ORRIN G. HATCH
UTAH

ROBERT PORTER
CHIEF OF STAFF

104 Hart Senate Office Building

TELEPHONE: (202) 224-5251
TDD (202) 224-2849
FAX: (202) 224-6331

Website: hatch.senate.gov

United States Senate

WASHINGTON, DC 20510-4402

PRESIDENT PRO TEMPORE

COMMITTEES:

FINANCE
CHAIRMAN

JUDICIARY

HEALTH, EDUCATION, LABOR, AND PENSIONS

AGING

JOINT COMMITTEE ON TAXATION

May 18, 2016

The Honorable Thomas Wheeler
Chairman
Federal Communications Commission
445 - 12th Street, SW
Washington, D.C. 20554

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.

PRINTED ON RECYCLED PAPER

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

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

July 11, 2016

The Honorable Orrin G. Hatch
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

Thank you very much for your letter sharing your views about how the Commission's proceeding for better fostering competition in the set-top box and navigation app marketplace might impact the legal rights of content owners and creators. I take your input on this issue seriously and assure you that it will receive careful consideration.

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. Yet, unfortunately, the statutory mandate in section 629 is not yet fulfilled. The lack of competition in this market 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. One of the main contributing factors to these high prices is the no-option, add-on fee for set-top box rental that is included on every bill, forcing consumers to spend, on average, $231 in rental fees annually. Even worse, a recent congressional investigation found that the price of most equipment fees is determined by what the market will bear, and not the actual cost of the equipment.[1] With the lack of competition in this market, it should come as little surprise that fees for set-top boxes continue to rise.[2] Clearly, consumers deserve better.

This February the Commission put out for public comment a proposal that would fulfill the statutory requirement of competitive choice for consumers. This action opened a fact-finding dialog to build a record upon which to base any final decisions. Our record already contains more than 280,000 filings, the overwhelming majority of which come from individual consumers. FCC staff is actively engaged in constructive conversations with all stakeholders—content creators, minority and independent programmers, public interest and consumer groups, device manufacturers and app developers, software security developers, and pay-TV providers of all sizes—on how to ensure that consumers have the competition and choice they deserve. I am hopeful that these discussions will yield straight-forward, feasible and effective rules for all.

---

[1] U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS COMMITTEE, MINORITY STAFF REPORT, INSIDE THE BOX: CUSTOMER SERVICE AND BILLING PRACTICES IN THE CABLE AND SATELLITE INDUSTRY, 17 (Jun. 23, 2016).

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

You raised questions about how this proceeding might affect the legal rights of content owners and 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. 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 share your goal of ensuring that the marketplace of legal copyrighted works is not harmed by our proceeding. And I am confident that these FCC-specific authorities and well-practiced contractual arrangements will continue to 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.

The goal of this rulemaking is to promote competition, innovation and consumer choice. I can assure you that we do not seek to alter the rights that content owners have under the Copyright Act; nor will we 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.

I also share your interest in ensuring that we do not interfere with the licensing agreements and contractual arrangements between pay-TV providers and programmers. Licensing agreements in particular are used to establish usage terms for content that falls outside of the protections afforded by federal copyright law. I believe that such provisions should remain protected, and we are actively seeking input from the programming community on a number of methods to accomplish this.

I also share your interest in ensuring strong anti-piracy protections. Our proceeding will protect the role of digital rights management (DRM) platforms in the television ecosystem. DRM platforms offer rigorous protection against unauthorized copying and other violations of content owner rights.[3] Importantly, DRM platforms are not developed by content owners or multichannel video programming distributors, but rather, by businesses with expertise in DRM. Some of the more popular solutions currently on the market are Microsoft PlayReady and Adobe Primetime. The Notice of Proposed Rulemaking adopted by the Commission in February proposed that content owners would remain free to select the DRM platforms that they prefer. Developers of competitive apps and set-top boxes would license the DRM technology and satisfy

---

[3] *See* DOWNLOADABLE SEC. TECH. ADVISORY COMM., DSTAC FINAL REPORT 262-67 (Aug. 28, 2015), https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf.

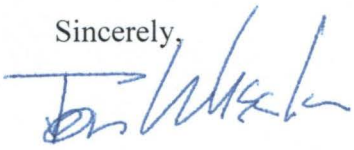
compliance requirements – in the very same way that current set-top boxes support DRM, and the same way that competitive apps and devices and already support DRM for online video.

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 that we can foster 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 of America, West (WGAW), 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 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."[4]

The record we are developing will help us preserve strong protections for content creators and owners while delivering American consumers meaningful choice. Thank you for your engagement in this proceeding, and I look forward to continuing to work with you on this important consumer issue.

Sincerely,



Tom Wheeler

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