

LGBT Technology Partnership

April 7, 2016
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Expanding Consumers' Video Navigation Choices (MB Docket No. 16-42); Commercial Availability of Navigation Devices (CS Docket No. 97-80)

Dear Ms. Dortch:

The LGBT Technology Partnership (LGBT Tech), the premier organization representing the interests of the LGBT community with regards to communications and technology issues, is extremely concerned with the Federal Communications Commission's (FCC's) proposal to "unlock" pay-TV set-top boxes.

LGBT Tech is seriously concerned that the proposal permits third parties to gather, use and disseminate private information about viewers, including sensitive personal and aggregate information from members of the LGBT community. Allowing third parties to unilaterally decide how to bundle, promote, and exhibit "niche" and minority content, such as content created by and for the LGBT community, while at the same time allowing these third parties to "self-certify" their compliance with privacy rules, would put at risk consumers who have come to rely on these rules for the protection of their private data.

LGBT Tech is also concerned that the proposed regulations could have significant unintended consequences for minority and diverse programmers, especially those that focus on underserved communities such as the LGBT community. The FCC's proposal would result in independent programmers losing control over how their content is presented, potentially resulting in diminished placement, exposure and revenues.

LGBT Tech urges the Commission to take these concerns into consideration and to pursue a different path toward a video policy that truly protects consumer privacy, fosters innovation, and enables independent programmers to provide the quality shows their audiences demand. LGBT Tech encourages the FCC to endorse the apps-based model described in the DSTAC expert report, which fully protects consumers' privacy interests and programmers' copyright interests while achieving the Commission's stated goals.

Respectfully Submitted,

Carlos Gutierrez

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Head of Legal and Policy Affairs
LGBT Technology Partnership & Institute

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April 7, 2016

The Honorable Thomas Wheeler
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Chairman Wheeler,

The LGBT Technology Partnership would like to express its concerns with the Commission's proposed regulations for set-top boxes.¹ These regulations could have significant unintended consequences for minority and diverse programmers, especially those that focus on underserved communities such as the LGBT community. The proposed regulations also raise serious concerns about the ways that third parties will now be able to gather, use and disseminate private information about viewers including sensitive personal and aggregate information from members of the LGBT community. Allowing third parties to unilaterally decide how to bundle, promote, and exhibit "niche" and minority content, such as content created by and for the LGBT community, while at the same time allowing these third parties to "self-certify" their compliance with privacy rules, would put at risk consumers who have come to rely on these rules for the protection of their private data.

The Current Record for the Proposed Rules Does Not Adequately Address the Impacts of the Commission's Proposal on the Privacy and Data Security Concerns of Television Viewers and Raises Serious Privacy Concerns for Consumers, Especially Minority and "Niche" Viewers Such as Members of the LGBT Community

The proposed rules fall far short of protecting customers' personal data to the same degree that multichannel video programming distributors (MVPDs) are required to per federal law, especially when it comes to tracking the viewing habits of their viewers. Federal law (Sections 338 and 631 of the Communications Act) requires satellite and cable providers to protect the privacy of their subscribers' viewing data and other personally identifiable information ("PII"). Under the FCC's proposed regulations, companies such as Google, Amazon and other tech companies and device manufacturers would have access to the same consumer PII as MVPDs, but would not be held to comparable privacy standards. In fact, the lead coalition in support of

¹ See FCC Chairman Proposal To Unlock The Set-Top Box: Creating Choice and Innovation, DOC-337449 (released January 27, 2016).

the FCC's proposal, the Consumer Video Choice Coalition, has filed comments² with the FCC stating that device manufacturers "are not subject to cable privacy laws." The coalition references the Video Privacy Protection Act but only to suggest that their offerings "may" be subject to it.

Moreover, the NPRM's proposed method of ensuring that third parties protect the MVPD customers' PII is flawed. Under the FCC's proposal, device manufacturers and app developers would only be required to "self-certify" that they are following the privacy requirements of the Communications Act. The FCC's proposal raises significant unanswered questions about who, if anybody, would be responsible for policing and enforcing those self-certifications and whether the FCC would have the authority to bring enforcement actions against companies that fail to comply with the privacy protections of the Communications Act.

This privacy enforcement issue is a major concern for the LGBT community as privacy concerns impact the LGBT community in unique ways. When it comes to the collection and dissemination of private viewer information, including whether a customer subscribes to an LGBT-focused network or has bought and is entitled to watch an LGBT-focused movie or program or even just viewing patterns and/or time spent on specific channels targeted at or created by the LGBT community, even minor lapses or breaches of privacy can have a real impact on the lives of the members of our community. All around the country, LGBT people still face significant discrimination including bullying, rejection by families, loss of employment and even the possibility of physical harm simply for their LGBT identity. LGBT individuals have learned to very carefully control who has access to this information and are well aware that "coming out" to the wrong person or being involuntarily outed can have catastrophic consequences. For this reason, LGBT individuals are fiercely protective of their privacy and may face drastic consequences if that privacy is breached.³ The current proposal allowing self-certification without providing for realistic enforcement or clearly spelling out the penalties for violations of the privacy rules allows for intentional or unintentional abuse of these rules without adequate recourse for those harmed.⁴ Having clear, uniform and enforceable privacy rules for all companies involved in the video ecosystem and ensuring that consumers continue to have the same privacy protections they are entitled to regardless of what device they choose to watch their MVPD programming on should be a non-negotiable component of any Commission proposal.

² See Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Consumer Video Choice, regarding Media Bureau Request for Comment on DSTAC Report, MB Dkt. No. 15-64, filed January 26, 2016, available at <http://apps.fcc.gov/ecfs/document/view?id=60001413769>.

³ See Ashley Madison hack: Leaking personal email addresses puts gay lives at risk around the world, available at <http://www.independent.co.uk/news/world/ashley-madison-hack-leaking-personal-email-addresses-puts-gay-lives-at-risk-around-the-world-10464546.html>

⁴ See Netflix Spilled Your Brokeback Mountain Secret, Lawsuit Claims, available at <http://www.wired.com/2009/12/netflix-privacy-lawsuit/>

In addition, even though many of these third party companies claim to understand the importance of privacy and security for all of their customers, their track records show that they may be lacking awareness of the concerns of diverse communities. Many of these companies have a striking lack of diversity among their employees and leadership resulting in an atmosphere where tools, tracking, data collection and use is only considered through a singular lens that does not take into account the sensitivities of specific minority communities. Moreover, many of these tech companies lack a demonstrated record of protecting their customers versus monetizing the data collected from them. Historically, these companies have been bad actors with regards to protecting customer privacy and have only changed their privacy policies when they face litigation for said policies.⁵

The Commission’s Proposal Would Result in Independent Programmers Losing Control Over How Their Content is Presented, Potentially Resulting in Diminished Placement, Exposure and Revenues

The LGBT Technology Partnership is also concerned about the proposal’s impact on independent and diverse programmers. The FCC’s proposal allows tech companies to appropriate video content from MVPDs for free, without negotiating agreements with the programmers or copyright holders, and then repackage and resell it as their own service. The FCC proposal has the potential to harm niche programmers and will increase barriers to entry as well as potentially result in the burying of niche channels that may appeal to a smaller audience in favor of bigger, broader channels that may not represent the views of a minority community. As the National Hispanic Foundation for the Arts stated, “Strip away the public messaging blitz, and one can see that the FCC’s proposal directly undermines the growth of quality entertainment, particularly emerging channels serving minority and ‘niche’ communities, being made available to more consumers in more areas of the country.”⁶

The proposed rules also strip away programmers’ right and ability to maintain agreements relating to advertising and channel placement. This is a dangerous precedent for businesses that rely on maximizing the number of viewers as a business model. Allowing these third-party companies to decide placement for minority channels can result in channels aimed at smaller niche audiences such as the LGBT community being buried deep in the programming universe created by these companies. Furthermore, the rules position tech companies to reap unfair benefits by allowing the tech companies to surround programming with their own advertising without consulting or sharing with the content creators. The implications of this loss of

⁵ See Google Will Pay \$22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple’s Safari Internet Browser, *available at* <https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented>; UC-Berkeley students sue Google, alleging their emails were illegally scanned, *available at* <https://www.washingtonpost.com/news/grade-point/wp/2016/02/01/uc-berkeley-students-sue-google-alleging-their-emails-were-illegally-scanned/>

⁶ See Felix Sanchez: How the FCC is actually undermining media diversity, *available at* <http://latino.foxnews.com/latino/opinion/2016/03/09/felix-sanchez-how-fcc-is-actually-undermining-media-diversity/>

advertising revenue are particularly serious since this would undermine production companies' ability to create and maintain innovative programs.

Large numbers of diversity groups and programmers across the industry are speaking out strongly against the FCC's proposal, as are dozens of Members of Congress. These stakeholders recognize the potential dangers that the FCC's proposal could have for their consumers and independent programmers. Unless the above significant problems with the proposal are fixed, we do not see how the proposal could reasonably be adopted.

Conclusion

We urge the Commission to take these concerns into consideration and to pursue a different path toward a video policy that truly protects consumer privacy, fosters innovation, and enables independent programmers to provide the quality shows their audiences demand. In this regard, we encourage the Commission to endorse the apps-based model described in the DSTAC expert report. That model fully protects consumers' privacy interests and programmers' copyright interests while achieving the Commission's stated goals.

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