("As more options for content discovery and selection become available, moreover, consumers will be able to choose an application or device based on a business's privacy policy and its track record for good privacy practices, among other considerations.").

[177] CVCC Comments at 44-45; Public Knowledge Comments at 33; TiVo Comments at 25-28; Google Comments at 5-8; INCOMPAS Comments at 23.

[178] Public Knowledge Comments at 30-36; Electronic Frontier Foundation Comments at 5-6; Consumer Federation of America Comments at 12-13; Google Comments at 5-8; Amazon Comments at 7-8; INCOMPAS Comments at 22-23; CCIA Comments at 25-28.

retail navigation device manufacturers are subject to the FTC's jurisdiction.[179] The FTC outlined its extensive experience and record of online privacy enforcement.[180] It also explained how retail navigation device manufacturers and developers could be required to make enforceable consumer-facing statements certifying compliance with obligations to protect consumer privacy.[181] The FTC stands ready to ensure that manufacturers abide by their commitments to consumers.

Opponents of the rulemaking argue that retail navigation devices would not be subject to consumer privacy requirements, and attempt to muddy the waters by decrying some past practices of some Internet companies.[182] Apart from demonstrating that these companies are in fact subject to enforcement, the examples cited merely attempt to draw attention away from the MVPDs' own privacy practices. MVPDs are no strangers to collecting huge amounts of consumer data, which they use and monetize in a variety of ways.[183] As noted by Public Knowledge, the "Wall Street Journal recently reported that 'Comcast is seeking to harness viewing data from the set-top boxes and streaming apps used by millions of cable-TV subscribers to create products it can license to other companies.'"[184] Public Knowledge also observed that six of the largest cable TV operators had formed a joint venture to combine data gathered from proprietary set-top boxes with web usage data, and that MVPDs license data to

[179] Letter from Jessica L. Rich, Director, Bureau of Consumer Protection, Federal Trade Commission, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Apr. 22, 2016) ("FTC Comment").
[180] *Id.* at 3-4.
[181] *Id.* at 5-6.
[182] NCTA Comments at 82-85; AT&T Comments at 48-53; Comcast Comments at 94-97.
[183] Public Knowledge Comments at 30-32; TiVo Comments at 29-30.
[184] Public Knowledge Comments at 30-31 (citing Shalini Ramachandran and Suzanne Vranica, *Comcast Seeks To Harness Trove of TV Data*, Wall Street Journal (Oct. 20, 2015), http://www.wsj.com/articles/comcast-seeks-toharness-trove-of-tv-data-1445333401.

third parties specializing in targeted advertising by combining TV viewing data with information from, for example, retail loyalty cards.[185]

A recent Center for Digital Democracy ("CDD") report details MVPDs' use of subscriber viewing data for targeted advertising, combining information gathered from set-top boxes with details gathered from online and offline sources to create more comprehensive dataset about consumers.[186] One of the several examples cited is AT&T's practices:

> "Data is at the heart" of AdWorks, the Big Data-enabled ad division of AT&T that claims to have "the industry's foremost targeting platform." The AdWorks system enables marketers to "reach your audience everywhere they watch on every screen," spanning "130 million US customer connections across TV, Internet and mobile." Moving beyond what it says is the "largest TV subscriber base, with over 26 million households nationwide," AT&T is expanding its ability to use data to reach consumers across devices, including video content "accessed on smartphones, tablets, desktop computers and connected devices." Its data targeting system involves the use of its "100% IPTV" platform, which enables significant data collection and audience-targeting capabilities for advertising. AT&T AdWorks has also developed a "cross-screen system to match users' mobile, online and television devices together based on identifiers and systems" that the company has "access to." It operates a "consumer insights platform" that uses "Big-Data" techniques to advance AT&T's targeted-marketing objectives.[187]

Because MVPDs are typically also broadband ISPs and even wireless phone and Internet providers, their ability to collect consumer data across platforms and devices is second to none.[188] Indeed, AT&T was recently granted a patent for a method of collecting and associating a variety of personal data ranging from medical and financial records to location information

[185] Public Knowledge Comments at 31-32 (citing Steven Perlberg, *Targeted Ads? TV Can Do That Now Too*, Wall Street Journal (Nov. 20, 2014), http://www.wsj.com/articles/targeted-ads-tv-can-do-that-now-too-1416506504).

[186] Center for Digital Democracy, *Big Data is Watching: Growing Digital Data Surveillance of Consumers by ISPs and Other Leading Video Providers*, Mar. 2016, *available at* https://www.democraticmedia.org/sites/default/files/field/public-files/2016/ispbigdatamarch2016.pdf.

[187] *Id.* at 4-5 (citations omitted).

[188] *Id.* at 3.

gathered from a phone's GPS capability.[189] Given all of these examples of their own data collection, analysis, and use for targeted advertising, it is strange for AT&T, Comcast, and other large MVPDs to warn against others' privacy practices. If anything, the MVPDs' overwhelming opposition to providing consumers with choices in how they access MVPD services makes more sense when understood as an effort to safeguard these comprehensive big data gathering plans.[190]

Opponents of competition also argue that by passing through the three information flows to competitive set-top boxes, MVPDs would violate Section 631 (for cable operators) or Section 338 (for satellite providers).[191] As discussed above, third-party navigation device providers would be subject to FTC jurisdiction and enforcement through requirements, as a condition to receiving the MVPD three information flows, to make a consumer-facing certification to comply with privacy protection obligations — for example, the requirements to protect consumer data found in Sections 631 and 338. Moreover, under the FTC's proposed approach, MVPDs would not be required to monitor third parties' privacy practices. MVPDs would simply verify that the competitive navigation device certified its compliance, leaving enforcement of the privacy protections to the FTC. Finally, MVPDs would not violate Sections 631 and/or 338 because MVPDs only would pass through the information flows for subscribers choosing to use competitive navigation devices. In other words, subscribers would opt to use a third-party device, and it would be a trivial matter to obtain prior subscriber consent as part of the device authentication process when the subscriber chooses to use a retail navigation device to access her MVPD subscription.

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[189] Philip Swann, *AT&T May Be Collecting Your Most Personal Data*, May 15, 2016, *at* http://tvpredictions.com/att051516.htm.

[190] *Cf.* NPRM at 9, ¶ 15 (seeking comment on MVPD incentives to protect their profits derived from controlling the user interface and collecting consumer data).

[191] Comcast Comments at 94; NCTA Comments at 40.

Protection of consumer privacy is likely to be stronger under the proposed rules than today. Consumers would have a choice among providers and be able to compare privacy practices — giving providers an incentive to compete on such a basis. Retail navigation device manufacturers and developers would be subject to the same substantive requirements to protect consumer data, and the FTC would enforce any violations. Finally, consumers retain the most effective way to punish retail navigation device manufacturers for any privacy-related concerns — by simply not purchasing or discontinuing the use of their devices.

VIII. CONCERNS REGARDING THREATS TO MVPD ADVERTISING ARE INCORRECT OR OVERBLOWN.

Today, through the CableCARD regime, manufacturers have numerous ways to provide innovative advertisements that would make competitive navigation opponents cry foul. The silence about these practices, however, stems from the fact that none of them have come into use with CableCARDs. There is no reason to expect the practices to come to fruition under the proposed rules. If new advertising methods materialized, however, consumers finally could choose among various retail or leased navigation devices to access MVPD subscriptions. These empowered consumers almost certainly would vote with their pocketbooks against devices piling on advertisements or interrupting programming.

The proposed rules do not promote removing and replacing ads from the programming stream. While possible, this practice has not occurred with CableCARDs. For example, TiVo has offered retail navigation devices for more than a decade and has never once removed advertisements and replaced them with its own – even though the CableCARD rules and DFAST license do not prohibit the practice. If the Commission decides to attempt to assuage

programmers' concerns, it could prohibit third-party navigation devices from removing advertisements in programming streams and replacing them with their own.[192]

Other so-called "intrusive forms" of advertising, including pop-up ads or ads that frame programming content, have not materialized with CableCARD devices – probably because consumers would consider them anathema. Advertisements that interfere with TV-watching would provide an unfavorable user experience. Unlike MVPDs that bundle program delivery with a leased set-top box, third-party navigation device manufacturers would have to compete against leased devices and one another in the retail marketplace. Device manufacturers have legitimate incentives to offer consumer-friendly products that would not be pilloried in press and user reviews. To do otherwise would raise a risk of failure in the marketplace.

Finally, advertisements that do not interfere with the viewing experience, such as those in a device's start-up menu or interface or "pause ads", should not cause any alarm. Pause ads are displayed only when a user chooses to temporarily stop a program and would not interfere with the viewing experience. TiVo utilizes "pause ads" today, the vast majority of which are for network television programs seeking to expand their audience. These advertisements, thus, provide both a benefit and an opportunity for programmers.

IX. INDEPENDENT AND DIVERSE PROGRAMMERS WOULD BENEFIT FROM A COMPETITIVE NAVIGATION DEVICE MARKETPLACE.

A. Independent Programmers Could Reach A Wider Audience Through Competitive Navigation Devices.

Competitive navigation devices would create a video ecosystem where independent programmers are no longer at the mercy of MVPDs to distribute their content. MVPDs operate

[192] *See* Letter of Hauppauge counsel Robert S. Schwartz on behalf of CVCC, May 13, 2016.

as gatekeepers; without their blessing, programmers struggle to reach viewers and succeed in the video marketplace.[193] A competitive device market would offer programmers additional avenues to distribute their content. Programmers would be able to appeal to the customer directly, succeeding on the merits of their programming and ideas rather than on their ability to get a carriage deal with an MVPD. As long as MVPDs can act as gatekeepers, independent and diverse programmers will continue to struggle.[194]

Many programmers and content creators continue to rally behind the Commission's proposals. The Writers Guild of America, West, representing writers of motion pictures, television, radio, and Internet programming, opined that "rules that increase competition and enable the integration of television programming and online video on one device [would] greatly expand consumer access to a wider range of diverse and independent programming and help level the playing field that has been dominated by too few companies for too long."[195] Other stakeholders emphasize that opening the market to competitive devices and apps would lower barriers to entry for content creators and innovators alike, opening countless possibilities for programmers and consumers.[196] As one programmer explained, the proposed rules provide an opportunity to "provide our country's diverse and independent video programmers and technology entrepreneurs an open media platform that will free us from our big cable past."[197]

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[193] *See* Comments of The Townsend Group in MB Docket No. 16-42; CS Docket No. 97-80, 2 (Apr. 22, 2016) (Townsend Comments); Comments of GFNTV in MB Docket No. 16-42; CS Docket No. 97-80, 2 (Apr. 22, 2016) (GFNTV Comments) (explaining the need for a path to greater distribution for independent, online programmers).

[194] Townsend Comments at 2 ("Unless we eliminate the gatekeeper system, we will forever be just talking about how to improve markets for independent and diverse programmers.")

[195] *WGAW Supports FCC Action on TV Set-Top Box Competition* (Jan. 27, 2016), http://www.wga.org/content/default.aspx?id=6141.

[196] *See generally* Townsend Comments at 2; Comments of UnifyMe.TV in MB Docket No. 16-42; CS Docket No. 97-80, 2-4 (Apr. 22, 2016) (UnifyMe.TV Comments).

[197] Comments of New England Broadband, Inc. in MB Docket No. 16-42; CS Docket No. 97-80, 2-4 (Apr. 22, 2016) (New England Broadband Comments).

A competitive market for navigation devices benefits the video marketplace from both sides: it would be easier for new and diverse programmers to reach their target audiences, and the visibility of that content to consumers would be elevated. The increased array of competitive devices would enhance consumers' ability to search for and locate content they may not have otherwise found in incumbent gatekeepers' walled-gardens. TV One erroneously concludes that diverse programmers would be "buried, making it even harder for a viewer to come across and be exposed to TV One's programming or any other minority content, even if it is technically available on that platform."[198] To the contrary, competitive devices and apps have every incentive to present compelling content to users, and in a competitive market, no one device or platform could dictate the terms of success to any programmer. By contrast, today, MVPDs promote some content and make other content less easy to discover.[199] In short, a competitive navigation solution allows anyone to get a foot in the door, an opportunity to have their voice heard, and a chance to succeed or fail on their own merits, rather being subject to the whims of a gatekeeper. Traditional MVPDs would retain autonomy over content that they create or elect to distribute, while the universe of independent, niche, and diverse content would thrive as consumers are empowered to explore it.

B. Opening The Navigation Device Market Will Not Lead Programmers To Lose Protections Negotiated For In Contracts With MVPDs.

Navigation device competition should not be stymied because programmers do not enter into direct contracts with each end-user device manufacturer.[200] First, programmers have not

[198] *See* Comments of TV One, LLC in MB Docket No. 16-42; CS Docket No. 97-80, 14-15 (Apr. 22, 2016) (TV One Comments).
[199] *See generally* PK Comments.
[200] *See, e.g.,* TV One Comments at 18.

entered into direct contracts with navigation device manufacturers.[201] Second, MVPDs have consistently used restrictive contractual terms to make it more difficult for small programmers to succeed. Third, requiring navigation device manufacturers to enter into multiple, onerous contract negotiations or to honor contracts that may vary widely among MVPDs and programmers is simply throwing up a roadblock to competition. To create a successful competitive market, stability and scale are required, as is the ability for consumers to use the same equipment with different MVPDs. Because Congress directed the Commission to promote a competitive market in navigation devices, arguments to undermine the creation of a competitive market must be rejected.

Use of oppressive contractual terms by MVPDs with independent and diverse programmers is ubiquitous, leading to a series of well-documented harms.[202] Commenters in the Independent Programming NOI[203] revealed that one way that MVPDs limit independent programmers' abilities to reach audiences is through pervasive use of most favored nation clauses (MFNs) and alternative distribution method clauses (ADMs). Record evidence proves that contracts are used by MVPDs to leverage their market power to exclude programmers from the broader video market, not to shield programmers from harms.

The best way to ensure that programmers are protected is to not place them at the mercy of MVPDs. To achieve this, the Commission should enable competitive apps and devices to serve consumers and reach scale while respecting programmers' legitimate rights. However, a system where third parties are forced to honor specific contractual terms when they had no voice

[201] *See supra* Sec. VI.B.i.
[202] *See* Reply Comments of Public Knowledge, MB Docket No. 16-41, 3 (Feb. 18, 2016).
[203] In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41 (rel. Feb. 18, 2016).

in the negotiations is unworkable and unconscionable. This is particularly true for terms that may make it impossible for competitive navigation devices to compete.

X. ACCESSIBILITY FEATURES REQUIRED IN THE FCC'S RULES WOULD BE ENABLED BY COMPETITIVE NAVIGATION DEVICES.

Consumers using a competitive navigation device to view pay TV and other lawful video content of their choice will enjoy the full complement of accessibility features mandated in the Commission's rules. As the record reflects, competitive navigation devices are subject to Commission rules enacted pursuant to the CVAA.[204] As noted above, competitive navigation devices fall within the definition of "digital apparatus" -- devices "designed to receive or play back video programming transmitted simultaneously with sound."[205] Obligations for digital apparatus are stronger than those for MVPD-supplied "navigation devices"[206] that are "used by consumers to access multichannel video programming and other services offered over multichannel video programming systems."[207] Digital apparatus must make available an accessible user interface and other accessible features *at all times*,[208] whereas navigation devices only need to have available an accessible user interface and other accessible features *upon request*.[209] Regardless of how the FCC ultimately defines "navigation device"[210] for the purpose of rules stemming from the instant proceeding, CVAA requirements for competitive navigation devices would remain equivalent or stronger than requirements imposed upon devices leased to subscribers by MVPDs.

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[204] *See, e.g.,* Comments of Consumer Groups and DHH-RERC in MB Docket No. 16-42, CS Docket No. 97-80, at 3 (Apr. 22, 2016) ("Consumer Groups/DHH-RERC Comments").
[205] Pub. L. 111-260, 124 Stat. 2773 § 204.
[206] *Id.* § 205.
[207] 47 CFR § 76.1200(c).
[208] *Id.* § 79.107.
[209] *Id.* § 79.108.
[210] *NPRM* ¶ 24.

As the Consumer Groups and DHH-RERC note, whether or not a program contains accessibility features is critical information for consumers with disabilities when using a leased or competitive navigation device to view video content.[211] Because many consumers rely on this information when using their current set-top box, they should retain the ability to access important accessibility details when using a competitive navigation device.[212] To enable this, the Commission should adopt its proposal to include within the "Content Delivery Data" flow the "information necessary to make the Navigable Service accessible to persons with disabilities."[213] Likewise, the "Service Discovery Data" flow should include details about whether a "program has accessibility features such as closed captioning and video description."[214] For scenarios in which the MVPD lacks knowledge of the accessibility features at the Service Discovery Data level, it is acceptable to ensure that those features can be determined by introspecting the Content Delivery Data.

XI. THE FCC HAS LEGAL AUTHORITY TO IMPLEMENT THE PROPOSED RULES.

A. Congress Intended for the Commission to "Promote Competition in Set-Top Boxes and Other New Technologies."[215]

Through Section 629[216] and STELAR,[217] Congress provided the Commission with a clear mandate to promote and "assure" a competitive market in which consumers could use the retail

[211] Consumer Groups/DHH-RERC Comments at 8.
[212] *Id.*
[213] *See NPRM* ¶ 40. *See also* Consumer Groups/DHH-RERC Comments at 7 (supporting this definition as correctly recognizing "accessibility as a critical component of the navigable service itself").
[214] *See NPRM* ¶ 38. *See also* Consumer Groups/DHH-RERC Comments at 8 (supporting including this information in the "Service Discovery Data" definition); Comments of the American Council for the Blind, MB Docket No. 16-42, CS Docket No. 97-80, at 2 (Apr. 22, 2016) (stating that "vital services for people with sensory disabilities must also be passed through with any data intended to inform consumers of the content being presented").
[215] Cong. Rec. E635 (daily ed. Mar. 21, 1995) (statement of Rep. Bliley), *available at* https://www.congress.gov/crec/1995/03/21/CREC-1995-03-21-pt1-PgE635.pdf.

video navigation device of their choice to access MVPD programming via a software-based solution. The Commission is squarely within its authority to promulgate these rules to "assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services."[218]

Section 629 was based on a bill introduced earlier in 1995 by the House Commerce Committee Chairman, Tom Bliley (R-VA), and then-Congressman Ed Markey (D-MA). The Competitive Consumer Electronics Availability Act of 1995[219] directed the Commission to write rules to promote competition for video navigation devices.[220] This bill became part of the Telecommunications Act of 1996 as Section 629, through which Congress intended "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[221] In this spirit, Bliley intended that his bill "would require the [FCC] to take affirmative steps to promote competition in set-top boxes and other new technologies that will

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[216] 47 U.S.C. § 549(a).
[217] STELA Reauthorization Act of 2014 (STELAR), Pub. L. No. 113-200, § 106(d), 128 Stat. 2059, 2063 (2014).
[218] 47 U.S.C. § 549(a).
[219] H.R. 1275, 104th Cong. (1995).
[220] *Compare* Competitive Consumer Electronics Availability Act of 1995, H.R. 1275, 104th Cong. (1995) (requiring the Commission to "adopt regulations to assure competitive availability, to consumers of telecommunications services, of converter boxes, interactive communications devices, and other customer premises equipment from manufacturers, retailers, and other vendors not affiliated with any telecommunications system operator") *with* 47 U.S.C. § 549(a) (requiring the Commission to "adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor").
[221] S. REP. NO. 104-230, at 113 (1996) (joint explanatory statement of Committee of Conference).

give consumers access to the national information infrastructure [NII]."[222] Bliley singled out the user interface as "the one area that ought to be a priority" because it determines "how our constituents will actually be connected to these new networks."[223] Therefore, the user interface, or how consumers access and interact with MVPD programming, is an important component of the Commission's delegated authority "to promote competition in set-top boxes and other new technologies."[224]

The NPRM is in line with the intentions of the drafters of Section 629 because it does not prescribe which operating systems or functions the MVPDs will use. Instead, the NPRM lets the MVPDs develop their own features and user interfaces as long as they make the three information flows available to third-party device manufacturers so that third-parties can also innovate. Bliley's goal was to empower the Commission with the ability to promote "the competitive market model rather than the monopoly model"[225] that is still prevalent as 99% of MVPD subscribers lease a set-top box from their MVPD, and that would be perpetuated by an proprietary-app-only approach.

The NPRM notes that "Section 629 is plainly written to cover any equipment used by consumers to access multichannel video programming and other services, and software features have long been essential elements of such equipment."[226] Indeed, Section 629 covers "other equipment used by consumers to *access* multichannel video programming and other services

[222] Cong. Rec. E635 (daily ed. Mar. 21, 1995) (statement of Rep. Bliley), *available at* https://www.congress.gov/crec/1995/03/21/CREC-1995-03-21-pt1-PgE635.pdf.
[223] *Id.*
[224] *Id.*
[225] Cong. Rec. E635 (daily ed. Mar. 21, 1995) (statement of Rep. Bliley), *available at* https://www.congress.gov/crec/1995/03/21/CREC-1995-03-21-pt1-PgE635.pdf.
[226] NPRM at ¶22.

offered over multichannel video programming systems."[227] Therefore, how consumers access programming and services over MVPD systems is a crucial component of any rules the Commission promulgates to promote competition for navigation devices under Section 629. Furthermore, authentication of a consumer's credentials is critical to the consumer being able to access the MVPD's services. Because video navigation device equipment needs to authenticate whether a consumer is authorized to access the content or services from the MVPD, and the authentication function can occur via software, the Commission has the requisite authority to promulgate rules regarding a software-based solution

The Commission's authority under Section 629 is not confined only to hardware.[228] Section 629's scope was not "narrowed to include only *equipment* used to access services *provided by*" MVPDs.[229] The conferees clearly stated their intention that the Commission be forward-looking in its actions and embrace technological changes:

> The conferees intend that the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services. One purpose of this section is to help ensure that consumers are not forced to purchase or lease a specific, proprietary converter box, interactive device or other equipment from the cable system or network operator. Thus, in implementing this section, the Commission should take cognizance of the current state of the marketplace and consider the results of private standards setting activities.[230]

Congress wanted the Commission to adapt its rules and support technological advancements and innovation in the navigation device market. In this proceeding, the Commission seeks to enact

[227] 47 U.S.C. 549(a) (emphasis added).
[228] *See* NCTA Comments app. A at iii ("When Congress enacted Section 629(a), it made unmistakably clear through the plain text, history, and structure of the statute that the scope of the FCC's rulemaking authority was limited to assuring the 'commercial availability' of 'equipment' used by 'consumers' to access their *MVPDs'* service.").
[229] NCTA Comments app. A at iv (emphasis provided by the appendix's authors).
[230] S. REP. 104-230, at 181 (1996) (Conf. Rep.).

rules based on an extensive review of the marketplace and technological advancements in software-based solutions. Therefore, the NPRM fully complies with Congress's goals of promoting a competitive market where consumers would not have to lease a set-top box from an MVPD.

STELAR clearly directed the Commission to convene a panel of experts to make recommendations for a "technology- and platform- neutral software-based downloadable security system"[231] to advance Section 629's goal of a viable, retail market for video navigation devices. As Public Knowledge stated, "Congress effectively re-authorized Section 629 in the STELA Reauthorization Act of 2014."[232] When Congress passed STELAR, Congressman Greg Walden, the chairman of the House Energy & Commerce Subcommittee on Communications and Technology, said the legislation "urges the consumer electronics manufacturers and MVPDs to work together to find a next-generation solution for a competitive set-top box market."[233] Although some parties have requested that the Commission "call it a day" on the DSTAC's recommendations,[234] the Commission is appropriately moving forward on the DSTAC's work to develop "technology- and platform- neutral software-based downloadable security system" as required by Congress.

B. The Nondelegation Doctrine is Not Applicable to the NPRM.

The nondelegation doctrine does not restrict the Commission's authority to promulgate these rules. The nondelegation doctrine states that Congress cannot delegate its legislative duties

[231] Pub. L. No. 113-200, § 106(d), 128 Stat. 2059, 2063 (2014).
[232] Public Knowledge Comments at 7.
[233] https://www.gpo.gov/fdsys/pkg/CREC-2014-11-19/html/CREC-2014-11-19-pt1-PgH8081.htm.
[234] *See* Comments of AT&T, MB Docket 15-64, at 22 (filed Oct. 8, 2015) ("[T]he commission should carefully review the DSTAC Report and then call it a day, allowing the Apps Approach to continue its virtuous development unencumbered.").

to a government agency, but Congress can grant agencies rulemaking authority as long as it provides an "intelligible principle" upon which the agency can write its rules.[235] Here, the Commission has a clear statutory mandate from Congress to "adopt regulations" "in consultation with appropriate industry standard-setting organizations."[236] If the Commission codifies a default standard and tells stakeholders that they can improve upon that standard in an industry standards body setting, that is not a delegation. Furthermore, the nondelegation doctrine applies to delegations from Congress to agencies, not from agencies to standards bodies. There are plenty of instances in which the Commission has previously relied on standards bodies[237] – even for set-top boxes.[238]In any event, no impermissible delegation of authority would occur as a result of this rulemaking.

XII. CONCLUSION.

For two decades, consumers have paid billions of dollars in fees to their pay-TV providers to lease set-top boxes with antiquated technologies. Competition and choice are fundamental principles of the American economic engine, yet today there is a marked lack of competition in the marketplace for set-top boxes. The NPRM represents a balanced approach

[235] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("[W]hen Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'").

[236] 47 U.S.C. 549(a).

[237] *See, e.g.,* 47 C.F.R. § 79.101 (effectively adopting CEA-608 and requiring CEA-608 decoders in receivers by inclusion in the rules directly); 47 C.F.R. § 79.102 (adopting CEA-708-B with by reference with slight changes, and requiring CEA-708-B decoders in receivers; 47 C.F.R. 76.640(b)(1) (adopting by reference and requiring certain digital cable systems to comply with SCTE 40 2003, ANSI/SCTE 65 2002, ANSI/SCTE 54 2003, and ATSC A/65B); 47 C.F.R. 79.4(c)(1) (adopting by reference and providing a safe harbor to video programming owners, distributors and providers that comply with SMPTE ST 2052-1:2010); 47 C.F.R. § 76.605(a)(1)(ii) (requiring cable television systems to conform to CEA-542-B); 47 C.F.R. § 76.607(a)(1) (requiring MVPDs to comply with ATSC A/85).

[238] *See* 47 C.F.R. § 76.640(b)(4)(iii) (requiring that cable operators shall "[e]ffective December 1, 2012, ensure that the cable-operator-provided high definition set-top boxes, except unidirectional set-top boxes without recording functionality, shall comply with an open industry standard that provides for audiovisual communications including service discovery, video transport, and remote control command pass-through standards for home networking.").

that would facilitate open standards, which would drive innovation. The Commission's proposed rules would finally unlock the set-top box marketplace, help consumers save money, and let imagination and competition bring about the future of innovation.

Respectfully submitted,

_____/s/_____

CONSUMER VIDEO CHOICE COALITION

Subject:	Hold for call with staffers re FCC set top
Start:	Wed 7/27/2016 3:00 PM
End:	Wed 7/27/2016 4:00 PM
Recurrence:	(none)
Meeting Status:	Tentatively accepted
Organizer:	Claggett, Karyn T.
Required Attendees:	Damle, Sarang; Charlesworth, Jacqueline

From:	Marla Grossman
To:	Pallante, Maria; Damle, Sarang
Subject:	http://cpip.gmu.edu/2016/07/27/letter-on-fcc-set-top-box-regulation-once-again-confuses-the-issue/
Date:	Thursday, July 28, 2016 4:37:44 PM
Attachments:	image001.jpg

Dear Maria and Sy,
I wanted to make sure you both saw this.
http://cpip.gmu.edu/2016/07/27/letter-on-fcc-set-top-box-regulation-once-again-confuses-the-issue/
Fondly,
Marla

Marla P. Grossman
Partner
The American Continental Group, Inc.
1800 M Street N.W.
Suite 500 South Tower
Washington, DC 20036
Direct: (202) 327-8100
Fax: (202) 327-8101
E-mail: grossman@acg-consultants.com

From:	Alex Byers
To:	Charlesworth, Jacqueline
Subject:	RE: FCC set-top box letter timing
Date:	Thursday, July 28, 2016 2:10:01 PM

Roger that, thanks. Enjoy your time back in NYC – I imagine I'll hear from/about you at some point on some IP topic. Looking forward to it.

From: Charlesworth, Jacqueline [mailto:jcharlesworth@loc.gov]
Sent: Thursday, July 28, 2016 2:03 PM
To: Alex Byers <abyers@politico.com>; Roberts, William <wroberts@loc.gov>
Subject: RE: FCC set-top box letter timing

Hi Alex –

Thanks for interest. We won't be releasing the response publicly but instead will be sending it to the Members who requested it.

Jacqueline C. Charlesworth
General Counsel and
Associate Register of Copyrights
U.S. Copyright Office
jcharlesworth@loc.gov
202.707.8772

From: Alex Byers [mailto:abyers@politico.com]
Sent: Thursday, July 28, 2016 11:27 AM
To: Roberts, William; Charlesworth, Jacqueline
Subject: FCC set-top box letter timing

Hi Bill & Jacqueline –

I'd love to get a copy of the Copyright Office's letter on the copyright implications of the FCC's set-top box proceeding. I had heard that might come this week. Can you tell me off the record when we should expect that? (I'd obviously love to get a copy ASAP when its ready.)

Thanks!
Alex

--
Alex Byers
POLITICO
Tech reporter
202.695.2083
@byersalex

Subject:	Conference Call: FCC & Set-Top Boxes (TiVo)
Location:	Call In Line: 202-707-5900; Collaboration Code: 181606
Start:	Tue 8/2/2016 1:00 PM
End:	Tue 8/2/2016 2:00 PM
Recurrence:	(none)
Meeting Status:	Accepted
Organizer:	Day, Brian
Required Attendees:	Damle, Sarang; Smith, Regan; Abramson, Cindy; 'rschwartz@constantinecannon.com'; 'sgreenstein@constantinecannon.com'; 'dkumar@g2w2.com'

Please note the collaboration code has changed to 181606

Instructions for participants to join

1) Dial (202) 707-5900
   Prompt: "Please enter your Collaboration Code"

2) Enter the Collaboration code provided to you in this meeting invite.
3) You will be joined to the conference.

From:	Schwartz, Robert
To:	Day, Brian; Damle, Sarang; Smith, Regan; Abramson, Cindy
Cc:	Greenstein, Seth; "dkumar@g2w2.com"
Subject:	INCOMPAS ex parte FCC filing today
Date:	Tuesday, August 02, 2016 6:26:06 PM
Attachments:	INCOMPAS Ex Parte Letter (8 2 16) FINAL.pdf

Thanks for your devoted time and attention in our discussion on behalf of TiVo today. I'd mentioned that CVCC members will be advocating a simpler solution, based on electronic certificates signifying certification to observed performance of agreed outcomes , as an alternative to a device having to "know" what is in every MVPD-content programmer contract. The last page of the attached ex parte filing by INCOMPAS (just filed, likely appear in docket tomorrow morning) contains the first description by a CVCC member of such an outcome. This will also be addressed in the Hauppauge filing, due COB tomorrow, which also addresses this approach.

With best to all,

Bob

Robert S. Schwartz
Constantine Cannon LLP
1001 Pennsylvania Av., N.W.
Suite 1300 North
Washington, D.C. 20004
202-204-3508 office
202-253-7526 cell
202-204-3501 fax
RSchwartz@constantinecannon.com

-----Original Appointment-----
From: Day, Brian [mailto:bday@loc.gov]
Sent: Friday, July 29, 2016 12:45 PM
To: Damle, Sarang; Smith, Regan; Abramson, Cindy; Schwartz, Robert; Greenstein, Seth; 'dkumar@g2w2.com'
Subject: Conference Call: FCC & Set-Top Boxes (TiVo)
When: Tuesday, August 02, 2016 1:00 PM-2:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: Call In Line: 202-707-5900; Collaboration Code: 450230

Instructions for participants to join

1. Dial (202) 707-5900

Prompt: "Please enter your Collaboration Code"

2. Enter the Collaboration code provided to you in this meeting invite.
3. You will be joined to the conference.

INCOMPAS
THE FUTURE OF COMPETITION

1200 G STREET, NW, SUITE 350 PH: 202.296.6650
WASHINGTON, DC 20005 FX: 202.296.7585

August 2, 2016

VIA ECFS ***EX PARTE NOTICE***

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Expanding Consumers' Video Navigation Choices, Commercial Availability of Navigation Devices*, MB Docket No. 16-42, CS Docket No. 97-80

Dear Ms. Dortch,

On July 29, 2016, Chip Pickering, Angie Kronenberg, and the undersigned counsel of INCOMPAS and Jeff Kardatzke of Google Fiber (the "INCOMPAS Representatives") spoke on the phone with Gigi Sohn, Counselor to Chairman Wheeler, Jessica Almond, Legal Advisor to Chairman Wheeler, Louisa Terrell, Advisor to Chairman Wheeler, and Eric Feigenbaum of the Office of Media Relations, to discuss several topics related to the above-captioned proceeding.

The INCOMPAS Representatives addressed the July 21, 2016 filing of the National Cable & Telecommunications Association ("NCTA"), et al.,[1] which provides additional technical information for a HTML5 apps-based alternative ("apps proposal") to the original approach proposed by the Commission in its Notice of Proposed Rulemaking ("NPRM").[2] Following the initial release of the apps proposal in June,[3] INCOMPAS has examined this approach individually[4] and as a member of the Consumer Video Choice Coalition ("CVCC")[5]

[1] Response to Questions About Open Standards HTML5 Apps-Based Approach, Rick Chessen & Neal M. Goldberg, National Cable & Telecommunications Association, et al., MB Docket No. 16-42, CS Docket No. 97-80 (filed July 21, 2016) ("NCTA Response").
[2] *See* Expanding Consumers Video Navigation Choices; Commercial Availability of Navigation Devices, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 31 FCC Rcd. 1544 (2016) ("NPRM").
[3] *See* Letter from Paul Glist, Davis Wright Tremaine LLP, MB Docket No. 16-42, CS Docket No. 97-80 (filed June 16, 2016).
[4] *See* Chip Pickering, *Competition and Innovation Principles Will Help FCC "Unlock the Box,"* MEDIUM (July 11, 2016), https://medium.com/@ChipPickering/competition-and-innovation-principles-will-help-fcc-unlock-the-box-faa67f53a980#.srflajqzx.
[5] *See* Letter from Robert S. Schwartz, Constantine Cannon LLP, MB Docket No. 16-42, CS Docket No. 97-80, at 2 (filed July 1, 2016) ("CVCC Ex Parte Letter").

using four core principles fundamental to the NPRM and any proposed regulatory solution to address the competitive concerns underlying Section 629. A competitive solution must include: (1) an open and independent user interface ("UI") to ensure innovation and access to new content; (2) at a minimum, equivalent functionality to that enjoyed and relied upon by consumers pursuant to the CableCARD regime; (3) device interoperability across all MVPDs; and (4) strong provisions to protect and enforce rights. We expressed concern that the app proposal falls short of these principles and the Commission's statutory goals.

With respect to integrated search, INCOMPAS cautioned that the apps proposal may not provide third-party devices with information and metadata necessary to actualize a truly integrated search feature. The apps proposal would require device manufacturers to license metadata from third-party providers (such as Rovi or Gracenote) for linear content, but fails to provide details about how metadata for VOD content would be made available to competitive navigation devices. Under the apps proposal, device manufacturers would be unable to present sufficient information to consumers about available VOD programming, significantly limiting a third-party device's utility. NCTA's illustrative example of a consumer moving from search results to an app on a Roku device[6] requires more information and metadata about linear and VOD content than app proposal proponents have been willing to provide up to this point. For example, Roku's search requires providers of applications embedded on its platform to submit all relevant metadata to Roku via a unique identifier that indicates what content to play back when launched as well as information about purchasing options.[7] To have a Roku-like experience via the app proposal, each MVPD would be required to submit all of their linear TV and VOD catalog information to each device manufacturer, which NCTA has not committed its members to do in its filing. NCTA also previously has argued that it does not have the rights to submit the metadata required by a partner like Roku, leading critics to wonder whether and how the app proposal has changed that position.[8]

The INCOMPAS Representatives indicated that the search feature's user experience could be frustrated by MVPDs' intentions not to provide individual subscriber entitlement data through search. This would prevent the search function from filtering out content the user is unable to access; users would not know if they can play content after they have selected it from the search feature. The app proposal also seeks to limit search results provided on third-party devices to "licensed content" to prevent presentation of pirated content. While well-intentioned, the app proposal would chill search usage and restrict users from searching the general Internet through their personal devices. The INCOMPAS Representatives agreed that pirated content should not be purposefully co-mingled with legitimate content sources, but as presented the app proposal would restrict access to lawful, popular, user-generated content on sites such as YouTube, Facebook, and Vimeo.[9] Furthermore, non-MVPD affiliated programmers would benefit from a competitive navigation device market to share their content with a wider audience. The app proposal would foreclose the opportunity for many independent programmers to make

[6] *See* NCTA Response at 19-20.
[7] *See* Roku Search, ROKU, https://sdkdocs.roku.com/display/sdkdoc/Roku+Search#RokuSearch-IntegratingYourVODChannelContentIntoRokuSearch (last visited Aug. 1, 2016).
[8] *See* Reply Comments of NCTA, MB Docket No. 16-42, CS Docket No. 97-80, at 39-40 (filed May 23, 2016).
[9] NCTA Response at 20.

their programming available via search features of third-party devices, and keep search results firmly within MVPDs' control.

The INCOMPAS Representatives also called on MVPDs to provide content parity under the apps proposal and suggested the Commission seek additional information to determine what content would be available on an MVPD-leased device as opposed to a MVPD-provided app. NCTA's filing proposes to include "all linear and all on-demand programming the MVPD *has the rights to distribute* through their MVPD service."[10] While seemingly motivated to include all content from MVPD offerings on an app, the proposal makes no commitment and indicates that some content could continue to be restricted.[11] Additionally concerning is the admission that the app proposal would supplement, and not replace, the current MVPD app approach, where content and the user experience is already limited. The proposal contains no assertions about whether an MVPD-provided app would provide content at the same quality level or resolution as that provided to a leased navigation device. Device manufacturers would need assurances, for instance, that apps would not receive SD programming while leased set-top boxes continue to receive HD content.

In terms of providing functionality equivalent to CableCARD navigation devices, the NCTA filing lacks any technical details for implementing a third-party DVR or for local recording of content accessible by apps. Consumers have come to rely on the flexibility that DVRs provide to them, and their elimination would be a step back for the user experience. While the NCTA Response claims that the NCTA is "investigating potential for local recording," any expectations are tempered through statements indicating that content licensing agreements likely will render the investigation moot.[12] As noted by the CVCC, "courts have repeatedly held that home recording is a fair use."[13] Third-party video navigation devices should not be denied DVR functionality under the app proposal.

The INCOMPAS Representatives also raised concerns about NCTA's claims that consumers could access both their video service and broadband Internet access service ("BIAS") via the same cable gateway device if the consumer chooses an Internet service provider different from their pay-TV provider. The filing indicates that the user could utilize a leased or customer-owned cable modem to access content from MVPD offerings over a managed IP network.[14] However, this networking technique is advanced and not something that consumers could generally configure without technical support. The problem arises with consumer routers, which generally have a single upstream connection. A consumer would connect all of their devices to a router on their home network connected upstream to their ISP, generally by a modem. As a result, consumers cannot properly connect the cable modem for the managed IP video channels, because that device also is intended to be connected upstream of the router. Consumers would have to choose to which network they connect, and only with very advanced networking

[10] *Id*. at 8-9 (emphasis added).
[11] *Id*. at 9.
[12] *Id*. at 10.
[13] *See* Reply Comments of the CVCC, MB Docket No. 16-42, CS Docket No. 97-80, at 52 (filed May 23, 2016) (citing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984); *Fox Broad. v. Dish Network*, 723 F. 3d 1067 (9th Cir. 2013)).
[14] NCTA Response at 13.

configurations would they be able to connect to both services simultaneously. Taking into account cable's record of providing installation and technical support for CableCARD devices,[15] we noted that it is unlikely that consumers would receive adequate customer support for this advanced networking technique.

Basing the apps proposal on the HTML5 standard for a video-connected application is curious because of the general issues associated with use of HTML5. Native apps continue to be ideal platforms for consumer electronics devices. Although HTML5 provides ample compatibility, its use is not ideal for performance. A major OVD's use of the HTML5 standard is instructive because it used apps with HTML5 to standardize its user interface across all platforms. In 2013, this OVD abandoned HTML5 due to performance issues and adopted a native apps approach instead.[16] The INCOMPAS Representatives noted that NCTA intends to update current applications with the updated HTML5 standard moving forward. This means that older devices—which may lack compatibility with updated HTML5 standards—may suffer a significant drop-off in performance and cause pay-TV consumers serious disruption. Rather than adopt the HTML5 standard, the INCOMPAS Representatives encouraged the Commission to require MVPDs to adopt and develop native apps. While HTML5 app updates are controlled by the app developer (here, MVPDs), control over updates to native apps is held by the user, who can make the ultimate determination about the impact an update might cause to her consumer electronics. Additionally, the cost for consumer electronics devices that support MVPD apps also likely would increase because these devices require a more powerful processor to support a well-performing HTML5 app than a well-performing native application.[17]

The INCOMPAS Representatives disputed NCTA's onerous claims that the "bolt on" solution offered by the CVCC[18] "is not an apps-based approach or a compromise."[19] The CVCC solution would use the EME/MSE components of the MVPD-provided HTML5 application to provide video content delivery and DRM license acquisition in ways that could be controlled by the MVPDs to allay concerns about content protection and security. This would represent a subset of solutions currently being developed by the Web Application Video Ecosystem (WAVE). The NCTA filing does not offer any technical concerns associated with the "bolt on"

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[15] *See* FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010) at 52 (explaining that users of CableCARD-enabled, retail set-top boxes "encounter more installation and support costs and hassles than those who lease set-top boxes from their cable operators").

[16] *See* Janko Roettgers, *Netflix Ditches Webkit to Roll Out Slick New UI for Smart TVs, Roku Boxes and Game Consoles*, GIGAOM (Nov. 12, 2013, 9:01 PM), https://gigaom.com/2013/11/12/netflix-ditches-webkit-to-roll-out-slick-new-ui-for-smart-tvs-roku-boxes-and-game-consoles/ (reporting that to make the HTML5 app work, Netflix "had to tweak its app for each platform, and leave out some features on cheaper and less powerful devices – which is why Roku boxes for example never had access to individual profiles").

[17] *See* Letter from Trey Hanbury, Hogan Lovells US LLP, MB Docket No. 16-42, CS Docket No. 97-80, at 1 (filed July 8, 2016) (expressing Roku, Inc.'s concern that additional hardware requirements to accommodate HTML5 applications would increase consumer prices for streaming devices).

[18] CVCC Ex Parte Letter at 2.

[19] NCTA Response at 27.

proposal, but reiterates the original arguments against the NPRM in areas of consumer privacy, emergency alerts, advertising protection, preservation of channel lineups, and security.

The INCOMPAS Representatives emphasized, however, that the practice of digital certification, which is in common use today, could assure enforceable compliance with MVPD requirements and consumer expectations. Digital certification would simplify achieving the NPRM's goals of device and user interface competition and portability. For a device manufacturer to obtain a digital certificate, a navigation device would need to pass certification testing administered by a certificate authority. The manufacturer also would need to sign a contract agreeing to requirements for privacy, emergency alerts, advertising protection, preservation of channel lineups, and security. A digital certificate would allow third-party devices to electronically verify that they comply with licensing and certification protections outlined in the NPRM.[20] Devices seeking to access content from MVPD offerings would present a digital certificate to the MVPD at which point the information about the content and the actual content itself would be exchanged. This would establish a solid, enforceable chain of trust for any device or app that intends to make use of content from MVPD offerings. This process also allows device identification to permit MVPDs to deny access to any device found to be in violation of the rules.

The INCOMPAS Representatives also expressed support for the Computer & Communications Industry Association's ("CCIA") analysis of the app proposal in its most recent filing.[21]

Pursuant to Section 1.1206 of the Commission's Rules, a copy of this letter is being filed electronically in the above-referenced docket. Please do not hesitate to contact me if you have questions about this submission.

Respectfully submitted,

/s/ Christopher L. Shipley

Christopher L. Shipley
Attorney & Policy Advisor
(202) 872-5746

cc: Gigi Sohn
Jessica Almond
Louisa Terrell
Eric Feigenbaum

[20] *See* NPRM at ¶ 70 et seq.

[21] *See* Letter from John A Howes, Jr., CCIA, MB Docket No. 16-42, CS Docket No. 97-80 (filed July 28, 2016) (raising concerns about the NCTA Response in the areas of content parity, offering a competitive UI, integrated search, technical support, and functionality).

The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

August 3, 2016

Dear Representatives Blackburn, Butterfield, Collins and Deutch:

I am pleased to deliver this response to your letter of July 15, 2016, requesting the views of the United States Copyright Office regarding the Federal Communication Commission's ("FCC's") pending set-top box proposal, referred to herein as the "Proposed Rule," as set forth in its Notice of Proposed Rulemaking ("NPRM"), *In the Matter of Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42. The United States Copyright Office is the expert agency created by Congress in 1897 to administer the Nation's copyright laws and to provide impartial advice to Congress, federal agencies, and others on matters of copyright law and policy.[1]

As set forth in the NPRM, the Proposed Rule would require multichannel video programming distributors ("MVPDs") to provide qualifying third parties with access to copyrighted video content, as well as associated programming information, for use across a broad spectrum of products ranging from physical set-top devices to internet-based software applications. The video programming would be made available according to a content protection standard adopted by an open standards body not substantially controlled by the MVPD industry. The Proposed Rule would not by its terms restrict repackaging, manipulation, or commercial exploitation of the programming made available to the third-party device and application producers, even where private contractual agreements between programmers and MVPDs might prohibit such activities.

As requested, our comments pertain to the potential copyright implications of the Proposed Rule, as well as the general copyright principles at issue. Please note that although the Copyright Office did not file public comments in the FCC proceeding, the FCC did request our advice on the copyright issues raised by its proposal. This response elaborates on guidance provided in those discussions, as well as in meetings requested by Congressional offices.

The Copyright Office understands from speaking with the FCC and from the rulemaking materials that the FCC's ultimate goal is to promote competition and choice in the set-top box marketplace. And we note that, in fact, the FCC proposal has generated robust discussion concerning the existing and future video marketplace and potential alternatives to physical set-top boxes. We welcome and support the FCC's efforts on behalf of consumers in this marketplace. As the FCC itself has recognized, however, the challenge here is determining how

[1] *See* 17 U.S.C. § 701(b).

the FCC can meet its objective without impairing the rights of creators and copyright owners under the Copyright Act.[2]

As discussed below, we have no doubt that a number of the third-party products facilitated by the FCC's rule would enable fair and other noninfringing consumer uses of MVPD programming. The Copyright Office is therefore focused on whether these goals can be accomplished without overriding other concerns of copyright law and policy. The Office's principal reservation is that, as currently proposed, the rule could interfere with copyright owners' rights to license their works as provided by copyright law, and restrict their ability to impose reasonable conditions on the use of those works through the private negotiations that are the hallmark of the vibrant and dynamic MVPD marketplace. Indeed, the Obama Administration[3] and the FCC itself[4] have highlighted the importance of such private licensing arrangements in enabling the production, acquisition, and distribution of MVPD programming.

We note that at the July 12th Congressional oversight hearing, FCC Commissioners acknowledged that they might choose to follow a different approach to achieve the FCC's objectives than that outlined in the NPRM, and that emerging alternative proposals showed promise.[5] The Copyright Office is therefore hopeful that the FCC will refine its approach as necessary to avoid conflicts with copyright law and authors' interests under that law. As a threshold matter, it seems critical that any revised proposal respect the authority of creators to manage the exploitation of their copyrighted works through private licensing arrangements, because regulatory actions that undermine such arrangements would be inconsistent with the rights granted under the Copyright Act, and to some degree, as discussed below, the authority of Congress to decide whether and when limitations on these rights should apply.

I. BACKGROUND

A. Basic Precepts of U.S. Copyright Law

United States copyright law derives from the grant of power to Congress in Article I, Section 8 of the Constitution to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[6] Congress has protected the rights of creators beginning with the first federal copyright act of 1790 and through successive enactments, including the current 1976 Copyright Act (the "Copyright Act"), which grants authors of copyrighted works a bundle of exclusive rights, namely the rights "to do and to authorize" the reproduction, distribution, public

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[2] *See Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, 31 FCC Rcd. 1544, ¶ 80 (Feb. 18, 2016) ("NPRM") (notice of proposed rulemaking and memorandum opinion and order).
[3] Letter from Lawrence E. Strickling, Assistant Secretary of Commerce, Nat'l Telecomm. and Info. Admin. ("NTIA"), to Tom Wheeler, Chairman, FCC 4 (Apr. 14, 2016).
[4] NPRM ¶ 29.
[5] *See Oversight of the FCC: Hearing Before the Subcomm. on Commc'ns and Tech. of the H. Comm. on Energy and Commerce*, 114th Cong. 57-59 (July 12, 2016), *available at* http://docs.house.gov/meetings/IF/IF16/20160712/105179/HHRG-114-IF16-Transcript-20160712.pdf (unofficial transcript) (discussion between Rep. Marsha Blackburn and Comm'rs Wheeler, Clyburn, Rosenworcel, Pai and O'Rielly).
[6] U.S. CONST. art. I, § 8, cl. 8.

performance, and public display of their works, as well as the preparation of derivative works.[7] As the Supreme Court has explained, "[t]he primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public."[8] Thus, "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[9]

The rights protected by the Copyright Act are "exclusive" to the copyright owner, meaning that the copyright owner generally has full control as to whether or how to exploit his or her work, including by entering into licensing agreements. As a leading treatise explains, the default rules within the Copyright Act are only a "starting point," with "collaborators . . . free to alter this statutory allocation of rights and liabilities by contract."[10] Importantly, as noted above, a copyright owner has the exclusive right "*to authorize*" the reproduction, distribution, public performance, or public display of a copyrighted work, or to prepare a derivative work, as well as to perform those acts directly.[11] This language in section 106 affords the copyright owner the sole right to license another to use the work,[12] as well as the right to impose conditions on such use under the license.[13] Moreover, the right to authorize use of a work encompasses the right to grant licenses to some parties and not others, or to decline to license a work at all.[14]

The exclusive rights afforded under the Copyright Act are subject to certain limitations and exceptions within the Act. Such limitations and exceptions have been adopted by Congress in accordance with its authority to establish the Nation's copyright law, as provided in Article I, Section 8 of the Constitution.[15] Perhaps the best-known among these is the fair use limitation, codified in section 107 of the Act, which permits unauthorized uses of copyrighted works under certain circumstances.[16] As discussed further below, fair use has played an important role in the evolution of the video marketplace. The Act also includes several compulsory licenses for

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[7] 17 U.S.C. § 106.

[8] *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994).

[9] *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

[10] 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 4.2 (2016); *see also* 17 U.S.C. § 201(d)(1) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . . .").

[11] 17 U.S.C. § 106 (emphasis added).

[12] *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1003 (9th Cir. 2015) ("The right to 'authorize' [one of the six exclusive rights] is also an 'exclusive right' under the Act."); *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 n.17 (1984) ("[A]n infringer is not merely one who uses a work without authorization by the copyright owner, but also one who authorizes the use of a copyrighted work without actual authority from the copyright owner.").

[13] *See, e.g.*, *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 939-41 (9th Cir. 2010) (discussing conditions and covenants associated with copyright licenses).

[14] *See, e.g.*, *Minden Pictures*, 795 F.3d at 1002-03 (recognizing that the Copyright Act permits the copyright owner to subdivide his or her interests and, "[t]hus, an author of a novel might convey the right to publish a hardcover edition of the novel to one person and the right to create a movie based upon the novel to another"); *Salinger v. Colting*, 607 F.3d 68, 74 (2d Cir. 2010) (recognizing that "there is value in the right *not* to authorize derivative works" (emphasis in original)).

[15] *See* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ."); *see also Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) ("The Copyright Clause [of the Constitution] . . . empowers Congress to *define* the scope of the substantive right." (emphasis in original)).

[16] 17 U.S.C. § 107 (setting forth factors courts should consider in evaluating fair use).

audiovisual content that limit the copyright owner's control by allowing cable and satellite providers to retransmit broadcast television programming provided they adhere to specific conditions, including payment of royalties.[17]

The Office's analysis of the Proposed Rule flows from these defining principles of U.S. copyright law.

B. The Proposed Rule

As described in the NPRM, the Proposed Rule would require MVPDs to provide to all qualifying third-party manufacturers of competing set-top boxes and software applications, free of charge and on a nondiscriminatory basis, the following:

- All of an MVPD's "multichannel video programming (including both linear and on-demand programming)" in "every format and resolution . . . that the MVPD sends to its own devices and applications"[18]
- "Entitlement Data," including information on what content a particular subscriber has rights to access and the limitations on that access[19]
- "Service Discovery Data," including channel lineups and listings of video-on-demand offerings[20]
- A content protection system licensable on reasonable and nondiscriminatory terms, issued by an organization "that is not substantially controlled by an MVPD or by the MVPD industry"[21]

By its terms, the rule would thus appear to provide third-party manufacturers and developers that do not have a contractual relationship with the MVPD (or a license from content owners) access to an MVPD's video stream, program listings, and subscriber data for use in and through a wide range of products, including physical set-top devices and internet-based software applications. Once accessed, the video content and program data could be made available via the third-party device or service to a MVPD subscriber according to that subscriber's privileges reflected in the "Entitlement Data."

It is our understanding that a third party seeking to access the video stream and associated data under the Proposed Rule would need to enter into an agreement with a non-MVPD-controlled organization[22] that would offer content protection technology pursuant to security

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[17] *See id.* §§ 111, 119, 122 (compulsory cable and satellite licenses); *see also id.* §§112, 114-115 (compulsory music licenses).
[18] NPRM ¶ 26.
[19] *Id.* ¶¶ 36, 39.
[20] *Id.* ¶¶ 36, 38.
[21] *Id.* ¶ 50.
[22] *Id.* at 48 (Appendix A) (defining "Compliant Security System" in § 76.1200(k)), ¶¶ 58-60, 71 (outlining proposed framework for third parties to enter into licenses with providers of a "Compliant Security System"). We understand the FCC may be considering a standardized agreement for the prescribed content protection technology akin to the DFAST license implemented in the CableCARD regime. *See id.* ¶ 71 n.192.

standards to be set by a yet-to-be-developed body.[23] As described in the Proposed Rule, the terms of that agreement would apparently be addressed to the use of the prescribed security technology rather than any content-based licensing issues, such as those relating to channel lineup, advertising, etc.[24] While the rule contemplates that third parties would need to undergo a testing and certification process to ensure that their devices would not electronically or physically harm MVPD networks or facilitate theft of service, the NPRM leaves open what this process might be, and suggests that some form of self-certification might be appropriate.[25]

C. The Role of Copyright Licenses in the MVPD Marketplace

With the limited exception of retransmission of broadcast television content under the statutory compulsory licenses set forth in sections 111, 119, and 122 of the Copyright Act,[26] an MVPD must negotiate and obtain licenses directly from copyright owners in order to publicly perform, display, reproduce, or distribute copyrighted video programming. The National Telecommunications and Information Administration ("NTIA"), commenting in the FCC proceeding on behalf of the Obama Administration, observes:

> The selection and organization of [MVPD] programming . . . reflects investment decisions and market assessments made by MVPDs—with attendant business risks—as well as a constellation of licensing arrangements between MVPDs and program producers. Those agreements typically include a variety of provisions beyond price—issues such as brand protection, advertising, program availability windows, and duration—that are important to enabling parties to defray the costs of producing, acquiring, and distributing that programming.[27]

The Office agrees that private licensing agreements are critical to the effective functioning of the dynamic video marketplace—a marketplace that has facilitated what many consider to be a new "Golden Age of Television."[28]

As the Copyright Office understands from public comments submitted in response to the Proposed Rule, licenses between content owners and MVPDs generally contain highly detailed provisions concerning the exploitation of the content being licensed, including the following:

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[23] *Id.* at 48 (Appendix A) (defining "Open Standards Body" in § 76.1200(i)), ¶ 41 (describing need for an "open," multi-member standards body).

[24] *Id.* ¶ 71; *see also id.* at 48 (Appendix A) (§ 76.1200(k)).

[25] *Id.* ¶¶ 73-74; *see also* 47 C.F.R. § 76.1203 (allowing MVPDs to restrict use of navigation devices where devices can cause electronic or physical harm or assist in the unauthorized receipt of service).

[26] 17 U.S.C. §§ 111, 119, 122.

[27] Letter from Lawrence E. Strickling, Assistant Secretary of Commerce, NTIA, to Tom Wheeler, Chairman, FCC, 4 (Apr. 14, 2016) (citing Comments of the MPAA at 7, MB Docket No. 15-64, (filed Oct. 8, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001328337).

[28] *See* Katherine Cusumano, *In the "Golden Age" of Television, Casting Directors Expand Their Reach*, FORBES (Jan. 21, 2016), http://www.forbes.com/sites/katherinecusumano/2016/01/21/in-the-golden-age-of-television-casting-directors-expand-their-reach/#19b5a6f61661; *see also* Lisa de Moraes, *FX Study: Record 409 Scripted Series On TV In 2015*, DEADLINE HOLLYWOOD (Dec. 16, 2015), http://deadline.com/2015/12/tv-study-record-number-scripted-series-fx-1201668200/ (noting that, from 2002 through 2015, "the greatest growth in the number of scripted series has come courtesy of basic cable networks with a 484% increase over that span").

- The kinds of platforms and devices to which the programs may be delivered
- Requirements related to advertising, including limitations on an MVPD's ability to replace advertising or add additional advertising as part of the program, and restrictions on embedded advertising in the MVPD's program guide or user interface (*e.g.*, preventing adult programming from being advertised when a user is browsing children's programming)
- The works that may be made available to subscribers to be played on demand (rather than as part of linear programming), and any promotional consideration related to on-demand works, such as advertising for, and placement of, television shows and movies in the on-demand menu
- Channel lineup requirements, including agreements relating to the types of channels that will be grouped together ("neighborhooding") and requirements that certain channels be provided together as a package ("bundling")
- Time-limited licensing arrangements, including "windowing" or "tiering" agreements that allow certain programs to be shown by certain providers or platforms before they are more widely distributed, or expiration terms for content provided on-demand
- Requirements for content protection, including specific security measures the MVPDs must adopt for each kind of platform
- Conditions the MVPDs are required to include in downstream agreements with third-party platform developers (*e.g.*, Amazon Fire TV, Roku, Apple TV) before allowing installation of MVPD applications (*e.g.*, the Xfinity app) on those platforms, such as requirements to exclude applications used for the consumption of pirated works
- Stipulations that the MVPDs will refrain from engaging in activities that might otherwise be considered fair use of the copyrighted works[29]

In other words, the copyrighted works that make up an MVPD's multichannel video programming are produced and made available to the public only as a result of complex, private negotiations between content owners and MVPDs, and on the understanding that the MVPDs will make works available to the public in accordance with the terms of the resulting licenses. Typically, a violation of the license terms by the MVPD will constitute either copyright infringement[30] or a breach of contract.[31] And, traditionally, in order to obtain any contractual remedies, the content owners must have privity of contract with the MVPD.[32]

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[29] *See generally* 21st Century Fox, Inc., A&E Television Networks, LLC, CBS Corp., Scripps Networks Interactive, Time Warner Inc., Viacom Inc., & the Walt Disney Co. (collectively, "Content Companies") Comments at 8-9; NCTA Comments at 100 (discussing licensing terms that restrict cross-platform search results from displaying licensed programming alongside pirated content in search results); *Fox Broad. Co. v. Dish Network LLC*, No. CV 12-4529 DMG, 2015 WL 1137593, at *30 (C.D. Cal. Jan. 20, 2015). References to comments submitted in response to the FCC's February 18, 2016 NPRM in this document are by party name (abbreviated where appropriate) followed by "Comments" (*e.g.*, "Content Companies Comments"). References to reply comments submitted in the same proceeding are by party name (abbreviated where appropriate) followed by "Reply Comments" (*e.g.*, "Content Companies Reply Comments").

[30] 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.15[A][2] (2016) ("[W]hen a license is limited in scope, exploitation of the copyrighted work outside the specified limits constitutes infringement."); *see also, e.g.*, *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 498-504 (2001) (finding infringement when license was exceeded by distributing electronic reprints of individual freelance works); *Sun Microsystems, Inc. v. Microsoft*

To be sure, certain consumer uses of copyrighted video content may qualify as fair uses under copyright law—for example, consumers' time-shifting of programming for later home viewing. Fair use is a critical part of copyright law, and as further discussed below, it will continue to adapt and will likely be invoked in defense of particular business strategies, including in this developing video marketplace. But, at the same time, it is important to understand that "[p]arties are free to bargain away their rights to make fair use of copyrighted material" as a matter of contract.[33] Accordingly, content owners and users can—and frequently do—choose to eliminate uncertainty over fair use questions by negotiating clear usage rights and limitations in advance. Thus, in this marketplace, as a condition of granting access to their works, copyright owners may choose to exclude certain uses of content by an MVPD by contract, regardless of whether such activities could potentially qualify as fair uses under copyright. The ability to delineate and assign value to permissible uses—and to exclude others—through the licensing process flows from the copyright owner's more general right to withhold access to the content altogether if licensing terms cannot be agreed.

II. ANALYSIS OF THE PROPOSED RULE

A. Encroachment on the Exclusive Right to License

In its most basic form, the rule contemplated by the FCC would seem to take a valuable good—bundled video programming created through private effort and agreement under the protections of the Copyright Act—and deliver it to third parties who are not in privity with the copyright owners, but who may nevertheless exploit the content for profit. Under the Proposed Rule, this would be accomplished without compensation to the creators or licensees of the copyrighted programming, and without requiring the third party to adhere to agreed-upon license terms.[34] Indeed, a third party without access to the governing agreement between a content programmer and the MVPD would have no way of knowing all of the requirements and limitations imposed under that license. As a result, it appears inevitable that many negotiated conditions upon which copyright owners license their works to MVPDs would not be honored under the Proposed Rule.

Corp., 188 F.3d 1115, 1121 (9th Cir. 1999) ("If . . . a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement.").

[31] *See Graham v. James*, 144 F.3d 229, 236-37 (2d Cir. 1998) ("Generally, if the licensee's improper conduct constitutes a breach of a covenant undertaken by the licensee . . . and if such covenant constitutes an enforcible contractual obligation, then the licensor will have a cause of action for breach of contract, not copyright infringement." (internal quotation marks and alterations omitted) (quoting 3 *Nimmer on Copyright* § 10.15[A], at 10-120)). We note that "[n]o precise constructional rule separates copyright contract obligations, called 'covenants,' whose breach will give rise only to contract remedies, from those called 'conditions,' whose violation will terminate the agreement and thus constitute copyright infringement as well as contract breach." 1 GOLDSTEIN ON COPYRIGHT § 5.3.5.1.

[32] SAMUEL WILLISTON, 13 A TREATISE ON THE LAW OF CONTRACTS § 37:1 (Richard A. Lord ed. 2013).

[33] *Dish Network LLC*, 2015 WL 1137593, at *30; *see also Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1325-26 (Fed. Cir. 2003) (private parties are allowed to contract away statutory rights and defenses, including fair use).

[34] As explained above, the third party would be required to agree to observe only certain non-customized security-related standards established by a non-MVPD-controlled organization.

Some commenters appear to dispute this characterization of the Proposed Rule, analogizing the third-party set-top boxes and software that might be facilitated by the Proposed Rule to televisions that passively display licensed MVPD programming to the consumer without alteration.[35] To be sure, if the rule were limited to passive hardware devices, the copyright concerns would be greatly reduced, if not eliminated. The analogy, however, appears to be undermined by the Proposed Rule, which would apply not just to passive hardware elements, but also to software that could potentially be used to manipulate, repackage, and monetize the content in ways that would be contrary to contractual conditions imposed by the content owners.[36]

Others have described the rule as essentially equivalent to the existing CableCARD system, under which a subscriber can access MVPD programming through a CableCARD-enabled device connected to the cable in the subscriber's home, rather than leasing an MVPD-provided set-top box.[37] But the Proposed Rule is not limited to hard-wired hardware devices, as under the CableCARD system—rather, the rule seemingly contemplates that content could also be accessed by subscribers directly through internet-based services, which, as noted below, presents different considerations under copyright law. Moreover, the CableCARD regime is administered by an MVPD-governed entity, CableLabs,[38] which licenses the CableCARD technology to third-party device manufacturers in written agreements.[39] This allows MVPDs, and by extension, copyright owners in contractual relationships with MVPDs, to impose and maintain appropriate standards for the delivery of content to consumers. In contrast, the Proposed Rule requires MVPDs to support a content protection system administered by an entity "that is not substantially controlled by an MVPD or by the MVPD industry," and the Proposed Rule does not clearly indicate whether there would be any licensing relationship between an MVPD and the third-party device manufacturer.[40]

As explained above, it is broadly recognized, including by the Obama Administration and members of Congress, that the preservation of contractual arrangements is critical to the video programming marketplace.[41] When a copyright owner licenses its works to an MVPD, it

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[35] *See, e.g.*, Annemarie Bridy, et al. & the Electronic Frontier Foundation Reply Comments at 5 ("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.").

[36] *See* NPRM ¶ 22 (tentatively concluding that the term "navigation device" should be interpreted "far broader than conventional cable boxes or other hardware alone," including by encompassing downloadable software).

[37] A CableCARD is a physical card that, when be inserted into a hardware device, allows that device to play MVPD content. *See* NPRM ¶ 11.

[38] CableLabs is governed entirely by its cable industry member companies. *The Board*, CABLELABS, http://www.cablelabs.com/about-cablelabs/the-board (last visited Aug. 2, 2016).

[39] *See* DFAST Technology License Agreement for Unidirectional Digital Cable Products (Jan. 2014), *available at* https://ecfsapi.fcc.gov/file/60001515605.pdf.

[40] NPRM ¶ 50.

[41] *See, e.g.,* Letter from Lawrence E. Strickling, Assistant Secretary of Commerce, NTIA, to Tom Wheeler, Chairman, FCC 4 (Apr. 14, 2016) (noting that terms of such agreements "are important to enabling parties to defray the costs of producing, acquiring, and distributing [MVPD] programming"); Letter from Sen. Patrick Leahy to Tom Wheeler, Chairman, FCC 1 (May 26, 2016); Letter from Sen. Mitch McConnell to Tom Wheeler, Chairman, FCC 1 (June 10, 2016); Letter from Representatives Doug Collins, Ted Deutch, Marsha Blackburn, et al., to Tom Wheeler,

typically does so, as noted, based on a detailed agreement with the MVPD that governs how the MVPD will deliver those works to consumers and includes conditions that the MVPD, in turn, is obligated to pass through to third-party platform developers. In this way, copyright owners protect their works from piracy and other undesirable forms of exploitation and secure a fair return on their investment in content creation.

The FCC has stated that the Proposed Rule is not intended to negate these private contractual arrangements.[42] However, it is not clear how the FCC would prevent such an outcome under the Proposed Rule, for it appears to obligate MVPDs to deliver licensed works to third parties that could then unfairly exploit the works in ways that would be contrary to the essential conditions upon which the works were originally licensed.[43] For instance:

- The NPRM announces that, under the Proposed Rule, "consumers should be able to choose how they access the multichannel video programming," including "through an application . . . offered by an unaffiliated vendor on a device such as a tablet or smart TV," without consideration of potential restrictions on such modes of delivery that would apply under negotiated agreements[44]
- The Proposed Rule requires MVPDs to make licensed programming feeds available to third-party device or software manufacturers free of charge and without "discrimination," thus potentially undermining copyright owners' ability to enforce exclusivity agreements, including "windowing" or "tiering" agreements that make content available on certain platforms before others[45]
- The Proposed Rule anticipates creation of "competitive user interfaces and features"[46] that could override agreements between copyright owners and MVPDs—for example, provisions that govern what movies or television shows the MVPD has agreed to promote in menus for on-demand programming, and what channels are entitled to favored placement in channel lineups
- The Proposed Rule would seem to allow third-party devices and applications to ignore MVPDs' agreements not to alter agreed-upon channel lineups or neighborhooding restrictions, to replace or alter advertising, or to improperly

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Chairman, FCC 1 (Apr. 22, 2016) (all expressing concern that the Proposed Rule may negatively affect the dynamic licensing market for video programming).

[42] NPRM ¶ 17 (stating "our goal is to preserve the contractual arrangements between programmers and MVPDs, while creating additional opportunities for programmers, who may not have an arrangement with an MVPD, to reach consumers").

[43] NPRM ¶ 26. Although we have been asked to analyze the Proposed Rule, we note that some commenters have suggested that "the NPRM's approach could easily be amended to create some form of privity between competitive device makers and MVPDs, provided that it relied on standard, nondiscriminatory agreements and did not require separate negotiations between each MVPD and each competitive device manufacturer." Letter from John Bergmayer, Senior Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, FCC 4 (July 29, 2016). The FCC may wish to consider these issues further.

[44] NPRM ¶ 26.

[45] *Id.* ¶¶ 63, 66-68; *see also* Motion Picture Association of Am. & SAG-AFTRA ("MPAA/SAG-AFTRA") Comments at 9.

[46] NPRM ¶ 66.

manipulate content—even though such acts are almost always prohibited under licensing agreements

- Even if third-party devices and applications did not replace the advertising that appears in the programming itself, the Proposed Rule would appear to allow them to add additional advertising as part of the programming stream, *e.g.*, advertising spots before or after an on-demand video, or banner advertising next to or overlaid on top of a program, without any requirement that resulting advertising revenues be shared with either the MVPD or the content creator[47]

Thus, rather than being passive conduits for licensed programming, it seems that a broad array of the third-party devices and services that would be enabled by the Proposed Rule would essentially be given access to a valuable bundle of copyrighted works, and could repackage and retransmit those works for a profit, without having to comply with agreed contractual terms. And even though such activities—for instance, competing or incompatible advertising—could easily lessen the value of the rights licensed by program producers to the MVPDs, no offsetting compensation would flow back to the copyright holders or their actual licensees. The Proposed Rule would thus appear to inappropriately restrict copyright owners' exclusive right to *authorize parties of their choosing* to publicly perform, display, reproduce and distribute their works according to agreed conditions, and to seek remuneration for additional uses of their works.

The Copyright Office would caution against government action that would interfere with, rather than respect, the flexible legal framework Congress has set forth. In this regard it is important to remember that only Congress, through the exercise of its power under the Copyright Clause, and not the FCC or any other agency, has the constitutional authority to create exceptions and limitations in copyright law.[48] While Congress has enacted compulsory licensing schemes, they have done so in response to demonstrated market failures, and in a carefully circumscribed manner. For example, as noted above, in the audiovisual context, sections 111, 119, and 122 of the Copyright Act establish statutory licenses that allow cable and satellite operators to retransmit broadcast television programming, given evidence of high transaction

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[47] The Office understands that there are certain CableCARD-enabled devices in the marketplace that overlay additional advertising, or provide alternate user interfaces and programming guides that do not adhere to relevant contractual arrangements between content owners and MVPDs. *See TiVo Advertising*, https://www.tivo.com/tivoadvertising/pausemenu.html (last visited Aug. 2, 2016) (example of overlaid advertising in TiVo devices); Consumer Video Choice Coalition Reply Comments at 54 ("CableCARD devices allow manufacturers and subscribers to customize the user experience, irrespective of contracts between programmers and MVPDs that demand special placement."). It is unclear the extent to which content owners have acquiesced to such practices. *See* MPAA Reply Comments at 22-23 (suggesting that third parties using CableCARDs are contractually bound to comply with terms on service presentation and content manipulation). In any event, as the NPRM acknowledges, CableCARD-enabled devices represent only a small fraction of the market. NPRM ¶ 7 ("[T]he nine largest incumbent cable operators have deployed only 618,000 CableCARDs for use in consumer-owned devices."). Thus, in crafting a rule that achieves the objective of allowing consumers to more readily purchase their own set-top boxes, rather than renting them from an MVPD, the FCC should consider how contractual arrangements between content owners and MVPDs over terms such as advertising restrictions and program placement in programming or on-demand guides will continue to be effective.

[48] *Cf. Eldred v. Ashcroft*, 537 U.S. 186, 192-93 (2003).

costs in that market.[49] These compulsory licenses come with a host of specific conditions and require cable and satellite operators to submit detailed statements of account and pay royalties into funds administered by the Copyright Office, which are then distributed to rightsholders through proceedings before the Copyright Royalty Judges.[50]

In effect, absent a mechanism to allow copyright owners to impose reasonable and appropriate licensing conditions, the Proposed Rule may be understood to create a new statutory license that requires the entirety of copyrighted programming offered by MVPDs to be delivered to third parties, including for commercial exploitation.[51] The rule thus raises serious concerns as a matter of copyright policy, because allowing third parties to commercially exploit copyrighted works in this manner could diminish the value of those works. To take one example, as noted above, under the Proposed Rule, MVPDs and content creators would seemingly have no ability to control certain forms of advertising or to share in the ad revenues that might be generated by third-party devices and services. But it seems reasonable to assume that the available pool of advertising dollars would to some degree be redirected to those third parties, and away from the content producers and MVPDs, negatively impacting the value of copyrighted works in the marketplace. Without the ability to exercise commercial judgment with respect to the dissemination of their works in the marketplace—and to seek remuneration for marketplace exploitations—program creators will be hampered in their ability to earn a return on their investments, or to invest in new programming.

B. Considerations Regarding Exclusive Rights of Public Performance, Display, Reproduction, and Distribution

A separate potential issue is the degree to which the Proposed Rule could lead to the adoption of devices and services that could result in direct or indirect infringement of copyright owners' exclusive rights of public performance, display, reproduction, and/or distribution. While some commenters assert that the rule is likely to lead to products or services that infringe these exclusive rights,[52] we caution that any infringement analysis in this area necessarily would be highly fact-specific and depend upon characteristics of the particular device or software at issue, as well as the particular exploitations of copyrighted works through that technology.

Any analysis of copyright infringement would first begin with the question of whether any of the copyright owners' exclusive rights—such as the rights of public performance, display,

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[49] U.S. COPYRIGHT OFFICE, SATELLITE TELEVISION EXTENSION AND LOCALISM ACT: § 302 REPORT 1 (2011), *available at* http://www.copyright.gov/reports/section302-report.pdf.

[50] 17 U.S.C. §§ 111, 119, 122. Licensees must also comply with relevant FCC regulations to be eligible to retransmit content under these provisions. *Id.*

[51] To the extent the Proposed Rule can be understood as delivering MVPD programming to unaffiliated third parties for commercial exploitation without compensation, the rule may also raise Fifth Amendment concerns. As one court has explained, an "interest in a copyright" is also "a property right protected by the due process and just compensation clauses of the Constitution." *See Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983); *cf. Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 641-42 (1999) (holding that patents "are surely included within the 'property' of which no person may be deprived . . . without due process of law").

[52] *See, e.g.*, MPAA/SAG-AFTRA Comments at 26-28; NCTA Comments at 100-06.

reproduction, and distribution—were implicated at all.[53] In some cases—such as passive hardware devices that do not alter or record copyrighted programming—the exclusive rights would not be implicated. But for other types of devices or services, further examination would be necessary. For instance, the right of public performance, as the Supreme Court recently made clear, includes the exclusive right to control "not only the initial rendition or showing [of a work], but also any further act by which that rendition or showing is transmitted or communicated to the public," including using individualized streams over the internet.[54] Thus, depending upon its particular characteristics, a third-party service that retransmitted MVPD programming to subscribers over the internet under the Proposed Rule could implicate copyright owners' right of public performance. Other kinds of services and devices might also implicate the exclusive rights of reproduction, distribution, and public display.[55] Moreover, these exclusive rights can be infringed either *directly*, where the defendant itself publicly performs, reproduces, distributes or displays a copyrighted work without authorization, or *indirectly*, under a theory of secondary copyright liability: contributory infringement,[56] including inducement of infringement,[57] or vicarious infringement.[58]

Assuming any of a copyright owner's exclusive rights was implicated, one would next need to examine the applicability of exemptions or limitations on those exclusive rights, including the fair use doctrine. Section 107 of the Copyright Act sets forth four nonexclusive factors that must be considered in assessing fair use, including "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;" "the nature of the copyrighted work;" "the amount and substantiality of the portion used in relation to the copyrighted work as a whole;" and "the effect of the use upon the potential market for or value of the copyrighted work."[59] Of these, the most important factor is typically understood to be the last—market harm.[60] In cases where the unlicensed use is supplanting an existing market (as could be the case here, for example, in relation to advertising), the use is less

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[53] In addressing these particular rights, the Office does not mean to rule out the possibility that the right to prepare derivative works could also be implicated.

[54] *Am. Broad. Co., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2506, 2509-10 (2014) (quoting H.R. REP. NO. 94-1476, at 63 (1976)).

[55] The Copyright Act provides for the exclusive rights "to reproduce the copyrighted work in copies or phonorecords," "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending," and "to display the copyrighted work publicly," including specifically "individual images of a motion picture or other audiovisual work." 17 U.S.C. § 106(1), (3), (5).

[56] *See, e.g.*, *Davis v. Blige*, 505 F.3d 90, 105 n.13 (2d Cir. 2007) (one can be liable for contributory infringement if, with knowledge of infringing activity, one induces, causes or materially contributes to infringing conduct of another).

[57] *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 934-41 (2005) (applying an inducement theory of liability, based on evidence that the distributor had specifically promoted its software for infringing uses); *see also Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1035-36 (9th Cir. 2013) (relying on the inducement theory in *Grokster* to hold a defendant, who operated peer-to-peer BitTorrent websites, liable for copyright infringement by virtue of "offer[ing] his services with the object of promoting their use to infringe copyrighted material").

[58] *See, e.g.*, *Grokster*, 545 U.S. at 930 (one infringes vicariously "by profiting from direct infringement while declining to exercise a right to stop or limit it").

[59] 17 U.S.C. § 107.

[60] *Harper & Row Publishers Inc. v. Nation Enters., Inc.*, 471 U.S. at 566 ("This last factor [of market harm] is undoubtedly the single most important element of fair use.").

likely to be considered fair.[61] In contrast, where there is not a showing of market harm, there is less likely to be a finding that the use is fair.

Fair use has played an important role in the marketplace for television programming, both in fostering innovation and setting consumer marketplace expectations. For example, in *Sony Corp. of Am. v. Universal City Studios, Inc.*, the Supreme Court considered whether Sony could be held responsible for indirect infringement by virtue of its distribution of the Betamax video recorder, which consumers used to record copyrighted television programming.[62] The Court held that Sony could not be held liable because the VCR was capable of substantial noninfringing use.[63] Specifically, the Court held that individual users' private recording of television programs for later home viewing (*i.e.*, "time-shifting") was a fair use because there was no meaningful likelihood of market harm.[64] As a result of that decision, consumer time-shifting is now an established and valued aspect of the television marketplace.

At the same time, existing case law does not purport to set out the full range of permissible activity under the fair use doctrine, and many open questions remain. *Sony* itself focused on the distribution of an article of commerce where the seller had no ongoing relationship with the purchaser after the sale, and no connection to the content being exploited.[65] Nor did the Court address fair use where the device distributor was *itself* engaged in copying activities, as opposed to private home users.[66] Both of those factors could conceivably be present with respect to devices and services authorized under the Proposed Rule. Nor have courts gone so far as to *obligate* copyright owners to provide content in a manner that would facilitate time-shifting or other noninfringing uses.[67] Thus, as more recent cases demonstrate, questions of fair use require a nuanced approach as the intersection of copyright law with new distribution technologies continues to be the subject of unpredictable litigation and evolving precedent.[68] And, as noted, it is for that reason that many privately negotiated agreements between copyright owners and MVPDs contract around fair use questions to avoid uncertainty.[69]

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[61] *See Campbell*, 510 U.S. at 591; *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 550-51 (S.D.N.Y. 2008); *see also* Bridy, et al. & EFF Reply Comments at 3 ("It is, of course, possible to imagine potential features of a competitive set-top box or service that could infringe copyright.").

[62] 464 U.S. at 420.

[63] *Id.* at 442, 456.

[64] *Id.* at 421, 442, 451-55.

[65] *Id.* at 435-38.

[66] *Id.* at 436-38.

[67] *Cf. Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001) ("Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.").

[68] *See, e.g., Fox News Network, LLC v. TVEyes, Inc.*, 124 F. Supp. 3d 325, 328-29, 331, 334-37 (S.D.N.Y. 2015), *appeal docketed*, Nos. 15-3885, 15-3886 (2d Cir. Dec. 3, 2015) (television news clip service's archiving and keyword search functions found fair, while clip sharing, downloading and other video search functionality were not); *Dish Network LLC*, 2015 WL 1137593 at *17-19, 22-24, 29-31 (finding market harm from satellite subscribers' recording of blocks of licensed content "too speculative to defeat a finding of fair use" in light of time and other limitations on the recordings, but additional service allowing streaming of content to alternative devices violated copyright owners' contractual rights).

[69] *See, e.g., Dish Network LLC*, 2015 WL 1137593 at *30; *see also* TiVo Reply Comments at 10-11 (suggesting that the Proposed Rule consider allowing for privately-negotiated encoding rules in order to "give content owners,

To be sure, under the Proposed Rule, third-party set-top box manufacturers and application developers would be required to comply with restrictions contained in "Entitlement Data" provided by MVPDs, such as whether a consumer is permitted to make DVR copies of particular programs or whether out-of-home streaming were permitted.[70] But compliance with those limitations would not in itself address the potential liability of the device makers or developers who might seek to exploit content under the rule. The proposed definition of "Entitlement Data" addresses only the permitted activities of *subscribers*[71]—not the third parties who would be providing them with content; accordingly, mere adherence to subscriber-specific limitations would not (and could not) ensure that the activities of unlicensed third-party actors were otherwise compliant with copyright law.[72] Again, while fair use would of course be available to these third parties, and will continue to be an important part of this particular marketplace, the full scope of fair use in this context cannot be stated with certainty and any FCC action should account for licensing conditions that are employed to resolve uncertainty in this area.

C. Considerations Regarding MVPD Copyright Interests

The MVPDs claim copyright interests in their selection and bundling of the programs and in the programming data reflecting those choices.[73] At this point, the Office is unable to determine whether the MVPDs' claimed copyright interests are valid.

The Copyright Act protects "compilations," or works "formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[74] For example, copyright protects the selection and organization of pre-existing short stories into an anthology, assuming the selection and organization are sufficiently original.[75] While further

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navigation device manufacturers, and consumers a predictable and consistent set of rules on how content can be treated").

[70] NPRM at 48 (Appendix A); *see also id.* ¶¶ 35, 39 (proposing that "Entitlement Data" include, at a minimum, pass-through of copy control information, whether content is permitted to pass through outputs, information about rights to stream the content out-of-home, the resolutions available on various devices, and recording expiration date information).

[71] *Id.* at 48 (Appendix A) (defined in § 76.1200(g)).

[72] For example, the Supreme Court rejected Aereo's argument that it did not "perform" copyrighted works because it was "simply an equipment provider" that enabled subscribers to watch free over-the-air television programs, finding this logic to be plainly contradicted by the 1976 Copyright Act, which "completely overturned" previous Court decisions holding that the provision of community antenna television (CATV) systems did not result in performances of copyrighted works. *Aereo*, 134 S. Ct. at 2504-06 (quoting H.R. REP. NO. 94-1476, at 86-87 (1976) and citing *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974)).

[73] *See, e.g.*, NCTA Comments at 53-54, 58; *id.* at App. A at 48-55; NCTA Reply Comments at 39-40; AT&T Comments at x, 77-81; AT&T Reply Comments at 51-53; Comcast Corp. & NBCUniversal Media, LLC ("Comcast/NBCUniversal") Comments at 50-51; Echostar Technologies & Dish Network Comments at 22-23.

[74] 17 U.S.C. § 101 (defining the term "compilation" and providing that it includes "collective works."); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991) (explaining that the Copyright Act protects compilations if sufficiently original).

[75] 17 U.S.C. § 101 ("A 'collective work' is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective

analysis of relevant facts would be required to fully assess the question, as this concept applies here, the particular selection and organization of individual copyrighted programs that make up the MVPD video stream could theoretically constitute a protectable compilation, although it would have to be shown that the MVPD has made creative choices in compiling those programs. At the same time, as with the content owners' rights of public performance, display, reproduction, and distribution, an assessment of whether a compilation copyright was actually infringed would turn on the particular features of the third-party service or device at issue.

With respect to the programming data to be supplied under the Proposed Rule, we understand MVPDs may be obligated to provide only underlying factual material, from which third parties would be able to create their own visual interface displays and programming guides.[76] It is true that if factual, or otherwise non-copyrightable, data is collected and assembled with sufficiently creative selection, coordination, or arrangement, the result could be a copyrightable compilation. But "[n]o matter how original the format, . . . the facts themselves do not become original through association. . . . inevitably mean[ing] that the copyright in a factual compilation is thin."[77]

D. Interplay with Section 1201 of the Copyright Act and Security Considerations

We also observe that the approach of the Proposed Rule appears to be in tension with Congress' judgment in enacting the Digital Millennium Copyright Act of 1998 ("DMCA") [78] to allow copyright owners to select and implement technological measures to secure their content on digital delivery platforms.[79] This policy, codified in section 1201 of the Copyright Act, allows copyright owners to take legal action to address the circumvention of such measures.[80] Section 1201 also contains specific exceptions to its anticircumvention provision, and provides for a triennial rulemaking process through which the Librarian of Congress may grant additional exemptions to the bar on the circumvention of technological access controls; exemptions have been granted to allow noninfringing uses of MVPD and other programming.[81] In proscribing the

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whole."); *Tasini*, 533 U.S. at 493-94 (analyzing use of individual articles that were "part of" collective works put out by newspaper publisher and explaining that the "[c]opyright in *each separate contribution to a collective work* is distinct from copyright in *the collective work as a whole*" (emphasis in original)).

[76] *See* NPRM ¶¶ 2, 26-27, 40; App. A at 48 (proposed definitions of Service Discovery Data, Entitlement Data, and Content Delivery Data).

[77] *Feist Publ'ns*, 499 U.S. at 349-51, 357-59; *see* 17 U.S.C. § 101 (defining a "compilation" work); *id.* § 103(a).

[78] Pub. L. No. 105–304, 112 Stat. 2860, 2863-77 (1998). The DMCA implemented aspects of the WIPO Copyright and WIPO Performances and Phonograms Treaties, to which the United States is a party.

[79] *See* H.R. REP. NO. 105-551, pt. 2, at 20 (1998); U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 8 (2015), *available at* http://www.copyright.gov/1201/2015/registers-recommendation.pdf.

[80] *See* 17 U.S.C. § 1201 (prohibiting circumvention of access controls protecting copyrighted content as well as trafficking in circumvention tools).

[81] *Id.* § 1201(a)(1)(C)-(D). Frequently, the Librarian has granted exemptions that would include circumvention of technological measures protecting MVPD-programming feeds. *See, e.g.,* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65,944 (Oct. 28, 2015) (granting seven exemptions to permit the access of motion pictures via a digital transmission protected by a technological measure for purposes of criticism and commentary).

circumvention of protective technologies, Congress explained that such measures were intended to "support new ways of disseminating copyrighted materials to users, and . . . safeguard the availability of legitimate uses of those materials by individuals."[82] Congress also made clear that "product manufacturers should remain free to design and produce the best available products, without the threat of incurring liability for their design decisions."[83] The Proposed Rule would inhibit the ability of MVPDs and content programmers to develop, improve, and customize technological solutions to protect their content in the digital marketplace. It would do so in part by requiring MVPDs to give third-party actors access to copyrighted video content and associated data[84] according to one or more security standards prescribed by an outside organization rather than the through their preferred (and potentially more secure) protocols negotiated between copyright owners and the MVPDs.[85] In addition, the Proposed Rule suggests that the FCC might allow third parties to self-certify their compliance with whatever security standards are adopted.[86] The Proposed Rule would thus undermine content creators' ability to choose how best to protect their content in the marketplace, as Congress intended in enacting the DMCA.

E. Enforcement Issues

It is worth noting that there already exists today a variety of third-party set-top box devices, mainly produced overseas, that are used to view pirated content delivered over the internet.[87] A reasonable concern is that, in response to the Proposed Rule, this market might expand to encompass devices designed to exploit the more readily available MVPD programming streams without adhering to the prescribed security measures. In addition, some commenters have suggested that limiting options for content security in this manner could jeopardize robust content security regimes—including innovations to those systems—thereby opening doors for third parties to acquire content illegally.[88] Therefore, this is an area that is worth more thought, particularly with respect to the ability to enforce compliance.

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[82] STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4, 1998, 6 (Comm. Print 1998).

[83] 144 CONG. REC. S9936 (daily ed. Sept. 3, 1998) (remarks of Sen. John Ashcroft); *see also* 144 CONG. REC. H7100 (daily ed. Aug. 4, 1998) (remarks of Rep. Scott Klug) ("[W]e have eliminated any ambiguity or presumption that products must be designed to affirmatively respond to or accommodate any technological measures . . . . In the end, this language ensures that product designers and manufacturers will have the freedom to innovate.").

[84] NPRM ¶¶ 35, 38-41.

[85] *See* NCTA Comments at App. A at 43, 75 (explaining how MVPDs may implement apps to monitor and detect content security); *id.* at App. B. at 3, 36-45 (explaining how "MVPD security and cybersecurity best practices are maintained today through a combination of conditional access and Digital Rights Management ('DRM') services, apps, and licenses all operating in a well-understood hardware environment").

[86] NPRM ¶¶ 2, 50, 58-60; *id.* ¶ 72 (seeking comment on whether self-certification on security compliance would be sufficient).

[87] *See* Rodrigo Orihuela, *Soccer Pirates Shift to TV From Computers as Set-Top Boxes Surge*, BLOOMBERG TECH. (May 8, 2015), http://www.bloomberg.com/news/articles/2015-05-08/soccer-pirates-shift-to-tv-from-computers-as-set-top-boxes-surge.

[88] *See, e.g.*, MPAA/SAG-AFTRA Comments at 21-28; Copyright Alliance Comments at 2, 15; Comcast/NBCUniversal Comments at 89-90.

As discussed, by its terms, the Proposed Rule does not contemplate direct contractual privity between copyright owners or MVPDs and the third parties who would be receiving video content and data under it. Instead, it would obligate MVPDs to provide access to such content and data to unaffiliated parties who would not be in contractual privity with MVPDs or content owners. Significantly, the FCC lacks the authority to create a cause of action to address potential violations of copyright owners' or MVPDs' rights under the rule.

The FCC appears to recognize this limitation, as the Proposed Rule states that copyright owners would still have "remedies under copyright law."[89] The FCC has also explained that the Proposed Rule "will not alter the rights that content owners have under the Copyright Act; nor will it encourage third parties to infringe on these rights," because new market entrants will still be "required to respect the exclusive rights of copyright holders."[90]

Unfortunately, this view may underestimate the barriers to invoking copyright remedies to redress potential violations by third-party actors purporting to operate under the rule. First, copyright owners and MVPDs presumably will have no obvious means to monitor the activities of these parties and may not even be aware of compliance issues or the misuse of copyrighted materials until considerable damage has been done. Additionally, although the letter suggests that "market participants can consult a series of Federal court decisions made over the past several decades that have carefully distinguished non-infringing uses of copyrighted video content from infringing uses,"[91] the fact is that much of the legal terrain in this area remains uncharted. As noted above, untested platforms and models will require independent analysis to assess whether they are operating lawfully; indeed, a great benefit of contractual relationships is that the parties can agree in advance how to address areas of legal uncertainty. By contrast, litigation is uncertain and highly fact-dependent, so it may be unclear whether a particular precedent will govern future conduct. The Office further observes that federal court actions can be prohibitively expensive,[92] and may take years to resolve.[93] In the case of overseas actors, it may be difficult to pursue litigation or enforce a judgment. As a result, the mere possibility of *ex post* litigation would appear to be an unsatisfying policy choice.

Conclusion

The Copyright Office appreciates the discussion that has been initiated by the FCC concerning ways to enhance consumer choice in the video marketplace. We are hopeful that any rule ultimately adopted in this area will not diminish, but instead will respect, the value of copyrighted video programming in the marketplace. The above analysis suggests that any

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[89] NPRM ¶ 80.

[90] Letter from Tom Wheeler, Chairman, FCC, to Rep. Marsha Blackburn 2 (June 3, 2016).

[91] *Id.*

[92] In 2015, the American Intellectual Property Law Association ("AIPLA") estimated that the median cost for a party to litigate a copyright infringement lawsuit with less than $1 million at stake through appeal in the federal court system was $250,000, and that parties with over $25 million at stake faced litigation costs of $1.2 million through appeal. *See* AIPLA, 2015 REPORT OF THE ECONOMIC SURVEY 39 (2015); *see also* U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS 8 (2013) ("SMALL CLAIMS REPORT"), *available at* http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf.

[93] The median time to trial in a copyright case is currently 2.1 years. BRIAN C. HOWARD, LEXMACHINA COPYRIGHT LITIGATION REPORT 15 (2015) (on file with the Copyright Office); *see also* SMALL CLAIMS REPORT at 26.

revised approach to be taken by the FCC should be crafted to preserve copyright owners' exclusive right under copyright law to authorize—through their contractual relationships with MPVDs and, in turn, MVPDs' relationships with third-party device makers and platforms—the ways in which their works are made available in the marketplace.

Please do not hesitate to contact me should you require further information on this subject.

Respectfully submitted,

Maria A. Pallante

Maria A. Pallante

From:	Schwartz, Robert
To:	Damle, Sarang; Day, Brian; Smith, Regan; Abramson, Cindy
Cc:	Greenstein, Seth; "dkumar@g2w2.com"
Subject:	RE: INCOMPAS ex parte FCC filing today
Date:	Wednesday, August 03, 2016 6:49:34 PM
Attachments:	Hauppauge-exparte-8-3-2016.pdf

As I'd mentioned, for our client Hauppauge Computer Works on Monday I participated in a conversation with the Chairman's Office that included a discussion of how a "digital certificate" issued pursuant to a certification regime could assure compliance with respect to stated goals re channel lineup, ad obfuscation, and privacy. I've just filed the attached ex parte letter.

We likewise appreciated your time, research and reflection evident in our discussion.

With best to all,

Bob

From: Damle, Sarang [mailto:sdam@loc.gov]
Sent: Tuesday, August 02, 2016 6:53 PM
To: Schwartz, Robert; Day, Brian; Smith, Regan; Abramson, Cindy
Cc: Greenstein, Seth; 'dkumar@g2w2.com'
Subject: RE: INCOMPAS ex parte FCC filing today

Bob, thanks for this and for the very helpful conversation today. We very much appreciate the time you, Seth and Dave took to explain your views on this complex issue.

Best,
Sy

Sarang (Sy) Damle
General Counsel and
Associate Register of Copyrights
U.S. Copyright Office
(202) 707-3572
sdam@loc.gov

From: Schwartz, Robert [mailto:rschwartz@constantinecannon.com]
Sent: Tuesday, August 02, 2016 6:24 PM
To: Day, Brian; Damle, Sarang; Smith, Regan; Abramson, Cindy
Cc: Greenstein, Seth; 'dkumar@g2w2.com'
Subject: INCOMPAS ex parte FCC filing today

Thanks for your devoted time and attention in our discussion on behalf of TiVo today. I'd mentioned that CVCC members will be advocating a simpler solution, based on electronic certificates signifying certification to observed performance of agreed outcomes , as an alternative to a device having to "know" what is in every MVPD-content programmer contract. The last page of the attached ex parte filing by INCOMPAS (just filed, likely appear in docket tomorrow morning) contains the first description by a CVCC member of such an outcome. This will also be addressed in the Hauppauge

filing, due COB tomorrow, which also addresses this approach.

With best to all,

Bob

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-----Original Appointment-----
From: Day, Brian [mailto:bday@loc.gov]
Sent: Friday, July 29, 2016 12:45 PM
To: Damle, Sarang; Smith, Regan; Abramson, Cindy; Schwartz, Robert; Greenstein, Seth; 'dkumar@g2w2.com'
Subject: Conference Call: FCC & Set-Top Boxes (TiVo)
When: Tuesday, August 02, 2016 1:00 PM-2:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: Call In Line: 202-707-5900; Collaboration Code: 450230

Instructions for participants to join

Dial (202) 707-5900
Prompt: "Please enter your Collaboration Code"

Enter the Collaboration code provided to you in this meeting invite.
You will be joined to the conference.

Robert Schwartz
202-204-3508
rschwartz@constantinecannon.com

August 3, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

Re: *In the Matter of Expanding Consumers' Video Navigation Choices, Commercial Availability of Navigation Devices*, MB Docket No. 16-42, CS Docket No. 97-80

Dear Ms. Dortch:

On August 1, 2016, Brad Love, Chief Engineer of Hauppauge Computer Works, Inc., and the undersigned as Hauppauge counsel (the "Hauppauge representatives" or "Hauppauge") had a telephone conference about the above-entitled matters with Gigi Sohn, Counselor to Chairman Wheeler, Jessica Almond, Legal Advisor to Chairman Wheeler, and Eric Feigenbaum of the Office of Media Relations. The subjects were (1) whether the "app alternative" as proposed[1] by the National Cable & Telecommunications Association ("NCTA"), and then described[2] in response to FCC questions, could be a feasible solution for Hauppauge as a TV display device manufacturer; and (2) whether there are simpler and better solutions for assuring preservation of channel lineups, advertising, and consumer privacy in the context of the Commission's Notice of Proposed Rulemaking.[3]

The Hauppauge representatives recounted that Hauppauge, a member of the Consumer Video Choice Coalition (the "CVCC"), is an independent designer and seller of devices that are certified and licensed to deliver cable TV video programming through CableCARDs. Hauppauge's ability to continue to compete and to offer innovative products depends on its ability to offer MVPD subscribers full access to the video programming for which they pay,

[1] Notice of Ex Parte Presentation from Paul Glist, Davis Wright Tremaine LLP, MB Dkt. No. 16-42, CS Dkt. No. 97-80 (filed June 16, 2016) ("App Alternative").

[2] Response to Questions About Open Standards HTML5 AppsBased Approach, Rick Chessen & Neal M. Goldberg, National Cable & Telecommunications Association, et al., MB Dkt. No. 16-42, CS Dkt. No. 97-80 (filed July 21, 2016) ("NCTA Response").

[3] Expanding Consumers' Video Navigation Choices, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, MB Dkt. No. 16-42, CS Dkt. No. 97-80, FCC 1618 (rel. Feb. 18, 2016) (the "NPRM").

through a competitive and nationally portable TV display device that is at least as functional and nationally portable as Hauppauge's current CableCARD devices. The current Hauppauge CableCARD devices are based on the DFAST License regime that has been in common operation since 2003. The Hauppauge representatives made these main points and observations:

1. Hauppauge and the CVCC have said repeatedly that there could be more than one technical path to implementation of the NPRM as published,[4] but "could be" is not the same as "is." Hauppauge agrees with ACA[5] that, as elaborated upon, the App Alternative would be *more* complex and expensive than the more flexible path to competition laid out in the NPRM.

2. Contrary to NCTA's assertion in its Response,[6] Hauppauge and the CVCC have stated that the NPRM can and should assure preservation of channel lineups, advertising, and consumer privacy, and that this can be done without forcing a TV display device manufacturer to know and conform to whatever is in every MVPD contract with every content programmer.[7]

3. Hauppauge remains open to paths to simplify requirements, but the NCTA answers to the FCC's specific questions indicate that the App Alternative would complicate rather than simplify the achievement of competition, and would limit the functions and competitiveness of non-MVPD supplied devices.

4. The NCTA Response highlights a number of areas in which concerted MVPD restrictions on design and on access to necessary data would preclude the described approach from being workable and would create a third party TV display device that would not be acceptable to consumers.

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[4] *See, e.g.*, CVCC April 22, 2016 Comments at 29 – 31 ("CVCC Comments"); CCIA May 23, 2016 Reply Comments at 29 – 31; CVCC May 23, 2016 Reply Comments at 27 – 42 ("Coalition Reply Comments"); letter of Hauppauge counsel Robert S. Schwartz on behalf of the CVCC, filed July 1, 2016, at 2.

[5] Letter of Thomas Cohen, Kelley Drye & Warren, LLP, on behalf of the American Cable Association, filed July 12, 2016.

[6] NCTA Response at 26.

[7] *See* Coalition Reply Comments at 64; May 23, 2016 Reply Comments of TiVo Inc. at 12 – 13; Letter of Hauppauge counsel Robert S. Schwartz on behalf of CVCC, filed May 13, 2016, at 2.

5. A simpler and more reliable and secure approach to assuring MVPD and consumer concerns with respect to privacy protection and channel lineup and ad preservation would involve the use of electronic certificates and device certification and licensing, practices that are in common use today. By allowing MVPDs to require electronic certificates (attesting to certification of compliance with paper certificates) the Commission can assure enforceable compliance with reasonable MVPD requirements, consumer expectations, and the objectives and requirements of Section 629[8] as sought through the NPRM.

The App Alternative Imposes Design and Data Limitations

Core design limitation. The NCTA proposal seems built on assumptions that all App Alternative implementations would occur on a common platform such as iOS or Android, yet neither of these platforms directly supports HTML5 apps that are not embedded within a native app. The App Alternative also seems not to anticipate implementations on specialized platforms (such as Hauppauge's current CableCARD TV receivers) for which no "app store" framework exists. In such case, as in the circumstances discussed by ACA and Roku,[9] the HTML5 environment would provide added expense but no advantage.

Necessary data unavailable. The Hauppauge representatives observed that even if the browsing app can be made functional, there would be insufficient data exposed to enable universal search as claimed, or to populate a functional EPG to allow users to navigate to the live and on-demand video programming to which they subscribe. The apparently concerted decision that MVPDs would deny all metadata to app-reliant devices would require a device designer to license multiple guide data sources in an attempt to build a guide or search facility. Even if a device manufacturer licenses guide data from multiple sources, no licensable guide source provides data to enable "discovery" of video-on-demand programming. This is factual information provided, exclusively, by MVPDs. So, Hauppauge would be attempting to field a device competitive with leased devices and proprietary apps, where:

- No entitlement data is exposed.
- No linear channel data is exposed.
- No VOD catalog browsing is enabled.

[8] 47 U.S.C. § 549.

[9] Ex parte letter of Trey Hanbury, Hogan Lovells, on behalf of Roku, Inc., filed July 8, 2016.

- No "what's on" information per channel / time is made available.
- No access is afforded to the consumer to her *own* subscription rights.
- No url is provided to directly stream a program – so even if a program can be located through externally licensed metadata, the information cannot be used to tune to a channel. So to the extent an independent third party device grid guide can be populated it cannot be used to tune to anything.

To make a third party navigation device buildable by Hauppauge or a competitor, MVPDs must provide basic navigation information for both live and VOD TV and there needs to be a standard for accessing this information. Under the App Alternative as described, it is not clear that a third party device manufacturer could get enough information to allow consumers to access video on demand or the services for which they pay by subscription. Moreover, without even the most basic channel and navigation information from the MVPD, it does not seem to be possible to provide a channel guide for live TV. These are limitations that would render third party navigation devices unacceptable to consumers.

Necessary search and play functions not supported. The Hauppauge representatives said that based on the information provided, functions necessary for a device to be competitive with an MVPD-provided device would be forbidden by design or by license. These limitations would create a user experience so awkward that it is questionable whether a TV video display device designed by an independent company like Hauppauge would be sellable:

- No search facility is provided for in the app. A compatible implementation would have to be formulated by the device manufacturer, with insufficient information provided by the MVPD app to determine any search results. If the solution is a link to a landing page inside the app, it is unclear how a device could obtain such a link from an MVPD.
- No choice of media playback engine – devices must use the HTML5 implementations.
- No direct 3rd party access to tune to a linear television stream.
- Consumer "lands" on another app page rather than direct media play, thus being exposed to additional / unwanted ads, program links.
- Once consumer "lands" she is 'stuck' inside the experiences control of the app, relegating back to the MVPD complete control of the user interface.

- Inside the app, the 3rd party grid guide and user interface are no longer accessible to the consumer, nor would a thumbnail of presently tuned video continue to run while the consumer leaves the HTML5 app and consults the device's own Guide.
- Jumping back and forth between a user interface developed by the device manufacturer and the "landing page" developed by the MVPD is unnecessarily clunky and may not be acceptable by consumers.

There is no technical reason why a secure video player utilizing the same security systems HTML5 supports cannot be used. Using a device manufacturer's navigation application along with an MVPD provided HTML5 player would limit the ability of the device manufacturer to create a seamless experience for consumers. Once again, these are limitations that would render third party navigation devices unacceptable to consumers.

Consumer home recording no longer supported. The Hauppauge representatives observed that NCTA apparently proposes to deny or heavily condition consumers' entitlement to home recording, as understood and practiced since the introduction of the first popular consumer VCR in 1976. Since then, consumers have had the option of engaging in personal home recording and local storage without the permission or even the knowledge of a broadcaster, MVPD, or content owner. This would change radically and permanently under the NCTA regime:

- There seems no feasible path to local storage, with or without MVPD permission.
- It is unclear whether user-initiated "cloud" recording would be feasible.
- If cloud recording is feasible, it is unclear whether the consumer would have adequate information to find and play back a recording, or whether export to and playback from a portable device would be feasible or allowed.
- Cloud recording would be by permission and according to conditions entirely discretionary with the MVPD and its contracts with content owners.
- MVPDs could arbitrarily deny permission to record, or condition recording on fees for storage, number of playbacks, resolution, fast-forwarding, viewing on more than one device, and other personal and private practices that today are discretionary with consumers.

Hauppauge CableCARD devices, operating under the DFAST License, support local recording without MVPD knowledge, permission, or conditions, other than the standard robustness requirements. The Hauppauge representatives observed that by ending permission-

less local storage and playback, the NCTA plan would effectively give its members and their programmers total control over discretionary and personal consumer recording, as sought by MPAA, Universal, and Disney in 1979 and denied to them by the Supreme Court in 1984.[10]

The App Alternative Imposes Unnecessary Complexity To Design And License A Product.

The Hauppauge representatives explained that in addition to added expense and reduced capability, the App Alternative, as elaborated upon in the NCTA Response, would be prohibitively complex to implement, even for an experienced company such as Hauppauge:

- License negotiations with, potentially, every MVPD would be exceptionally cumbersome, would require months of lead time in each case, and could require changes to completed implementations in order to accommodate new or differing requirements from another MVPD or another content programmer.
    - It might not even be possible to settle on an initial product design if all terms of all agreements are not known, and if there is even a possibility that license terms pertaining to performance may change according to MVPD contract renewals with programmers.
    - It would be an engineering nightmare to ensure that no "licensing collisions" occur, where features allowed by N-1 MVPD are then prohibited by MVPD N-2, and so on. *The higher the N value, the more tangled and complex this web becomes.*
    - In addition to the engineering obstacles, small companies do not have the resources to negotiate separately with so many entities.

By contrast, though initial CableLabs certification was difficult and expensive, it had to be done only for the first product. The terms and Compliance and Robustness rules of the DFAST license are clear and uniform, as are its remediation terms in the event of perceived breaches of both technical and legal obligations.

[10] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

The App Alternative's Managed IP Channel Introduces New Difficulties and Issues.

The Hauppauge representatives explained that the NCTA clarification, that managed IP channels would involve placing the termination device inside the home's private network and IP firewall, poses difficulties. Managing such an implementation would be beyond the capability of almost all consumers and would be challenging even for engineers trained in this area. Hauppauge also noted that the introduction of a managed IP channel offering services inside a consumer's private home network could lead to possible security issues if not done correctly. Standalone devices could also have difficulties finding the HTML5 app offered over the managed channel as well, leading to a possible increase in support calls due to configuration errors.

In the case of a "cabin in the woods" (anyone with television and no internet), interoperation with the HTML5 app would not be feasible. A 3rd party device cannot compete against a proprietary HTML5 app as described in the NCTA proposal, without its own access to the Internet. A proprietary HTML5 app would have extensive metadata retrieved over the managed IP connection, but the 3rd party device could not retrieve any sources of further metadata. The 3rd party device at this point would be nothing more than a dumb terminal offering access to the MVPD app. By contrast, under the information flows as described in the NPRM and as illustrated in the Technical Appendix to the CVCC Comments, independently sourced devices would receive sufficient information to be competitive in the same circumstance.

The App Alternative Removes Common Functions Supported By CableCARD Navigation Devices.

The Hauppauge representatives observed that today, a DFAST-licensed CableCARD-reliant device may be provisioned with and is capable of:

- One user interface for both watching and recording video content and viewing program guide data (no jumping to landing pages just to play video content).
- A fully populated EPG designed by the device manufacturer, which can include pop up or preview windows with live TV, lists of previously recorded TV programming, and other features to differentiate the product from leased set top boxes.
- Display of tuned-to live TV, while looking for options within the EPG.

- Direct tuning of channels from the device's EPG, as well as channel up/down tuning from the device's remote control.
- Entering recording instructions without leaving the EPG or tuning to the program to be recorded.
- Providing menus of recording programming and one-click playback from any program point, without the involvement of any MVPD user interface or any regime of permissions or additional fees.
- Inclusion in the search facility and comparison of acquisition costs of all other programming to which the user may have rights, even if the programming is not offered by the MVPD.

The NPRM and the path to compliance set forth in the CVCC's Technical Appendix would preserve and build upon these attributes, which are necessary to the design of innovative and competitive devices. The NCTA Response indicates that the App Alternative would not preserve any of these attributes of the existing CableCARD regime, even though that regime is based on a 2002 license and on technology that is significantly older than 2002.

Digital Certificates Offer A Simpler Path To Enforcement Re Channel Lineup, Ads, Privacy.

The Hauppauge representatives explained that there is a far simpler path to assuring that channel lineups and advertising would be displayed by competitive devices as transmitted and without obfuscation, and that privacy obligations will be respected. The elements of such a regime would be:

- The device manufacturer would sign a contract with a certificate authority agreeing to requirements for privacy, emergency alerts, advertising protection, preservation of channel lineups, and security.
- A navigation device would be tested and must pass certification testing administered by the certificate authority based on observed compliance with NPRM "certificate" pledges,[11] through comparison to a known compliant device with respect to channel lineup preservation, ad obfuscation, and compliance with privacy norms and published privacy policy.

[11] *See* NPRM Appendix A, proposed § 76.1200(l).

- A Digital Certificate would then be granted to the device manufacturer for the product certified, attesting that the tested device conforms to the maker's Certificate promises.
- Devices seeking to access content from MVPD offerings would present the Digital Certificate to the MVPD in the authentication process. This would establish an enforceable chain of trust for any device (or app) that intends to make use of MVPD content.
- Although the electronic certificate should be presumed valid, FCC rules would allow (in addition to the limited MVPD governance presently allowed by 47 CFR §§ 76.1201 and 76.1203) the certificate to be questioned and, subject to notice and remediation, not to be honored where there is a good cause to believe there is noncompliance. The remediation process can be modeled on standard practices and precedent – the existing provisions of the DFAST license for technical or legal breach and, with respect to FCC governance, the regulations implementing, e.g., IP Closed Captioning and the CVAA.[12]

The Hauppauge representatives noted that in 13 years' experience under the DFAST license and the existing certification regimes and remediation regimes for security technologies, products from independent competitors have not been a source of complaint with respect to system security, channel lineup distortion, or the deletion or obfuscation of advertising. Nevertheless, as noted, there are precedents and standard practices for certification, remediation, and cure that can provide assurance in these respects.

This letter is being provided to your office in accordance with Section 1.1206 of the Commission's rules.

Respectfully submitted,

Robert S. Schwartz

Robert S. Schwartz
Counsel

Cc:
Gigi Sohn
Jessica Almond
Eric Feigenbaum

[12] 47 C.F.R. 79.4(e) and 79.110.

From: Day, Brian
To: Damle, Sarang
Subject: Marc Paul - FCC
Date: Wednesday, September 07, 2016 11:32:00 AM

Marc Paul from the FCC just called to follow-up on your conversation from yesterday. He has some info he wanted to pass along to you. He can be reached at: 202.418.2401

Subject:	Call with Marc Paul, FCC
Location:	Sy
Start:	Fri 9/9/2016 9:30 AM
End:	Fri 9/9/2016 10:30 AM
Recurrence:	(none)
Meeting Status:	Meeting organizer
Organizer:	Damle, Sarang
Required Attendees:	Abramson, Cindy; Smith, Regan

From: Sandgren, Matthew (Judiciary-Rep) <Matthew_Sandgren@judiciary-rep.senate.gov>
Sent: Friday, September 09, 2016 5:39 PM
To: Pallante, Maria
Subject: Fw: Release: Hatch Criticizes Proposed FCC Set-Top Box Regulations

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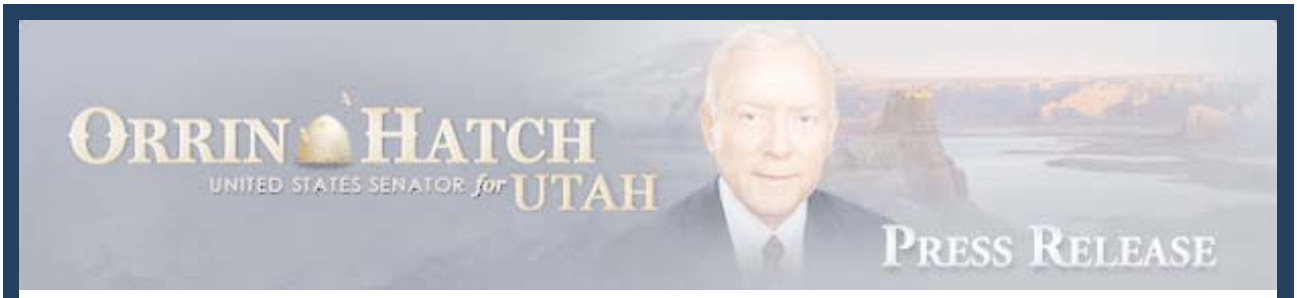
From: Whitlock, Matt (Hatch) <Matt_Whitlock@hatch.senate.gov>
Sent: Friday, September 9, 2016 5:17 PM
Cc: Freire, JP (Hatch)
Subject: Release: Hatch Criticizes Proposed FCC Set-Top Box Regulations



FOR IMMEDIATE RELEASE

September 9, 2016

Media Contact:

J.P. Freire: (202) 228-0210

Matt Whitlock: (202) 224-4511

Hatch Criticizes Proposed FCC Set-Top Box Regulations

Washington, D.C.—U.S. Senator Orrin Hatch, R-Utah, the longest-serving current member and former Chairman of the Senate Judiciary Committee, today expressed serious concern about the Federal Communications Commission's extensive new regulations of cable and satellite TV set-top boxes. The Senator's comments came in response to FCC Chairman Tom Wheeler's *Los Angeles Times* op-ed, which outlined his regulatory proposals.

"I am troubled by FCC Chairman Tom Wheeler's approach to the proposed set-top box plan," Hatch said. "By establishing itself as the arbiter of licensing terms, the FCC appears to be both setting up an unlawful compulsory licensing scheme and overstepping its jurisdictional bounds by involving itself into copyright law where it lacks expertise or authority. I urge Chairman Wheeler to continue to seek the views of the Copyright Office to ensure his proposal does not conflict with copyright law."

Background: In May, Senator Hatch authored a letter to FCC Chairman Wheeler about the proposed set-top box plan. The text of the letter appears below:

Dear Chairman Wheeler:

I write concerning the FCC's proposed set-top box rules, which would require cable and satellite providers to make television programming streams available to third parties. As the former chairman and senior member of the Senate Judiciary Committee, I am particularly concerned that the proposed rules could upend carefully negotiated licensing agreements between multichannel video programming distributors (MVPDs) and content providers.

Technological advancements have provided consumers with almost limitless options to watch pay-for content on an array of smart TVs and other devices. Streaming technologies have freed consumers from costly and cumbersome set-top boxes. To date, the fast-growing streaming market has forced cable and other video providers to be more nimble and competitive—unleashing greater innovation and consumer choice.

Unfortunately, many believe that if something is on the Internet it must be free. Producing and distributing video content, however, is not only costly—it also requires a legal framework to license that content. Approaches that ignore the need for licensing or undercut existing licensing agreements will likely increase costs for consumers, reduce choices, and discourage innovation.

While you have repeatedly said that copyright law will not be impacted by the proposal, the terms of the licensing agreements between MVPDs and programmers are the key mechanism for protecting the copyrights of content owners, and these are the very terms that third-party devices and apps will be permitted to disregard under the FCC's proposal.

I appreciate your February 18, 2016, statement that the proposal "will not interfere with the business relationships or content agreements between MVPDs and their content providers"

and "will not open up content to compromised security." I support those objectives and request all relevant information that will provide a clearer understanding of exactly how the proposed rules will ensure those objectives are met.

Sincerely,

Orrin G. Hatch

United States Senator

cc: Commissioner Ajit Pai

Commissioner Mignon Clyburn

Commissioner Michael O'Rielly

Commissioner Jessica Rosenworcel

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http://www.hatch.senate.gov

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