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

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

Comments of
the Motion Picture Association of America
and SAG-AFTRA

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April 22, 2016

Executive Summary

The United States is enjoying a Second Golden Age of television—even more exciting than the first—because American copyright law supports investment in diverse, high-quality content, and enables programmers, distributors, and audiences to enter into a variety of new relationships as technology and consumer expectations evolve. Even if one believes that the marketplace for MVPD set-top boxes is not sufficiently competitive, the answer cannot be for the FCC to violate copyright policy, or to make it easier for pirates to build a business based on content theft. Doing so would encroach on copyright holders' exclusive rights under section 106 of the Copyright Act, thereby diminishing the economic incentives that enable the rich and expanding array of content and distribution models audiences have come to expect and enjoy. These incentives have fostered intense creativity and innovation not only by established content creators, but also by an ever-growing array of new distributors seeking to differentiate themselves by licensing and even financing original content.

We appreciate Chairman Wheeler's commitment to ensure his set-top box proposal respects copyright and programmers' licensing agreements. Unfortunately, the text of his proposal does not adequately do so.

Under copyright law, someone may not use copyrighted content without the permission of the copyright holder. Yet the proposal requires MVPDs to transmit to third-party device, Internet application, and web service providers all the content the MVPDs license from programmers, allowing those third parties to exploit the content for their own commercial services without seeking permission from the programmers or compensating them. That is tantamount to granting third parties a zero-rate compulsory copyright license, something the FCC does not have the authority to convey.

Parties seeking to use copyrighted content would also ordinarily be required to abide by the terms in the copyright holders' licensing agreements regarding not just copying, output, and further dissemination of the content, but also the way they present and secure the content. The proposal, however, explicitly refuses to prohibit third parties from improperly manipulating content, including altering channel lineups and advertising, even though programmers and MVPDs extensively negotiate terms on content presentation in their licensing agreements. It also interferes with the ability of copyright holders to negotiate content protection terms, jeopardizing the security of their programming and impeding their legal rights to prevent theft.

The Communications Act's navigation device provisions offer no authority for such interference with copyright law and the marketplace, which are bringing viewers unparalleled amounts of diverse and compelling content. Section 629 authorizes the FCC only to ensure that viewers have choices in the devices they use to navigate MVPD services. The statute does <u>not</u> allow the FCC to require MVPDs to transfer content to companies with no relationship or obligations to content producers, and for no compensation, so that those companies may create different video programming services.

Yet that is what the proposal would do, exceeding the FCC's authority and raising significant copyright, First Amendment, Fifth Amendment, and content-security issues. The complexity of the proposal also makes it infeasible. It threatens to undermine the ecosystem that is providing audiences an abundance of exciting content, that is generating a livelihood for two million people in the United States, and that is producing great cultural and fiscal benefit to our nation.

Proponents of Chairman Wheeler's proposal say it is no different than the current CableCARD regime. That is inaccurate. The CableCARD is a <u>unidirectional</u> solution that facilitates <u>security functionality</u> so a third party <u>device</u> can render <u>the subscriber's MVPD service</u>. The CableCard regime is not a <u>two-way, Internet-based</u> solution that facilitates <u>manipulation of content</u> so <u>device or application</u> providers can offer a <u>different service</u> from the one the subscribers obtain from their MVPD. In that way, the proposal raises far more significant legal issues and threatens the economics and vibrancy of the programming ecosystem.

Proponents of the proposal claim that opponents are just defending MVPD's set-top box revenues. That is not the motivation of MPAA's or SAG-AFTRA's members, as they do not collect those revenues.

Proponents also say they are just trying to help subscribers access programming they have already paid for, and that critics are trying to "double charge." This reflects a fundamental misunderstanding of how television content is made available to MVPD subscribers. Copyright holders do not sell content to television viewers. Rather, they license content to particular distributors, authorizing them to make it available, in turn, to viewers in exchange for equipment subscription fees, advertising revenue, or both. Just because a copyright holder has licensed programming to a particular company to disseminate to viewers in a particular way, does not mean that another company may, for a profit, disseminate that same programming to the same or any other viewers. Thus, the MPAA and SAG-AFTRA are concerned that some companies will exploit the proposal to make commercial use of programming they have not paid for, or to profit off of pirated content, harming the MPAA and SAG-AFTRA's members, the creative community as a whole, and television audiences.

The Commission should not adopt the rules as proposed in this proceeding. The Commission cannot punt critical issues of copyright and contract to as-yet-unidentified standards groups that are expected to implement currently non-existent technical specifications. Unlike a Hollywood movie, this is not something we can just "fix in post."

To respect copyright law and the agreements between programmers and MVPDs, the FCC must neither interfere with the ability of copyright holders to secure their programming, nor allow third parties, absent programmer consent and compensation, to manipulate the content, the way it is presented, or otherwise deviate from conditions in the licensing agreement with the pay-

TV provider; to sell advertising in conjunction with the programming; to monetizing the viewing habits of subscribers; or to present unlicensed or pirated content alongside licensed content.

If third parties wish to use licensed content in ways that differentiate themselves, they may enter into licensing agreements like other distributors in today's well-functioning marketplace. By contrast, if the point is simply to enable viewers to access their pay-TV service over third-party devices and applications, there is no reason not to require third parties to abide by all the licensing terms that the viewers' pay-TV providers must abide by.

I. Respect for Copyright is Driving Another Golden Age of Television

The United States is enjoying a Second Golden Age of television—even more exciting than the first—because American copyright law supports investment in diverse, high-quality content, and incentivizes programmers, distributors, and audiences to enter into a variety of new relationships as technology and consumer expectations evolve.

The Motion Picture Association of America, as the voice and advocate of the American motion picture, home video, and television industries, and SAG-AFTRA, as the representative of approximately 160,000 actors, announcers, broadcast journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists and other media professionals, file these comments to ensure the FCC does not harm that flourishing ecosystem as it considers further intervention into the market for multichannel video programming distributor set-top boxes and other navigation devices. Our members are committed to encouraging the availability of content to audiences through a wide variety of platforms and distributors. The last thing anyone wants is to undermine the copyright-driven economics underpinning the production and distribution of that programming.

Audiences have access to more television and movie content than ever before. In addition, many programmers offer their own applications to deliver content directly to viewers, as well as license programming to scores of "over the top" providers, including Amazon, Apple, Netflix, and Sling TV. OTT providers are also financing their own original programming in rapidly growing amounts in order to differentiate themselves in the marketplace. This has led to an explosion in program production. The number of scripted broadcast, cable, satellite, and online shows nearly doubled from 211 to 412 between 2009 and 2015, while the number of scripted online shows alone grew from 2 to 45.[1]

Viewers can navigate all this content inside and outside the home on devices such as smartTVs and smartphones, PCs and Macs, laptops and tablets, gaming systems and dedicated online video systems, including AppleTV, Roku, Chromecast, and Amazon Fire TV. With such equipment, American audiences today can choose among more than 115 online services to legally access television and film content over the Internet, up from essentially zero in 1997.[2] Viewers used these services to access 66.3 billion television episodes and 7.1 billion movies in 2014, up 229 percent and 1,132 percent, respectively, from 2009.[3] Under the current, market-driven environment, these figures are expected to grow by some 40 percent to 101.6 billion TV episodes and 11.7 billion movies by 2019.[4]

In a related trend, audiences can increasingly access MVPD content using Internet-enabled applications without a set-top box. This is the Commission's stated goal, and it is happening—without need for the regulatory interference envisioned by the proposal.

Content is expensive and risky to produce. A major motion picture costs on average $100 million to make and television shows can cost millions per episode. Against all this upfront expense and very long odds of success, the existing programming ecosystem keeps generating more investment and more production, largely because the copyright laws empower creators to decide how, when, and to whom to distribute their content, all in an effort to maximize the likelihood of a return on their investment. When there are financial returns from shows, large

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1 FX Networks Research, *Trend in the Number of Scripted Original Series* (2016).

2 *See* MPAA, *The Number of Legal Online Services for Movies and TV Shows Around the Globe Keeps Climbing* (July 30, 2015), *at* http://www.mpaa.org/the-number-of-legal-online-services-for-movies-and-tv-shows-around-the-globe-keeps-climbing/#.VpfIqU1IiUl.

3 Underlying data available from IHS. *See* https://www.ihs.com/.

4 *Id*.

portions of these returns are reinvested in creating more content, a virtuous cycle that depends on respect for copyright.

While content production is a global business, the United States remains the world leader, and every state in the nation benefits financially. The movie and television industry directly and indirectly supported 1.9 million U.S. jobs in 2014—jobs that included those with trade skills, college educations, and professional degrees—and $121 billion in total wages.[5] Direct industry jobs generated $50 billion in wages and an average salary of $76,000, 48 percent higher than the national average.[6]

The movie and television industry includes nearly 89,000 businesses across all 50 states.[7] Most of those businesses are small businesses, with 84 percent employing fewer than 10 people.[8] The industry made more than $41 billion in payments to more than 345,000 local businesses.[9] And when a major movie or television show is filming on location, it brings an average of $200,000 per day of production—more than a million dollars a week—into the local economy.[10]

The industry contributed $131 billion in sales to the overall economy in 2014 and registered a positive balance of trade in nearly every country of the world, with $16.3 billion in exports, generating a $13.6 billion trade surplus.[11] That's 6 percent of the total U.S. private-

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[5] MPAA, *The Economic Contribution of the Motion Picture & Television Industry of the United States* (April 2016), http://www.mpaa.org/wp-content/uploads/2016/04/MPAA-Industry-Economic-ContributionFactsheet_2014_v2-002.pdf.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

sector trade surplus in services: a larger trade surplus than such leading sectors as advertising, mining, telecommunications, legal, information, and health related services.[12]

II. The Proposal Encroaches on Copyright Holders' Rights, Exceeds the FCC's Authority, and Raises Significant First and Fifth Amendment Issues

A. The Proposal Encroaches on Copyright Holders' Rights

Chairman Wheeler maintains, and the notice of proposed rulemaking states, that the proposal will preserve the contractual arrangements between copyright holders and MVPDs, and that nothing in the proposal will affect content creators' rights or remedies under copyright law.[13] While that may be the intention, the text of the proposal falls short.

First, the proposal interferes with copyright holders' rights by permitting third-parties to use copyrighted content to enhance their commercial services without compensating the content company.

An author's right, rooted in the Constitution,[14] to decide how and when the author's works may be exploited is predicated on the principle that "the public benefits from creative activities of authors, and that [the grant of exclusive rights to authors] is a necessary condition to

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12 *Id.*

13 Statement of Chairman Tom Wheeler at 2, *In re* Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42, *NPRM*, FCC 16-18 (rel. Feb. 18, 2016) (stating that the proposal "will not interfere with the business relationships or content agreements between MVPDs and their content providers or between MVPDs and their customers. This proposal will not open up content to compromised security."); *NPRM* at ¶¶ 17, 80. *See also* Remarks of Jon Sallet, General Counsel, FCC, "20th Anniversary of the Telecom Act," as prepared for delivery at Incompas 2016 Policy Summit, Newseum, Washington, D.C. (Feb. 10, 2016) (stating that "[i]t is always critical that copyright be protected, not just as a matter of law, but in recognition of its role in powering innovation, investment and, of course, the creative arts. The Chairman's proposal fully respects the copyright interests of content creators."), *at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-337681A1.pdf.

14 U.S. Const., art I, § 8, cl. 8.

the full realization of such creative activities."[15] Accordingly, the Copyright Act provides that the exclusive rights to reproduce, distribute, publicly perform, publicly display, and prepare derivative works of, copyrighted works vests in the copyright holder.[16] The exclusive distribution and public performance rights are broadly construed and encompass the right to control every distribution[17] and "each and every method by which the images or sounds comprising a performance or display are picked up and conveyed" to the public, whether existing or not yet invented.[18] Thus, a commercial enterprise that wishes to transmit or otherwise provide copyrighted content to its customers must obtain a license from the copyright holders.

Arm's length agreements between MVPDs and programmers provide the necessary licenses to transmit the content, and in exchange the MVPDs agree to a range of license terms, including security requirements, advertising rules, EPG channel placement obligations, and tier placement requirements. These terms are material to the grant of the copyright license, and to

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15 1-1 Nimmer on Copyright § 1.03 (2015). *See also Golan v. Holder*, 132 S. Ct. 873, 889 (2012) ("Our decisions . . . recognize that copyright supplies the economic incentive to create and disseminate ideas.") (internal quotation marks omitted); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

16 *See* 17 U.S.C. § 106(1)-(6).

17 *See, e.g.*, 2-8 Nimmer on Copyrights § 8.11(B)(4)(d) (stating that under the 1976 Copyright Act, "[t]he distribution right accorded by Section 106(3) is to be interpreted broadly, consonant with the intention expressed by its drafters" and that "it extends to [any] offer to the general public to make a work available for distribution without permission of the copyright owner").

18 H.R. Rep. No. 94-1476, at 64. *See also Am. Broad. Cos., Inc. v. Aereo*, Inc., 134 S. Ct. 2498, 2506 (2014) ("[T]he concep[t] of public performance . . . cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public.") (quoting H.R. Rep. No. 94-1476, at 63).

copyright holders' ability to direct the exploitation of their works in a manner that enables them to continue to invest in the high-quality programming that viewers expect.

By contrast, the proposed order mandates that MVPDs transmit to third-party providers of set-top boxes and other navigation devices three "flows" or "streams" of information—including all the content the MVPDs license from copyright holders—and it permits third parties to manipulate all of this content as inputs to their own services <u>without seeking the permission of the copyright holders or compensating them</u>.[19] Because the FCC defines "navigation device" to include not only hardware, but also software,[20] this "grant" of rights also extends to providers of Internet applications and web-based services.

The only terms the proposal would explicitly recognize are copy, output, and streaming limitations. Extensively negotiated terms on matters including "service presentation (such as agreed-upon channel lineups and neighborhoods), replac[ing] or alter[ing] advertising, or <u>improperly manipulat[ing]</u> content,"[21] are all left unaddressed by the FCC's proposal.

This would mean that the FCC would allow third-party service providers who may access the programmers' valuable content at zero cost to drop, add, or change programming, and wrap their own ads around the content. The copyright holders, who have painstakingly negotiated these agreements with the MVPDs, would have no say in the matter. And proponents of this approach stated explicitly in the DSTAC proceeding that as non-parties to the licensing

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19 *See NPRM* at ¶¶ 2, 35-37, 40. *See also* App. A (delineating proposed section 76.1211(a) requiring provision of information flows and section 76.1200(h) defining "content delivery data").

20 *NPRM* at ¶¶ 1, 2 n.4, 11, 21-22, 24.

21 *See NPRM* at ¶¶ 39, 71, 80 & n.231 (emphasis added). See also App. A (delineating proposed section 76.1200(g) definition of "entitlement data").

agreements between the programmers and the MVPDs, they did not intend to abide by the terms of those agreements.[22]

Consequently, programmers may lose their negotiated channel position, and their content may be improperly manipulation or dropped altogether from the package offered by the third party. The proposal would also unfairly shift advertising revenues from those who invest in, and take considerable risks in, creating the programming, to third parties who seek to build their businesses on content they have not licensed. Those third parties could wrap their own ads around channel menus, program recommendations, and search results pertaining to content they have not paid for, threatening the content owners' advertising revenues. Why would a client pay to advertise on a programmer's network if a third-party navigation device is likely to overlay its own ads before the content reaches its intended audience?

This framework, which permits third parties to repackage and manipulate copyrighted works in ways that could be directly contrary to the terms upon which the content was licensed, is fundamentally at odds with core copyright principles. Indeed, some of this disaggregation,

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[22] *See In re* Final Report of the Downloadable Security Technology Advisory Committee, MB Docket 15-64, Letter from Consumer Video Choice Coalition to Marlene H. Dortch, Secretary, FCC, at 4 (Jan. 21, 2016) (stating that "makers and marketers of competitive devices cannot be expected to respect private, secret, and temporary pacts between and among MVPDs and content owners"); Letter from Devendra T. Kumar, Counsel for TiVo Inc., to Marlene H. Dortch at 1 (Jan. 13, 2016) (stating 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"); CCIA Reply Comments, at 10 (Nov. 19, 2015) (stating that "device manufacturers, of course, cannot violate contracts to which they are not a party"). *See also* Transcript of March 24, 2015, DSTAC meeting at 38-39, 96-97 (documenting statements of Public Knowledge and TiVo representatives that "an operator might have agreed to channel numbers and channel line ups but … a lot of those sorts of restrictions that operators have agreed to may not make any sense in a retail place," and that "operators have made agreements where there's not a disaggregation perhaps with the content owners, [but] that those should not necessarily apply to a third party device which should have the freedom to not be bound"). Video of the March 24 DSTAC meeting can be found at https://www.fcc.gov/news-events/events/2015/03/downloadable-security-technology-advisory-committee.

repackaging and manipulation may amount to infringement.[23] Moreover, permitting the foregoing is tantamount to giving those third parties a zero-rate compulsory copyright license—which is not within the FCC's power to grant.

Only Congress may create compulsory licenses, which operate as statutory exceptions to copyright holders' rights under the Copyright Act "to do and to authorize" the exercise of their exclusive rights.[24] When Congress has done so (for example, in the case of the compulsory licensing regimes for cable and satellite providers to retransmit broadcast television), those statutory licenses have been carefully calibrated, provide for royalty payments to compensate copyright owners, and prohibit alterations of the programming or advertisements.[25]

Even setting aside that the FCC has no power to create a new compulsory license for third party navigation devices and Internet applications, the proposed order does not provide for any of the types of copyright holder protections that Congress has included when it did create such licenses. In the case of broadcast programming, the *de facto* compulsory license created by the proposed order would directly conflict with the existing statutory compulsory licensing regime. As noted above, the MVPD retransmission compulsory licenses expressly prohibit MVPDs from altering the programming content or advertisements. If MVPDs may not manipulate content obtained through compulsory licenses, then surely Congress did not intend for them to pass the content to unlicensed third-parties so that they may do so. Additionally, the prohibitions on altering content and advertising in the statutory compulsory licenses show that

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[23] *See, e.g.*, *New York Times v. Tasini*, 533 U.S. 483, 503-04 (2001) (license to exploit individual copyrighted works as part of a collective work exceeded when licensee distributed the works individually and manipulated formatting and presentation of the works).

[24] 17 U.S.C. § 106.

[25] *Aereo*, 134 S. Ct. at 2506 (citing 17 U.S.C. § 111) (Congress established "a complex, highly detailed compulsory licensing scheme that sets out the conditions, including the payment of compulsory fees, under which cable systems may retransmit broadcasts."); 17 U.S.C. §§ 111(c)(3), 119(a)(5), 122(e) (alterations prohibited).

the programmers' copyrights include the right to prohibit such manipulation. The proposed order ignores those rights by creating a framework in which third-party navigation devices may disregard those restrictions. Thus, not only does the proposed order create a framework that far exceeds the FCC's authority and mandate, the resulting *de facto* compulsory license is a blunt instrument that ignores the complexities of the existing content licensing marketplace, all to the detriment of copyright holders.

In any event, the U.S. Copyright Office, the expert agency charged with administering the Copyright Act, has repeatedly expressed skepticism toward existing statutory compulsory licenses, and has opposed the creation of new ones. As the Copyright Office has stated: "The Office has traditionally viewed statutory licenses as a mechanism of last resort that must be narrowly tailored to address a specific failure in a specifically defined market."[26] No such failure has been identified in the video-distribution market, and certainly none that would justify the drastic, "last resort" remedy of the creation of a brand new form of compulsory license.

Second, the proposal interferes with the ability of copyright holders to offer geographic, temporal, or platform rights. It imposes a "parity" requirement, mandating that MVPDs enable third parties to offer all the programming in all the formats and to all the devices the MVPD may offer, and prohibits "discrimination" on the basis of affiliation of the navigation device.[27] This would prevent copyright holders from entering into exclusive arrangements or windowing agreements.

Today, a copyright holder may choose to make a provider the sole source of its content, either altogether, for a limited time, in a particular geography, or on a particular platform. The proposal would bar copyright holders from negotiating such terms, which are common, pro-

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[26] U.S. Copyright Office, *Notice of Inquiry re Orphan Works and Mass Digitization*, 77 Fed. Reg. 64559 (Oct. 12, 2012).

[27] *NPRM* at ¶¶ 63, 66-68.

competitive features of content licensing agreements. Once a copyright holder has allowed a particular MVPD to offer a movie or television show to a viewer in the home, the MVPD would in turn be forced to allow an unlimited range of third parties to do the same. This would also apply once the copyright holder allows an MVPD to offer a movie or television show on demand, on a separate device in the home, or on a device outside the home. This would harm the licensing system that allows copyright holders to offer not only MVPDs, but also wireless, over-the-top, and other content providers exclusive content for certain platforms and certain periods, thereby distinguishing their offerings in the marketplace.

Copyright holders are not common carriers obligated to serve all on the same terms and conditions, and the FCC may not treat them as such.[28] Copyright holders often experiment with new formats, technologies, services, platforms, and business models by first entering into arrangements with a specific partner based on level of trust, reputation of firm, degree of security, addressable market, risk, and of course potential financial benefit. The parity requirement would effectively end this experimentation and differentiation by requiring programmers to either roll out to all third parties once they roll out with a single MVPD, or to seek an FCC waiver, which is costly, time consuming, telegraphs business plans, is antithetical to

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[28] *Cf. Orson Inc. v. Miramax Film Corp*., 189 F.3d 377 (3rd Cir. 1999) (partially pre-empting a Pennsylvania statute restricting a motion picture distributor from entering into an exclusive first-run exhibition agreement with an exhibitor because it violated the distributor's rights under the Copyright Act); *Syufy Enterprises v. National General Theatres*, 575 F.2d 233, 236 (9th Cir. 1978) (supporting proposition that a movie distributor may license a movie exclusively); *Naumkeag Theatres Co. v. New England Theatres, Inc*., 345 F.2d 910, 912 (1st Cir. 1965) (supporting proposition that a movie distributor is under no obligation to make its motion picture available in all markets at the same time); *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101, 124 (5th Cir. 1954) (stating that "a distributor has the right to license or refuse to license his film to any exhibitor, pursuant to his own reasoning, so long as he acts independently"); *Westway Theatre Inc. v. Twentieth Century Fox Film Corp.*, 30 F. Supp. 830, 836-37 (D. Md.) (stating "it is clearly the established law that the distributors have the right to select their customers, and therefore the plaintiff has no absolute right to demand exhibition rights for the pictures of any of the distributors") (citations omitted), *aff'd,* 113 F.2d 932 (4th Cir. 1940).

the widely accepted notion of "permissionless innovation," and once again undermines the bundle of rights Congress has granted to copyright holders under the Copyright Act.

Third, the proposal not only purports to permit third parties to exploit copyright holders' content without respecting the terms of their agreements with MVPDs, it may also interfere with the provisions of the agreements with the MVPDs themselves. For example, the NPRM asks whether the Commission should prohibit copyright holders from placing terms on the devices on which pay-TV providers may display content,[29] which suggests the Commission is considering pre-empting content licensing agreements. Neither section 629 nor any other provision of the Communications Act give the FCC such authority.

Fourth, the proposal is inconsistent with Section 1201 of the DMCA, which establishes a legal framework that strengthens and undergirds the use of technical protection measures (sometimes called "digital rights management," or "DRM") to protect against unauthorized copying and access to copyrighted works.[30] The DMCA prohibits individuals from circumventing any "technological measure that effectively controls access to a work protected under" the copyright laws.[31] And it prohibits the manufacture, sale, importation, or otherwise trafficking "in any technology, product, service, device, component, or part thereof, that" is primarily aimed at circumventing any such technological measure.[32] The law thus acknowledges the significant threat that modern technology poses to copyright interests and confirms that copyright holders' have a right to limit the distribution, reproduction, and public performance of their works through technological measures.

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[29] NPRM at ¶ 18.

[30] *See* 17 U.S.C. §1201.

[31] *Id.* §1201(a)(1)(A).

[32] *Id.* §1201(a)(2).

Although the proposal claims to require third parties to respect these security concerns, it significantly limits the types of technological measures that MVPDs may employ, and thus harms a copyright holder's ability to build such restrictions into the licenses through which it makes its content available to third parties.[33] This limitation directly contradicts congressional intent in enacting section 1201 of the DMCA that "product manufacturers should remain free to design and produce the best available products, without the threat of incurring liability for their design decisions. Technology and engineers—not lawyers— should dictate product design."[34]

The NPRM's restriction on the ability of copyright owners and MVPDs to implement the DRM of their choice—*i.e.*, the technology that most effectively protects their content—coupled with the requirement that pay-TV providers provide the actual content of their programming to all third-party navigation services, greatly increases the chances of piracy. It thus significantly undermines the DMCA's protections. And it conflicts with Congress' even more specific direction, discussed below, that the FCC not adopt any regulations under section 629 of the Communications Act that jeopardize the security of MVPD programming.

B. The Proposal Exceeds the FCC's Authority

Neither Section 629 nor other provisions of the Communications Act allow the FCC to abrogate copyright law or licensing agreements. Section 629(a) provides that:

> [t]he Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services <u>offered over multichannel video programming systems</u>, of converter boxes, interactive

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[33] *See* NPRM at ¶¶ 2, 50, 58-60.

[34] 144 Cong. Rec. S9936 (daily ed. Sept. 3, 1998) (remarks of Sen. Ashcroft). *See also* 144 Cong. Rec. H7100 (daily ed. Aug. 4, 1998) (remarks of Rep. Klug) (stating "we have eliminated any ambiguity or presumption that products must be designed to affirmatively respond to or accommodate any technological measures. It also ensures that lawyers, judges and juries do not become the principal designers of consumer products in this country. In the end, this language ensures that product designers and manufacturers will have the freedom to innovate.").

> communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.[35]

Section 629(a) of the Communications Act does not allow the FCC to encroach on copyright policy or in any way diminish copyright holders' rights under the Copyright Act. It narrowly gives the FCC limited power to ensure the availability from third parties of the equipment that consumers of MVPD services may choose to access the MVPD service in a secure manner. It does not authorize the FCC to require MVPDs to transmit content to third parties in a form that the third parties can manipulate as inputs into a different service, or to facilitate the use of Internet applications and web services, as opposed to devices.

Moreover, section 629(f) explicitly directs that "[n]othing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996."[36] Because the Communications Act does not grant the FCC authority over copyright or power to create copyright policy, the FCC may not implement section 629 in ways that affect copyright law or the rights of content owners to exercise their rights under copyright law through licensing agreements.

Section 624A of the Communications Act is similarly unavailing. Section 624A requires the FCC to issue such rules as needed for:

> assuring compatibility between televisions and video cassette recorders and cable systems, consistent with the need to prevent theft of cable service, so that cable subscribers will be able to enjoy the full benefit of both the programming available on cable systems and the functions available on their televisions and video cassette recorders [as well as] to promote the commercial availability, from

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[35] 47 U.S.C. § 549(a) (emphasis added).

[36] 47 U.S.C. § 529(f).

> cable operators and retail vendors that are not affiliated with cable systems, of converter boxes and of remote control devices compatible with converter boxes.[37]

As with section 629, section 624A does not allow the FCC to encroach on copyright law. All it provides is that the FCC shall ensure compatibility of televisions and cassette recorders with cable systems for the purpose of watching the programming on the cable system and enjoying the features of the television, as well as to promote the competitive availability of converter boxes and remote controls. It is by its terms technology specific. It does not authorize the FCC to require MVPDs to transmit content to third parties in a form that the third parties can manipulate as inputs into a different service, or to facilitate the use of Internet applications and web services, which are obviously not contemplated by section 624A.

The Constitution's Copyright Clause recognizes that respecting the right of creators to determine whether and how to disseminate their works increases both the production and distribution of content, ultimately to benefit the public. And the Copyright Clause directs Congress to administer that policy,[38] not the FCC.

Some claim that the proposal is no different than the existing CableCARD regime, and the NPRM says there has not been any evidence of service or content manipulation with CableCARDs, making it unnecessary to adopt rules to address these issues as part of this new proposal.[39] The analogy is inapt, and the facts do not support the assertion.

First, the CableCARD regime is fundamentally different than the current proposal:

- CableCARDs enable unidirectional services, not two-way, Internet-based services.

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[37] 47 U.S.C. § 544A(b)(1), (c)(2)(C) (emphasis added).

[38] *See* U.S. CONST., art. I, § 8, cl. 8 (conferring upon the legislative branch the role "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

[39] *NPRM* at ¶ 80.

- The CableCARD enables use of alternative consumer electronics equipment; it does not facilitate the provision of cable service over Internet applications or web services.

- The CableCARD and associated FCC rules merely implement for third parties the security functionality that enables third-party devices to render the cable service; they do not require the cable operator to transmit content to third parties in a form that the third parties can manipulate as inputs into a new service.

- The Dynamic Feedback Arrangement Scrambling Technique (DFAST) license by which CableLabs authorizes third parties to use CableCARDs is only a license for the security functionality; it is not a content license that authorizes third parties to make their own, different uses of programming.

- Third parties using CableCARDs are contractually bound to comply with terms on service presentation and content manipulation; the current proposal refuses to require that third parties that are provided with the three streams abide by terms on service presentation and content manipulation.

- CableLabs is an organization that is affiliated with the cable industry, and thus would likely not be allowed to provide the security solution envisioned by the proposal, which requires that the solution be provided by an entity "not substantially controlled by an MVPD or by the MVPD industry."[40]

As a result of all this, the proposal raises far more copyright concerns.

Second, the notion that there is no evidence of service and content tampering under the CableCARD regime is also wrong. For example, there is documentation suggesting TiVo has overlayed advertising on top of broadcast programming.

Third, and perhaps more fundamentally, for the Commission to be consistent, whether all stakeholders agree that evidence of misbehavior exists should be beside the point: In other major proceedings such as this one, the Commission has determined that conduct should be proscribed through prophylactic rules, observing that if parties are not engaging in the proscribed behavior, they have nothing to lose. Even if the Commission could otherwise justify the rules it proposes here, it should act consistently with its efforts in other areas to head off the real risk of harmful activity here.

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[40] See NPRM at ¶ 50. *See also id.* at ¶¶ 2, 58-60.

Some proponents of the proposal insist it does nothing more than help subscribers access the content they have already paid for via their subscription to their MVPD provider; these proponents accuse copyright holders of trying to "double charge" for programming. This shows a fundamental misunderstanding of the way television programming is made available to MVPD subscribers. Copyright holders do not sell content to television viewers. Rather, they license content to distributors, who in turn make it available to viewers in exchange for subscription fees, advertising revenue, or both, in addition to placement and promotional considerations contained in commercial agreements. Just because a copyright holder has licensed programming for a particular MVPD to disseminate to a viewer in a particular way, does not mean another company may disseminate that same programming to that same or other viewers in that or any other way. To take a concrete example, just because Sony Pictures Entertainment, which produces and owns the copyright in *Breaking Bad*, grants Comcast a license allowing Comcast to make an episode of that program available to a cable subscriber, this does not mean that Netflix is somehow given a license to make that episode available—even to that same subscriber—unless, of course, Netflix strikes its own separate license agreement with Sony Pictures Entertainment. Rather than helping subscribers to access the content they have paid for, the proposal would help companies to distribute and publicly perform content they have not paid for, commercially exploiting the programming through fees, advertising, or personal data collection without the permission of or remuneration to the copyright holder. Perhaps that is why Congress has expressed bipartisan, bicameral concern about the proposal in a series of letters.[41] If third

[41] *See, e.g.*, Letter from Rep. Yvette Clark et al. to FCC Chairman Tom Wheler (Dec. 1, 2015) (expressing concerns of 30 members of the Congressional Black Caucus); Letter from Senate Commerce Committee Ranking Member Bill Nelson to FCC Chairman Tom Wheeler (Feb. 12, 2016); Letter from Reps. Tom Marino and Ted Deutch to FCC Chairman Tom Wheeler (Feb. 12, 2016) ; Letter from Rep. Tony Cardenas et al. to FCC Chairman Wheeler (Feb. 16, 2016) (expressing concerns of 25 members of the Congressional Hispanic Caucus and House moderates); Letter from Reps. Doug Collins, Judy Chu., et al. to the FCC (Feb. 16, 2016)

parties wish to use content in ways that differentiate themselves, they must enter into licensing agreements like other distributors in the marketplace.

Some argue the proposal does not interfere with copyright holders' exclusive rights because copyright holders would remain free to sue third parties that use their content in ways that infringe their rights. That ignores the fact that it is the proposal itself that is creating the ability and incentives for the third parties to act in ways outside of the underlying distribution agreement. Moreover, content owners do not make primary use of litigation in the marketplace in order to enforce and protect their rights. The primary mechanism for copyright holders to enforce their exclusive rights is program license agreements. It is misplaced to assume that enforcement via litigation could compensate for the displacement of detailed arrangements that have been carefully negotiated between programmers and distributors.

Litigation against parties who use content without permission should be seen as a last resort, one that may take years—and millions of dollars in legal fees—to resolve. The exclusive rights granted under the Copyright Act are what enable programmers and copyright owners to negotiate contractual relationships with content distributors that are specifically tailored to the economic and technical realities of the particular deal. The orderly grant of rights through contracts is preferred in our free market economy absent extraordinary circumstances. The proposal interferes with that process by purporting to permit third parties to exploit copyrighted

(expressing concerns of five Republicans and Democrats on the House Judiciary Committee); Letter from Reps. Jerry McNerney, Joe Barton, and Renee Ellmers to FCC Chairman Tom Wheeler (Feb. 17, 2016) (expressing privacy concerns of three Republicans and Democrats on the House Energy and Commerce Committee); Letter from House Subcommittee on Communications and Technology and Chairman Greg Walden and Rep. Yvette Clark to GAO (April 1, 2016) (seeking a study on the potential harms of the proposal); Letter from Senate Commerce Committee Chairman John Thune to FCC Chairman Tom Wheeler (April 22, 2016); Letter from House Subcommittee on Courts, Intellectual Property and the Internet Chairman Darrell Issa to FCC Chairman Wheeler (April 22, 2016); Letter from Reps. Doug Collins, Ted Deutch, et al. to FCC Chairman Tom Wheeler (April 22, 2016) (expressing concern of 23 House Republicans and Democrats).

content without the copyright owner's permission. Bringing a copyright lawsuit against a third party that a copyright holder has no direct relationship with is a vastly more challenging, costly, and lengthy enforcement mechanism than enforcing a contract with a business partner. Programmers may not even be able to find these third parties, especially if they are a foreign device manufacturer, or an application developer somewhere out on the vast Internet.

C. The Proposal Raises Significant First and Fifth Amendment Issues

Compelling speech in this way conflicts not only with the core of copyright law, but also the First Amendment, as well as the Fifth Amendment prohibition against government takings of property without compensation.

Under the First Amendment, it is the speaker and the audience acting in the free market—not the government—that determines what is said and heard, as well as how it is communicated.[42] Congress has been careful to minimize the Communication Act's impact on speech,[43] and is explicit when it wants the FCC to regulate in ways that bear upon the First Amendment.[44] Thus, to avoid potential First Amendment issues, the FCC must not interpret provisions of the Communications Act as authorizing regulation of speech in the absence of express statutory language.

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42 *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988) (stating that "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it").

43 *See, e.g.*, 47 U.S.C. § 326 (providing that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication"); 47 U.S.C. § 544(f) (providing that "[a]ny Federal agency ... may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title").

44 *See, e.g.,* 18 U.S.C. § 1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."); 47 U.S.C. § 315 (governing provision of broadcast time to candidates for public office); 47 U.S.C. § 399 ("No noncommercial educational broadcasting station may support or oppose any candidate for political office.").

The D.C. Circuit held in 2002, for example, that the First Amendment precluded the FCC from imposing video description rules absent a direct Congressional authorization to do so.[45] Because the FCC was trying "[t]o regulate in the area of programming," it could not rely on the general provisions of section 1 of the Communications Act.[46] Similarly, because nothing in Title VI of the Communications Act explicitly authorizes the FCC to compel MVPDs to transmit content to third parties in a form that the third parties can manipulate as inputs into a new service, the FCC cannot, consistent with the First Amendment, construe the Communications Act as doing so. As the Supreme Court has made clear, government forced access to media "brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment."[47]

Requiring MVPDs to transmit to third parties the content they license from programmers without the consent of or remuneration to the copyright holders also conflicts with the Fifth Amendment prohibition on government takings without compensation.[48] The Supreme Court has made clear that government action conveying someone's intellectual property to another in violation of their reasonable, investment-backed expectation runs afoul of the Takings Clause.[49]

Programmers have a reasonable investment-backed expectation that the government will not appropriate their content for public use. Indeed, the government assures them of that expectation by recognizing copyright in the first place, which gives them the confidence to invest hundreds of millions of dollars in their movies and television content. Forcing MVPDs to allow

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45 *See MPAA v. FCC*, 309 F. 3d 796 (D.C. Cir. 2002).

46 *Id.* at 804.

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

48 U.S. Const. Amend. 5, cl. 4 (prohibiting the government from taking private property for public use without just compensation).

49 *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (ruling that the EPA violated the Fifth Amendment when it required a chemical company to submit intangible property for use by commercial competitors).

third parties to use the programmers' content without licensing it from the programmers and paying a negotiated royalty, as well as to generate their own revenue through fees, advertising, or other means, deprives programmers the benefit of their intellectual property. That remains true even though the programmers may still be able to license the content to others, as the economic value of intellectual property is the ability to competitively benefit from it over others that are not the creators.[50]

III. The Proposal Increases the Risk of Piracy by Jeopardizing Content Security and Impeding the Legal Rights of Programmers to Prevent Theft of Content

Not only does the proposal exceed the FCC's statutory mandate by adopting requirements section 629 does not impose, it also falls short of the FCC's statutory mandate by failing to meet a requirement that section 629 does expressly impose—specifically, the requirement to prevent content theft.

Section 629(b) provides that "[t]he Commission shall not prescribe regulations under subsection (a) which 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." Yet this is precisely what the proposal does.

The statute and the legislative history clearly indicate that the "theft of service" that section 629 is concerned with includes theft of content, and that the section requires the Commission to protect the rights that *owners* of programming have in their programming. Section 629(b) talks of "jeopardize[ing] security of multichannel video programming and other services."[51] Thus section 629 specifically focuses on programming, and the reference to "other

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[50] *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1012.

[51] 47 U.S.C. 549(b) (emphasis added).

services" indicates that the section includes programming as one species of service. Senator Snowe confirmed this point in the floor debates over Section 629, 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."[52]

A. The Proposal Jeopardizes Content Security and Impedes the Legal Rights of Programmers to Prevent Theft by Mandating Access to Content Outside Licensing Agreements

The proposal mandates that MVPDs transmit content to third parties without the consent of the copyright holders. This eliminates the contractual relationship that a copyright holder ordinarily negotiates with MVPDs to ensure security of content. The proposal tries to compensate for this by regulating both the security regime that will apply to third parties, as well as the mechanism for enforcing it.

But the proposal underestimates the complexity of content security systems, presuming that different systems can be created and managed by new regulation without fundamentally weakening security. In the relationship between copyright owners and MVPDs, a "chain of trust" is created that follows a trust model managed by a trust authority. An effective trust model covers much more than the simple specifications of a content protection system. It includes a complex compliance and robustness framework that ensures the system behaves in the expected manner with a sufficient level of resistance to attacks. It will also usually include constraints on the provisioning chain of cryptographic material. It lists the methods used to authenticate a viewer. It defines the expected response to a breach. And while the proposal focuses on software solutions to the problems that it creates, it ignores the fact that hardware must also be part of the

[52] 141 Cong. Rec. S7992 (daily ed. June 8, 1995) (statement of Sen. Snowe) (emphasis added).

equation. For example, many content creators do not license high-definition content for software-only solutions or to certain platforms because the content owner has determined they do not provide sufficient protection for such content.

Another problem is that trust authorities are inherently linked to particular security solutions. Because each MVPD may use different content protection solutions, there will be multiple trust authorities, adding additional complexity to implementing the FCC proposal. And if multiple MVPDs use the same trust authority, revoking access for one of those MVPDs because of a breach requires revoking access for all those MVPDs. The sharing of the Root of Trust for multiple content protection systems within one device is also an issue, as all current models assume that they own the Root of Trust.

In short, a security regime prescribed by regulation cannot reasonably account for all the issues and the necessary variations across content and distributors that copyright holders' individualized licensing agreements tailored to the participants can and must. Accordingly, the proposal severely restricts the content protection options available to copyright holders, "which would jeopardize the security of multichannel video programming," in violation of section 629(b). Simultaneously, it "impede[s] the legal rights of [the] provider of such services to prevent theft of service," also in violation of section 629(b), because the copyright holder no longer has a contract through which it can enforce its content protection provisions.

B. The Proposal Jeopardizes Content Security by Requiring an Unaffiliated Trust Authority

The proposal would jeopardize the security of multichannel video programming by requiring each MVPD to support, for the benefit of third parties, at least one content protection system with a trust authority that is not affiliated with MVPDs.[53] This is both unnecessary and

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[53] *See NPRM* at ¶¶ 2, 50, 58-60.

harmful. It is unnecessary because a device maker, application provider, or browser vendor can simply license a digital rights management system directly from the DRM vendor, consistent with content owner requirements, under the current marketplace model: the MVPD would not be involved in establishing the detailed security requirements, licensing, or operation of third-party DRMs. It is harmful because it restricts the content security protection options available to copyright holders, and the ones that remain available are inherently less secure. While MVPDs may continue to use one or more additional content protection systems of their choosing, no matter how secure those systems are, there will always be at least one system with a trust authority unaffiliated with the MVPD, providing a weak link. Additionally, the trust authority should not be confused with the license server. Usually, the trust authority does not manage the license servers. It provides the keys used to manage the licenses and authenticate the devices. The trust authority does not create the licenses, *per se.*

Another complicating factor is that today the MVPD has end-to-end control over its security system. Under the proposal, the control is split between the MVPD and one or more unaffiliated trust authorities. But the proposal does not make clear what the relationship is between the trust authority, the MVPD, and the programmer. As a result, some responsibilities may get dropped, and whenever a problem arises there is likely to be an enforcement gap. Having taken away contracts as a way for programmers and MVPDs to implement compliance and robustness to manage and secure content, the FCC will have created big challenges.

Assurance in the trust model is also supplied by the use of a variety of security regimes to protect the content as it moves through the distribution chain. For security to be resilient, it must be diverse and redundant. Uniformity in security or use of a single content protection system creates a <u>single point of failure</u>, making the content vulnerable and exposing it to attacks. The proposal's notion that third parties use a single available content security technology suggests they will do the minimum necessary. This is exacerbated by the fact that the proposal explicitly sets out to "assure competitors and those considering entering the market that they can build to what is likely to be a limited number of content protection standards."[54] Limiting security options is unwise.

Moreover, DTCP and other link protection security protocols the proposal appears to endorse are insufficient. DTCP version 1.4 protects only unidirectional content flowing out of a retail device and has an obsolete trust model based on the threats existing in the 1990s. DTCP-IP is an option for downstream content encryption and device authentication, but today's systems require both upstream and downstream support. Furthermore, DTCP 1.4 fails to provide an adequate means by which authenticate viewers, deter password sharing, and otherwise ensure adherence to many usage terms, such as limited simultaneous viewing across devices. Viewer authentication is paramount for securely delivering content only to subscribers. The new version of DTCP has not yet been subject to any public discussion or review, so no one can credibly make any assumptions about its capabilities.

Link protection is also flawed in that it does not protect bidirectional communication of control information, including channel selection. Implementation of link protection relies on: 1) manufacturers driving and abiding by compliance and robustness rules, and 2) proper management of the supply chain in order to avoid theft or duplication of cryptographic material and ensure non-repudiable traceability of devices. These conditions are mandatory for renewability and revocation. Content security is physical (ensuring sites and the supply chain are intact), technical (using content protection technologies), and legal (having the ability to enforce the compliance and robustness rules set forth in the technical standard). Using a link-protection technology like DTCP-IP as the sole content protection technology between a navigation device and a display does not fortify these products from outside attacks nor does it enable the content

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[54] *See NPRM* at ¶ 59.

provider to track how the content is manipulated when it resides in either of these devices. As the MPAA stated as part of the DSTAC proceeding, a layered approach to security is the best way to promote a secure system. The proposal runs counter to that.

Another problem is that the proposal hinders the evolution of security technology. Compliance and robustness rules typically change as frequently as once a year, based on new threats and technologies. For example, because the proposal would affect all types of content across all resolutions and quality levels and all business models (linear, transactional, etc.), the security solution should reflect the requirements documented in MovieLabs' Specification for Enhanced Content Protection.[55] The specification was developed in conjunction with studio technical experts to address the protection of more valuable UltraHD and early window content and the evolution of the state of technologies and attacks. Because the state of the art evolves rapidly as new consumer devices and operating systems are introduced, the protection requirements and the resulting compliance and robustness rules must also change over time.

The proposal, however, will make it difficult if not impossible to administer such changes since they will need to be run through the standards bodies and unaffiliated trust authorities before they can be applied to third parties, and without privity of contract there is no simple mechanism to ensure compliance. Yet the parity requirement would prevent programmers and MVPDs from making any changes in the MVPDs services until they can be implemented for third parties, which will introduce significant delay until standards are ready. The only way around this would be to obtain an FCC waiver, which would be costly, time consuming, reveal business plans, and run contrary to the notion of permissionless innovation. This also gives third parties an inappropriate competitive advantage, since they are not obligated to wait, either to make their own changes or to implement the very ones the MVPD has revealed in the standards

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55 http://movielabs.com/ngvideo

process. In fact, the proposal gives third parties an incentive to delay the standards process so they can benefit from the changes before even the MVPDs can.

Prohibiting MVPD industry affiliation with the trust authority weakens the chain of trust. A trust authority must define the compliance and robustness regime, usually in negotiation with copyright holders. It must enforce this compliance and robustness regime using license terms and defining a certification regime. It must then generate and securely distribute cryptographic material to licensees, manage revocation and respond to hacks, and manage the timely evolution of the security solution. For content owners to preserve an environment in which they can recoup their investments and are encouraged to experiment with new distribution models, they must be intimately involved in decisions regarding robustness, compliance, security key management, the revocation of access to content when third-parties act in ways that are inconsistent with the terms content providers negotiate with MVPDs, and the selection of the trust authority itself.

The proposal constrains content providers' involvement in these key decisions, which jeopardizes security, undermines the economics of program production and distribution, and hinders the availability of high-value content to audiences. It does so by severely limiting the available security options (and their evolution and improvement) for third-party devices and applications.

C. The Proposal Jeopardizes Content Security by Opening the MVPD World to Internet Piracy

The proposal would facilitate prominent display of unlicensed or pirated content from the Internet alongside authorized content. Today, there already is a substantial problem with search engines directing consumers to unlicensed or pirated content on the Internet. In the MVPD environment, copyright holders may negotiate over provisions in their licensing agreements to ensure that only licensed content is available on the MVPD system to subscribers.

We anticipate that video navigation device and application providers will rely on the proposed rules to offer "cross-platform searches" and "recommendation engines" that mingle licensed MVPD content with both licensed and unlicensed Internet content. This will increase the potential for viewers to unintentionally view unlicensed content accessed via search, which ultimately negatively impacts the incentives to create the very content that the viewer is trying to access. And according to *Walking Dead* producer Gale Anne Hurd, this "would spell disaster for those [creators] who are trying to figure out how to keep making the movies and TV shows audiences love."[56]

When MVPD subscribers search for specific content on their MVPD service using a third-party device or application, they may be presented with an opportunity to view on demand an authorized version of a show or movie for a fee right next to an unauthorized version for free. This will increase the consumption of pirated content, and the viewer may not even be aware of the pirated nature of the show or movie.

D. The Proposal Jeopardizes Content Security by Facilitating Businesses Based on Content Theft

Mandating that MVPDs transmit copyrighted programming to third parties outside a licensing agreement, requiring unaffiliated trust authorities, and importing Internet piracy into the MVPD world make it easier for "black-market" boxes or applications that aggregate and facilitate access to pirated content to gain access to MVPD systems, programming, and subscribers.

The problem is compounded by the fact that the proposal mandates that MVPDs transmit the content to third parties in "information flows" that third parties can manipulate as inputs into

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56 Gale Anne Hurd, *Stop Piracy Apocalypse: 'Walking Dead' Producer—FCC Proposal Would Make Zombies of Your Favorite TV Shows*, USA Today (April 12, 2016), *at* http://www.usatoday.com/story/opinion/2016/04/12/fcc-set-top-box-proposal-cable-internet-piracy-walking-dead-zombies-gale-hurd-column/82919704/.

a different service, rather than merely facilitating compatibility of equipment. Devices and applications to facilitate piracy exist today, but they will become vastly more attractive and tremendously harmful if the FCC makes it possible to co-mingle authorized content from MVPD service with pirated content from the Internet, offering consumers "one-stop shopping" in a marketplace with both legitimate content (improperly given to third parties by the Commission's new rules) and illegitimate content (not expressly prohibited by the Commission's new rules).

Mandating that MVPDs transmit copyrighted programming to third parties outside a licensing agreement and allowing third parties to aggregate content without respecting licensing terms can harm the program provider's reputation as well as cause consumer confusion. The MPAA's members negotiate channel placement in part to ensure, for example, that family programming is not placed next to content more suitable for older audiences. Placing unlawful or "undesireable" content next to a programmer's MVPD content could negatively impact the program provider's brand. It could also expose unsuspecting viewers and their children to unlicensed, unwanted, or inappropriate content.

Today, audiences can be assured that if they are watching a children's channel distributed by an MVPD, they are enjoying the legitimate, licensed content they were searching for. This is one reason why today copyright holders vigorously negotiate over channel placement, content presentation, and search functionality in their licensing agreements—among the key contractual provisions that the Commission's proposal would overrule.

IV. Implementing the Proposal Is Not Feasible and Would Limit Innovation

The complexity of the proposal also calls into question its feasibility and the real possibility of harmful, unintended consequences. If adopted, the very complexity the rule proposes could severely limit innovation. MVPD service is a complex amalgam of licensed content, a variety of networks, different security and content protection measures, hardware, software, licensed metadata, diagnostics, application data (synchronized with content), interactivity, user interfaces, advertising, ad reporting, and audit paths, among other things. Licensing agreements change continually in light of, for example, new technology (*e.g.*, HDR), new devices (*e.g.*, tablets), new usages (*e.g.*, download-to-go), new business models (*e.g.*, EST), and new content formats (*e.g.*, movies with extras). The current model allows each copyright holder and each distributor to decide when to negotiate new license terms to accommodate these types of changes.

Requiring MVPDs to provide service discovery, entitlement, and content delivery data to third parties pursuant to open standards, however, will change this dynamic by preventing roll out of new content, formats, features, and business models until the associated standards are developed. We are in a world where formats are increasingly software driven and changing rapidly. For example, while the MPEG-2 video codec was around for decades, now we are moving quickly from MPEG4 to HEVC, from early streaming formats to DASH adaptive streaming, and from HD formats to UHD and HDR and even to VR. Under the proposal, the standards defined at the outset could be frozen for all time. Third party device and application manufacturers would have the ability to insist that programmers and MVPDs continue to support the formats they need (the proposal contemplates no mechanism for declaring devices or applications obsolete), perpetuating and worsening the problem that exists under the CableCARD regime. And third parties will have an incentive to stall the open standards process so they can benefit from the new content, formats, features, and business models before MVPDs can. Indeed, the Supreme Court has cautioned that members of open standards bodies have economic incentives to restrain competition, so these groups are traditionally subject to antitrust scrutiny.[57]

[57] *See Allied Tube v. Indian Head*, 486 U.S. 492, 500 (1988)

The proposal's two-year deadline for the open standards process also offers an unrealistically short timeline. Developing standards always takes time. HTML5 took 10 years. DLNA VidiPath took approximately eight years. The standards needed to implement this proposal will be extraordinarily complex, including mandates for the rendering of the information required in each of the three data flows, for which there is no existing format that will translate from distributor to distributor, device to device, content type to content type, and business model to business model. The sheer number of technologies for distributing content is staggering.

We are left with countless questions that must be answered before rules can be put in place. Who determines whether a standards body qualifies as open, how, and when is that determination made? Do any existing standards bodies meet the FCC's criteria? Is the same standards body responsible for creating the three information flow standards and the security solutions? Does the standards body define what is in the three information flows or does the FCC? Can there be multiple standards bodies? Do they all have to abide by the same definitions of what is in the information flows? What requirements will there be regarding who must be allowed to participate in the standards body and the process for decision-making? How does one challenge a decision of the standards body or trust authority?

The proposal also creates perverse incentives that will undercut compromise. Making the the proposal of the unbunding proponents in the DSTAC the default in the event the two years expire without completed standards gives the proponents every motivation to drag their feet.

The proposed self-certification or certification to the MVPD by third parties also would not work. Licensing agreements ordinarily include audit and testing provisions to ensure the MVPD is in compliance, such as with security requirements. Similarly, content protection technologies such the CSS system for DVDs, the AACS system for Blu-ray discs and link protection systems such as HDCP that protects content on the HDMI interface between the set-top box and television, provide copyright owners with third-party beneficiary rights. Under these common rights, copyright owners may enforce compliance, robustness and other security rules directly against third party device makers.

In this context, MPAA has learned that self-certification is insufficient. Even when a manufacturer or application provider is a good actor, trusting them to self-certify or self-test assumes they are knowledgeable about the standards and current threat landscape surrounding the content protection technology, know-how to apply such standards to their product verification methodology, how to properly defend their product against the latest attacks and diligently do so. In 2006, MPAA purchased and tested about 100 products subject to "self-certification" in the CSS license for DVDs. All of the products failed to comply with at least one content security rule. It took ten lawsuits and about 30 other legal settlements to materially enhance the compliance level. Moreover, no certification can fully test today's complex systems and even if a device passes certification, the device manufacturer, application provider, or end user can change the software the next day and there is no sufficient provision for revocation of certifications.

How do copyright holders enforce compliance and robustness requirements on third parties in the current proposed setting? Will they be given legal rights they can independently pursue such as in the CSS situation noted above, or would those 100 product failures now need to flow into some type of FCC complaint procedure? Licensing agreements also usually require MVPDs to update security measures in case of a breach. How do copyright holders ensure third parties also engage in such updates? How do they monitor how third parties provide content to viewers to ensure the third parties they are abiding by entitlements and other content-related requirements? How does a copyright holder seek enforcement of the FCC's requirements? Would it file a complaint with the FCC? With the standards body or the trust authority? Against the MVPD? Against the third party? When it comes to a hack or improper handling of content by third parties, copyright holders must be allowed to require MVPDs to suspend the content stream. Are consumers and the FCC prepared for viewers to lose access? Do third parties get fined for violations? How are copyright holders compensated for injury when there is no privity and thus no contractual basis for suit? Programmers themselves have certain consumer obligations. If the third party fails to pass through information needed to meet those obligations, are programmers held culpable?

The proposal leaves these and many more questions open. All would need to be answered before any final rules were adopted. It is not good enough to fall back on the old Hollywood saying: “We’ll fix it in post.”

V. Conclusion

The proposal raises significant copyright, First Amendment, and Fifth Amendment issues, and would exceed the FCC’s authority. It would also jeopardize the security of multichannel video programming and impede the legal rights of copyright holders to prevent theft of content.

It would do so while creating little, if any, benefit to the viewer. The proposal would not provide viewers access to any content that isn’t available to them over the MVPD and broadband services already coming into their homes. Some viewers wish to “cut the cord,” but the proposal does nothing for them, because it only pertains to households that subscribe to an MVPD. Some subscribers don’t like set-top boxes, but the proposal may actually do nothing for them, either, because it will create regulatory inertia around third-party and MVPD provided set-top boxes, boxing them in to yesterday’s technologies rather than supporting the applications that are proving immensely popular with viewers. In fact, many engineers believe that, in order to be able to access all of today’s video service functionality under the FCC proposal, subscribers would still need a device in the home, in addition to whatever device they want to use to view the content.

Were these rules to take effect, the companies that want these rules would have less incentive to license content, since they could simply access programming free of charge from MVPDs and use it as an input to their own services that go beyond those licensed by the MVPD.

The proposal would also give certain players an unfair regulatory advantage over those that are entering into agreements with programmers and are complying with those agreements.

Although Chairman Wheeler has maintained he has no intention of either violating copyright or restricting contractual rights, the text of the proposal does not prevent either result. To respect copyright law and the agreements between programmers and MVPDs, the FCC must not interfere with the ability of copyright holders to secure their programming, or allow third parties, absent programmer consent and compensation, to manipulate the content, the way it is presented, or otherwise deviate from conditions in the licensing agreement with the pay-TV provider; to sell advertising in conjunction with the programming; to monetizing the viewing habits of subscribers; or to present pirated content alongside licensed content.

If third parties wish to use licensed content in ways that differentiate themselves, they may enter into licensing agreements like other distributors in today's well-functioning marketplace. By contrast, if the point is simply to enable viewers to access their pay-TV service over third-party devices and applications, there is no reason not to require third parties to abide by all the licensing terms that the viewers' pay-TV providers must abide by.

Respectfully Submitted,

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April 22, 2016