April 26, 2016

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

Re: Written *Ex Parte* Communication, MB Docket Nos. 15-216, 10-71

Dear Ms. Dortch:

The pay television industry insists that the Commission has the authority to force a broadcaster that offers copyrighted television programming online to continue providing that programming to benefit a multichannel video programming distributor's (MVPD) subscription broadband service during a retransmission consent dispute with that MVPD.[1] NAB and other broadcast commenters previously explained why such a requirement would violate the copyright owners' exclusive rights in their programming, as established by Section 106 of the Copyright Act, and that the Commission lacks authority under the Communications Act of 1934 to impose such a requirement.[2] We also have shown that adoption of such a rule,

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[1] *See, e.g.,* AT&T, Notice of *Ex Parte* Communication, MB Docket Nos. 15-216 and 10-71, at 1-3 (Mar. 16, 2016) (AT&T *Ex Parte*); American Television Alliance (ATVA), Notice of *Ex Parte* Communication, MB Docket Nos. 15-216, 10-71, at 9-15 (Mar. 15, 2016) (ATVA *Ex Parte*); Reply Comments of ATVA, MB Docket No. 15-216, at 21-26 (Jan. 14, 2016) (ATVA Replies); Reply Comments of AT&T, MB Docket No. 15-216, at 12-16 (Jan. 14, 2016) (AT&T Replies); Reply Comments of National Cable & Telecommunications Ass'n (NCTA), MB Docket No. 15-216, at 1-5 (Jan. 14, 2016) (NCTA Replies); Joint Reply Comments of the Networks for Competition and Choice Coalition and the Open Technology Institute at New America, MB Docket No. 15-216, at 11-13 (Jan. 14, 2016) (Joint Commenters Reply) (collectively, MVPD Commenters).

[2] *See, e.g.,* Comments of NAB, MB Docket No. 15-216, at 36-39 (Dec. 1, 2015) (NAB Comments): Reply Comments of NAB, MB Docket No. 15-216, at 41-44 (Jan. 14, 2016) (NAB Replies); Comments of the Affiliates Ass'ns, MB Docket No. 15-216, at 53-58 (Dec. 1, 2015); Reply Comments of the Motion Picture Ass'n of America, MB Docket No. 15-216 (Jan. 14, 2016); Comments of News-Press & Gazette Co., MB Docket No. 15-216, at 20-21 (Dec. 1, 2016); Comments of 21st Century Fox, Inc. and Fox Television Stations, LLC, MB Docket No. 15-216, at 14-16 (Dec. 1, 2015); Comments of the Walt Disney Co., MB Docket No. 15-216, at 22-24 (Dec. 1, 2015).

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even if the Commission had authority, could well have unintended and likely adverse consequences for viewers.[3]

In this letter, NAB responds further to the pay TV industry. We show that MVPDs' arguments attempting to justify violating broadcasters' copyright rights mischaracterize and demonstrate a profound misunderstanding of both the Copyright Act and the FCC's authority under the Communications Act to regulate broadcasters' provision of online content, and consequently are without merit.

A Copyright Owner's Public Performance of its Works Made Available for Free Does Not Provide Authorization for Third Parties to Publicly Perform Those Works

The MVPD Commenters rely on the erroneous premise that, once a broadcaster publicly performs a work on free over-the-air television and/or for free online, the broadcaster/copyright owner somehow relinquishes its control over and its right to limit others, specifically broadband providers, from also providing that program to the viewing public online.[4] This supposition is tantamount to saying that once a program is aired on ABC or CBS or on their Internet services, NBC has the right to publicly perform it online as well, or if the Washington Post offers its articles free online, then a competitor such as the New York Times can include those articles on its subscription online service over the objections of the Post. The MVPD Commenters' position is completely contrary to Section 106 of the Copyright Act, which reserves to the copyright owner the exclusive right "to authorize" (or to refuse to authorize) others from publicly performing its works.[5] And, it is completely contrary to the right, recognized by the Supreme Court, of a copyright owner to refuse access to a work for any reason or no reason at all.[6] The MVPD Commenters would attach an addendum to *Stewart v. Abend*'s clear holding that if the copyright owner has previously provided the public with free access to a work, it must continue to provide free access to anyone and everyone – including for-profit MVPD broadband providers that are charging their customers for service – or be accused of acting in "bad faith."

Unsurprisingly, no MVPD Commenter cited any authority for this remarkable proposition. There simply is none. As NAB explained in its comments, there is a name in copyright parlance for what MVPD Commenters contend they should have a "good faith" right. It is called a compulsory or statutory license.[7] Lacking any such license under copyright law,

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[3] *See, e.g.*, NAB Comments at 38-39; NAB Replies at 43-44; Comments of CBS Corporation, MB Docket No. 15-216, at 11-13 (Dec. 1, 2015).

[4] *See, e.g.*, ATVA *Ex Parte* at 14; AT&T Replies at 14-15; NCTA Replies at 3-5; Joint Commenters Reply at 12.

[5] Under 17 U.S.C. § 106, owners of copyrighted works have exclusive rights to make copies, to prepare derivative works, to control the sale and distribution of the works and of any copies or derivative works and – most importantly here – to control the public performance or display of the works. The Copyright Act also reserves to the copyright owner the exclusive right "to authorize" others to do any of the specified activities. *See* NAB Comments at 36-37; NAB Replies at 41-42.

[6] *Stewart v. Abend,* 495 U.S. 207, 228-229 (1990). "[N]othing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright. In fact, . . . a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work." *Id*. *Accord* Paul Goldstein, *Goldstein on Copyright* § 7.0 (3d ed. Supp. 2013).

[7] On occasion, Congress, under its copyright powers, has determined that copyright owners' exclusive rights, including the right to refuse to authorize a user's public performance of their works, should be diminished by

MVPD Commenters try to create a *de facto* one out of whole cloth. And while urging the Commission to extend extra-legal rights to them, the MVPD Commenters also apparently believe that the Commission could mandate the provision of broadcasters' copyrighted programs to broadband service providers for free. Not one of the MVPD Commenters suggests they need pay anything for access to this copyrighted programming.[8] Of the many compulsory licenses Congress has created, none are so extraordinarily generous to users. And, of course, that is the crux of the matter – it is Congress, not the Commission, which has authority to establish a new compulsory license. Indeed, Article I, Section 8 of the Constitution explicitly grants Congress power over copyrights and patents.[9]

Beyond violating the Copyright Act, adoption of the MVPD Commenters' proposals about mandated access to online broadcast programming during retransmission consent negotiations is contrary to congressional intent as expressed when passing the 1992 Cable Television Consumer Protection and Competition Act. There, Congress was "careful to distinguish between the authority granted to broadcasters under the new Section 325(b)(1)" to "consent or withhold consent for the retransmission of the broadcast signal, and the interests of copyright holders in the programming contained in the signal."[10] Congress emphasized that nothing in this legislation was "intended to abrogate or alter existing program licensing agreements between broadcasters and program suppliers, or to limit the terms of existing or future licensing agreements."[11] In fact, Section 325(b)(6) of the Communications Act unequivocally states that "[n]othing" in Section 325 "shall be construed as . . . affecting existing or future video programming licensing agreements between broadcasting stations and video programmers."[12] Any Commission mandate requiring a broadcaster to offer its content online, such that it would alter or limit its existing or future licensing agreements in connection with that content, therefore would violate congressional intent and the terms of Section 325(b)(6), as well as federal copyright law.

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means of a statutory or compulsory license. Were the FCC to require that broadcast copyright owners, against their will, provide their programming to MVPDs to stream, it would be creating a *de facto* compulsory license – an action far beyond any authority possessed by the FCC. *See* NAB Comments at 37-38, n.108; Affiliates Ass'ns Comments at 55-56.

[8] AT&T, ATVA and the Joint Commenters at least concede that broadcasters who place their copyrighted online programming behind a pay wall would not be required to provide such programming to them under the proposed rule. *See* ATVA *Ex Parte* at 9; AT&T Replies at 14-15; Joint Commenters Reply at 12. NCTA, on the other hand, asserts its members should be entitled to broadcasters' online programming "where a broadcaster is already making its content available online to the general public – with or without charge." NCTA Replies at 3. *See also id*. at 1. There is no basis for the FCC to adopt any such inequitable and anticompetitive rule requiring broadcasters to provide their subscription online video programming for use by MVPDs' online services.

[9] *See* Sony *Corp. of Am. v. Universal City Studios, Inc.,* 464 U.S. 417, 428-29 (1984) (quoting Article I, Section 8 and referring to the "monopoly privileges that Congress may authorize").

[10] S. Rep. No. 92, 102nd Cong., 1st Sess. at 36 (1991). Even ATVA expressly recognized in this proceeding that retransmission consent with respect to the broadcast signal is "distinct" from copyright with respect to the works contained in the signal. Comments of ATVA, MB Docket No 15-216, at 4 n.11 (Dec. 1, 2015).

[11] S. Rep. No. 92, 102nd Cong., 1st Sess. at 36 (1991).

[12] 47 U.S.C. § 325(b)(6).

The *Sony v. Universal City Studios* Case Provides No Support for the Proposed Rule

AT&T misrepresents the holding in *Sony Corp. of Am. v. Universal City Studios, Inc.,* 464 U.S. 417 (1984), taking a few sentences out of context that have no relation to the rule proposed here. AT&T asserts that *Sony* stands for the proposition that "consumers do not infringe broadcasters' copyrights by recording for non-commercial purposes broadcast programming that consumers have been 'invited to witness in its entirety free of charge' because such recordings 'cause . . . [minimal] harm to the potential market for, or the value of, the[ ] copyrighted works.'"[13] AT&T's own description of *Sony* demonstrates that it has no relevance whatsoever to the MVPD Commenters' proposed rule. The *Sony* case involved the applicability of the fair use doctrine to the right to reproduce copyrighted works, with respect to home copying for private noncommercial use by viewers. That situation is not analogous, relevant or instructive to the instant case, where commercial for-profit broadband providers claim the right to publicly perform copyrighted works on a service for which consumers pay subscription fees.

AT&T also remarkably asserts that once a broadcast copyright owner makes its programs available to Internet users for free online, the Commission is empowered (presumably by its retransmission consent good faith authority) to "ensure" continued access by all Internet access providers and users "on equal terms."[14] Again, this is, in effect, claiming that the Commission has authority to create a compulsory copyright license. Not only would such action be *ultra vires*, Congress has made absolutely clear that retransmission consent only concerns the broadcast signal, and has nothing to do with and in no way affects, the copyrights in the programming contained in the signal.[15] Nothing in the entire retransmission consent regime, in any event, requires any broadcaster to provide access to its signal "on equal terms" to all MVPDs. Indeed, the good faith negotiation statute specifically permits broadcasters to enter into retransmission agreements "containing different terms and conditions, including price terms, with different" MVPDs.[16]

At bottom, the legal basis supporting AT&T's argument remains unclear. For example, given that it relies on *Sony*, a copyright fair use case, is AT&T asserting a fair use defense to justify an *FCC* rule? Such a justification would be unprecedented.[17] And if that is the case, AT&T never explains how the MVPDs' proposed rule would further the purpose of the fair use

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[13] AT&T Replies at 15, citing *Sony*, 464 U.S. at 447-56.

[14] AT&T Replies at 15. *See also* AT&T *Ex Parte* at 3 (citing the good faith negotiation requirements of 47 U.S.C. § 325(b)(3)).

[15] *See* discussion p.3, *supra*.

[16] 47 U.S.C. § 325(b)(3)(C).

[17] As explained above, the Copyright Act grants the copyright holder exclusive rights to use and to authorize the use of its works in the ways delineated in 17 U.S.C. § 106. "[A]nyone who trespasses into [a copyright owner's] exclusive domain by using or authorizing the use of the copyrighted work" in one of the ways set forth in Section 106 "is an infringer of the copyright." *Sony*, 464 U.S. at 433 (internal citations omitted). Anyone, however, who is authorized by the copyright owner to use the copyrighted work "or who makes a fair use of the work" under Section 107 is "not an infringer of the copyright with respect to such use." *Id*. Fair use is thus an exception to copyright owners' exclusive rights, and is a congressionally codified, judicially created affirmative defense to claims of copyright infringement for which the alleged infringer bears the burden of proof. *See Video Pipeline, Inc. v. Buena Vista Entertainment, Inc*., 342 F.3d 191, 197 (3d Cir. 2003).

exception.[18] Nor does it analyze the four statutory factors that must be considered on a case-by-case, fact-specific basis under any fair use defense.[19] And if AT&T were proffering such a novel justification for the MVPDs' proposed rule, is it seriously suggesting the Commission has the authority to be an arbiter of copyright law and policy and the expertise to assess and apply the multi-factor copyright fair use standard, which heretofore has been the exclusive province of the courts? The answer to that question is unequivocally no.[20]

ATVA and AT&T additionally assert that no evidence suggests that, if the proposed rule were adopted, broadcasters might no longer offer their programming online for free.[21] This argument, of course, does not make the MVPDs' proposal consistent with law, and, in fact, there is such evidence. Broadcasters are already offering online pay services, along with free content online, and they are currently expanding the content offered only on their pay online services.[22] If the Commission, at the behest of pay TV providers, used retransmission consent as an excuse to interfere with broadcasters' ability to control the content they currently distribute online for free viewing, such interference could well incent broadcasters to place more of their online content behind a pay wall and accelerate broadcasters' current plans to develop content only for online subscription services.

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[18] The exclusive copyright and patent rights that Congress may authorize are "intended to motivate the creative activity of authors and inventors . . . ." *Sony*, 464 U.S. at 429. The "fair use doctrine may be implicated" when "'rigid application of the copyright statute . . . would stifle the very creativity which that law is designed to foster.'" *Video Pipeline*, 342 F.3d at 197, quoting *Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569, 577 (1994). NAB fails to see how fully recognizing broadcasters' copyright rights in their programming offered online stifles the creativity of the creators of broadcast or other video programming. It seems much more likely to encourage such creativity.

[19] In 17 U.S.C. § 107, Congress provided examples of fair use (*e.g*., using a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research) and set forth four non-exclusive factors to consider in determining whether the use made of a work is a "fair use" in any particular case. These four factors are: (1) the purpose and character of the use, including whether the use is commercial or for noncommercial educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work. *Id*.

[20] AT&T additionally claims that provision of broadcast programming to broadband providers under the MVPDs' proposed rule would have a "*de minimus* effect" on broadcasters' copyrights. AT&T Replies at 15. This contention is both irrelevant and unsupported. AT&T's *de minimus* argument would only be relevant if its fair use analogy was relevant to the facts here and an appropriate basis for an FCC rule, which as discussed above, it is not. The adverse effect on a broadcaster under the rule proposed by MVPD Commenters, where it would either be required to provide online programming to a broadband provider affiliated with an MVPD with whom the broadcaster has a retransmission consent dispute for free or "on equal terms" with other MVPD providers, could hardly be characterized as "*de minimus.*" Such a rule would both erode the broadcaster's copyright rights and provide the MVPD with increased leverage in the retransmission consent negotiation – which is, of course, why the MVPD Commenters continue to advocate for it.

[21] AT&T Replies at 15-16; ATVA Replies at 23, n. 101.

[22] For example, on CBS.com, recent episodes of CBS shows are available for free. CBS also offers a premium paid online service, CBS All Access, which includes unlimited access to more than 7,500 full episodes of current and past CBS shows. CBS plans to roll out several original series for CBS All Access starting in 2017. Of particular note, CBS is launching a new Star Trek series, with the first episodes premiering on CBS TV and All Access simultaneously and subsequent episodes available only on CBS All Access. *See* Peter Leitzinger, *CBS All Access expands live feed to 132 markets; originals on the way*, SNL Kagan (Apr. 4, 2016).

The Copyright Misuse Doctrine Is Inapplicable to, and Provides No Support for, Approval of the Proposed Rule

NCTA suggests that, even if broadcasters' copyright rights might preclude the MVPD Commenters' proposed rule, such protection would not extend to broadcasters "misusing" their copyrights in a manner that would otherwise violate their duty to negotiate retransmission consent in good faith, citing *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc*.[23] Presumably, NCTA is suggesting that a broadcaster's withdrawal of its online programming from an MVPD's broadband service when the broadcaster and that MVPD are involved in a retransmission consent dispute concerning a station's signal would be a *per se* misuse of the broadcaster's copyrights in those programs. Beyond again failing to recognize the distinction between copyright rights in programming and retransmission consent rights in signals, this assertion has no merit for several additional reasons.

First, the copyright misuse doctrine appears nowhere in the Copyright Act and has never been recognized by the Supreme Court. It is a common law precept that some courts have adopted.[24]

Second, even where recognized, the doctrine has been applied in the context of the copyright holder's alleged anti-competitive conduct, particularly using copyright licenses to preclude licensees and others from using or developing competing goods or services in a manner contrary to the ultimate purpose of the copyright laws – "to stimulate artistic creativity for the general public good."[25] The Commission should reject NCTA's attempt to misuse the copyright misuse doctrine. Temporarily preventing an MVPD broadband provider's commercial use of a broadcaster's copyrighted programming in no way hinders that MVPD from using or developing competing program sources. In fact, it could stimulate or encourage an MVPD to develop or provide alternative competing programming.

Third, the Third Circuit's reasoning in *Video Pipeline* denying a claim of copyright misuse made against Disney supports broadcasters' arguments in this case. The following language of the court is particularly instructive for the Commission here:

> [C]opyright law, and the misuse doctrine in particular, should not be interpreted to require Disney, if it licenses its [movie] trailers for display on any web sites but its own, to do so willy-nilly regardless of the content displayed with its copyrighted works. Indeed such an application of the misuse doctrine would likely decrease the public's access to Disney's works because it might as a result refuse to license at all online display of its works.[26]

In a more recent *ex parte* submission, AT&T raises a purported justification analogous to copyright misuse. It cites *BMI, Inc. v. CBS, Inc.*, 441 U.S. 1, 9 (1979), for the unassailable proposition that copyright laws provide no justification to price fix or otherwise violate the

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[23] 342 F.3d 191 (3d Cir. 2003). *See* NCTA Replies at 5.

[24] *See Video Pipeline*, 342 F.3d at 203-204.

[25] *Id*. at 204, quoting *Sony*, 464 U.S. at 432.

[26] *Id*. at 206.

antitrust laws.[27] AT&T and the Joint Commenters then make a breathtaking leap to assert that these cases support the FCC's ability to violate broadcasters' copyright interests in the name of enforcing the good faith negotiation requirement.[28] Never mind that BMI and ASCAP, the defendants sued under the Sherman Act in the *BMI v. CBS* case have been subject to and have operated under antitrust consent decrees for decades.[29] Never mind that the MVPD Commenters have not offered one scintilla of evidence showing that the proposed rule is necessary or justified due to broadcasters' price fixing or similar anti-competitive conduct. Indeed, AT&T's argument points to the appropriate remedy and forum for resolution of any legitimate claims relating to online access to broadcasters' content. If any such activity by broadcasters rises to the level of illegal antitrust conduct, AT&T and other MVPDs should avail themselves of the courts to allege and prove such claims on a fact-specific basis.

The Commission Lacks Authority to Adopt the Proposed Rule

Despite their best efforts, the MVPD Commenters have not and cannot legally justify forcing a TV broadcaster to continue providing access to its copyrighted programming free online to the benefit of an MVPD's subscription broadband service during a retransmission consent dispute with that MVPD. As NAB explained above and in previous comments, the proposed rule is contrary to the Copyright Act and for that reason the Commission lacks authority to adopt it. The Commission, like all "federal agencies," "must obey all federal laws, not just those they administer."[30] The fact that the Commission has authority over limited aspects of the retransmission consent process between MVPDs and broadcasters provides no valid basis for the Commission to fail to obey, ignore or rewrite portions of the Copyright Act. "[A]n agency literally has no power to act" – "let alone" override "validly enacted legislation" – "unless and until Congress confers power upon it."[31] Congress has in no way conferred power on the Commission to establish rules overriding "validly enacted" copyright legislation.[32]

But even setting aside the inconsistency of their proposal with copyright law, the MVPD Commenters fail to directly confront the fundamental question of how the Commission can stretch its limited good faith authority – which the FCC has said should be "narrowly construed" – to regulate broadcast stations' online offerings.[33] Undoubtedly, this failure was

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[27] AT&T *Ex Parte* at 3. *See also* Joint Commenters Reply at 13, citing *U.S. v. Microsoft Corp.*, 253 F.3d 34, 62-63 (D.C. Cir. 2001), for the proposition that intellectual property rights do not convey a privilege to violate antitrust laws.

[28] AT&T *Ex Parte* at 3; Joint Commenters Reply at 13.

[29] *See BMI v. CBS*, 441 U.S. at 11-12 (noting long history, beginning in the 1920s, of Department of Justice investigations of, complaints against and restrictions on ASCAP and BMI).

[30] *FCC v. NextWave Pers. Communs. Inc.*, 537 U.S. 293, 299 (2003) (internal citations omitted).

[31] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (also stressing that "only Congress can rewrite" the Communications Act). *Id.* at 376.

[32] Any statutory grant of authority sufficient to override federal copyright law "must be a clear one." Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001).

[33] First Report and Order, 15 FCC Rcd 5445, 5453 (2000) (Good Faith Order). As noted many times before, the FCC's power over retransmission consent is narrow. In Section 325 of the Communications Act, Congress

not a mere oversight, as it remains entirely unclear how a statute concerning negotiations over the retransmission of broadcast stations' over-the-air signals would allow the Commission to control under what circumstances and to whom broadcasters must make their programming accessible via the Internet. The D.C. Circuit has "categorically reject[ed]" the position that an agency "possesses *plenary* authority to act within a given area," such as retransmission consent, "simply because Congress has endowed it with *some* authority to act in that area."[34] Broadcasters, moreover, are not ISPs or MVPDs controlling consumers' online access to the content of others, and the Commission has made clear that its open Internet rules and policies "involve[] only the transmission component of Internet access service" and not "any Internet applications or content."[35]

In short, neither MVPD Commenters nor the Commission can simply presume that Section 325(b)(3)(C) justifies FCC regulation of broadband provider access to broadcasters' online programming.[36] Blithe assumptions that the Commission can "regulate online content" that is "freely available to the public" will not pass muster with a reviewing court.[37]

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The pay TV industry in this proceeding has offered numerous proposals designed to disfavor broadcasters in retransmission consent negotiations to the benefit of large, consolidated MVPDs that dominate the marketplace. These notably include several proposals entailing the forced retransmission of broadcast signals, which violate Section 325(b)(1)(A) of the

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granted broadcasters, not the FCC or MVPDs, control over the retransmission of stations' signals and intended to create a "marketplace" in which broadcasters and MVPDs would privately negotiate for the disposition of broadcast signals. S. Rep. No. 92, 102nd Cong., 1st Sess. at 36 (1991) (stressing that it was not the intent of Congress to "dictate the outcome" of negotiations). The Commission has specifically concluded that the "good faith negotiation requirement" did not alter Congress' intention that the Commission refrain from "intrud[ing] in the negotiation of retransmission consent." Good Faith Order, 15 FCC Rcd at 5450.

[34] *Railway Labor Executives' Ass'n v. Nat'l Mediation Bd*., 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc) (emphasis in original).

[35] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5775 (2015) (unequivocally stating that the Commission is not "regulating the Internet, *per se*, or any Internet applications or content"). *See also* Order, RM-11757, DA 15-1266, at ¶ 1 (WCB Nov. 6, 2015) (dismissing a petition for rulemaking that "plainly does not warrant consideration" because the "Commission has been unequivocal in declaring that it has no intent to regulate edge providers").

[36] The Joint Commenters fruitlessly argue that "FCC rules frequently touch on the property rights of regulated entities in one way or the other," citing as examples must carry obligations and closed captioning and emergency information accessibility mandates. Joint Commenters Reply at 12-13. In a similar vein, ATVA points out that a broadcaster cannot negotiate for retransmission consent with only one MVPD in a market, to the exclusion of others in the market, as illustrating the ways in which the good faith rules limit broadcasters' rights. *See* ATVA Replies at 25. ATVA and the Joint Commenters proffer these examples to supposedly show that the FCC could adopt the proposed rule impinging on broadcasters' copyrights rights. These arguments are meritless, as they, among other things, ignore the fact that Congress imposed these obligations by statute. *See* 47 U.S.C. § 325(b)(3)(C)(ii) (prohibiting a broadcast station that provides retransmission consent from engaging in exclusive contracts); 47 U.S.C. § 534 (must carry); 47 U.S.C. § 613 (closed captioning and emergency information accessibility). At issue here is the FCC's power and authority to adopt the proposed rule, which, as discussed above, it clearly lacks.

[37] AT&T Replies at 12, n. 31.

Communications Act and which the Commission lacks authority to adopt.[38] The MVPD Commenters' proposal discussed here is contrary to Section 106 of the Copyright Act and the Commission similarly lacks authority to adopt it. We urge the Commission to summarily reject all pay TV industry proposals inconsistent with applicable law.

Respectfully submitted,

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[38] *See* NAB Written *Ex Parte* Communication, MB Docket Nos. 15-216, 10-71 (Mar. 17, 2016).