

July 29, 2016

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, 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:

On July 29th, John Bergmayer, Kate Forscey, John Gasparini, and Gene Kimmelman of Public Knowledge (PK) spoke by phone with Gigi Sohn, Counselor to Chairman Wheeler; Louisa Terrell, Advisor to Chairman Wheeler; Jessica Almond, Legal Advisor to Chairman Wheeler, Eric Feigenbaum of the Office of Media Relations; and John Williams of the Office of the General Counsel, to discuss the above-captioned matters.

PK reviewed some aspects of the MVPD app proposal. While PK continues to believe that the NPRM's approach to navigation device competition is best, it is possible for there to be *an* app-oriented approach that would achieve the Commission's goals. However, the current iteration of the MVPD app proposal is not it.

Perhaps the most significant drawback to the HTML5 app proposal is that PK is unaware of any existing devices it would actually work with. It is certainly possible to create apps for many different platforms that leverage HTML5. For instance, Facebook's app for the iPhone used to be HTML5-based. But it wasn't a "pure" HTML5 app—it was an HTML5 interface wrapped in a native iOS shell, distributed through Apple's app store, and tested to work on iPhones. (Even so, the poor performance of HTML5 led Facebook to abandon even this use, with Mark Zuckerberg stating "The biggest mistake we made as a company was betting too much on HTML5 as opposed to native."<sup>1</sup>) However, the MVPDs do not appear to be proposing to create native apps for existing devices that leverage HTML5 internally, but rather creating a complete HTML5 app that would be expected to run on diverse hardware platforms. But which specific platforms would such on app work on today? Each platform, for very good reasons, develops its own app format and typically only apps in that format work on the device. There is no equivalent to a web browser for TV-connected devices that allows some semblance of a "write once, run anywhere" app.<sup>2</sup> An app proposal that would produce apps that are not compatible with any existing device hardly seems like an ideal solution, and previous MVPD attempts to persuade the consumer

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<sup>1</sup> Christina Warren, *Zuckerberg's Biggest Mistake? Betting on HTML5*, MASHABLE (Sept. 11, 2012), <http://mashable.com/2012/09/11/html5-biggest-mistake/#2EcX01ipmGqS>

<sup>2</sup> Cf. Andy Johnson-Laird, *Looking Forward, Legislating Backward?*, 4 J. SMALL & EMERGING BUS. L. 95, 115 (2000) (The goal of universal compatibility "was dubbed 'Write Once, Run Anywhere,' and while being an admirable goal, it has not been attained yet—the epithet 'Write Once, Debug Everywhere' is unfortunately more appropriate.").

electronics industry to adopt its preferred technologies have fallen flat.<sup>3</sup> Finally, even if a universal app did work and could be deployed to a number of devices, it would always be a second-best alternative to a native app on that same platform—not merely in terms of performance, but through obeying that platform's conventions as to the structure, appearance, and functionality of navigation elements.<sup>4</sup>

PK also noted that MVPDs have not guaranteed parity of content or features between their own boxes and their apps, which exists today (with some technical, not licensing limitations) with CableCARD. They have only guaranteed that they would deliver content licensed for their MVPD service to their MVPD apps—but since the apps are part of the MVPD service, this non-commitment does not guarantee parity. The FCC should be clear that accessing programming on competitive navigation devices (possibly including under an app proposal) is a *condition* for MVPD carriage. MVPDs and programmers cannot be permitted to negotiate on a case-by-case basis which devices their programming may be displayed on—just as programmers and cable companies do not have this right today.<sup>5</sup>

PK also argued that the MVPD proposal for “universal search” would lead to a poor customer experience. First, it doesn't appear to allow viewers to begin playing content immediately from search results, and instead would drop them to a landing screen—which is simply a sub-par user experience. But that aside, the MVPD proposal would require that each device inefficiently procure its own programming line-up information from a third-party vendor, and even then, the device's universal search feature would have no way of knowing what particular programming bundle a customer is subscribed to. Thus a consumer might search for a

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<sup>3</sup>Nate Anderson, *Tru2way plug-and-play digital cable support still AWOL*, ARS TECHNICA (October 20, 2009), <http://arstechnica.com/tech-policy/2009/10/tru2way-plug-and-play-digital-cable-support-still-awol>; Stewart Schley, *False Start: Cable's 2008 tru2way Initiative was Steamrolled by the Internet*, CED MAGAZINE (Oct. 5, 2015), <https://www.cedmagazine.com/article/2015/10/false-start-cables-2008-tru2way-initiative-was-steamrolled-internet>.

<sup>4</sup> For example, on a given device, pressing “menu” on the remote control may typically take the customer up one level in the navigation hierarchy. An MVPD app should behave the same way. Or, on a given device, highlighted elements in the UI may have a certain appearance. To avoid customer confusion, MVPD apps should look and behave consistently with other apps on the same platform. The easiest way to achieve this is through native apps tailored to a specific platform, not through some hypothetical “universal” app format.

<sup>5</sup> It is further valuable to remember that CableCARD devices exist on the marketplace today that permit many of the features that incumbents have claimed are incompatible with copyright or programming contracts. For example, consumers can pair an SiliconDust HD Homerun with the “Channels” app to watch MVPD programming on an Apple TV or iOS device—all in a UI designed by the makers of the Channels app, not by a cable company, and not even by SiliconDust. See Jeff Benjamin, *Hands-on: Channels for iOS – a beautiful live local TV solution for cord cutters*, 9to5Mac (July 27, 2016), <http://9to5mac.com/2016/07/27/hands-on-channels-for-ios-video> (“Channels is for anyone who wishes to watch live TV from an iOS device ...In order to use Channels, you will need to own an HDHomeRun box... Some HDHomeRun boxes even work with cable television signals via a CableCARD or QAM.”)..

movie, get a result from the MVPD app, and be delivered to an MVPD landing page that states that the customer is not subscribed to a package that includes that programming source.

MVPDs have posited that information about what programming package a customer subscribes to constitutes personally identifiable information, which prohibits them from making this information available to competitive devices. In the first place, allowing consumers to make use of *their own* PII on a competitive device is hardly the same as disclosing that information to a third party. Indeed, MVPDs are required to make a customer's PII available to that customer.<sup>6</sup> Provided the information never leaves the device, it is unclear how a "disclosure" to a third party has even taken place. But, out of an abundance of caution assuming that such uses do constitute disclosure, consumers should be able to opt in to it.<sup>7</sup> Many consumers do not object to *choosing* to share information when they receive a clear benefit that would not be possible without such disclosure—especially when disclosure of such information is not some sort of "payment" but rather a necessary precondition for the service to work to begin with. Enabling a functioning universal search would be such a situation.

PK then observed that an app proposal that required MVPDs to create native apps (with content, quality, and feature parity with MVPD boxes) for various platforms, or required them to sign agreements on nondiscriminatory terms with competitive device manufacturers so that those manufacturers could create native apps or functionality for their own platforms,<sup>8</sup> might be more effective at creating real competition and presenting consumers with meaningful options.<sup>9</sup> Such an approach would seemingly satisfy some of the objections to the Commission's proposal, insofar as apps would be created either by MVPDs or by entities in privity with MVPDs.<sup>10</sup>

It should be clear that making an apps approach work as a technical matter, and policy questions associated with an apps approach are separate. For example, an approach where MVPDs enabled competitors to create native apps that access MVPD content would be compatible with permitting competitors great flexibility in terms of UI presentation and features, or it could be more limited. PK prefers that competitors have as much flexibility as is compatible with protecting the various legitimate interests (channel placement, advertising overlays, customer privacy, and so on) that have been identified at length in this docket. However, PK would expect that these issues would be explored by the Commission in consultation with programmers, MVPDs, consumer groups, and competitors.

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<sup>6</sup> 47 U.S.C. § 551(d).

<sup>7</sup> 47 U.S.C. § 551(c).

<sup>8</sup> It would be important for there to be some level of standardization throughout the industry, such that a competitor could create one app that, with minor modifications, would allow its device to work with various MVPDs. Additionally, any approach should also permit for competitive devices that are not necessarily full app platforms.

<sup>9</sup> Even a device maker that is supported by an MVPD app might still want to make its own, for example, to provide a custom UI.

<sup>10</sup> Additionally, to protect programmers, MVPDs should not be permitted to require of programmers that MVPD apps of this kind are the *only* way that their programming is available on a device. Programmers should be free to create their own apps and strike deals with online video distributors, irrespective of how the Commission proceeds on competitive navigation devices.

PK additionally noted, in agreement with the American Cable Association,<sup>11</sup> that apps-based approaches are generally *more* burdensome on MVPDs than the Commission’s “information flows” proposal, which could be implemented by MVPDs quite easily, and 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 maker.

PK ended its discussion by emphasizing the importance of consumer rights with respect to copyrighted content. Competitive navigation solutions can both protect the legitimate interests of creators and enable true competition and consumer choice, and the programming and creative community should have a voice, along with consumers, MVPDs, and competitors, in setting the standards and policies that enable competition. (And, as noted above, the programming community’s desire for a line of privity can be satisfied through a nonburdensome requirement that competitors execute agreements with MVPDs, which could include the ability of programmers to raise concerns about compliance.)

PK’s preference is that no technologies or policies stand in the way of consumers exercising their fair use rights. But to the extent that the Commission adopts policies that could permit for such restrictions, it should be guided by the precedent of the encoding rules,<sup>12</sup> which permit content owners to place certain restrictions on devices and consumers, but only within strict boundaries. In general, consumers should always be permitted to engage in activities that are plainly fair uses (or simply outside the scope of copyright, e.g. private performances, or accessing programming on competitive devices) under copyright law.

Courts have repeatedly upheld consumer rights with respect to recording and playing back video programming. In *Sony Corp. of Am. v. Universal City Studios.*, 464 U.S. 417 (1984), the Supreme Court found that consumers have a fair use right to record programming for playback at a later time (time-shifting)—and that device makers have a right to sell devices that enable this. In *RIAA v. Diamond Multimedia Systems*, 180 F. 3d 1072 (9th Cir. 1999), the court found that “merely mak[ing] copies in order to render portable, or space-shift” media is a “paradigmatic noncommercial personal use” and expressly analogized this use to the Supreme Court’s holding in *Sony* with respect to time-shifting. And in *Fox Broadcasting Co., Inc. v. DISH Network LLC*, 723 F. 3d 1067 (2013), the court made it clear that consumer rights in this area apply not only to time- and space-shifting but expressly noted that place-shifting includes the right to copy recorded media to other devices such as mobile phones (device- and possibly format-shifting), and to play back media in the manner of the users’ choice (e.g., skipping past commercials). These views are hardly judicial novelties. As early as 1961, the Register of Copyrights stated,

New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright.

Along the same lines, in 1971, the House Report on the Sound Recording Act (which was passed in the explicit hope of curbing record piracy) includes the recognition of lawful home recording. In today’s parlance, that would constitute not only time-shifting, but also space-shifting and format-shifting as well:

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<sup>11</sup> Ex Parte Filing of American Cable Association in MB Docket No. 16-42 (July 26, 2016).

<sup>12</sup> 47 CFR § 76.1904.

[I]t is not the intention of the Committee to restrain the home recording, from broadcasts or form tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it.

In short, that consumers are permitted to record, copy, convert, and play back lawfully-acquired copyrighted content for personal fair uses is by now a settled point of law. Commission action around standards for video devices should recognize this, and not give any stakeholder the ability to restrict consumers' lawful activities. These principles apply whatever approach the Commission adopts to promote navigation device competition.

Respectfully submitted,

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