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September 22, 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 September 20, 2016, Ken Plotkin, President of Hauppauge Computer Works, Inc., Chief Engineer Brad Love (by telephone), and the undersigned as Hauppauge counsel (the "Hauppauge representatives" or "Hauppauge") met with Gigi Sohn, Counselor to Chairman Wheeler, Jessica Almond, Legal Advisor to Chairman Wheeler, John Williams, Senior Counselor to the General Counsel, and CTO Scott Jordan (by telephone). The subjects were, in the context of the Commission's Notice of Proposed Rulemaking¹ and the Chairman's subsequent fact sheet,² discussion of (1) what should be considered a "widely deployed platform," (2) the most efficient and least burdensome ways, for MVPDs as well as for device makers, for the necessary software to be made available to entrants, (3) the metadata necessary to support VOD as well as linear program search, (4) the authority of the FCC over the reasonable and necessary rights and expectations of entrants to achieve a fair "app" license, and the rights of entrants to participate in the process of formulating one, and (5) why device entrants would not be receiving any "compulsory license" of any right reserved to content programmers.

The Hauppauge representatives recounted that Hauppauge is an independent designer and seller of devices that are certified and licensed to deliver cable TV video programming through CableCARDS.³ Hauppauge's ability to continue to compete and to offer innovative products depends on its ability to afford MVPD subscribers full access to the video programming for

¹ 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").

² FACT SHEET: CHAIRMAN WHEELER'S PROPOSAL TO INCREASE CONSUMER CHOICE & INNOVATION IN THE VIDEO MARKETPLACE, rel. Sept. 8, 2016.

³ The current Hauppauge CableCARD devices are based on the standard DFAST License regime that has been in common operation since 2003.

which they pay, on a basis that is at least as functional and nationally portable as Hauppauge's current CableCARD-reliant devices.

Widely Deployed Platform Solutions

The Hauppauge representatives explained that present Hauppauge CableCARD "OCUR" USB or Ethernet CableCARD-reliant devices are connected to a "PC" via a USB cable or Ethernet network connection. The most common customers are end users who use their PCs as media systems to watch and record live TV. Many use Windows Media Center, which has a deployed base in Windows 7 and 8 of around 100 million units in the United States. Windows Media Center supports both ATSC "over the air" TV and CableCARD-based cable TV.

An app solution that can render MVPD programming would need to be available to Windows-based computers, without imposing undue burden on MVPDs or device entrants. Once such an MVPD app solution is available on Windows, Hauppauge would then use the app solution's API (application program interface, which is the standard way computer programs "talk" to each other) to add live TV, video on demand and other functions, as allowed or required by the FCC, to the Hauppauge "WinTV application for Windows."

The Hauppauge representatives stressed that the number of devices used to determine a "widely deployed platform" should be low enough not to preclude new entrants to the marketplace, while allowing for uniformity sufficient to assure national portability and interoperability of solutions. They also stressed that current marketplace participants with specialized platforms should not be excluded. The diversity of potential platforms that share common operating system origins, such as the variants of Windows and Linux, suggests that the Commission regulations should, as a minimum, include support for platforms that currently support CableCARDS.⁴ The Hauppauge representatives also suggested that nothing in Commission regulations should preclude an MVPD from voluntarily supporting products in the manner envisioned in the NPRM.

⁴ Hauppauge also supports TiVo's proposal in its September 6 and 19, 2016, ex parte letters that CableCARD distribution and support by MVPDs should be required for at least seven more years.

Providing a Porting Kit Would Usefully Share the Implementation Burden With Device Manufacturers

“Porting kits” are used often in the software industry to make it easier to move a software technology from one platform to another. With the porting kit, content security is built into the app by the MVPD, but the work needed in porting of the app to the platform is left to the device manufacturer. The porting kit would allow high value content to utilize built-in security instructions while leaving presentation details the responsibility of the developer.⁵ In this case, MVPDs can provide a porting kit for their app, which would be provided to device manufacturers through the chip set manufacturers who have implemented the app security. A porting kit could also offer multiple well-supported secure delivery mechanisms (content protection) and separate the data and control planes of the MVPD app to make the porting kit easier to implement.

App Characteristics, User Guide and Necessary Metadata

Characteristics of the App. The Hauppauge representatives observed that while the MVPD’s “app” can retain responsibility for secure rendering of programming, consumers should retain the option of running it in a “window” so that they can maintain control over navigation. It should have borderless operation (so that the live TV can be embedded in the program guide), and support multi-tasking (so that live TV can be run at the same time as metadata collection). The app should provide data, playback, and recording APIs that are functional even when the app is not currently focused or active so that guide data and other navigation functions can be performed in the “background.” The playback API in the app should allow content rendering without any app “decorations” such as overlays. The experience should be as fluid as possible for the best consumer experience.

By having the MVPD app API provide these features, advertising and other MVPD-provided inserts in the video would be preserved, while the device manufacturer will have the ability to position the video on the screen where it makes the most sense. In addition, the device manufacturer can “navigate” to the content by retrieving “links” to live TV, video on demand, and recordings previously made and stored by the consumer.

⁵ As an example, such “porting kits” are available today for porting Netflix to new computer platforms.

Metadata. Metadata is the information needed to associate a program name and episode to the “link” that allows that program to be played or recorded. Metadata is formatted into a “guide,” which shows the consumer the names and episodes of programs they are entitled to view. Such a guide must have information to support live TV, video on demand, and customers’ access to their own catalog of recordings.

The Hauppauge representatives reviewed the metadata necessary for a guide to provide for adequate user search, including instances where no general Internet access is available. For all program types the minimum level of metadata should include show title, original air date, program start and end times (if applicable), a “link” to the programming (tuning data such as URL) and ratings data. For previously recorded programs, each item should be uniquely identified, whether stored locally or in the “cloud.”

With respect to video on demand (VOD), this must also include season and episode data (e.g., *The Simpsons* 15:5) when available, or a unique production code (e.g., *The Simpsons* 3FC7) that is permanently associated with the program. Metadata listings for VOD should also contain the episode title to assist consumers visually when selecting programs. Without these fields an end user cannot distinguish among offers or recordings of individual series episodes, nor can a third party look up the information in an external database for further rich metadata retrieval. The most reliable way to do this is for this persistent, factual information to be associated with the content as received from the MVPD.

The ultimate goal of the minimum level of metadata is to ensure that, in a home without an Internet connection, a fully navigable guide can be presented to the consumer. A competitive device must be both functional and navigable in this scenario, even though the leased STB might be able to obtain further rich metadata over a managed IP channel.

Rules and Precedent Require FCC Oversight of and Entrant Participation In Specifications and Licenses Related to the Attachment and Commercial Operation of Devices.

The Hauppauge representatives observed that FCC rules assuring that entrants must receive adequate technical specifications and that licenses must enable their commercial use were adopted by the Commission in 1998, with its First Report and Order in CS Docket No. 97-80, and codified at 47 C.F.R. Sections 76.1200 – 1210. These technical specifications and

licenses are specifically related to the attachment of third party devices to an MVPD network and do not depend on prior programmer authorization under copyright law.

These rules remain in place after four D.C. Circuit challenges, and the recent and highly specific congressional review of the Commission's navigation device rules. In 2014, when the Congress passed SHIVERA to require a specific change to Section 76.1204(a)(1), the Congress *left in place* rules 76.1201, 1203, and 1205. The rules unambiguously require MVPDs to provide, under license if necessary, interface specifications to enable commercial availability. ***These 1998 rules do not allow device function to be restricted, other than to avoid electronic harm to the network or theft of the MVPD services.***

Section 629 requires Commission rules to *assure* the attachment of commercially competitive devices to MVPD systems. These First Report and Order regulations clearly interpret "assure" in the Carterfone / Part 68⁶ sense of (1) providing adequate interface information for the product to function competitively, and (2) not impairing the function of the product *unless* required to prevent electronic harm to the network or theft of service (emphasis supplied):

- **Section 76.1201** requires support for connection "except in those circumstances where ***electronic or physical harm*** would be caused by the attachment or operation of such devices or such devices may be used to assist or are intended or designed to assist in the unauthorized receipt of service."
- **Section 76.1203** allows the denial of attachment or competitive use "only of such devices as raise reasonable and legitimate concerns ***of electronic or physical harm or theft of service.***"
- **Section 76.1205** reads, in its entirety: "Technical information concerning interface parameters that are needed to permit navigation devices to operate with multichannel video programming systems ***shall be provided*** by the system operator upon request in a timely manner."

⁶ *In the Matter of Use of the Carterfone Device in Message Tool Service*, 13 FCC 2d 420 (1968); 47 C.F.R. Part 68. For background see, e.g., http://itlaw.wikia.com/wiki/Carterfone_decision.

The Hauppauge representatives asserted that these provisions, in place for 18 years and having survived four court challenges⁷ and congressional review, define compelling interests of both the Commission *and device entrants* in any specification and necessary license that would result from this rulemaking. Hence the Hauppauge representatives agreed with the Chairman's assertion that the FCC can and must exert oversight over any license to be extended to device or competitive app entrants.

Moreover, the Hauppauge representatives argued that such oversight can be meaningful *only if device and app entrants are fairly represented*, from the outset, in any licensing discussion or "app board" deliberations to determine the necessary specifications for, grants of rights to, and responsibilities of competitive devices and apps. ***The contents of any such licenses and specifications cannot be left exclusively to the entities whose regulation was found necessary by the Congress in passing Section 629.***

The FCC Oversight and Entrant Interests Clearly Extend To Copyright-Related Specification and License Provisions.

The Hauppauge representative observed that the Commission had affirmed in its Declaratory Ruling⁸ of September 18, 2000 that Sections 76.1201, 1203 and 1205 also apply in the context of programmers' copyright interests, as well as MVPD service interests. In that Ruling, issued by unanimous Commission vote, the FCC confirmed that (1) asserted programmer copyright concerns can be recognized only in the context of unauthorized receipt of service, and (2) FCC review must be available to device entrants, to determine whether a copyright-based restriction on a device is appropriate in a license.⁹

The Hauppauge representatives noted that the DFAST license, which assures entrant rights in the use of CableCARD-reliant devices, was jointly presented to the Commission in 2003, by electronics and cable industry representatives, specifically pursuant to this expression

⁷ *General Instrument Corporation v. FCC*, 213 F.3d 724 (D.C. Cir. 2000); *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006); *Comcast Corporation v. FCC*, 526 F.3d 763 (D.C. Cir 2008); *EchoStar Satellite LLC v. FCC*, 704 F.3d 992 (D.C. Cir 2013) ("EchoStar").

⁸ CS Docket No. 97-80, *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Further Notice of Proposed Rulemaking and Declaratory Ruling, rel. Sept. 18, 2000 ("Declaratory Ruling").

⁹ *Id* at ¶ 29 and n. 71. Commissioner Tristani wrote separately in support to emphasize that "our ruling in no way authorizes any attempt by providers of services to utilize this ruling to combine technology with copy protection in a manner that interferes with, or unreasonably restricts, a consumer's fair use of copy-protected material."

of FCC jurisdiction. The compelling interest of the Commission and device entrants in the license terms was affirmed by the NCTA in its April 28, 2003 Reply Comments in Docket No. 97-80. The NCTA specifically cited to the Declaratory Ruling in confirming the Commission's interest in oversight of the DFAST license, on behalf of *both* licensees and MVPDs.¹⁰

The FCC has already asserted, pursuant to its authority under Section 629, that it is not a violation of the separation requirement of its navigation devices rules to include some measure of copy protection within a host device.¹⁷⁸ The FCC concluded that copy protection measures are acceptable through licensing as part of a cable operator's grant of conditional access to its services.¹⁷⁹ When reaching this decision, the FCC recognized that copy protection was a sticking point between CE and MSO negotiations and noted its expectation that resolution of the issue would bring to fruition the goals established by Congress in Section 629.¹⁸⁰

The NCTA went on to clarify (as Public Knowledge has recently asserted¹¹) that rules addressing the limitations that may be imposed on entrant devices constitute FCC valid oversight over MVPDs, *not* programmers:

As an initial matter, the proposed rules impose limitations on an *MVPD's* distribution of programming content, not on the *programmer's* actions. The Commission has taken the same approach in other contexts, such as closed captioning, children's programming, and programming providing emergency information (*i.e.*, the rules are imposed on the MVPD, not directly on the programmer),¹⁷³ and can do so here.

NCTA was also correct in 2003 in observing then that license oversight may be applied "independent of copyrights":

Moreover, many rights exist and are regulated independent of copyrights. The FCC was upheld in regulating the degree of "syndicated exclusivity" that could be exercised when cable systems imported television programming (copyrighted or not) into other television markets.¹⁷⁴ Retransmission consent was created as one right independent of rights in the underlying copyright of broadcast works re-transmitted on cable. The DMCA creates another set of rights and limitations for technological measures protecting access to a work that exist independent of underlying copyrights.

¹⁰ Each of the NCTA internal footnote citations is to the Declaratory Ruling.

¹¹ Ex parte letter of John Bergmayer and attachments, Sept. 20, 2016.

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The Hauppauge representatives observed that the D.C. Circuit in *EchoStar*, though it found the FCC had exceeded its jurisdiction *with respect to DBS providers based on the state of the record in 2003* (when the FCC record at that time indicated that the FCC had found that DBS providers *did* adequately support device entrants in gaining access to MVPD content), never questioned that the FCC has authority to assure that MVPDs (on the 2003 record, cable operators) must provide competitive device entrants with specifications, and if necessary a license, that enables them to receive, per Section 76.1205, “technical information concerning interface parameters that are needed to permit navigation devices to operate with multichannel video programming systems.” Four court decisions have not disturbed this requirement, nor did Congress disturb it in 2014, when it required the Commission to amend Section 76.1204(a)(1). Instead, the Congress specifically instructed the Commission to commence the inquiry that has resulted in this proceeding.

No “Compulsory License” Is Conveyed In The Support of Competitive Devices

The Hauppauge representatives provided the FCC personnel with the “one-pager,” attached below, discussing why competitive attachment does not involve a license, real or implied, to any exclusive right granted by the Copyright Act to programmers.

This letter is being provided to your office in accordance with Section 1.1206 of the Commission’s rules.

Respectfully submitted,

Robert S. Schwartz

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Counsel

Cc:
Gigi Sohn
Jessica Almond
John Williams
Scott Jordan

Appendix:

The FCC Does Not Propose Any Compulsory License

“A **compulsory license** provides that the owner of a patent or copyright licenses the use of their rights against payment either set by law or determined through some form of adjudication or arbitration.”¹²

The key to this definition (left out of some formulations, perhaps as obvious) is that the owner must have an exclusive *right* in order for that right to be subject to license, compulsory or otherwise. Copyright adheres to any fixed expression. The Copyright Act strictly limits the exclusive rights that are granted, so as to avoid undue restrictions on the rights and creativity of others. So the law (17 U.S.C. Section 106) provides *only* for these enumerated exclusive rights:

“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”¹³

Note, there is *no* exclusive right to a *private performance on a privately owned device*. Where there is no exclusive right, there can be no license of that right.

In opposing Chairman Wheeler’s compromise “Unlock The Box” proposal, the Motion Picture Association and its members claim that allowing retail products that lawfully receive the programming to *also* have search and menu capabilities of which the content owner disapproves amounts to a “compulsory license” – because, in initial contracts with the cable and satellite distributors they may seek to prohibit such downstream uses as a license *condition*. But this is different from having any copyright *right* to prohibit the private use of privately owned devices. There is no such right.¹⁴

Where there is no exclusive right there can be no license of it, free or otherwise. The assertion of a nonexistent exclusive right is contrary to law, competition, and Section 629 of the Communications Act, which assures the right of retail devices to receive cable and satellite programming.

¹² https://en.wikipedia.org/wiki/Compulsory_license.

¹³ <https://www.law.cornell.edu/uscode/text/17/106>.

¹⁴ See, e.g., *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).