Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	MB Docket No. 16-42
Expanding Consumers' Video Navigation Choices	)	CS Docket No. 97-80
Commercial Availability of Navigation Devices	)	

COMMENTS OF 21ST CENTURY FOX, INC., A&E TELEVISION NETWORKS, LLC, CBS CORPORATION, SCRIPPS NETWORKS INTERACTIVE, TIME WARNER INC., VIACOM INC., AND THE WALT DISNEY COMPANY

Dated: April 22, 2016

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EXECUTIVE SUMMARY

The Content Companies respectfully submit these comments in response to the Commission's call for feedback on its proposal to spur competition in the marketplace for the equipment used by consumers to access video programming. The Content Companies appreciate that Section 629 of the Communications Act directs the Commission to ensure a competitive market for navigation devices. The Commission's proposed rules, however, disserve the consumer by ignoring the very requirements of Section 629 that are designed to ensure that Commission navigation device rules do not jeopardize the content experience that consumers enjoy and appreciate. The Notice also undermines innovation and the development of content for viewers, as well as conflicts with the mandates of reasoned decision-making, the protections of copyright law and contract law, and the Constitution. We therefore urge the Commission to reject the proposed rules as drafted.

The Content Companies, Who Have No Stake in Set-Top Box Revenues, Support Innovation to Enhance the Consumer Viewing Experience

The Content Companies are independent programmers with no economic stake in the revenues earned by distributors from leasing set-top boxes. Indeed, the Content Companies have a vested interest in promoting innovation in content navigation because improving consumers' ease of use makes the programming we provide more appealing and thus more valuable. The Content Companies write not in defense of set-top boxes or leased equipment, but instead to highlight that the Commission's proposal is fundamentally flawed and therefore threatens to harm the video programming marketplace and consumers.

At a time when the Content Companies already are providing the world's most highly desired content on a multitude of new platforms and devices and increasingly experimenting with innovative new business models, it would be unfortunate if a proposal initiated under

Section 629 were to dampen this emerging competition. And yet the Notice presents precisely this risk, placing the Commission on a path to undermining, rather than enhancing, an emerging marketplace in which innovation is the hallmark of the viewing experience.

<u>The Content Companies Are Bringing Audiences More Great Content Over More Devices and Platforms</u>

Content Companies invest enormous resources to create exceptional sports, entertainment, and news programming, with the goal of informing, entertaining, and capturing the imagination of an audience that has ever-increasing and evolving expectations. Having invested these substantial sums to create and acquire diverse, high-quality programming, the Content Companies have every incentive to work with both traditional and non-traditional distributors to ensure that programming is accessible in the broadest ways possible. Indeed, driven by innovation, investment, and our demonstrated interest in serving viewers, the Content Companies continue to expand our multi-platform offerings, which are made possible by agreements between content companies and multichannel video programming distributors (MVPDs), "over-the-top" (OTT) video providers, device makers, and a host of others.

<u>License Agreements Are Essential to Maintaining a Positive Viewing Experience While Also Preserving Incentives to Invest in Both Content and Distribution</u>

To ensure that our content reaches consumers in a way that enhances the consumer experience and safeguards our investment, the Content Companies negotiate detailed agreements with our distributors, both traditional MVPDs and emerging OTT providers. These necessarily complex, carefully negotiated license agreements with distributors reflect the fact that for both creators and their audience, the content is inextricably connected to features that are critical to the audience experience, indeed to the very discoverability of content, including branding, channel placement, advertising, viewer data, and other features. The distribution agreements protect content against theft and unlawful redistribution; secure content against unauthorized uses; and represent the means by which programmers respond to evolving audience expectations about the form, discoverability, and overall receipt of content. Just as important, because programmers do not own all of the content that comprises their networks, these license agreements reflect the vastly differing scope of underlying rights and production requirements that each programmer must abide by with respect to each piece of content that it acquires. This approach has enabled the Content Companies to distribute programming over an expanding array of distributors and technology platforms, including not only cable and satellite providers but also cutting-edge services like Amazon Prime, Netflix, Sling TV, and Playstation Vue.

The Commission's Sweeping Proposal Violates the Law and Would Undermine Consumers' Ability to Continue Enjoying Diverse Content

Into this exciting and diverse dynamic, the Commission has now proposed rules with the goal of promoting new ways for subscribers to navigate multichannel video programming content. But the Commission's proposal goes far beyond its stated goal and strays far afield from its lawful authority. Rather than simply fostering a marketplace for equipment alternatives, the proposed rules would upend the video marketplace in ways destined to harm content creators and consumers, while providing unwarranted benefits to app and technology developers with little or no appreciable benefit to the public interest.

The proposal would require that content provided today to existing distributors under detailed licensing agreements be distributed to a new group of both device manufacturers and app developers, none of which would be bound by any commitments to protect and secure content. By inviting third parties to aggressively seek to profit from the Content Companies' investments without incurring any of the obligations that effectively safeguard and thereby promote the creation of valuable programing today, the Commission's proposal reduces the incentives to continue to create the great programming that consumers enjoy.

To be sure, the interface between content and viewers can be improved. No one in the video marketplace has a greater incentive to enhance the audience experience than those who invest billions of dollars in the creation of content. That is why programmers have worked with both traditional MVPDs and new distribution platforms to experiment with new business models and audience experiences. But the one constant has been the content creators' direct contractual engagement with distribution partners, not simply about price, but about the delivery of an exceptional audience viewing experience that is the very goal of content creation.

Until recently, the Content Companies understood the Commission to recognize that nothing in Section 629 was intended to create a wholesale disintermediation of content creators from their audience, and Chairman Wheeler's public statements reinforced that understanding. Chairman Wheeler's statements, however, were not embodied in the proposed new rules. Chairman Wheeler testified before Congress, for example, that the content "the cable operator puts out [will] remain sacrosanct and untouched, and nothing in [the] proposal creates an opportunity" for threats to the security or integrity of video programming.[1] Those public statements were not surprising, given the limited scope of the statute (which in Section 629(a) is focused exclusively on set-top box "equipment"), and its command (in Section 629(b)) that the Commission not "jeopardize security of multichannel video programming" or "impede the legal rights of a provider of such [multichannel video programming] services to prevent theft of service."

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[1] *Hearing on FCC Oversight Before the S. Commerce, Science, and Transportation Committees*, 114th Congr., (March 2, 2016) (statement of Tom Wheeler, Chairman, FCC).

The text of the proposed rules, however, fails to meet the Commission's statutory obligation or to live up to Chairman Wheeler's promises. Remarkably, the Notice includes no effective mechanism to ensure that navigation device and software makers adhere to the contractual obligations that bind the MVPD from which the device or software maker could demand content under the proposed rules. The Notice suggests that copyright enforcement will adequately protect against the various ways a distributor could repurpose, rebrand, reform, and generally misuse content. Copyright holders, however, justifiably rely not solely on copyright litigation, but on licensing agreements and contractual enforcement to secure their rights. These critical agreements reflect our substantial interest in working to enhance the viewing experience, meet our own contractual commitments, and ensure that the integrity of our content is protected on its way to our audiences. Relying on copyright litigation is no substitute for the entire contractual structure that supports the development and delivery of great content to consumers.

From a legal perspective, the harm to consumers and the video programming marketplace from the proposed rules is especially unwarranted. Section 629 explicitly requires the Commission to protect the "security" of content and limits the Commission's authority to enhancing competition among set-top boxes. The Administrative Procedure Act likewise requires the Commission to establish a reasoned connection between the problem identified by the Commission – navigation device competition – and the proffered solution. The Copyright Act gives content owners exclusive distribution rights and allows them to create the binding, enforceable contracts that currently protect those rights. And the First and Fifth Amendments protect against compelled speech and government appropriation of intellectual property without just compensation. The proposal cannot withstand scrutiny under any of these legal frameworks.

In sum, the rules as drafted would undermine consumers' ability to continue enjoying the diverse, high-quality content that they expect and demand today, and would violate the law on several fundamental grounds. Accordingly, the Content Companies urge the Commission to reject the proposal and instead carefully evaluate the current marketplace and emerging competitive trends before acting hastily to promulgate new rules.

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21st Century Fox, Inc. ("Fox"), A&E Television Networks, LLC ("A&E"), CBS Corporation ("CBS"), Scripps Networks Interactive, Inc. ("Scripps"), Time Warner Inc. ("Time Warner"), Viacom Inc. ("Viacom"), and The Walt Disney Company ("Disney") (collectively, the "Content Companies") respectfully submit these comments in response to the Commission's Notice of Proposed Rulemaking (the "Notice") in the above-captioned proceeding.[2]

The Content Companies have a unique perspective on the proposed rulemaking. As independent programmers, the Content Companies have no economic interest in the revenues attributable to set-top boxes leased by MVPDs. The Content Companies support the overall goal of fostering the development of a competitive market for set-top boxes and for innovative, user-friendly ways for audiences to enjoy their favorite shows and networks. While the Content Companies recognize that Section 629 authorizes the Commission to promote additional options

[2] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. 14,033 (Mar. 16, 2016).

for set-top boxes, the Content Companies are deeply concerned that the proposal in the Notice risks substantial harm to today's vibrant content marketplace, and thus the viewing public.

Specifically, the Commission's proposals as structured would allow third parties to appropriate, monetize, and distribute content without undertaking any of the risks or expenses associated with the creation of that content and without being bound by any of the duties or obligations that distributors agree to in order to obtain distribution rights. Were the Commission to mandate such a dramatic change in program distribution relationships, it would negatively impact the economic underpinnings of the creation and distribution of content as well as the rich and diverse viewing choices available to consumers. As the Content Companies previously submitted, this would threaten their "ability to meet evolving consumer demand" and have a "negative impact on the development of programming and innovation in distribution," to the detriment of consumers and today's vibrant programming marketplace.[3]

In these comments, the Content Companies provide an overview of today's programming marketplace and highlight the ways in which programmers offer their content to consumers. These comments also provide a detailed overview of the licensing agreements that help foster that marketplace by protecting content and ensuring a positive viewer experience.

The Content Companies then highlight how the Commission's proposals would fall outside Section 629. First, the Notice's proposals exceed the Commission's authority under the narrow provisions of Section 629(a) by going beyond the mere facilitation of competition among set-top boxes and instead mandating the transmission of programming to device makers with no assurance that they will comply with key licensing terms. Second, the proposals are contrary to

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[3] *See* Letter from A&E Television Networks, LLC, AMC Networks, Inc., Discovery Commc'ns, Inc., NBCUNIVERSAL, Scripps Networks Interactive, Inc., The Walt Disney Co. & ESPN, Inc., Time Warner Inc., 21st Century Fox, Inc., & Viacom Inc. to Marlene H. Dortch, Sec'y, FCC, MB Docket 15-64, at 3-4 (Jan. 14, 2016).

Section 629(b), which instructs the Commission not to "jeopardize security," by disregarding essential licensing terms and addressing security only in vague and undefined terms. In addition, the Notice proposes no sufficient enforcement mechanisms to ensure content security, either with respect to copy or output control or compliance with the key contractual terms that establish the parameters that govern the usage and monetization of the content, which presents still another core violation of Section 629(b). Third, the Commission's broad assertion of authority to mandate distribution of Content Companies' programming to third parties – without limitations on how they exploit it for their own economic benefit – violates Section 629(f) which explicitly reinforces the narrow nature of the Commission's authority under Section 629.

The Notice also suffers from other fundamental flaws. The Commission's failure to recognize and account for the proposed rule's harm to programmers, as well as numerous other erroneous assumptions and propositions contained in the Notice, reflects a lack of reasoned decision-making. The Notice further would conflict with the Copyright Act by either (i) permitting device makers to violate copyright law or (ii) impermissibly creating the effective equivalent of a compulsory license for the use of programmers' content. And, finally, the proposed rules raise serious problems under the First Amendment and Fifth Amendment.

I. THE CONTENT COMPANIES SUPPORT THE GOAL OF PROMOTING INNOVATIVE WAYS FOR AUDIENCES TO ENJOY THEIR FAVORITE VIDEO PROGRAMMING AND PROGRAM NETWORKS

Audiences are enjoying more compelling, high-quality video programming and content than ever before, over an expanding array of devices, applications, and services. Consumer demand for programming has spurred new business models for the distribution of video programming on a variety of distribution platforms. As a result, consumers have increasing access to linear and on-demand options for viewing compelling, high-quality video content online. This demand already incentivizes the Content Companies and other programmers to make content available on new distribution platforms, just as it promotes investment in new and original content by competing distributors hoping to differentiate themselves.

The newer entrants are distinguishing their digital platforms from traditional distributors with original content and library content presented in new ways that appeal to consumers. The Content Companies have entered into agreements with many of these distributors to make their content available across a number of devices and services. For instance, in 2014, Sony announced the launch of its PlayStation Vue TV service, which offers access to scores of linear programming networks, including linear content from CBS, Disney, ESPN, FOX, Scripps, Time Warner, and Viacom. This and many other emerging platforms (*e.g.*, Roku and SlingTV) now feature the Content Companies' programming. These offerings are supplemented by an assortment of on-demand, Internet-based options that enable consumers to view tens of billions of hours of programming through distributors such as Netflix and Hulu.[4] Collaboration with these services is the latest in a long line of steps taken by the Content Companies to make their content more widely available to consumers using a variety of platforms. The Content Companies routinely negotiate with these and other potential distributors to further disseminate their programming. The Content Companies also work with MVPDs to provide authenticated subscribers with the ability to access their content out-of-home on a variety of devices.

Specific examples of new content offerings from the Content Companies include:

- Disney offers an array of TV Everywhere products – including for ESPN, Disney Channel, Disney XD, Disney Junior, Freeform and the ABC Owned Television Stations. ESPN's and Disney's authenticated networks also are available on Microsoft X-Box, Apple TV, and Roku. ESPN, ESPN2, Disney Channel and

[4] *See By the Numbers: 70 Amazing Netflix Statistics & Facts*, DMR (Jan. 21, 2016), http://expandedramblings.com/index.php/netflix_statistics-facts.

Freeform are on the Sling stand-alone service. Just this year, Disney reached a deal to include the ESPN and Disney networks, as well as ABC, on Sony Vue. Most recently, Disney announced that two of its digital distribution deals are structured to permit accelerated inclusion by non-owned ABC Affiliates.

- Fox recently added to its long history of making content available through alternative means by expanding its already robust Internet services to include live linear streaming of sports content through FOX Sports GO, an interactive sports programming website and application that simulcasts the linear streams of Fox Sports 1, Fox Sports 2, FOX College Sports and FOX Deportes, as well as select sporting events airing on the FOX broadcast network and Fox's regional sports networks.

- CBS has been introducing a number of digital video services in a variety of business models for almost a decade. Most recently, CBS announced its innovative distribution platform, CBS All Access, which is a multi-platform subscription service that gives subscribers access to the live broadcast signals of CBS owned-and-operated CBS Television Network stations and 132 local affiliates of the CBS Television Network, and on-demand programming from the CBS Television Network and CBS's vast library. In addition, Showtime, one of CBS' subsidiaries, launched a stand-alone streaming service for its Showtime programming last year, which brings the network's library of original series, movies, specials, and documentaries to viewers without requiring a traditional cable or satellite TV subscription.

- Time Warner last year launched a stand-alone online video service for its HBO programming called HBO NOW. The service offers every episode of the best HBO original series for streaming on an on-demand basis, along with comedy specials, movies, sports programs, and documentaries. Time Warner also has played a leadership role in making TV Everywhere products available, incorporating both live and on-demand viewing over mobile devices for several of its Turner networks, including CNN, Cartoon Network, TNT, and TBS. Time Warner also offers authenticated apps for its HBO and CINEMAX networks.

- As pioneers in the lifestyle space, Scripps Networks Interactive has long offered a full complement of TV Everywhere websites, and iOS and Android apps for HGTV, Food Network, Travel Channel, DIY Network and Cooking Channel. In Fall 2015, Scripps continued to expand platform availability by launching its TV Everywhere apps on the three most popular in-home connected devices: Amazon Fire TV, Roku, and Apple TV. Scripps video content can also be found on Netflix, SlingTV, Sony Vue, Snapchat ,and Apple News.

- Viacom has authenticated apps featuring content from MTV, Comedy Central, Spike, Nickelodeon, CMT, and TV Land. It has also launched Noggin, a mobile subscription app for preschoolers featuring award-winning shows, music, and educational videos. The service is available direct to consumers and contains hundreds of episodes of safe and ad-free children's programming.

- A&E Networks distributes content on a variety of alternative platforms. Its A&E, History, Lifetime, Viceland and FYI TV Everywhere applications are available as branded websites and mobile applications for phones and tablets on iOS, Windows, Android and Amazon Kindle platforms and on streaming media devices including Roku, Amazon Fire TV, and Apple TV. The A&E Networks portfolio of A&E, History, Lifetime, FYI, LMN, and Viceland are included in the line-up for DISH Network's Sling TV. In addition, A&E has licensed short-form content on YouTube and long-form content on Netflix, Amazon and Hulu and has introduced direct-to-consumer SVOD products "Lifetime Movie Club" through iOS, Roku, and Amazon Prime and "HISTORY Vault" through Roku and Amazon Prime.[5]

Thus, the Content Companies have been leaders in making programming available to consumers over new devices and networks and have done so without sacrificing the viewing experience. Indeed, they have done so with a goal of *enhancing* the viewing experience, which is critical to attracting and retaining both viewers and distributors. This is the result of their painstaking focus on ensuring the content is presented in a compelling way in their own video applications and, as discussed below, maintaining quality content presentation through detailed agreements with all licensed distributors – whether traditional cable or satellite TV providers, Internet-based carriers, or new entrants.

II. LICENSING AGREEMENTS BETWEEN PROGRAMMERS AND DISTRIBUTORS ENSURE A POSITIVE VIEWING EXPERIENCE AND PRESERVE INCENTIVES FOR INVESTMENT IN CONTENT

A. Carefully Negotiated Terms in Program Licenses Safeguard Content Against Theft and Protect Critical Branding and Presentation Elements

Agreements between the Content Companies and distributors, including traditional MVPDs and alternative platforms, ensure that audiences enjoy a wealth of curated, high-quality

[5] For a description of offerings by Content Companies, *see, e.g.*, Comments of The Walt Disney Co., 21st Century Fox, Inc., & CBS Corp., MB Docket No. 14-261, at 2-5 (filed March 3, 2015).

programming, presented in an appealing and consistent manner. These carefully negotiated agreements reflect requirements associated with rights acquisitions and production commitments, as well as individualized decisions of the Content Companies regarding the manner in which they reach their audiences and present their content. These agreements benefit consumers by allowing viewers to differentiate among the wide array of available programming, facilitating the navigation and selection of content, protecting them from over-commercialization and inappropriate advertising, and enabling them to enjoy their programming without alteration or confusion.

These agreements also define the rights granted by each Content Company. They establish the scope of each license and describe how the distributor is permitted to exploit those rights when it creates commercial retail offerings for viewers. Importantly, the agreements also detail ways in which the distributor *cannot* disseminate or commercially exploit content. These restrictions also may be necessary because a programmer is not the copyright owner for all of the content on its network, and therefore does not have certain rights to grant. Importantly, linear programmers simply may not possess the full scope of rights from the copyright holder, especially with respect to sports or high-quality programming. There may also be specific marketplace reasons for not including certain rights as part of a particular distribution agreement. For example, agreements often specify that distributors may make particular content available only in certain geographic regions or markets, or on some other exclusive basis. Similar provisions limit the types of devices that can be used to view content, as some copyright owners may restrict distribution through, for example, mobile phones because they sell those rights separately in the marketplace.

Agreements between programmers and distributors may include numerous terms related to security and programming integrity,[6] such as the following:

(1) Scope of License – These provisions may detail the platforms, technologies, and territories covered by the distribution rights as well as other conditions of distribution, including:
   - The extent of the distributor's obligation to carry the content in its entirety, without modification, deletion, disruption, interruption, substitution, insertion into, or alteration (which may include ancillary materials, such as metadata, security watermarks, images, graphics, and logos);
   - The amount of content distributed to consumers, the timing of delivery, and whether it may be made available on-demand; and
   - Who is permitted to access content; where they can access the content (*e.g.*, territorial and retransmission restrictions); when they may access it (*e.g.*, whether time-shifting is permitted); and how (*e.g.*, with or without fast forwarding).

(2) Permitted Devices – These provisions vary based on concerns about security risks posed by certain devices, or the content provider's – or underlying copyright holder's – market-based decision to sell distribution rights to different devices separately.

(3) Terms Negotiated with Copyright Owners for Content that a Programmer Licenses from Others – A distributor must abide by any restrictions contained in the license that a program network receives from a copyright owner (*e.g.*, networks license live sports content from sports leagues, which, as the copyright owners, provide various restrictions on the networks).

(4) Content Protection – These provisions may detail various security measures, such as the implementation of certain security or authentication protocols.

(5) Advertising – These provisions may include terms regarding the alteration or replacement of advertising, as well as the type of ads allowed.
   - The distributor may or may not be allotted advertising availabilities to sell during commercial breaks.

(6) Placement – These terms may include the tier on which content is carried, channel position and neighborhood restrictions, as well as commitments with respect to brand and channel location, and appearance in electronic program guides.

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[6] *See, e.g.*, Letter from Lawrence E. Strickling, Admin'r, Nat'l Telecomms. & Info. Admin. to Tom Wheeler, Chairman, FCC, MB Docket 16-42, at 4 (Apr. 14, 2016) (emphasizing the importance of "respecting the security and integrity of MVPD programming").

(7) Navigation, Search, and Recommendation – Such provisions may detail how consumers will see and navigate to content and how content will be treated in search and recommendation engines. They may also include provisions relating to auto-tuning to other channels and/or auto-directing consumers to other content at the conclusion of a given program.

(8) Signal Quality – These provisions detail delivery obligations to ensure that consumers receive the best possible picture and sound.

(9) Data – These terms govern the collection, sharing, and use of viewer data, including methods for tracking viewership of programs with advertising (*e.g.*, Nielsen, Rentrak).[7]

These agreements do not impede the ability of competitive navigation device makers to develop and market their devices. Nor are they designed to limit the distribution of content to new platforms. As described above, the Content Companies have incentives to distribute their content to new platforms and are working hard to do so. The agreements are instead focused on protecting the security and integrity of content and the underlying content license.

The distribution agreements Content Companies enter into with new distribution platforms contain similar protections. However, those agreements often contemplate fundamentally different consumer offerings, such as smaller packages or lower advertising loads. These packages enable new entrants to offer consumers a truly differentiated service, spurring the type of competition that the Commission desires. Were the Commission's rules to take effect, as discussed below, OTT platforms would have less incentive to negotiate licenses for content, since they could obtain programming from MVPDs for free, without any additional commitments.

[7] The specific terms of these agreements, as the Commission is aware, are confidential and proprietary. *See, e.g.*, *CBS Corp. v. FCC*, 785 F.3d 699, 701 (D.C. Cir. 2015) (characterizing programming distribution agreements as "proprietary business material"); *see also News Corp. & Liberty Media Corp.*, 22 FCC Rcd. 12797, 12798-804 (2007); *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd. 24816, 24831 (1998).

In any case, by detailing each of these issues as a condition of granting distribution rights, the agreements reflect a concept of "security" that encompasses not only compliance with copy control requirements (*e.g.*, copy once, copy never), but also compliance with the terms of the license. This concept of security – as encompassing all of the protections embedded in the licensing agreements – safeguards the integrity of the content created, acquired, and packaged into channels by the Content Companies. It also ensures programmers' direct involvement (as copyright owners and licensees) over how, when, and where their content is distributed and displayed.

The rights licensed by the Content Companies through these agreements derive and flow from copyright law, which grants copyright holders the right to license – or not to license – their content as they deem appropriate. The Copyright Act grants the owners of copyrighted works the exclusive right to determine how their content will be distributed, reproduced, and publicly performed. Collectively, this bundle of rights ensures that the owner of a work, if it chooses, can decide how its content will ultimately appear to the consumer.

In addition to establishing a shared understanding as to how content can be presented, distributed, and monetized, licensing agreements also detail the required copy control and piracy protections that must accompany various categories of programming. In particular, agreements may require the implementation of certain security or authentication protocols by the distributor. If a distribution method proves unsafe or threatens the security of content, the Content Companies and distributors rely on agreed-upon procedures set forth in their contracts to resolve any issues. This is especially the case for some of the highest value content that viewers enjoy and demand, including pay-per-view or video-on-demand programming. Keeping this content secure ensures that content providers can continue to invest in creating this vibrant and diverse programming.

B. The Notice Poses Risks to Content Companies' Ability to Continue Providing Audiences a Diverse Array of Compelling, High-Quality Content

Several weeks before adoption of the Notice, a number of the Content Companies raised concerns regarding the approach being contemplated by the Commission.[8] These concerns were centered on the potential impacts of the proposed rule on today's dynamic programming marketplace. In particular, the Content Companies cautioned that the Commission should carefully consider the effects its proposed actions would have on existing licensing agreements, the incentives of programmers to develop high-quality content, and the copyright framework under which content providers make their content available to consumers.

Despite these concerns, the Commission adopted the Notice and proposed changes that go far beyond the goal of improving the commercial availability of set-top boxes.[9] As proposed, the broad scope of the rules would harm consumers and reduce the incentives to invest in content because:

- The proposals impede the Content Companies' ability to negotiate and enforce private contractual agreements with third-party navigational interface providers that carefully manage branding, presentation, and other aspects of how their content will be distributed and discovered. The proposals offer no alternative enforcement mechanism that would substitute for these contract terms. The proposals also would abrogate the Content Companies' private contractual agreements with MVPDs.

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[8] *See* Letter from A&E Television Networks, LLC, AMC Networks, Inc., Discovery Commc'ns, Inc., NBCUNIVERSAL, Scripps Networks Interactive, Inc., The Walt Disney Co. & ESPN, Inc., Time Warner Inc., 21st Century Fox, Inc., & Viacom Inc. to Marlene H. Dortch, Sec'y, FCC, MB Docket 15-64 (Jan. 14, 2016).

[9] The Notice notes that content providers "raised concerns" that a competitive navigation solution would lead to breach of the terms of licensing agreements, but then completely fails to address the substance of those concerns. *See* Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,046.

- The proposals contain insufficient protections – or leave key details of protections wholly absent or unresolved – that are necessary to ensure that the security provisions contained within the distribution agreements would flow through to the third-party devices. The proposal for an "Open Standards Body" to determine the appropriate security protocols is particularly unavailing and falls far short of the Commission's statutory obligation to protect the security of content.

- The proposals would allow third parties to alter, substitute, and otherwise dilute the advertising that helps support investment in high-quality content.

- The proposals would allow third-party navigation device and software makers to change, remove, rearrange, or disaggregate content from the distinct channels and on-demand portals created by the Content Companies.

- The proposals would give non-MVPD distributors little incentive to negotiate content licenses for innovative services if they can demand the content at no cost, and without contractual obligations, directly from MVPDs.

Each of these aspects of the Notice would undermine programmers' intellectual property rights and increase the economic risks of investing in content. The Notice increases the likelihood that third-party navigation device makers will fail to secure content, weaken the appeal or value of the content to consumers, or otherwise negatively impact content providers' ability to derive economic returns from investing in content. By weakening content providers' ability to earn returns on content investments, the FCC's proposal as drafted decreases their incentives and ability to produce more of the great programming audiences love. As drafted, the Commission's proposals would thus undermine, rather than expand, consumers' ability to continue enjoying the diverse, high-quality content that the Content Companies provide over a variety of distribution platforms.

III. THE PROPOSALS IN THE NOTICE EXCEED THE COMMISSION'S STATUTORY MANDATE

The Content Companies appreciate and support the Commission's desire to provide consumers with additional options for set-top boxes. Section 629 grants the Commission authority to spur competition in the set-top box market, but in doing so the Commission must adhere to the unambiguous terms of the statute.[10] The terms of Section 629 are, in reality, quite narrow. They allow the Commission to promote competition in the market for set-top boxes, but they do not give the Commission power to force programmers to pass on their content to third-party developers – a problem exacerbated because those developers are not obliged to abide by the terms of programmers' licensing agreements. The statute also requires the protection and security of content, including preservation of the contractual terms meant to keep content secure. The Notice, however, far oversteps these bounds.

A. The Commission's Authority Under Section 629 Is Limited to Promoting the Commercial Availability of Set-Top Boxes

Section 629 authorizes the Commission to pursue a narrow solution to a specific problem: the lack of competition in the MVPD set-top box marketplace. Section 629(a) provides the Commission with limited authority to promote the availability of devices made by companies unaffiliated with MVPDs as alternatives to MVPD-leased set-top boxes. The carefully cabined nature of Section 629 is clear from the statute's text, structure, and legislative history.

1. *Section 629(a) sets forth a clear statutory command.*

Under Section 629(a), the Commission may "adopt regulations to assure the commercial availability . . . of *converter boxe*s, interactive communications *equipment*, and *other equipment* used by consumers to access multichannel video programming . . . from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor."[11] This provision is unambiguous. Contrary to the Commission's expansive interpretation of the statute

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[10] *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006).

[11] 47 U.S.C. § 549(a) (emphasis added).

– which would cover not only hardware but also software[12] – the text of the statute refers only to the availability of converter boxes and other *equipment*. The term "equipment" refers to a physical device and does not include software.[13] And under the principle of *noscitur a sociis*, which provides that "additional neighbors" in a statute can help determine the meaning of a particular statutory term, "other equipment" must mean something similar to a converter box.[14] This clear statutory text underscores Congress's narrow goal of ensuring that set-top boxes would be available from multiple, competitive vendors.

The legislative history confirms that this directive was intended to be narrow and straightforward. Although the House originally proposed a bill that would have affected all manner of "telecommunications subscription service[]" technology, the "scope of the regulations [was] narrowed to include only equipment used to access services provided by multichannel video programming distributors."[15] That is, the law as passed ultimately covers only the commercial availability of set-top boxes and similar equipment – not any conceivable technology that could be used in conjunction with MVPD service.

In previous proceedings, the Commission itself agreed that Section 629(a)'s mandate was limited to set-top boxes. In 1998, for example, the Commission noted that "[t]he purpose of Section 629 . . . is to expand opportunities to purchase . . . *equipment* from sources other than the

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[12] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,037 (software can be considered "a navigation device separate and apart from the hardware on which it is running").

[13] *See, e.g.*, BLACK'S LAW DICTIONARY 654 (10th ed. 2014) (defining "equipment" as the "articles or implements used for a specific purpose or activity"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 423 (11th ed. 2004) (defining "equipment" as "the set of articles or physical resources serving to equip a person or thing").

[14] *See, e.g., Bullock v. BankChampaign, NA*, 133 S. Ct. 1754 (2013).

[15] S. REP. NO. 104-230, at 181 (1996) (Conf. Rep.).

service provider."[16] In both its CableCARD and its AllVid proposals, the Commission never strayed beyond the bounds of converter boxes and other physical equipment. The nature of the proposed intervention here is, by contrast, broad, novel, and unsupported by the statutory text or legislative history.

2. *Section 629(b) protects the security of content, including the security of licensing terms.*

Section 629(b) further carefully and explicitly limits the Commission's authority by demanding that actions taken to promote set-top box competition do not undermine the security of content. Section 629(b) provides that the "Commission shall not prescribe regulations . . . which would jeopardize security of multichannel video programming and other services offered over multichannel video programming systems."[17] It also states that the Commission may not "impede the legal rights of a provider of such [multichannel video programming] services to prevent theft of service."[18]

The legislative history of Section 629(b) emphasizes what the plain language requires: that the Commission may not pursue a competitive set-top box marketplace at the expense of the security of programming. The Commerce Committee Report on Section 629 stresses the protection of those who "have a valid interest, *which the Commission should continue to protect*, in system or signal security and in preventing theft of service."[19] The Report further observes

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[16] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report & Order, 13 FCC Rcd. 14775, 14776 (1998) (emphasis added).

[17] 47 U.S.C. § 549(b).

[18] *Id.*

[19] H.R. REP. NO. 104-204, at 112 (1995) (referring to the original draft of what later became Section 629) (emphasis added).

that Section 629 "directs the Commission to take this interest into account in developing its regulations."[20]

The statute and the legislative history also clearly state that Section 629 requires the Commission to protect the rights that *owners* of programming have in their content. Section 629 specifically prohibits the Commission from adopting regulations that would, in any way, "jeopardize security of multichannel video *programming*."[21] In the floor debates over Section 629, Senator Snowe confirmed this point by stating that "the FCC has the responsibility and obligation to consider the legitimate needs of *owners and distributors* of cable programming to ensure system and signal security, and to prevent theft of programming or services."[22] As owners and licensees of programming, the Content Companies' interests in the security and protection of their programming are of central importance to Section 629(b).

Importantly, Section 629(b) protects programmers in two different ways, as reflected in its use of the terms "theft" and "security." Of course, 629(b) guards against the "theft" of service, and hence the theft of programmers' content. But it also protects the "security" of programming. Under the ordinary rules of statutory interpretation, "security" must mean something different from the mere prevention of theft. Congress easily could have used the term "theft" alone if that was all it intended.[23] Instead, it referred to "security" as distinct from "theft," and the plain language of "security" means something broader: "freedom from risk or

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[20] *Id.*

[21] 47 U.S.C. § 549(b).

[22] 141 CONG. REC. S7992 (daily ed. June 8, 1995) (statement of Sen. Snowe) (emphasis added).

[23] *Keene Corp. v. United State*s, 508 U.S. 200, 208 (1993) ("where Congress includes particular language in one section of a statute but omits it in another . . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

danger; safety."[24] In other words, the Commission has an obligation to protect the integrity of programming from the risk of alteration and other dangers. Read against the background of intellectual property law, this protection of "security" must extend not only to the protection from piracy but also to the entire realm of exploitation and presentation issues covered by the Content Companies' licenses.

3. *Section 629(f) confirms that the Commission's authority is limited.*

Section 629(f) underscores the fact that the Commission's authority is narrowly circumscribed. Section 629(f) explicitly provides that "[n]othing in [Section 629] shall be construed as expanding or limiting any authority that the Commission may have under law . . .."[25] In other words, Section 629(f) directs the Commission and courts to read Section 629's directive narrowly. The existence of Section 629(f) confirms that Section 629, as a whole, was not meant to radically disrupt the status quo beyond 629(a)'s stated purpose: to enhance competition for set-top boxes by ensuring that non-MVPD competitors could manufacture and deploy similar equipment. Courts reading Section 629 have agreed: the scope of Section 629 is limited and does not "empower[] the FCC to take any action it deems useful in its quest to make navigation devices commercially available."[26]

B. The Proposal Exceeds the Commission's Statutory Mandate by Enabling Third Parties to Sidestep the Contractual Terms that Govern the Grant of Content to MVPDs

Given its narrow purpose and carefully cabined language, Section 629 does not permit regulations that would interfere with the Content Companies' contracts or intellectual property

[24] THE AMERICAN HERITAGE DICTIONARY 1575 (4th ed. 2006).

[25] 47 U.S.C. § 549(f).

[26] *EchoStar Satellite, L.L.C. v. FCC*, 704 F.3d 992, 999-1000 (D.C. Cir. 2013).

rights. Chairman Wheeler has recognized that fact. He indicated publicly that the Notice would (or should) safeguard content consistent with programmers' underlying agreements. The Chairman's Fact Sheet stated that "[e]xisting content distribution deals, licensing terms, and conditions will remain unchanged" under the new rule.[27] The Chairman later reiterated this reassurance to Congress, claiming "that which the cable operators put out should remain sacrosanct and untouched."[28] The Notice itself states that the contracts between programmers and MVPDs should not be jeopardized. One of the Commission's goals, according to the Notice, is to "ensure that negotiated licensing terms imposed by content providers on MVPDs are passed through to Navigation Devices."[29] The Commission tentatively concludes that it should withhold advertising information from Service Discovery Data to ensure advertising is not replaced or altered, but adopts no other rules to implement this or to protect other program licensing terms.[30]

These statements by the Chairman and Commission make sense in light of Section 629's limited statutory mandate. Section 629(a) does not give the Commission the authority to interfere with programmers' contractual rights, and Section 629(b) explicitly protects the

[27] *FCC Chairman Proposal to Unlock the Set-Top-Box: Creating Choice & Innovation* 2 (Jan. 27, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0127/DOC-337449A1.pdf ("Chairman's Fact Sheet").

[28] *Oversight of the FCC: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 114th Cong. 23 (2016) (testimony of Tom Wheeler, Chairman, FCC).

[29] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,044.

[30] *In re Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking, FCC 16-18, MB Docket No. 16-42, CS Docket No. 97-80 (rel. Feb. 18, 2016) ¶ 80 n.232 ("NPRM") ("We note that in paragraph 38 above, we tentatively conclude that Service Discovery Data need not include descriptive information about the advertising embedded within the program, to ensure that competitive Navigation Devices do not use that data to replace or alter advertising.").

"security" of content, which is embedded in the licensing and distribution agreements. Indeed, these statements seem to reflect that the Commission is cognizant of its legal obligations.

Nonetheless, as currently structured, the proposed rules contain no mechanism to ensure that "negotiated licensing terms" are "passed through to Navigation Devices." Indeed, the Notice specifically *disclaims* any intention of imposing regulations to protect important licensing terms, stating that it is "unnecessary . . . to propose any rules to address" device makers' ability to "disrupt elements of service presentation (such as agreed-upon channel lineups and neighborhoods), replace or alter advertising, or improperly manipulate content."[31] The Notice's mandate that content be passed along to third parties, without the protection of programmers' negotiated license terms, would clearly exceed the scope of authority provided to the Commission under Section 629.

The deficiencies of the Notice under Section 629 are twofold: It both abrogates contracts between programmers and MVPDs and would require – by regulatory fiat – that MVPDs further sub-distribute the underlying content without a negotiated license. MVPDs would be mandated to pass along programming to third parties who are not bound by the terms that govern the MVPDs' rights to content. The import of the FCC's proposal, as currently drafted, is that selected benefits of private contracts would be extended to third parties, without any of the accompanying burdens, covenants, and conditions that were integral to the content owners' agreement to provide the content in the first instance. The Notice's proposals would also negatively affect the rights of third-party copyright holders and the other original content owners from whom the Content Companies license content.

[31] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,046.

Such a drastic change in the video program distribution marketplace goes beyond any reasonable view of what Congress enacted in Section 629. The widespread derogation of privately negotiated contractual rights that would be effectuated by the proposed rules falls outside the limited statutory mandate to promote competition for set-top box equipment. To be sure, if Congress had desired to effectuate changes so fundamental to the way that content is licensed and distributed, it could have and would have said so clearly and directly. It would not have buried the sweeping overhaul of an industry by then-unknown technology in an obscure provision of law relating to set-top equipment. As the Supreme Court has noted, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[32] This is especially true when Congress specifies that it intends for a regulatory provision to be read narrowly, as it did in Section 629(f).

C. <u>The Proposal Falls Far Short of Enforcing Security Protections as Required Under Section 629(b)</u>

The Notice repeatedly acknowledges the Commission's obligation to secure programming under Section 629(b), but then fails to address many considerations that are essential to security. This failure harms both the quality of consumers' viewing experience and the Content Companies' ability to continue investing in new content. As explained above, the use of the term "security" indicates Congress's desire to protect programmers' rights not only to keep their content safe from piracy, but also more broadly to enforce key licensing terms related to the protection, exploitation, and presentation of content. The proposed rules, as drafted,

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32 *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (one would expect "Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance'"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").

would fail to require device manufacturers either to take adequate steps to prevent piracy and theft or to enforce the Content Companies' licensing terms, both of which would be inconsistent with the requirements of Section 629(b).

Perhaps the most glaring potential deficit in this regard relates to the security architecture laid out in the proposed rules. As discussed above, Section 629(b) commands the Commission not to "jeopardize [the] security of multichannel video programming" or "impede the legal rights of a provider of such [multichannel video programming] services to prevent theft of service."[33] However, the Notice's security proposals fail to meet Section 629(b)'s requirements to maintain security.

The proposed rules effectively create an entirely new content distribution ecosystem in which content will be transmitted to devices or other services by means of three "Information Flows" in formats specified by "Open Standards Bodies;"[34] purportedly secured through a "Compliant Security System" licensed to third-party device makers and service providers;[35] and managed by a "Trust Authority" responsible for maintaining certificates and keys for those devices.[36] However, despite the Commission's attempts to delineate the roles played by each new player in this marketplace, the proposed rules ultimately fail to assign sufficient security responsibilities to any of these three critical components.

According to the Notice, an Open Standards Body is responsible for determining what limitations are capable of being placed on the transmission, protection, and use of content, but

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33 47 U.S.C. § 549(b).

34 Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,039.

35 *Id.* at 14,042.

36 *Id.*

the Content Companies that own that content are not assured of any role within that body.[37] Based on their extensive experience developing content transmission policies and protocols and their strong incentive to keep content safe, the Content Companies are in the best position to develop specifications that accurately encode the granted permissions. If the proposed rule were to proceed as drafted, however, the underlying content would likely be transmitted using security protocols that differ from those set forth in licensing arrangements or that Content Companies would otherwise deem inadequate under such arrangements.[38]

Moreover, an Open Standards Body cannot lawfully take on this critical security role, for multiple reasons. First, it is inconsistent with the express language of Section 629(a), which contemplates that the Commission will adopt regulations "in consultation with" a standards-setting body.[39] Rather than merely proposing consultation with an Open Standards Body, however, the rules as drafted would delegate the Commission's authority on key questions of security to this yet-to-be-determined entity. However, Section 629(b) makes the *Commission* responsible for ensuring that security is not jeopardized. Second, as was true in *United States Telecom Ass'n v. FCC*,[40] "[i]t is clear here that Congress has not delegated to the FCC the

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[37] At best, the Content Companies will be one voice among many clamoring for greater access to their content, given its composition: "A standards body (1) whose membership is open to consumer electronics, multichannel video programming distributors, content companies, application developers, and consumer interest organizations, (2) that has a fair balance of interested members, (3) that has a published set of procedures to assure due process, (4) that has a published appeals process, and (5) that strives to set consensus standards." *Id.* at 14,039.

[38] In fact, there is no evidence in the record or the Notice to support the proposition that the parameters contained in licensing agreements are even capable of being transmitted to competitive navigation device makers via the three Information Flows. Moreover, as noted in n.7, *supra*, the terms of licensing agreement reflect confidential business information.

[39] 47 U.S.C. § 549(a); *see, e.g.*, *Bayou Lawn and Landscape Servs v. Sec'y of Labor* , 713 F.3d 1080, 1084 (11th Cir. 2013) (holding that a statute that instructs an agency "to consult with the 'appropriate agencies of the Government'" in rulemaking does not grant those agencies rulemaking authority, because other agencies "cannot bootstrap that supporting role into a co-equal one").

[40] 359 F.3d 554 (D.C. Cir. 2004).

authority to subdelegate to outside parties."[41] After all, "[a] general delegation of decision-making authority to a federal administrative agency does *not*, in the ordinary course of things, include the power to subdelegate that authority beyond federal subordinates."[42] Third, the Commission's proposed rules would conflict with settled Constitutional principles that prohibit agencies from delegating rulemaking authority to outside parties.[43]

Compliant Security Systems, meanwhile, must be "licensable on terms that require licensees to comply with robustness and compliance rules."[44] While this license is the single specific contractual obligation placed on device manufacturers in the proposed rules, the Notice includes no specific robustness or compliance rules. In other words, a device security system can be "compliant" without satisfying any specific obligations related to the security of content – a result that would be inconsistent with the obligations of Section 629(b). In addition, the proposed rules do not describe any concrete technical means through which Compliant Security Systems would ensure content is protected.[45]

Finally, the Trust Authority, which the Commission seems to envision will serve a critical role in securing content, is hardly mentioned in the proposed rules. The Notice includes no rules governing the selection and operation of the Trust Authority, and its role is left

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41 *Id.* at 566.

42 *Id.*

43 *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

44 Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,051.

45 The Commission even acknowledges that one of the technical approaches in its toolkit for securing content streams proposed in the Notice – link protection – "would create too much potential for vulnerability" for large swaths of programming. *Id.* at 14,042.

remarkably unclear.[46] Adoption of the proposed rules as drafted thus would be inconsistent with the obligation not to jeopardize security under 629(b). In fact, as noted more fully below, the Notice has offered so little detail regarding the Trust Authority that the Content Companies currently have insufficient notice of its role to provide comment on what they understand to be a key aspect of the Commission's proposed security infrastructure.

Moreover, even outside of the proposed security architecture, the new regime proposed in the Notice would have unforeseen side effects that would negatively impact security and conflict with the security mandates in Section 629(b). First, the Commission included no measures to address (or even acknowledge) the potential security concerns presented by software-based solutions. However, as many experts have noted, software-based solutions present content owners with less robust options for protecting and securing their content.[47] Even if Section 629(a) authorized the Commission to allow software-based navigation solutions, Section 629(b) would not permit it to do so unless it ensures that such solutions sufficiently protect content. Second, although the Commission expresses interest in encouraging streaming to mobile systems, including app-based systems, it also ignores the unique security concerns within mobile

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46 *Compare* NPRM ¶ 50 n.146 (suggesting the Trust Authority will issue "keys"), *with* Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,042 (suggesting it will issue "certificates and keys" and asking whether its role is sufficiently clear).

47 "Stronger security assurances may be possible by grounding security mechanisms in roots of trust. Roots of trust are highly reliable hardware, firmware, and software components that perform specific, critical security functions. Because roots of trust are inherently trusted, they must be secure by design. As such, many roots of trust are implemented in hardware so that malware cannot tamper with the functions they provide." Nat'l Inst. of Standards & Tech., *Hardware Roots of Trust* (last updated May 7, 2015), http://csrc.nist.gov/projects/root-trust. Thus, as the Commission has recently been told: "The use of a software-based module instead of a hardware security module increases the risk associated with the capture and reverse engineering of . . . [a] device." FCC TAC Cybersecurity Working Group, Applying Security to Consumer IoT Devices Subcommittee, *Technical Considerations White Paper*, Rel. V.1.117 (Dec. 4, 2015), https://transition.fcc.gov/oet/tac/tacdocs/reports/2015/FCC-TAC-Cyber-IoT-White-Paper-Rel1.1-2015.pdf.

environments.[48] The Commission should not be preparing to adopt lower security thresholds at the same time content is increasingly moving to higher-risk software-based and mobile environments.

IV. THE PROPOSAL FAILS TO PROVIDE EFFECTIVE MECHANISMS FOR THE ENFORCEMENT OF PROGRAMMER RIGHTS TO SECURE CONTENT OR COMPLIANCE WITH VARIOUS CONSUMER PROTECTION OBLIGATIONS

A. The Commission Eliminates the Existing Enforcement Mechanisms in Licensing Agreements Without Proposing any Effective Alternatives

The proposed rules jeopardize the security of programming not only by failing to establish protections for content, but also by effectively eliminating the existing rights of the Content Companies to enforce the agreement terms that protect that content. It is those contractual rights – and not copyright litigation generally – that form the primary basis by which the Content Companies enforce their rights. The Content Companies submit that the Commission's proposal fails to recognize the importance of these licensing agreements as enforcement mechanisms. The Commission is very clear about its intention to leave issues "such as channel placement and treatment of advertising to marketplace forces."[49] But the Commission ignores the fact that, with regard to the third parties who now will enjoy new compelled access to Content Companies' content, it has effectively dismantled the very "marketplace"-established agreements that otherwise protect that content.[50]

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[48] "Many mobile devices are not capable of providing strong security assurances to end users and organizations." NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, GUIDELINES ON HARDWARE-ROOTED SECURITY IN MOBILE DEVICES (Draft), SP 800-164, at v (2012).

[49] NPRM ¶ 2.

[50] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. 14,043.

Moreover, in making this change, the proposed rules do not offer any replacement for the protections built into licensing agreements or offer any plausible alternative enforcement procedure. The Notice fails to specify how the Commission, MVPDs, or the Trust Authority could act in the event a navigation device or service is shown to be insecure. The Notice does not detail how any party or the Commission would even discover such insecurity – an oversight that could potentially permit vulnerabilities affecting not only the security of transmitted content but consumers' home networks more broadly to fester for long periods of time. Nor does the Commission propose or even suggest any means to rescind certificates or keys, revoke manufacturers' licenses or suspend the stream of content to non-compliant devices. In many respects, the Commission appears to assume that third-party device manufacturers will simply follow the rules in all cases. With no functional alternative to contractual privity between programmers and navigation device manufacturers, the Commission's enforcement regime would be effectively toothless. Such an inadequate enforcement mechanism would not comply with Section 629(b).

B. By Failing to Propose Effective Licensing Enforcement Mechanisms, the Notice Ensures Other Important Commission Priorities Will Remain Unenforced

Licensing agreements have served as one of the primary means by which the Content Companies ensure compliance with various Commission policy objectives. Agreements often contain commitments by content distributors to comply with various congressional and Commission priorities, including protecting children, maintaining accessibility and closed captioning, and delivering emergency messages. The Notice proposes to require competitive device makers to self-certify that they will comply with Commission rules. Under the Commission's proposal, the Content Companies would still be obligated to comply with the underlying rules, but the Commission would have no effective means to ensure end-user device compliance. Indeed, the Commission does not identify any steps that could be taken if device makers fail to comply with these certifications. As such, this approach is almost certain to fail, with important Commission priorities accordingly going unaddressed and consumers without a remedy.

V. IF ADOPTED, THE NOTICE WOULD VIOLATE THE COMMISSION'S OBLIGATION TO ENGAGE IN REASONED DECISION-MAKING

The Administrative Procedure Act requires the Commission to engage in reasoned decision-making. The agency's regulations may be deemed unlawful if its actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[51] Thus, the Commission must closely examine relevant facts and base its decision on the record before it. In particular, the Commission may not adopt an approach if the "record before the agency does not support the agency action"[52] or if the agency has "entirely failed to consider an important aspect of the problem."[53] By refusing to protect programmers' content or licensing terms and otherwise ignoring the negative impacts the Notice might have on programming, the Commission has acted arbitrarily and unreasonably.

The Notice, as currently drafted, relies on faulty logic and erroneous assumptions about the state of the video marketplace to reach the conclusion that it need not adopt any limitation *at all* on the manner and methods by which third parties may monetize programmers' content.

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51 5 U.S.C. § 706(2)(A) (directing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

52 *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

53 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

Contrary to the facts presented to the Commission by the Content Companies and others,[54] the Commission suggests that no rules are needed to protect content against manipulation by device makers. Instead, the Notice posits that copyright litigation is an adequate tool to protect content against third-party misuse. This assertion starkly conflicts with the requirement of reasoned decision-making, since it is belied by not only the record before the Commission but also common sense.[55]

To begin with, the Notice's proposal is based on incorrect factual assumptions. The Notice deems the Content Companies' concerns about third parties monetizing their content outside of the scope of the underlying licenses "speculative."[56] It specifically notes that the Commission is "encouraged" by the absence of allegations against retail navigation devices currently on the market concerning such issues.[57] Despite the statements in the Notice, however, the existing CableCARD regime – which for more than a decade has allowed consumers to access MVPD content with third-party equipment – has already been a source of the very concerns the Content Companies have raised. For example, various navigation device makers have already been placing ads over linear programming.[58] A number of CableCARD-compatible

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[54] *See, e.g.*, Letter from A&E Television Networks, LLC, AMC Networks, Inc., Discovery Commc'ns, Inc., NBCUNIVERSAL, Scripps Networks Interactive, Inc., The Walt Disney Co. & ESPN, Inc., Time Warner Inc., 21st Century Fox, Inc., & Viacom Inc. to Marlene H. Dortch, Sec'y, FCC, MB Docket 15-64 (Jan. 14, 2016).

[55] *See, e.g., Fla. Power & Light Co.*, 470 U.S. at 744.

[56] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. at 14,046.

[57] *Id.* at 14,045.

[58] Deborah Yao, *More Ads Coming to TV Even to One-Time Havens*, ABCNEWS.COM, http://abcnews.go.com/Technology/story?id=8237990&page=1 (last visited Apr. 20, 2016) ("TiVo, the creator of the digital video recorder that panicked the TV business by making it simple to skip ads, now flashes banners on TV screens when users pause, fast-forward or delete shows," including "layering an ad on top of" programming.); *see also* Michael Hiltzik, *TiVo Finally Tells TV Broadcasters to Stuff It*, L.A.TIMES, Oct 5, 2015, http://www.latimes.com/business/hiltzik/la-fi-mh-tivo-finally-tells-tv-broadcasters-20151005-

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Smart TVs also place ads over programming without content owners' consent.[59] These practices have grown so common (and frustrating to viewers) that consumer electronics websites now provide tutorials explaining how to disable such advertisements.[60] Some navigation devices also insert tags at the beginning and end of commercial breaks to automatically skip all commercials aired during a program.[61] None of the Content Companies has granted these device makers the right to place advertisements over their content or tag commercials. Yet device makers are already openly defying programmers' contractual licensing terms under the CableCARD regime.[62]

The Commission's proposal as drafted would exacerbate these problems. Indeed, the Commission's goal is to create a market for competitive boxes where it believes only limited competition exists. Therefore, the Commission must assume that the harms under the current, more limited market will multiply with the entry of additional devices and competition. Moreover, given that new device makers will not receive subscription revenues for the content they are transmitting (which MVPDs will continue to collect), the Commission must consider how third parties will profit from offering these new devices or services. Potential sources of

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column.html (noting that one service offered on TiVo's new Bolt unit is its Quick Mode service, "which allows playback of recorded shows 30% faster, with the audio electronically tweaked").

59 *See* Meghan Neal, *You're Going to Need an Ad Blocker for Your Next TV*, MOTHERBOARD (Jan. 21, 2016), http://motherboard.vice.com/read/youre-going-to-need-an-ad-blocker-for-your-next-tv.

60 *See* Dan Graziano, *How to Block In-App Ads on Your Samsung Smart TV*, CNET (Feb. 19, 2015), http://www.cnet.com/how-to/samsung-smart-tv-app-ads-plex.

61 Associated Press, *New TiVo DVR Will Skip Through Entire Commercial Break*, CNBC.COM (Sept. 30, 2015), http://www.cnbc.com/2015/09/30/new-tivo-dvr-will-skip-through-entire-commercial-break.html

62 In addition, the Commission ignored a number of important differences between the CableCARD regime and the approach proposed in the Notice. At the outset, the CableCARD regime only addressed hardware-based navigation devices, not software-based solutions. In addition, the technology and licensing behind the CableCARD was controlled largely by MVPDs, who have significant incentives to protect programming content. Perhaps most fundamentally, very few devices today use CableCARD technologies, whereas the Notice is premised on the assumption that its approach will be widely adopted.

profit for device makers naturally include additional advertising, and for the Commission to ignore those market incentives – if not realities – would be unreasonable.

There is ample evidence of problems with the CableCARD system. Indeed, many third parties supporting the Commission's proposal have expressly stated that they have *no intent* to comply with programmers' carefully negotiated licensing terms. For example, one competitive device maker has "made clear that competitive device providers are not and should not have to be bound to programming contracts entered into by MVPDs to which they were not party."[63] Similarly, Public Knowledge agrees that device makers would be "answerable to the marketplace, not to network operators or programmers."[64] Given these explicit admissions – which already appear in the Commission's docket – it would be arbitrary and unreasonable for the Commission to fail to address the Content Companies' concerns regarding licensing protections.[65]

It also would be arbitrary and capricious for the Commission to rely on faulty logic in its refusal to protect programmers' licensing terms. The Notice points to the lack of competition among set-top boxes when arguing in favor of the drastic changes that would be wrought by the proposed rules, and concludes that this lack of competition warrants the demise of the CableCARD regime. On the other hand, however, it points to the "lack of harm" from the CableCARD regime to support its refusal in the new rules to prohibit specific types of conduct that would contravene licensing terms. But even if the Notice were correct about the supposedly innocuous nature of the CableCARD regime, it would be unreasonable to rely on the "current

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[63] *See* Letter from Devendra T. Kumar, Counsel for TiVo, to Marlene H. Dortch, Sec'y, FCC, MB Docket 15-64, at 1 (Jan. 13, 2016).

[64] *See* Comments of Public Knowledge, MB Docket No. 15-64, at 15 (filed Oct. 7, 2015).

[65] *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43.

marketplace" as evidence of the absence of harm, when this very proceeding is premised on the finding that *no marketplace for CableCARD compatible set-top boxes has developed*.

The Notice's assertion that copyright law currently serves – and can effectively serve in the new marketplace – as the sole method of protecting programmers' rights is also misplaced. Copyright litigation is lengthy and resource-intensive for all parties, and limiting programmers to that remedy alone would supplant exclusive rights defined in licensing agreements, including the right to enforce those rights via contract law. Indeed, many contractual provisions designed to secure programmers' content are not covered by copyright. The serial trips to court mandated by copyright litigation would be even more difficult for smaller programmers with fewer resources, for whom lawsuits may not be a realistic option. And all programmers would confront an environment in which they are forced to play "whack-a-mole" – repeatedly having to fight to undo damaging violations after the fact each and every time a third party attempts to commercialize content (perhaps in the guise of "innovation") by ignoring programmers' rights. In short, the potential remedy of copyright litigation does not begin to approximate the essential controls and protections that can be secured through licensing between parties in privity, and so has always been considered a last resort, not a first line of defense, against infringement. Ignoring this reality would be irrational.

All of this begs the question: Why is there such reluctance to include an explicit prohibition on the types of conduct that would alter or jeopardize content? All record evidence points to the conclusion that the Content Companies concerns are not speculative and that a prohibition is warranted. In the face of these facts, it would be unreasonable for the Commission to claim that the enforcement of licensing terms should be left to the marketplace.

In addition, the Notice contains several other flaws that indicate a lack of reasoned decision-making. For example, as discussed above, the proposal provides so little detail regarding the identity and function of the "Trust Authority" that it has deprived the Content Companies of any meaningful opportunity for notice and comment regarding that aspect of the proposed rule.[66] Indeed, the same argument could be made regarding essentially any element of the Notice's proposed security scheme.

Moreover, the Commission has stated that its rules are engineered to ensure parity between MVPDs and navigation device developers.[67] But in reality, developers would be getting the better bargain. They may access programming without complying with licensing terms, while MVPDs must adhere to their contracts with Content Companies. Similarly, the Notice would lead to unfair and arbitrary disparities between programmers whose content is distributed through MVPDs and programmers whose content is available primarily through broadband-based services. Content owners who distribute content via broadband outside of the MVPD environment would not be subject to the same requirement to have their content redistributed in contravention of their licenses' terms. This is another unaddressed contradiction in the Notice.

Beyond that, the proposal permits a whole host of third parties – the provider of a device or app with whom the Content Companies have no relationship – to insert themselves between content creators and their audiences. By permitting this new layer between audiences and programmers, the proposed rules ensure further intermediation between the Content Companies

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[66] *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (a rule "violates the APA's notice requirement where interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule") (internal quotation marks and citation omitted).

[67] *Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, 81 Fed. Reg. at 14,043.

and their audiences instead of bringing them closer. This cannot possibly lead to better, more responsive and targeted content that viewers want today. The Commission should examine options that further integrate programmers into the content delivery process, rather than pushing them further from their audience.

The Content Companies submit that the Commission needs to examine the record carefully before promulgating any final rule. As outlined above, the text of the rule is clear: the Commission's authority does not extend beyond creating competition in the set-top box market. The Content Companies are agnostic as to the brand of physical set-top boxes that their viewers use. The Content Companies do note, however, that the Commission has not provided any economic analysis demonstrating that its proposed remedy would actually address the problem that the statute is attempting to solve – *i.e.*, introducing competition and lowering the price of set-top boxes.[68]

Of course, the Notice goes far beyond this objective, seeking to stimulate growth in the market for navigation devices and content delivery in general. This is impermissible under the statute. But if the Commission is committed to regulating navigation devices or content delivery generally, it must show that there is a failure in this different, broader market. In so doing, it must assess the current availability of a wide variety of content on third-party devices. The Notice's approach of disrupting the current programming market is unjustified, given the lack of evidence in the record to support the idea that there is a failure in the overall content distribution market.

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[68] It bears noting, as others have argued, that the Notice will not necessarily result in lower prices for consumer, since MVPDs may simply raise their rates to cover any lost revenue. If so, this entire undertaking would appear to be arbitrary.

VI. THE NOTICE EXCEEDS THE COMMISSION'S AUTHORITY AND EXPERTISE BY DEPRIVING CONTENT OWNERS AND PROGRAMMERS OF THEIR INTELLECTUAL PROPERTY RIGHTS

The proposed rules promote wholesale violations of copyright law, an area where the Commission has neither jurisdiction nor expertise. The Copyright Act confers upon the creators of copyrighted works a variety of exclusive rights to promote innovation and spur "the Progress of Science and useful Arts."[69] Chief among these are "the exclusive rights to do and to authorize" the reproduction of copyrighted works, the preparation of derivative works from copyrighted works, the distribution of copies of copyrighted works, and the public performance of copyrighted works.[70]

It is thus a fundamental premise of the Copyright Act that content creators determine whether, when, and how to reproduce, distribute, and publicly perform their works. As discussed above, however, the Notice instead requires that MVPDs grant navigation device manufacturers and service operators access to the copyrighted works of content creators. Those manufacturers and operators then have power to determine how to reproduce, distribute, and publicly perform content, notwithstanding the express limitations within the licenses between MVPDs and content owners.

By requiring content to be sub-distributed by MVPDs in a manner that exceeds the underlying license granted by the content owners, the Commission is either (i) enabling a copyright violation or (ii) creating the equivalent of a compulsory license. If it is encouraging copyright violations – and by offering up copyright law as a solitary enforcement mechanism,

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69 U.S. Const. art. 1, § 8, cl. 8.

70 17 U.S.C. § 106(1)-(4).

the Notice appears to make that suggestion[71] – then the Commission is essentially dismantling the carefully established framework of contracts and licenses that arise out of the regime established by the Copyright Act. If it intends to in effect grant compulsory licenses, the Commission is far exceeding its authority under Section 629, and ignoring important considerations traditionally associated with compulsory licenses and uniquely suited for congressional – not administrative agency – balancing. Unless the terms of sub-distribution are limited to those reflected in the underlying distribution agreement, one result or the other is necessarily entailed.

A. The Proposed Rules Would Encourage Copyright Violations, Placing the Proposal in Conflict with the Copyright Act

1. The proposed rules would infringe upon the rights granted to content owners under the Copyright Act.

As the Supreme Court has made clear in *American Broadcasting Cos. v. Aereo, Inc.*,[72] the exclusive right of video programming owners to publicly perform their works is violated any time a third party – acting without the copyright owner's authorization – "transmits" a performance of a copyrighted work to the public "by any device or process whereby images or sounds are received beyond the place from which they are sent."[73] The Court has emphasized that copyright is infringed in such cases even if the third party's behavior is intended to "simply

[71] Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,046 ("Accordingly, we believe these concerns [regarding improper content manipulation] are speculative, and while we believe at this time it is unnecessary for us to propose any rules to address these issues, we seek comment on this view. We also seek comment on the extent to which copyright law may protect against these concerns, and note that nothing in our proposal will change or affect content creators' rights or remedies under copyright law.").

[72] 134 S. Ct. 2498 (2014).

[73] *Id.* at 2505-06 (citing 17 U.S.C. § 101).

enhance[ ] viewers' ability to receive . . . television signals."[74] While the Court addressed only the specific technologies before it in *Aereo*, it nevertheless made clear that many future technologies that transmit to the home are likely to be considered to transmit to "the public," as "'the public' need not be situated together, spatially or temporally."[75]

It is also axiomatic in copyright law that exceeding the scope of rights granted under a licensing agreement is a breach of the underlying rights of the copyright owner to limit distribution of the work and the creation of derivative works. For example, in *Gilliam v. American Broadcasting Cos.*,[76] the Second Circuit found that the broadcast of an edited version of the Monty Python program in America should be considered a violation of the license granted by Monty Python writers to broadcast the original British version of the program.[77] According to the court, while a distributor may be licensed to "vend or distribute [a] derivative work to third parties," that distributor's use "may not exceed the specific purpose for which permission was granted."[78] Depending on the technology used, competitive device makers would also likely be making additional copies of copyrighted material without the owners' authorization – which is also prohibited under the Copyright Act.[79]

The regime established under the Notice would promote the violation of copyright law by creating a new mandate obligating MVPDs to transmit copyrighted content to third parties

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74 *Id.*

75 *Id.* at 2509-10.

76 538 F.2d 14 (2d Cir. 1976).

77 *Id.* at 23, 26.

78 *Id.* at 20.

79 *See, e.g., MAI Systems Corp. v. Peak Compu., Inc.*, 991 F.2d 511 (9th Cir. 1993). Depending on the specifics of that underlying technology, the creation of those copies could be construed to be either directed or induced by the device makers – not by cable subscribers. *See Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("Cablevision"); *see also Aereo, Inc.*, 134 S. Ct. 2498.

without the authorization of the copyright owner. Indeed, the Commission appears to recognize as much because it directs copyright holders to pursue their remedies via litigation. The proposed rules enable unlicensed public performances or reproductions by navigation device manufacturers and service operators, permitting them to transmit MVPDs' underlying content to millions of members of the public. At the same time, the proposed rules allow those same device manufacturers to receive MVPD content and provide it to consumers without enforcing licensing restrictions. The FCC's proposal thus motivates and incentivizes copyright violations, while at the same time abrogating programmers' contractual enforcement rights.

2. The Commission cannot ignore the conflicts with the Copyright Act.

In compelling this access to content, the Commission would effectively abrogate the protections granted to Content Companies by the Copyright Act. Taking such action would be outside of the Commission's limited statutory grant of authority and inconsistent with its responsibility to engage in reasoned decision-making for two reasons: the Commission has an obligation to consider both (i) the ensuing negative results with respect to the market for copyrighted content and (ii) the inevitable conflicts with the Copyright Act.

As noted above, the Commission's proposal does not contain any assurances that the same security controls put in place through licensing agreements remain in place, and thus fails to protect bargained-for presentation and branding elements under copyright licensing agreements. Such activities would severely impair content owners' right to determine for themselves how their content should best be presented for the benefit of consumers. Nothing in the proposed rules would stop a third party from repackaging content, stripping it of its branding, placing it in a different channel neighborhood, replacing or supplementing its advertising, or otherwise prioritizing some programming at the expense of other content.

Both content owners and consumers would pay the price for improper content manipulation by device manufacturers that runs afoul of the underlying copyright licenses. Permitting search prioritization, to provide one example, would allow a device manufacturer to promote its own content ahead of that of others, or to force content owners to pay for prioritization. This would be particularly challenging for smaller programmers. Permitting device manufacturers to surround programming with advertising, to provide another example, would degrade the integrity of the content, risk exposing viewers to excessive and inappropriate advertising, and detract from the uniform viewing experience across MVPD platforms that viewers expect. Derogation of content owners' copyrights produces bad results for content owners *and* for consumers.

The Chairman has suggested that programmers should not be concerned about breaches of the terms of their licensing agreements with MVPDs because "copyright law remains in place."[80] But the rules conflict with and therefore undermine the enforcement regime contemplated under the Copyright Act. The Copyright Act provides exclusive rights precisely so that the right to copy, distribute or display content can be bargained for and then enforced as a property right licensed under contract. However, under the Commission's proposed approach, content owners would be deprived of the ability to use licenses or other agreements to enforce their rights against infringing device makers. Instead, they would have to pursue device makers and service operators in court while the infringing activity continues.

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80 *Hearing on FCC Oversight Before the S. Commerce, Science, and Transportation Committees*, 114th Congr., (March 2, 2016) (statement of Tom Wheeler, Chairman, FCC).

B. The Proposed Rules Would Effectively Create a New Compulsory License, Which is Beyond the Commission's Authority

The proposed rules would in practice compel the transfer of intellectual property to third parties. As discussed above, this aspect of the proposal involves the creation of copyright violations. However, if the Commission maintains that such transfers of intellectual property are in fact lawful, then the FCC is effectively creating a compulsory license. The third parties authorized by the Commission to acquire, redistribute, and manipulate copyrighted programming would not be governed by any contractual restriction. The Commission does not have the authority to create such compulsory licenses or the expertise required to manage them.

First, the Commission has proposed rules that in effect would permit navigation device manufacturers and service operators to leverage a *de facto* compulsory license to access MVPD content and further monetize that content – including the Content Companies' works – at no additional cost. However, the Commission does not have the authority to fashion such a zero-rate compulsory license. Congress gave no hint of any desire to permit the Commission to use Section 629 as a vehicle for creating a compulsory copyright license for navigation device manufacturers or services. The Commission also has not considered how compulsory licenses are traditionally structured. Congress has historically provided for compulsory licenses only in rare circumstances through specific statutory grants. In those limited instances where Congress has created statutory licenses to serve as an exception to copyright owners' exclusive rights, it has said so in clear and explicit terms, and has historically included language restricting content manipulation and mandating compensation payments to content owners.[81]

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[81] *See* 17 U.S.C. § 111 (compulsory license for cable operators); 17 U.S.C. § 119 (compulsory license for satellite operators to transmit distant programming); 17 U.S.C. § 122 (compulsory license for satellite operators to transmit local programming).

Second, if anything, Section 629(f) reinforces the Commission's obligation *not* to go beyond its limited scope of authority and insert itself into the realm of copyright. As the Commission has repeatedly acknowledged, copyright questions are typically reserved for the Copyright Office or for Congress.[82] The Commission historically has been very careful to defer to other agencies on the copyright aspects of communications policies that require compulsory licenses.[83] The most prominent such agency, the Copyright Office, has in turn suggested that such licenses have proven a poor replacement for market forces:

> [P]rivate negotiations between content providers and all types of distributors have given consumers the programming they desire. Statutory licensing has not been needed to provide millions of hours of local and national television content. A new video marketplace has developed free from government regulation and with the ability to quickly respond to consumer demand.[84]

Under the proposal, the Commission would assume responsibility in the copyright field that it has not been granted, and in so doing, would disregard the considered conclusions of the agency with specific expertise on point.

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82 *See, e.g.*, *In re Inquiry into the Existence of Discrimination in the Provision of Superstation & Network Station Programming*, Second Report, 6 FCC Rcd. 3312, 3321 (1991) ("This Commission does not have authority to enforce the Copyright Act."); *In re Compulsory Copyright License for Cable Retransmission*, 4 FCC Rcd. 6711, 6711 (1989) (recognizing that despite the intimate relationship between copyright and communications law, (a) "Congress is the body with the authority and the responsibility for making copyright policy," (b) enforcement of copyright law is "primarily the task of the judicial system," and (c) the expertise of the FCC is "in the area of communications policy, not in the area of copyright").

83 FCC, RETRANSMISSION CONSENT AND EXCLUSIVITY RULES: REPORT TO CONGRESS PURSUANT TO SECTION 208 OF THE SATELLITE HOME VIEWER EXTENSION & REAUTHORIZATION ACT OF 2004, at 40 (2005), https://apps.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf. ("As Congress has asked that we evaluate communications policy, and not copyright law, in this proceeding, we . . . defer to the Copyright Office's expertise in these areas.").

84 U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION & REAUTHORIZATION ACT, SECTION 109 REPORT 87 (2008).

VII. THE PROPOSED RULES RAISE SERIOUS CONSTITUTIONAL CONCERNS

Any attempt by the Commission to proceed with the proposed rules would raise serious constitutional problems, including First and Fifth Amendment concerns.

A. The Proposed Regulations Raise Troubling First Amendment Concerns

The proposed rules would violate the First Amendment. To begin with, the analysis in the Notice is fundamentally misguided, as it considers the First Amendment rights *only* of MVPDs. The Notice fails to address – or even mention – the First Amendment rights of programmers. But the vibrant programming produced by the Content Companies is undoubtedly First Amendment protected speech.[85]

As such, the Content Companies have a right to determine when, where, and with whom they will speak.[86] Yet the proposed rules would compel the Content Companies to speak with navigation companies and through navigation devices that may distort their message. The Content Companies have a right not to do so.[87] This forced speech is not justified by a compelling or important government interest. In addition, the Notice also wholly ignores the fact that programmers have a vital First Amendment interest in the manner in which their content is assembled and presented, which lies at the heart of free expression.[88]

Without even reaching the question of any actual First Amendment violation, however, the Commission should strive to avoid promulgating regulations that raise serious First

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85 *See, e.g.*, *Turner Broad.Sys. v. FCC* ("*Turner I*"), 512 U.S. 622 (1994); *Turner Broad. Sys. v. FCC* ("*Turner II*"), 520 U.S. 180 (1997).

86 *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 782 (1988).

87 *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254 (1974).

88 *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 723 (2011) (it is a "fundamental rule of protection under the First Amendment[] that a speaker has the autonomy to choose the content of his own message") (internal quotation marks omitted).

Amendment questions. Congress has already expressed its preference that the Commission avoid implementing regulations that create doubts under the First Amendment.[89] The Commission should avoid that serious, and very sensitive, pitfall here.

B. <u>The Proposed Regulations Raise Significant Fifth Amendment Questions</u>

The Notice, if adopted, also would violate the Fifth Amendment. As discussed above, the Commission's proposals effectively create a compulsory license. That would violate the Takings Clause, since the proposed rules seize content owners' intellectual property without just compensation.[90] Even if the Commission's proposed rules are not viewed as a compulsory license, they take content owners' intellectual property and give it to navigation device companies for their own profit and revenue exploitation. The Constitution prohibits this taking of intellectual property, just as it would prohibit the taking of physical property.[91]

Lastly, the FCC should follow the principle of constitutional avoidance, especially given the limited mandate of Section 629, and adopt a narrower proposal that avoids these constitutional problems.

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[89] *See, e.g.*, 47 U.S.C. § 544(f) ("Any Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter").

[90] *See, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015) (intellectual property "cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser" (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882))).

[91] In addition, programmers' intellectual property is being seized solely to benefit private parties, *i.e.*, device developers, not for any public purpose. This also would constitute a Fifth Amendment violation. *See Kelo v. New London*, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.").

VIII. CONCLUSION

The Content Companies are already engaged in efforts to make their programming available on a multitude of devices. Before turning their content over to MVPDs and other distribution platforms, though, the Content Companies enter into agreements to ensure that consumers obtain their content securely and receive a high-quality viewing experience. The proposed rules would abrogate these agreements and turn programming over to third parties without any licensing protections. Those rules, as currently drafted, threaten to violate the terms of Section 629 as well as numerous other provisions of law. Accordingly, the Commission must fundamentally rethink its proposed approach to enhancing competition in the set-top box marketplace.

Respectfully submitted,

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