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

In the Matter of	)	
	)	
Request for Comment by the Media Bureau	)	MB Docket No. 15-64
on the Report of the Downloadable Security	)	
Technology Advisory Committee	)	

Reply Comments of the Motion Picture Association of America

To expand viewers' access to compelling programming, downloadable security solutions—or any compatibility effort—must support the security and business terms that enable content providers to explore innovative distribution models and finance diverse, quality programming in the first place, as the Motion Picture Association of America explained in its initial comments.[1] The Downloadable Security Technology Advisory Committee produced a valuable report that catalogs the great technological diversity of video distribution systems; itemizes the myriad choices viewers have for accessing programming on the devices of their choosing; and outlines a non-burdensome, flexible, HTML5-based downloadable security and applications-based framework that could support innovative video delivery on most any system without weakening security or violating licensing agreements.[2]

That is all Congress asked for.[3] None of the language in section 106(d) of the Satellite Television Extension and Localism Act Reauthorization of 2014 expresses any expectation by

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[1] MPAA Comments at 1, 6-7, 11-12.

[2] *See* American Cable Association Comments at 7; Comcast Comments at 5, 11-12; AT&T Comments at 10, 14-16; EchoStar Comments at 4; Motion Picture Association of America Comments at 1-3, 5-6, 9, 11; National Cable & Telecommunications Association Comments at 15-20.

[3] That Congress would call for a report alone is not unusual. Congress routinely mandates reports and studies without requiring further regulatory action. It especially does so in connection with satellite television legislation, which involves a complex relationship between the Communications Act and the Copyright Act. *See, e.g.*, Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949, 3958, sec. 203 (Nov. 16, 1988) (creating 47 U.S.C. § 613 calling for report on discrimination by satellite carriers); Rural Local Broadcast Signal Act, Pub. L. No. 106-113, 113 Stat. 1501A-546, sec. 2002(c) (Nov. 29, 1999) (seeking report on satellite delivery of local broadcast

Congress that the FCC would take additional steps following completion of the DSTAC report or meander into non-security related video issues.[4]

Rather than build off the DSTAC report to develop voluntary, workable technical solutions and business models in the marketplace, some commenters are hoping the FCC will mandate their preferred AllVid-like approach.[5] That approach would allow certain stakeholders to exploit for their own commercial gain the content and features of video services created by others. This is not only inappropriate, but also unnecessary in light of the availability of a wide range of content and services on a large and growing variety of in-home and mobile devices.[6]

Ordinarily, the types of arrangements AllVid proponents seek are accomplished through licensing agreements, an approach that is preserved in the DSTAC's "Applications-Based" proposal. The best use of the DSTAC report may be as a resource describing a variety of technical specifications that existing and would-be device and service providers can refer to as they work collaboratively to design and roll out voluntary arrangements for accessing content in

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signals in unserved and underserved markets in same legislation adopting the Satellite Home Viewer Improvement Act of 1999); Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 3407-08, 3428, secs. 109, 110, 208 (Dec. 8, 2004) (seeking three studies on compulsory copyright licenses and retransmission consent); Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218, secs. 302-05 (May 27, 2010) (seeking three reports on in-state broadcasting and the phase-out of statutory licensing); Satellite Television Extension and Localism Act Reauthorization of 2014, Pub. L. No. 113-200, 128 Stat. 2059, secs. 107, 109, 110 (Dec. 4. 2014) (seeking in addition to the DSTAC report three reports on designated market areas, cable rates, and the communications implications of modifying statutory licensing). Conversely, when Congress does want FCC action, it does not hesitate to say so. *See, e.g.,* Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949, 3958, secs. 203-04 (Nov. 16, 1988) (explicitly authorizing two inquiries and follow-on rulemakings on syndicated exclusivity and encryption standards).

[4] *See* American Cable Association Comments at 3, 5; AT&T Comments at 4-5; Comcast Comments at 3, 6; Free State Foundation Comments at 7; Motion Picture Association of America Comments at 7-9.

[5] *See* Amazon Comments at 1, 4; Comptel Comments at 4; Computer & Communications Industry Association Comments at 2, 6; Consumer Video Choice Coalition Comments at 3-4, 13; Consumers Union Comments at 2, 6; Electronic Frontier Foundation Comments at 2; Google Comments at 4; Hauppauge Comments at 2-3; Public Knowledge Comments at 21; TiVo Comments at 8.

[6] *See* Arris Comments at 3; Comcast Comments at 4, 7; AT&T Comments at 6, 12, 20; Motion Picture Association of America Comments at 2-3, 11; National Cable & Telecommunications Association Comments at 14.

the marketplace. This would benefit consumers, programmers, distributors, and device manufacturers by further expanding the number of platforms for the distribution and viewing of video content—without the harms of a mandate.

House Energy and Commerce Committee Ranking Member Frank Pallone recently urged the FCC to "hit the pause button on regulating streaming video."[7] He said the FCC's proposed intervention there would merely "prop up some video business models" rather than "actually make people better off," and cautioned that "regulating certain business models does risk stifling innovation."[8] The same sentiments apply here. Mandating the burdensome, one-size-fits-all AllVid approach would chill investment, innovation, competition, and marketplace diversity while weakening security.[9] Compelling content owners to disassemble their programming for use by others would also abrogate contracts and licensing agreements, raising issues under copyright law, as well as the First and Fifth Amendments, especially absent a specific congressional mandate to do so.[10] The FCC wisely avoided this morass in 2010 by declining to pursue the AllVid proposal. We and other commenters ask that the FCC again make that wise choice.[11]

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[7] Ranking Member Frank Pallone, Jr., Remarks at the Duke Law Forum, Future of Video Competition and Regulation (Oct. 9, 2015).

[8] *Id.*

[9] *See* American Cable Association Comments at 4, 7, 11; Arris Comments at 7; Comcast Comments at 5, 6, 13, 16, 18-20; AT&T Comments at 5, 22; EchoStar Comments at 1-3, 5; Free State Foundation Comments at 1, 4, 6; Motion Picture Association of America Comments at 2, 10-12; National Cable & Telecommunications Association Comments at 9-11, 21-33; Verimatrix Comments at 4-7. *See also Ex parte* letter from the Motion Picture Association of America *et al*. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-64 (Nov. 5, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001333375.

[10] *See* AT&T Comments at 5, 18; Comcast Comments at 17, 19; Free State Foundation Comments at 3, 8; Motion Picture Association of America Comments at 2, 10-12; National Cable & Telecommunications Association Comments at 30-32. *See also Ex parte* letter from the Motion Picture Association of America *et al*. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-64 (Nov. 5, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001333375.

[11] *See* American Cable Association Comments at 14; Arris Comments at 2; Comcast Comments at 23; AT&T Comments at 6, 24; Motion Picture Association of America Comments at 10-12.

The FCC has neither jurisdiction over copyright matters, nor the authority to override the Copyright Act. For that very reason, Congress recently cautioned the Commission to consult with the committees of jurisdiction before making regulatory changes—even those that are within the agency's jurisdiction—that might impact copyright law.[12]

Commenters' claims that copyright's fair use doctrine allows the FCC to mandate disassembly of content, features, and services[13] are misplaced. First, fair use is an affirmative defense to a claim of copyright infringement. It cannot be definitively determined until adjudicated by a court, based on the specific facts of the case, after carefully analyzing the factors set forth in Section 107 of the Copyright Act.[14] It therefore cannot be used anticipatorily to bless all manner of encroachments on content owners' exclusive rights under section 106.

Second, content owners have no obligation to facilitate purported fair uses by third parties,[15] which is what the FCC would necessarily be requiring by mandating disassembly. In fact, content owners may take measures to prevent duplication, redistribution, or performance of

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12 *See* Letter from Senators Thune, Nelson, Grassley, and Leahy to FCC Chairman Tom Wheeler (Oct. 9, 2015) (opposing the FCC's proposal to eliminate the program exclusivity rules, noting "the interrelated nature of communications and copyright law" and urging that any reassessment of the retransmission consent regime be coordinated with the Senate Commerce and Judiciary Committees "to identify an approach that appropriately balances both copyright and communications regulation.").

13 *See* Consumers Union Comments at 5; Public Knowledge Comments at 15.

14 *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.").

15 *See 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.").

their works, and consumers may not disable those measures absent a specific exception.[16] Nor may the FCC weaken those measures under section 629.[17]

Third, any assumption that the proposed uses here would amount to a fair use—either by the consumers or the commercial entities that seek to facilitate such uses—is flawed as a matter of copyright law. 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."[18] And as to the individuals, the U.S. Copyright Office recently undertook a detailed fair use analysis of the types of uses proposed here and concluded—properly—that there is "insufficient legal authority to support the claim that [space- and format-shifting] are likely to constitute fair uses under current law."[19] The FCC does not have jurisdiction over copyright law, and should defer to the Copyright Office's interpretation of the Copyright Act, just as the FCC would expect the Copyright Office to defer to its interpretation of the Communications Act.

Dictating to content providers and distributors what content they must make available to third parties—as well as how—would also raise significant First Amendment issues. As the Supreme Court has made clear, government forced access to media "brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment."[20] Congress has been careful to minimize the Communication Act's impact on

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16 *See* 17 U.S.C. § 1201(a)(1) (prohibiting circumvention of technological protection measures except in certain circumstances).

17 *See* 47 U.S.C § 549(b) (stating that the FCC may not adopt rules under section 629 that would jeopardize the security of programming or services offered over multichannel video programming systems).

18 *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).

19 *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.

20 *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254 (1974).

speech,[21] and is explicit when it wants the FCC to regulate in ways that bear upon the First Amendment.[22] Thus, to avoid potential First Amendment issues, the FCC must not interpret provisions of the Act as authorizing regulation of speech absent express language. Section 629 neither authorizes the level of interference proposed by the AllVid proponents nor allows the FCC to force content owners to make their programming available in particular ways.[23]

Accordingly, the MPAA urges the Commission to reject requests by some parties to mandate the "virtual head-end" or similar proposals. Prescribing by regulation one approach may be good for a particular set of stakeholders in search of market opportunities for their devices and services, but not for consumers, or the programmers and distributors they rely upon to produce and distribute high-quality video programming.

Respectfully submitted,

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[21] *See, e.g.,* 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"); 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").

[22] *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.").

[23] *See* AT&T Comments at 18; Comcast Comments at 17.