

August 2, 2016

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Commercial Availability of Navigation Devices, MB Docket No. 16-42, CS Docket No. 97-80

Dear Ms. Dortch:

On August 1, 2016, Ernesto Falcon, Jeremy Gillula, and Mitch Stoltz with the Electronic Frontier Foundation (EFF) spoke by telephone call with Counselor to the Chairman Gigi Sohn and FCC staff Jessica Almond, Eric Feigenbaum, and John Williams.

On the call, we expressed our opposition to the recent MVPD proposal¹ and concerns over many of its provisions. We explained that the MVPD proposal does not meet the goals of Section 629, and that it would stifle technological innovation and raises user security concerns. EFF staff iterated that if the FCC were to adopt the MVPD proposal, it would in effect repeat the mistakes of CableCARD by giving the MVPD industry sufficient control and capabilities to stifle entry into the market for navigation devices and software. We also reiterated the opinion of leading copyright law scholars² that copyright does not confer a right to control the user interface, technological evolution of navigation devices, or any additional rights to control entry into the navigation device market.

Technical Concerns with MVPD proposal

Jeremy Gillula, EFF Senior Staff Technologist, noted that no technological barriers exist to prevent MVPDs from exposing the information necessary to allow third party navigation devices to create their own user interface or meet the other goals of the NPRM.³ The fact that the MVPD proposal envisions adopting a HTML5 model as an alternative demonstrates that such information exposure is well within the capabilities of the MVPD industry. Furthermore, Dr. Gillula noted that should the FCC mandate that all

¹ See NCTA & AT&T Response to questions about open standards HTML5 Apps-based approach, MB Docket No. 16-42, CS Docket No. 97-80 (July 21, 2016).

² See Copyright Scholars and EFF reply comments, MB Docket No. 16-42, CS Docket No. 97-80.

³ FEDERAL COMMUNICATIONS COMMISSION, Notice of Proposed Rulemaking, MB Docket 16-42, CS Docket No. 97-80 (Feb. 18, 2016).

third-party devices be required to use HTML5 as a standard, the hardware requirements of HTML5 will increase the cost of building competitive navigation devices.

Dr. Gillula disagreed with arguments that the MVPD industry must be in control of every app in order to ensure the most secure delivery of content. To the contrary, a truly open standard that allows any entrant to access and display purchased content for MVPD customers is fully capable of delivering content securely. In fact, it is just as plausible that allowing third-party device makers to develop methods for secure delivery of content could result in stronger protections. However, EFF strongly cautioned Commission staff against allowing the MVPD industry to dictate what Digital Rights Management (DRM) system must be used on third-party devices, as such mandates would inevitably lock out or stifle new entrants.

Lastly, EFF reiterated its earlier comments that any usage of DRM for third party devices must include a covenant not to sue security testers and researchers under Section 1201 of the Digital Millennium Copyright Act or its foreign equivalents.⁴ Allowing third-party auditing of navigation devices and the ability to publish findings of known vulnerabilities would ensure the most robust upkeep of security measures to protect consumer information.⁵

EFF Opposes the MVPD's Request for New Regulatory Rights Unsupported in Copyright Law

Throughout the MVPD proposal it is suggested that the FCC must give MVPDs full control over the HTML5 apps-based approach as the only means to protect copyrighted works and expand contractual obligations over third party devices.⁶ Mitch Stoltz and Ernesto Falcon explained how the approach proposed in the NPRM does not harm any of the interests protected under copyright law, and that allowing independent third party manufacturers to develop and deploy navigation devices would not violate or encourage violations of copyright. Legal experts have also submitted extensive explanations as to why the copyright infringement arguments raised by MVPDs and content companies in this proceeding are specious at best.⁷

EFF expressed concerns that the FCC would repeat the failures of CableCARD if it implements an Order that ensures that MVPDs control new entrants and such an approach is not envisioned by Section 629 of the Communications Act. Mr. Falcon stated that forcing third party device makers who wish to enter the navigation device market to

⁴ The World Wide Web Consortium is actively debating and seeking consensus on similar proposals.

⁵ See EFF comments, MB Docket No. 16-42, CS Docket No. 97-80

⁶ See NCTA & AT&T Response to questions about open standards HTML5 Apps-based approach, MB Docket No. 16-42, CS Docket No. 97-80 (July 21, 2016), at 20-23.

⁷ See Copyright Scholars and EFF reply comments, MB Docket No. 16-42, CS Docket No. 97-80.

come hat in hand to the MVPD industry for permission to invent and design would undermine the FCC's mandate. The suggested complaint process by the MVPD proposal to allow manufacturers to return to the FCC should they find themselves frozen out is insufficient and acknowledges that the MVPD apps proposal is subject to the same incumbent self protection abuses as CableCARD.⁸

MVPD Proposal to Only Allow “Licensed” Content to be Searchable Would Harm Small Content Creators and Open Platform Distributors

Mr. Falcon and Mr. Stoltz highlighted that the MVPD proposal to limit search functionality to “licensed content” would effectively limit the searchable video universe to a short, closed catalog of MVPD and online video content. Search functionality limited to “licensed content” would require a device maker to be able to verify ownership rights and whether transmission of content is lawful under the fair use doctrine in a given situation. Such technology does not exist today nor can it be invented given the fact specific nature of the inquiry. It is likely that the only method for a third party device maker to comply with a “licensed only” search regime would be to limit the contents of a search to the catalogs of established MVPDs and online video distributors.

Mr. Falcon further raised concerns for small content creators under a “licensed only” search regime as they regularly rely on the openness of the Internet, its low barriers to distribution of content, and capacity to reach large audiences quickly as means to achieve commercial success. Mr. Falcon argued that if the industry is interested in ensuring that content created by communities of color is given ample opportunity to reach audiences, it cannot square that with an excessively restrictive search regime that would freeze out open platforms where any artist can develop a following and market themselves.

Please direct any questions to the undersigned.

Sincerely,

/s/ Ernesto Falcon
Legislative Counsel
Electronic Frontier Foundation

⁸ NCTA & AT&T Response to questions about open standards HTML5 Apps-based approach, MB Docket No. 16-42, CS Docket No. 97-80 (July 21, 2016), at 23.