



**NEW YORK
LAW SCHOOL**

April 22, 2016

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

**Re: Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42;
Commercial Availability of Navigation Devices, CS Docket No. 97-80**

Dear Ms. Dortch,

The Advanced Communications Law & Policy Institute ("ACLP") at New York Law School respectfully submits the following comments in the above-referenced dockets.¹

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1. INTRODUCTION

The Notice of Proposed Rulemaking (NPRM) to which these comments respond proposes to upend the video marketplace in the United States – but not in the positive, consumer-friendly way that the FCC promises. To the contrary, the FCC's proposed plan to “unlock the box” represents an audacious plan to intervene in a market that is not failing or characterized by anti-competitive behavior, conditions that have long been the traditional animators of government intervention. But the FCC in recent years has eschewed these axioms in the pursuit of what can only be described as quasi-industrial policy, positioning itself as the proverbial “dragonlayer” seeking to save consumers from villainous broadband Internet service providers.²

¹ The ACLP is an interdisciplinary program that focuses on identifying and analyzing key legal, regulatory, and public policy issues impacting stakeholders throughout the advanced communications market. For more information, please visit the ACLP's [website](#).

² See Nilay Patel, *The Dragonlayer*, March 9, 2016, The Verge, <http://www.theverge.com/2016/3/9/11181450/fcc-chairman-tom-wheeler-interview-5g-internet-net-neutrality>.

Under the guise of consumer empowerment – here, in the form of greater “competition” in the provision of cable set-top boxes – the FCC is pursuing regulations that will dramatically reshape the broadband ecosystem, and not for the better. Rather than seeking to maintain a level playing field among all firms in this diverse, ever-growing, and ever-changing space – firms that compete viciously for consumers’ attention – the Commission’s recent policy initiatives – including its open Internet regime³; the instant proceeding; its recently opened privacy rulemaking⁴ – have had and will have the effect of tilting it in the favor of firms it argues are “just beyond” its jurisdictional reach.⁵ To rectify this outcome, the FCC could pursue more comprehensive frameworks appropriate for a converged market – *i.e.*, rules that would apply to all firm competing in this space. It could, for example, use its potentially limitless authority under section 706 of the Telecommunications Act to implement rules that cover every entity in the ecosystem⁶; it could partner with the FTC to forge a unified and meaningful approach to monitoring all firms, on equal terms, throughout the broadband ecosystem⁷; or it could simply exercise regulatory humility and defer to existing antitrust regimes and consumer protection laws to police this space.⁸ *In other words, numerous options exist that would further core notions of regulatory parity and technological neutrality in the pursuit of core public policy goals.* Instead, the FCC remains focused on just one segment of the market.

³ See *generally Protecting & Promoting the Open Internet*, Report & Order on Remand, Declaratory Ruling & Order, 30 FCC Rcd 560 (rel. March 12, 2015) (declining to extend open Internet rules to “edge” providers) (“*Open Internet Order*”).

⁴ See *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, WC Docket No. 16-106, FCC 16-39 (rel. April 1, 2016).

⁵ See *generally Open Internet Order*.

⁶ See, *e.g.*, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 15-191, Statement of Commissioner Ajit Pai Approving in Part and Dissenting in Part, at 1, <https://www.fcc.gov/article/fcc-15-101a5> (“When this proceeding ends, the FCC will issue a negative finding about the state of broadband deployment. And that’s because such a finding is necessary to maintain the limitless regulatory authority over Internet service providers, and perhaps *other online entities*, that the Commission thinks it has under the Telecommunications Act of 1996.” (emphasis added)).

⁷ It remains to be seen what, if any, real impacts the recently announced FCC-FTC Consumer Protection Memorandum of Understanding will have in this space. See *FCC-FTC Consumer Protection Memorandum of Understanding*, FTC (Nov. 2015), <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-fcc-sign-memorandum-understanding-continued-cooperation>. Cf. FTC Commissioner Maureen K. Ohlhausen, *FTC-FCC: When is Two a Crowd?*, Speech to the 33rd Annual Institute on Telecommunications Policy & Regulation (Dec. 4, 2015), https://www.ftc.gov/system/files/documents/public_statements/893473/151204plispeech1.pdf (warning that, with the FCC and FTC both forging different sets of privacy rules applicable to different categories of firms in the broadband ecosystem, “[c]onsumers may... be worse off if the two enforcers have conflicting rulebooks.” *Id.* at 4).

⁸ See, *e.g.*, JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE* 387 (2013) (calling on the FCC to “embrace the elusive virtue of regulatory humility” as it explores its “role in an industry characterized, however imperfectly, by competition, convergence, and a commensurate decrease in the need for competition-related regulatory oversight” (citations omitted)).

In the instant proceeding, such a narrow focus evinces either a shallow understanding or an intentional disregard of the actual contours of video competition and the relationships that undergird it. These two important factors are discussed in turn below. The comments end by articulating some high-level principles that should inform any new rules that might emerge from this rulemaking.

2. THE COMPETITIVE & INNOVATIVE DYNAMICS OF THE MODERN VIDEO SPACE ARE DELIVERING ENORMOUS BENEFITS TO CONSUMERS, WHICH STRONGLY ARGUES AGAINST FCC ACTION

Consumers currently have a rich array of options for watching video on *their* terms, a situation that is significantly different from the late 1990s, when section 629 was implemented. At that time, cable operators were by far the leading multichannel video programming distributors (MVPDs), providing video service to nearly two-thirds of all U.S. television households.⁹ Direct broadcast satellite was still emerging and had garnered only about four million subscribers¹⁰; most other households relied on free over-the-air broadcast television.¹¹ The only other option for watching video was to rent or purchase video cassettes, or go to the movies. Section 629 thus reflected the “current state of the marketplace” as it existed at the time of passage, a video market that was largely dominated by cable.¹²

The current video landscape is markedly different, and the FCC’s focus on MVPD-provided service is too narrow to fully appreciate just how innovative and competitive this space has become.¹³ Indeed, unlike in the late 1990s, the modern consumer has a cornucopia of choices for watching video content. Increasingly, these options and the viewing habits they enable are marginalizing the importance of a single device like the traditional cable set-top box. According to the FCC’s latest data, which is from 2013, the number of MVPD subscribers in the U.S. has plateaued and begun to decrease as viewers embrace the range of new video options available to them.¹⁴ According to eMarketer, “the total number of households that don’t subscribe to pay-TV – a combination of cord-cutters and the far more

⁹ In 1995, there were 61.1 million cable subscribers. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, CS Docket No. 96-133, FCC (rel. Jan. 2, 1997), <http://transition.fcc.gov/Bureaus/Cable/Reports/fcc96496.txt> (“Third Video Report”). In 1995, there were 94.5 million television households. See *A Report on the Growth and Scope of Television*, at 2, TV Basics (June 2010), http://www.tvb.org/media/file/TV_Basics.pdf.

¹⁰ *Third Video Report* at ¶ 4.

¹¹ *Id.*

¹² See *H.R. Rep. No. 104-458*, at 181 (1995).

¹³ Ironically, the FCC, in a separate proceeding, is exploring whether to expand the definition of MVPD to include over-the-top, IP-enabled video services. *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, MB Docket No. 14-261, FCC 14-210 (rel. Dec. 19, 2014) (“OTT MVPD Rulemaking”).

¹⁴ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, at ¶ 135, MB Docket NO. 14-16, FCC 15041 (rel. April 2, 2015) (“Sixteenth Video Report”).

common “cord-nevers” who had never signed up in the first place – [was expected to] hit 20.8 million by the end of 2015.”¹⁵ This represents 17% of households, or double the number of households from 2013.¹⁶

The primary means of non-MVPD video viewing is through over-the-top (OTT) services like Netflix and Amazon, which make available a broad selection of curated syndicated and original content; amateur and professional content via sites like YouTube; and apps that deliver content directly from a producer to the consumer (*e.g.*, HBO Go). Accessing each of these services requires a device separate and apart from a set-top box; most don’t even require a television. Consumers can stream Netflix on their laptop, phone or tablet; many of these services are also available as apps accessible on devices like Apple TV. In 2015, “181 million people in the U.S. ... watch[ed] video via an app or website that provides streaming content over the internet and bypasses traditional distribution.”¹⁷

Such data reflect the rapidly changing viewing habits of video consumers. Younger viewers, who comprise a growing share of television households as well as the most coveted demographic to advertisers, indicate a preference to watch video on devices other than TVs and at times that they choose. In other words, younger viewers crave the individualized viewing experiences enabled by OTT and other web-enabled services and eschew the long-held imperative to watch “appointment” television.¹⁸ More broadly, though, streaming video is increasingly popular across all age groups as smartphone, tablet, and smart TV ownership grows at a steady annual rate.¹⁹ In short, traditional programming provided by MVPDs is decreasingly relevant to the average consumer, who now has a plethora of alternatives available to satisfy their video needs and who seem to enjoy having multiple devices – and thus multiple options – for accessing the video content of their choice whenever, wherever, and however they want.

Recognizing these trends, a growing number of MVPDs are experimenting with how to remain relevant in a more robustly and intensely competitive video market. To that end, many are beginning to make their programming available to subscribers via apps accessible on mobile and third-party devices. Comcast and Time Warner Cable, for

¹⁵ See Keach Hagey, *Cord-Cutting is Accelerating*, Dec. 10, 2015, Wall St. Journal, <http://www.wsj.com/articles/cord-cutting-is-accelerating-1449745201>.

¹⁶ *Id.* See also *Sixteenth Video Report* at ¶ 302 (noting that one survey “found that eight percent of U.S. households...had eliminated their MVPD service in the third quarter of 2013”).

¹⁷ See *Seven in 10 US Internet Users Watch OTT Video*, Oct. 5, 2015, eMarketer, <http://www.emarketer.com/Article/Seven-10-US-Internet-Users-Watch-OTT-Video/1013061>.

¹⁸ See Emily Steel and Bill Marsh, *Millennials and Cutting the Cord*, Oct. 3, 2015, N.Y. Times, <http://www.nytimes.com/interactive/2015/10/03/business/media/changing-media-consumption-millennials-cord-cutters.html> (summarizing Nielsen data and other analyses).

¹⁹ See generally *The Changing TV Experience: Attitudes and Usage Across Multiple Screens*, Interactive Advertising Bureau (April 2015), <http://www.iab.com/wp-content/uploads/2015/05/TheChangingTVExperience.pdf>.

example, have each announced plans to partner with Roku to make their apps available; Comcast has also partnered with Samsung to make its cable service available on smart TVs.²⁰ Verizon is experimenting with a new approach to providing video via its set-top box, which could be a first step toward new access options.²¹ Overall, there appears to be a trend across the MVPD space away from the traditional set-top model.²²

In a world where the popularity of multichannel video programming is on the wane, where consumers have the ability to chart their own viewing experience, where the diversity of content production is proliferating far beyond the traditional realms of broadcast and cable studios, the FCC's proposed rules seem an anachronism at best and a dangerous attempt to force a particular technological outcome at worst. Given the Commission's poor track record in this exact context – *i.e.*, attempting to fashion rules and standards for competitive alternatives to the traditional set-top box – the Commission should, respectfully, remain on the sidelines and allow more expert and nimble private firms in the video marketplace to continue innovating and delivering to consumers what they actually want, not what a federal agency thinks they need.²³

3. THE FCC'S PROPOSAL IS TANTAMOUNT TO THE NULLIFICATION OF THE PRIVATE CONTRACTUAL RELATIONSHIPS THAT SERVE AS THE FOUNDATION OF THE MODERN VIDEO MARKET

In the NPRM and subsequent public advocacy in favor of its proposal, the FCC downplays the real reach of its efforts to “unlock the box” by confining it to actions that will “assure a competitive market for equipment, including software, that can access multichannel video programming.”²⁴ To do so, it seeks to require MVPDs to unbundle its programming, in the form of distinct “information flows,” and allow third-parties to use them in their own video devices.²⁵ This might seem harmless to the layperson, but in reality, the FCC's proposal represents a shocking overreach into the contractual agreements between MVPDs and content producers – relationships that serve as the bedrock upon which multichannel video programming has long been built.

²⁰ See, e.g., Dan Howley, *Comcast Will Soon Let You Watch Cable Shows on Your Roku Without a Box*, April 21, 2016, Yahoo! Tech News, <https://www.yahoo.com/tech/comcast-will-soon-let-you-watch-cable-shows-on-152340396.html>.

²¹ See Janko Roettgers, *Verizon Readies Next-Gen TV Service For Launch Later this Year*, April 15, 2016, Variety, <http://variety.com/2016/digital/news/verizon-ip-tv-service-set-top-box-1201754543/>.

²² See, e.g., Michael Powell, *No Good Market Goes Unregulated*, Jan. 28, 2016, Re/code, <http://recode.net/2016/01/28/no-good-market-goes-unregulated/>.

²³ For an overview of the FCC's poor track record in this context, see Larry Downes, *Unlocking Pandora's Set-Top Box: The FCC Flirts with Disaster, Again*, Georgetown Center for Business & Public Policy (April 2016), <http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/PP-Downes-Unlocking-Pandoras-Set-Top-Box-The-FCC-Flirts-with-Disaster-Again.pdf>.

²⁴ NPRM at ¶ 11.

²⁵ *Id.* at ¶¶ 35-49.

In short, the Commission is essentially seeking to nullify private contractual arrangements between programmers and content producers and reorient them around preferred outcomes dictated by the federal government. Even in the contexts where the Commission has played some role in disputes between these entities – *e.g.*, retransmission consent – the FCC lacks the formal authority to do much of anything to prevent or settle these disagreements or dictate the terms of settlement.²⁶ In the instant proceeding, the Commission’s proposed rules might seem to be aimed only at MVPDs, but they also target content producers.

The relationship between these two parties has evolved significantly over time as MVPD offerings have grown from just relaying broadcast television signals to providing curated lineups of hundreds of channels. Even so, there has always been tension between these parties. On the one hand, MVPDs wish to amass as much content as possible in order to attract subscribers. On the other hand, content producers are justifiably aggressive in protecting their creations from copying or illicit transmission, activities that would greatly decrease their value and, in turn, dampen incentives to continue creating content. Consequently, copyright law and communications law work together in intricate and novel ways in this space. A compulsory license for cable systems was written into the federal copyright laws in the 1970s after many years of legal disputes between MVPDs and content producers.²⁷ Similarly, copyright laws have long influenced and informed the development of regimes like must-carry and retransmission consent, both of which attempt to balance the monetary interests and legal rights of parties on both sides.²⁸

In the digital age, the relationship between content producers and distributors has grown even more complex as the means for delivering and pirating content have proliferated. Consequently, content producers have become increasingly careful in how they forge relationships with distributors. Contract negotiations between these parties now encompass a broad range of licensing considerations, including, among many others, whether and to what extent content can be streamed on non-TV devices; when and where certain content can be made available; and how content is presented when viewed on different platforms.²⁹

²⁶ See, *e.g.*, *Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No 10-71, FCC 14-29 (rel. March 31, 2014).

²⁷ For an overview, see Fred H. Cate, *Cable Television and the Compulsory Copyright License*, 42 Fed. Comm. L. J. 191 (1990), <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1749&context=facpub>.

²⁸ See, *e.g.*, T. Randolph Beard et al., *An Economic Framework for Retransmission Consent*, at 7-12, Phoenix Center Policy Paper Number 47 (Dec. 2013), <http://www.phoenix-center.org/pcpp/PCPP47Final.pdf>.

²⁹ See, *e.g.*, Letter from Content Companies, *Request for Comment on the Report of the Downloadable Security Technology Advisory Committee*, MB Docket No. 15-64 (Jan. 14, 2016) (“Content Companies Letter”).

Although these negotiations can become contentious at times, especially in the context of carriage disputes³⁰, the careful licensing of content for distribution via the growing array of new digital channels has contributed to the exponential growth of quality programming that is widely available on a number of platforms. In addition to providing consumers with more choice, this dynamic has also helped bolster programming diversity by providing new content creators and programmers with more ways to get their offerings to a broader audience (previously, it was extremely difficult, if not impossible, for anyone other than a major studio to have their content made available to broad audiences). The ability to create and profit from web-only content, for example, has lowered the barriers to entry for millions of independent minority and women creators and entrepreneurs, groups that have long been under-represented in this space.³¹

The FCC's proposed rules, however, would undermine this long-standing dynamic between programmers and creators. In essence, the Commission's proposed rules would have the practical effect of nullifying the privity of contract between these parties by mandating that licensing terms and conditions be made available to third-parties. This is a clear violation of many different laws, including basic contract law and, of most immediate relevance, section 629(b), which bars the Commission from prescribing rules that would "jeopardize security of multichannel video programming and other services offered over multichannel video programming systems, or impede the legal rights of a provider of such services to prevent theft of service."³² Nullifying licensing agreements that carefully parcel out rights to distribute content in a specific manner would certainly impede the ability of both original parties to secure that content.³³ It would also undermine the constitutionally protected rights of creators to secure the rights to and profit from their creations.³⁴

4. FOUNDATIONAL PRINCIPLES

The preceding sections highlighted just two of the many problematic parts of the FCC's proposal to "unlock the box." Other parties in this proceeding will likely address these other troubling aspects, including the FCC's flawed assertions regarding the need for intervention (especially with regard to its tenuous argument that set-top boxes are a

³⁰ See, e.g., Amol Sharma and Shalini Ramachandran, *Digital Video Rights are Hurdle in CBS-Time Warner Cable Fight*, Aug. 8, 2013, Wall St. Journal (reporting that, "In their negotiations, the companies made significant progress on the money Time Warner Cable would pay to carry the CBS TV signals, but one big roadblock was that the cable operator believes those fees should also buy it the rights to distribute content via on-demand platforms...").

³¹ See, e.g. *Letter from Independent Programmers and Content Creators to Senator John Thune et al.*, Feb. 17, 2016, <http://futureoftv.com/wp-content/uploads/2016/02/Opposition-to-FCC-AllVid-Mandate-Programmer-Letter-2-17-161.pdf> ("*Independent Programmers and Content Creators Letter*").

³² 47 U.S.C. § 549(b).

³³ See, e.g., *Content Companies Letter*

³⁴ U.S. Constitution, Article I, Section 8, Clause 8.

source of profit for MVPDs³⁵) and concerns about the privacy-related impacts of its proposed framework.³⁶ Beyond acknowledging these specific concerns, though, the FCC must also recognize that successful policymaking in this context – and every other context, for that matter – should be grounded in certain foundational principles regarding the proper role of regulation in dynamic spaces like the modern video ecosystem. The following identifies a handful of principles that should inform the FCC’s actions in the instant proceeding.

Principle #1 – Appreciate the new competitive contours of the video ecosystem. What does competition look like in the modern video market? A threshold question to this essential inquiry is what segments constitute this space? In other words, what is the most accurate market definition? MVPDs and the set-top boxes they provide certainly play a major role, but, as noted at length above, they face enormous pressure from companies like Amazon, Apple, Facebook, Google, and Netflix, all of which are fighting for a larger share of users’ attention, data about how they consume video and related services, and, most critically, the advertising dollars that stem from these uses. But the battle for market share has produced some potentially worrisome behavior. If the FCC is truly focused on competition, shouldn’t it care that Amazon, the world’s largest retailer, proprietor of Prime video streaming and a competitor of Apple and Google in the video space, refuses to sell Apple TV and Chromecast devices on its site?³⁷ That Amazon’s video service is not available on Apple TV?³⁸ That Netflix’s original, award-winning content like “House of Cards” is not available on any other platform? That Google’s seemingly agnostic approach to just facilitating access to particular kinds of content – video, mobile services, etc. – has come under intense antitrust scrutiny in Europe?³⁹

³⁵ *NPRM* at ¶ 13. Cf. Hal Singer, *Before it ‘Unlocks the Box,’ the FCC Must Solve this Pricing Puzzle*, Feb. 15, 2016, Forbes, <http://www.forbes.com/sites/halsinger/2016/02/15/before-it-unlocks-the-box-the-fcc-must-solve-this-pricing-puzzle/#3809640c3778>,

³⁶ There are many reasons to be concerned about these implications, especially since the FCC’s proposed “solution” to this problem is to require MVPDs to police the data collection behavior of firms like Google. The FCC continues to disclaim the ability to regulate “edge” providers, which has led to the absurdity of essentially deputizing MVPDs to monitor these firms under a “voluntary” arrangement. *NPRM* at ¶ 73. Equally if not more important are consumers’ concerns about the possibility of new set-top box arrangements emerging from this proceeding that result in more ads. See Teri Robinson, *FCC Set Top Box Proposal Could Intrude on Privacy, Americans Say in DCAA Survey*, April 20, 2016, SC Magazine, <http://www.scmagazine.com/fcc-set-top-box-proposal-could-intrude-on-privacy-americans-say-in-dca-survey/article/491117/> (reporting on the results of a survey conducted for the Digital Citizens Alliance (DCAA) that found that “Seventy-three percent of respondents...admitted to being bothered by the idea that ads relating to their private activities on their personal devices might appear on their home TVs.”).

³⁷ See, e.g., Tim Carmody, *What’s Behind Amazon’s Baffling Decision to Ban Apple TV and Chromecast?*, Oct. 2, 2015, The Verge, <http://www.theverge.com/2015/10/2/9439281/amazon-ban-apple-tv-chromecast-why>.

³⁸ See, e.g., Shirley Pelts, *Is Amazon Prime Video App Coming to Apple TV?*, Dec. 2, 2015, Market Realist, <http://marketrealist.com/2015/12/amazon-prime-video-app-coming-apple-tv>.

³⁹ See, e.g., Mark Scott, *E.U. Charges Dispute Google’s Claims that Android is Open to All*, April 20, 2016, N.Y. Times, http://www.nytimes.com/2016/04/21/technology/google-europe-antitrust.html?_r=0.

In short, categorically labeling one part of the video ecosystem “uncompetitive” is ultimately misleading because the true nature of competition in this space is much more complex. As such, before moving forward with rules that would only apply to one subset of competitors in this space, the Commission should endeavor to complete a comprehensive competition analysis of the entire U.S. video space, one that far exceeds, in scope and depth, the video competition report it releases each year. Doing so will yield important insights about the true nature of competition in this market and will demonstrate that rules like the ones being proposed here are unnecessary.

Principle #2 – Assure regulatory parity and preserve a level playing field. In addition to getting a better handle on the intricacies of the modern video ecosystem, the FCC should also consider whether and how its rules for one set of entities – here, MVPDs – might apply to every other firm competing in this space.⁴⁰ Doing so might demonstrate the many negatives associated with “regulating up” to parity. Consequently, the Commission should also seriously consider the pro-consumer benefits of “regulating down” to parity by refraining from unnecessary intervention in the video market at this time. Indeed, one possibility for Commission action is to invoke section 629(e) and *remove* set-top box regulation, a move that would recognize the new contours of innovation in the video space, “promote competition” in the provision of video programming, and put all entities on similar regulatory footing.⁴¹

Principle #3 – Preserve and enhance the significant amount of diversity that has emerged across the video space. As noted above, the expansion of the video market via digital platforms has resulted in a dramatic increase in programming diversity and the participation of historically marginalized creators like minorities and women. This is a critically important development given the inability of traditional business models in this space to “produc[e] or distribut[e] nearly enough multicultural content on...platforms and investing in diverse content creators.”⁴² As such, the FCC must take seriously concerns raised by these very groups about the likely negative impacts of the proposed rules on their ability to continue making much-needed strides in this space.⁴³ Their hard-fought progress to forge carriage deals and to monetize their digital content has been made unnecessarily precarious as a result of the instant proceeding. These are real concerns with potentially devastating consequences for millions of creative entrepreneurs. Consequently, the FCC must tread lightly.

Principle #4 – Respect contractual relationships between parties. The FCC is an expert agency that was created to administer the Communications Act. In recent years, courts

⁴⁰ The FCC is exploring related issues in a separate proceeding. *OTT MVPD Rulemaking*.

⁴¹ 47 U.S.C. § 549(e).

⁴² See Letter from Concerned Organizations, *Request for Comment on the Report of the Downloadable Security Technical Advisory Committee*, MB Docket No. 15-64 (Feb. 11, 2016), <http://apps.fcc.gov/ecfs/document/view?id=60001426681>.

⁴³ *Id.* See also *Independent Programmers and Content Creators Letter*.

have afforded the Commission considerable leeway in interpreting and acting on its Congressional mandate. However, across the vast body of regulatory, legislative, and judicial precedent implicating the FCC, there is no evidence that the Commission possesses the actual or implied authority to meddle in and essentially nullify legal private contracts. Yet the FCC’s proposed rules here are tantamount to such overreach. Not only would the instant proposal represent an incredible disregard for basic contract law, it would also undermine the economic incentives that have long driven the creative process in this space. Ultimately, the only acceptable reason for a government entity to interfere in private contracts is if those agreements are anticompetitive, exclusionary, discriminatory, blatantly illegal or otherwise in restraint of trade. In those cases, robust bodies of law and procedures already exist to police such behavior, rendering FCC action unnecessary.

5. CONCLUSION

For the many reasons discussed above, the undersigned respectfully call on the FCC to rethink its “unlock the box” campaign and instead focus its limited resources on better understanding the actual competitive contours of the U.S. video ecosystem. Failure to do so will yield rules that will undermine competition, chill innovation, reverse important diversity gains, and negatively impact consumers.

Respectfully submitted,

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