

January 14, 2016

VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket No. 15-64
*Request for Comment on the Report of the Downloadable Security Technology
Advisory Committee*

Dear Ms. Dortch:

The undersigned content companies (“Content Companies”) have closely followed the work of the Downloadable Security Technology Advisory Committee (“DSTAC”) and the development of the record in response to the DSTAC Report.¹ We write to explain the unique and independent perspective of programmers. While the Content Companies appreciate the DSTAC Report’s discussion of downloadable security, we urge the Commission not to pursue the proposal advanced by Google, TiVo, and others (the “Coalition Proposal”).²

As amply demonstrated in the record of this and other proceedings, content companies have been leaders in making programming available over an expanded array of mobile and other Internet-connected devices, paying particular attention not just to the quality of the content but also to the quality of the viewing experience.³ As a result, innovation in video distribution has been rapidly expanding, and quality has been dramatically improving. In such an environment, the Coalition Proposal—which, among other things, would permit the abrogation by third parties of uniquely and carefully interrelated elements of licensing agreements (including channel position, channel line-ups, neighborhooding, branding, and disaggregation of content from metadata) not only is unnecessary to spur the scale of diverse offerings and competition that the Commission seeks, but also would undermine programmers’ incentives to develop and market creative content and innovative services for the benefit of consumers. It also would undermine the copyright framework under which content providers agree to make their content

¹ *Media Bureau Seeks Comment on DSTAC Report*, Public Notice, MB Docket No. 15-64, DA 15-982 (MB rel. Aug. 31, 2015). Unless otherwise indicated, comments and reply comments cited herein were filed in MB Docket No. 15-64.

² *See generally* Comments of the Consumer Video Choice Coalition.

³ *See. e.g.*, Comments of the Motion Picture Association of America (“MPAA”) at 2-4; Comments of MPAA, MB Docket No. 14-261 (filed Mar. 3, 2015) at 4-6.

available. The proposal would therefore damage programmers' ability to continue to provide the diverse, high-quality content that viewers demand, as well as programmers' efforts to enhance the consumer viewing experience.

Thus, while the Content Companies will remain at the forefront of working to help improve consumers' experience in searching, navigating, and viewing a diverse range of high-quality programming, we urge the Commission to recognize that it need not go beyond DSTAC's narrow directive to report on downloadable security. As the DSTAC Charter indicates, "the STELA Reauthorization Act of 2014 ... requires the establishment of a working group of technical experts that represent a wide range of stakeholders to identify, report, and recommend performance objectives, technical capabilities, and technical standards of a not unduly burdensome, uniform, and technology- and platform-neutral software-based downloadable security system to promote the competitive availability of navigation devices in furtherance of Section 629 of the Communications Act."⁴ To the extent the DSTAC Report fulfills this narrow statutory directive to report on downloadable security, the Content Companies agree with various commenters who see value in the Report's discussion of downloadable security. However, Congress did not require any subsequent rulemaking.⁵

I. The Coalition Proposal Would Undermine Content Companies' Ability to Continue Delivering the Diverse, High Quality Content Consumers Demand.

There are several factors relevant to preserving content companies' ability to deliver the diverse, high-quality content consumers have come to expect over a growing number of devices and platforms. Specifically, content companies carefully manage the terms under which content is provided to consumers, as failure to do so could undermine the viewing experience and thus the value of the content. These include, but are not limited to: presentation; branding; the treatment of advertising; and the careful consideration of how new distribution models impact the delivery of content that consumers already enjoy. The Coalition Proposal also could impact compliance with regulatory requirements. These factors are interrelated (e.g., if a programmer's content is presented poorly, it can damage its brand). By enabling other companies to circumvent these licensing decisions, the Coalition Proposal would fundamentally alter content companies' ability to manage these important elements and thus impede the progress that is being made today in enhancing consumers' viewing experience, and ultimately leave consumers far worse off. We discuss these shortcomings more fully below:

⁴ DSTAC Charter, available at <https://transition.fcc.gov/dstac/dstac-charter.pdf>, at 1, citing Section 106(d) of the Satellite Television Extension and Localism Act Reauthorization Act of 2014 ("STELAR").

⁵ See, e.g., Comments of Adobe Systems, Inc. at 1.

- *Presentation.* In video programming, “consumers expect and value a consistently high level of content presentation.”⁶ Content producers are intimately involved in the meticulous details of how a viewer sees programming content. For example, a network’s adjacencies in a programming lineup can be the result of careful and unique agreements between distributors and content creators. The Coalition Proposal would allow an “end run” around such careful deliberations. It could leave channel placement and other elements of content presentation exclusively in the hands of those with far less incentive to ensure a high level of quality or consistency in content presentation, in turn undermining the value of the content itself.
- *Branding.* Agreements typically specify how the distributor will treat the content producer’s brands and content, including content placement and adjacencies or what, if any, advertising will be placed in and around that content. Branding is a “core component of the value of programming to consumers and distributors, and how a programmer reaches and informs consumers about its content and services. Consumers and distributors associate a given programmer with, among other things, specific types of content (such as reality, talk, drama, comedy, sports, etc.), features, and advertising, which in turn engender viewer loyalty.”⁷ Content companies dedicate enormous resources to differentiating and building consumer confidence in their respective brands, and the Coalition Proposal would allow distributors to strip away branding within and across program networks, thereby further undermining the viewing experience, the ability of consumers to identify and find content, and the value of the content.
- *Advertising.* Especially in light of consumer sensitivity to certain marketing practices, creators need to maintain control over product placement and commercial content. This is essential to avoid viewer confusion and dissatisfaction with commercial content that appears around, or is woven into, programming content. In the Content Companies’ experience, viewers dissatisfied with the type or placement of commercial content will blame the content producer. Requiring the Coalition Proposal would tie content companies’ hands regarding ad type and placement; the inability to establish a shared understanding with a distributor of how to commercialize content thus will negatively impact the content producer. It also ultimately will negatively impact consumers, who expect programmers to adhere to certain norms (whether industry-wide or brand-specific) and will not be able to rely on such expectations. In particular, a distributor not subject to the specific terms of a programming agreement could allow inappropriate advertising to be overlaid onto the content, perhaps in children’s and family programming.

⁶ Joint Reply Comments of Program Networks, MB Docket No. 10-91 (filed Aug. 12, 2010) at 4-5.

⁷ *Id.*

- *Business Models.* The growing list of new video offerings demonstrates content companies' strong incentives to make content available on an increasing number of platforms. But in order to respect existing contractual arrangements and to assess the financial impact of licensing to a particular service, it is critical for programmers to understand a distributor's business model and how it may interrelate with other services content companies are licensing or considering launching. Putting control of content under the exclusive control of distributors, without any contractual relationship to programmers, would have a severe negative impact on the development of programming and innovation in distribution.
- *Legal Issues and Regulatory Compliance.* It also is worth noting that there are any number of regulatory and legal restrictions and obligations with respect to linear content. For example, content companies and their advertisers may need to consider the Commission's children's programming restrictions, self-regulatory initiatives such as the Better Business Bureau's Children's Advertising Review Unit ("CARU") and Children's Food and Beverage Advertising Initiative ("CFBAI"), and contractual agreements with writers', directors', and/or actors' guilds. Some of these requirements and obligations do not apply to any distributors, let alone new OVDs. Content companies dedicate substantial resources to compliance, regardless of whether or not a particular obligation applies directly to them. If distributors are able to alter programmers' content and do not have an underlying distribution agreement with the programmer (which might specify the means of compliance, provide for indemnification, or both), there are significant questions as to how compliance can be assured.⁸

In sum, programmers enter into complex arrangements with MVPDs and OVDs to specify how their content is (and is not) distributed, and their entire business model and ability to meet evolving consumer demand and expectations is built on these arrangements. The Commission should bear in mind that those supporting the Coalition Proposal are seeking to monetize the underlying content without regard to a content owner's concern for how the content is presented to the viewer and without undertaking any of the risks or expenses associated with the creation of the content. Thus, any Commission action should ensure that it does not invalidate privately-negotiated contractual provisions (or chill any such future provisions). The Commission lacks authority to abrogate these arrangements, and programmers are best situated to determine how to meet consumer expectations

⁸ See *EchoStar and DISH Network* December 15, 2015 ex parte ("Manufacturers of third-party navigation devices are not parties to [MVPD-programmer] agreements, yet their devices may display programming in ways that violate the terms of the MVPDs' carriage agreements and are not covered by any compulsory license. What, if any, avenues do content suppliers have to ensure that their content is not being exhibited by a third party consumer electronics navigation device in a way that infringes their copyright or violates the terms of their carriage agreements?").

regarding their brands. Any action preventing them from doing so would be contrary not just to the interests of content creators, but also to consumers and to the overall video distribution marketplace.

II. The Coalition Proposal is Inconsistent with Copyright Principles.

The Coalition Proposal would allow third parties, with no ownership rights in the programmers' content, to divorce that content from critical, interdependent, negotiated-for elements such as branding, channel assignment, or advertising. By focusing on the terms of negotiated agreements between programmers and MVPDs exclusively, proponents of the Coalition Proposal ignore key aspects of copyright law meant to uphold carefully negotiated copyright licenses as the content is passed to consumers.⁹ In its evaluation of the DSTAC Report proposals, the Commission must act carefully to protect copyright in any actions it takes.¹⁰ Adoption of the Coalition Proposal subverts that protection, in addition to jeopardizing the security of high-quality content.

Coalition Proposal supporters' claims of fair use¹¹ are misplaced and unhelpful to the discussion. The fair use defense is largely irrelevant to the third-party distributor issues raised in this proceeding and presents an unnecessary distraction. To allow *third-parties* (the focus of the DSTAC Report and the Coalition Proposal) to monetize content in ways not anticipated by a content owner could impact a content owner's ability to offer those same products or lessen the long-term value of the underlying content. These concerns have nothing to do with *individuals'* ability as a matter of fair use to record, copy, or play back programming. In addition, the Commission cannot require a programmer to grant distribution rights it does not have.

⁹ Letter from John Bergmayer, Senior Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, FCC (dated Dec. 3, 2015) at 2 (“competitive devices would not be permitted to break copyright law or violate the terms of any agreements ... the CE manufacturer have entered into”).

¹⁰ See John Eggerton, *Dems Have DSTAC Issues, Too*, BROADCASTING AND CABLE (Nov. 18, 2015) (noting that at a recent FCC oversight hearing, Chairman Wheeler observed with respect to DSTAC that one reason for the security discussion in the first place is to protect copyrights), <http://www.broadcastingcable.com/news/washington/dems-have-dstac-issues-too/145899>.

¹¹ See, e.g., Consumers Union Comments at 5, Public Knowledge Comments at 15.

Although the Content Companies see merit in the DSTAC Report's discussion of downloadable security, we urge the Commission not to adopt the Coalition Proposal, which would undermine, rather than expand, consumers' ability to continue enjoying the diverse, high-quality content they love for years to come.

Respectfully submitted,

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