

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

In the Matter of)

Expanding Consumers' Video Navigation Choices)

Commercial Availability of Navigation Devices)

MB Docket No. 16-42

CS Docket No. 97-80

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

I. INTRODUCTION & EXECUTIVE SUMMARY

21st Century Fox, Inc., A&E Television Networks, LLC, CBS Corporation, Scripps Networks Interactive, Time Warner Inc., Viacom Inc., and The Walt Disney Company (collectively, the “Content Companies”) respectfully submit these reply comments in response to the Commission’s Notice of Proposed Rulemaking (the “Notice”) in the above-captioned proceeding.¹

As noted in their opening comments, the Content Companies support the overall goal of fostering the development of a competitive market for set-top boxes and of cultivating additional user-friendly ways for audiences to enjoy their favorite shows and networks.² However, the

¹ Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. 14,033 (Mar. 16, 2016) (to be codified at 47 C.F.R. pt. 76).

² Comments on Behalf of 21st Century Fox, Inc., A&E Television Networks, LLC, CBS Corporation, Scripps Networks Interactive, Time Warner Inc., Viacom Inc., and The Walt Disney Company, filed in MB Docket No. 16-42 and CS Docket No. 97-80, April 22, 2016 (“Content Companies Comments”). All further comments referenced below filed in those dockets on that date unless otherwise specified.

record developed in this proceeding confirms the Content Companies' concerns that the Commission's proposals would harm consumers and disadvantage programmers by jeopardizing the security and integrity of content in violation of Section 629 of the Telecommunications Act of 1996 ("Section 629"). Many commenters persuasively argued that the Commission lacks the authority to adopt the proposed rules, that the Commission's proposed approach fails to satisfy the requirements of reasoned decision-making, and that the Notice creates serious conflicts with other federal laws and the Constitution. The few substantive comments filed in support of the Commission's proposals contained little analysis, legal authority, or factual and empirical submissions that would justify such sweeping changes to the content distribution marketplace.

II. THE RECORD PROVIDES STRONG SUPPORT FOR THE CONTENT COMPANIES' CONTENTIONS THAT THE PROPOSED RULES ARE UNLAWFUL

The overwhelming consensus is that the proposals set forth in the Notice would exceed the Commission's authority under Section 629 and impair the Content Companies' incentives to produce and distribute content, to the ultimate detriment of consumers.³ Many commenters, including content creators and MVPDs, provided detailed legal analyses explaining that the Commission lacks authority under Section 629 or any other provision of law to compel MVPDs to provide to third parties programmers' content without the programmers' consent or authorization, especially if the content is not subject to the same licensing terms.⁴ With respect

³ See, e.g., Motion Picture Ass'n of Am. *et al.* ("MPAA") Comments at 2-9; Nat'l Ass'n of Broadcasters ("NAB") Comments at 7, 10-12; Recording Indus. Ass'n of Am. *et al.* ("RIAA") Comments at 4, 8; Creators of Color – Joint Filing Comments at 1; C-SPAN Comments at 1-2.

⁴ See, e.g., Theodore B. Olson *et al.*, The FCC's "Competitive Navigation" Mandate: A Legal Analysis of Statutory and Constitutional Limits on FCC Authority at 12-30, in Nat'l Cable and Telecomms. Ass'n ("NCTA") Comments, App. A; Comcast Corp. and NBCUniversal Media, LLC ("Comcast") Comments at 33-44; AT&T Servs. Inc. Comments at 59-82; NCTA-The Rural Broadband Ass'n Comments at 25-26; Am. Cable Ass'n ("ACA") Comments at 59-71.

to the contractual licensing arrangements between the Content Companies and MVPDs, numerous commenters stressed that it would be arbitrary and capricious for the Commission to require content to be passed through to third parties without ensuring compliance with the underlying contractual provisions.⁵ Turning to copyright, several prominent intellectual property law scholars and others emphasized in detail that the Notice conflicts with the Copyright Act and other provisions of intellectual property law.⁶ Still others provided lengthy submissions that echoed the Content Companies' arguments regarding security, reasoned decision-making, constitutional law, and harm to diverse programmers.⁷

In contrast, the proponents of the FCC's proposals provided only generalized statements of support lacking significant substantive analysis. Their comments contain thinly – and inadequately – supported assertions with respect to, among other things, the FCC's authority to issue the proposed rules and the conflicts they would create with copyright law.⁸ Several comments in support of the proposals validated the Content Companies' concerns by proclaiming, in no uncertain terms, that competitive navigation device makers do not intend to comply with the provisions in content owners' licensing agreements, including agreements with

⁵ See, e.g., MPAA Comments at 2-9; NAB Comments at 7, 11-12; RIAA Comments at 4, 8.

⁶ See, e.g., Intellectual Property Law Scholars Comments at 1-9; NCTA Comments at 18-20; Comcast Comments at 46-51; AT&T Comments at 80-81; EchoStar Techns. L.L.C. and DISH Network L.L.C. Comments at 20-23; ITTA Comments at 24-25; MPAA Comments at 4-8; NAB Comments at 11-14; TechFreedom and the Competitive Enter. Inst. Comments at 43-44; Int'l Ctr. for L. & Econ. Comments at 9-10, 28.

⁷ See, e.g., Telecomms. Indus. Ass'n Comments at 6-7 (security); ARRIS Grp., Inc. Comments at 13 (security); NCTA Comments, App. A at 74-81 (reasoned decision-making); AT&T Comments at 96-102 (reasoned decision-making); Comcast Comments at 55 (constitutional concerns); MPAA Comments at 18-19 (constitutional concerns); Multicultural Media, Telecom and Internet Council ("MMTC") Comments at 8-13 (diversity).

⁸ See, e.g., Consumer Video Choice Coalition ("CVCC") Comments at 23-26; Google Inc. Comments at 4-5; Pub. Knowledge Comments at 10-11, 45-48; Consumer Fed'n of Am. Comments at 5-6.

respect to the amount of advertising included in programming.⁹ As the Content Companies and others have expressed, those terms exist, in no small part, to ensure a high-quality viewing experience for consumers – one that is not cluttered with advertising overlays or surrounds, and in which channel-based content is easy to find. The statements of those supporting the Commission’s proposals provide a preview of the content distribution marketplace that would exist under the Commission’s proposals – a marketplace in which third-party device makers could impair consumers’ viewing experience by degrading or otherwise manipulating the presentation of programming.

In addition to validating the Content Companies’ general apprehension, some supporters of the Commission’s proposals also recognized the validity and importance of the Content Companies’ core concern. The National Telecommunications and Information Administration (“NTIA”), for instance, submitted a letter on behalf of the Obama Administration that highlighted the importance of ensuring the “security and integrity” of programming and programming agreements.¹⁰ Even as it expressed overall support for the new rules, NTIA noted that licensing terms, such as those related to “advertising” and “brand protection,” are “important to enabling parties to defray the costs of producing, acquiring, and distributing” their programming.¹¹ NTIA further noted that “prescribing ‘programming integrity’ requirements in

⁹ See TiVo Inc. Comments at 19 (“TiVo is not, and never has been, bound to programming agreements entered into by MVPDs to which TiVo is not a party”); Pub. Knowledge Comments at 2 (“The FCC should allow apps and devices to use unique interfaces, regardless of licensing agreement.”); Amazon Comments at 6 (“Amazon will not alter the programming stream, but seeks the ability to innovate around the stream,” leaving open the possibility of advertising surrounds or alteration of channel placement.).

¹⁰ Letter from Lawrence E. Strickling, Admin’r, NTIA, to Tom Wheeler, Chairman, FCC, MB Docket 16-42, at 2, 6 (Apr. 14, 2016) (“NTIA Comments”).

¹¹ *Id.* at 4; see also Writers Guild of Am., West, Inc. Comments, at 12.

this proceeding will likely have no significant adverse effects on competitive navigation providers.”¹²

The fact that both proponents and opponents recognized the same problems confirms that the Commission has not adequately considered or justified the profound impact that its proposals would have on content creation and distribution.

III. THE COMMISSION HAS THE STATUTORY AUTHORITY AND OBLIGATION TO MAINTAIN THE SECURITY AND INTEGRITY OF CONTENT

As discussed at length in the Content Companies’ initial comments, Section 629’s mandate is limited. It does not permit the Commission to adopt regulations that would interfere with or abridge the Content Companies’ contracts or intellectual property rights. Chairman Wheeler has recognized as much by stating that the FCC should safeguard content consistent with programmers’ underlying agreements.¹³ In other words, the Commission may not disturb the integrity of the programming or otherwise harm programmers’ licensing agreements under Section 629.

But even assuming, *arguendo*, that the Commission could compel MVPDs to provide programmers’ content to third-party device makers and even third-party online services and apps, Section 629(b) still requires the Commission to respect the security of programming – specifically by preserving all of the terms of Content Companies’ licensing agreements, including their enforceability. Section 629(b) states that the “Commission shall not prescribe regulations . . . which would jeopardize security of multichannel video programming and other

¹² NTIA Comments at n.24.

¹³ *FCC Chairman Proposal to Unlock the Set-Top-Box: Creating Choice & Innovation 2* (Jan. 27, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0127/DOC-337449A1.pdf (“Chairman’s Fact Sheet”) (“Existing content distribution deals, licensing terms, and conditions will remain unchanged.”).

services offered over multichannel video programming systems.”¹⁴ It also states that the Commission may not “impede the legal rights of a provider of such [multichannel video programming] services to prevent theft of service.”¹⁵ Section 629(b) thus imposes two different duties on the Commission. The first prohibits it from jeopardizing the “security” of programming; the second requires it to guard against the “theft” of service. Congress therefore clearly contemplated that use of the term “security” in 629(b) required the Commission to take additional steps beyond merely protecting content against theft. Neither the Commission nor the commenters supporting the Commission’s proposals have suggested a definition of “security” that gives it meaning beyond the separate statutory term “theft” – a fundamental and conspicuous failure of statutory interpretation.

In understanding the term “security” as used in Section 629, it is helpful to consider how the term is employed in related contexts. The term “security,” as used in the Telecommunications Act of 1996, should be considered a term of art with a well-understood meaning that includes a prohibition on manipulating or altering content.¹⁶ When “Congress borrows terms of art . . . it presumably knows and adopts the cluster of ideas that were attached to each borrowed word.”¹⁷ The technology community has a well-established trade definition of “security” for purposes of securing devices that transmit information, and Congress would no doubt have intended to incorporate this definition into Section 629(b). Indeed, important works in engineering and computer science dating back to the 1980s emphasize that “security” entails

¹⁴ 47 U.S.C. § 549(b).

¹⁵ *Id.*

¹⁶ Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012) (“Where the text is addressing a scientific or technical subject, a specialized meaning is to be expected”).

¹⁷ *Morissette v. United States*, 342 U.S. 246, 263 (1952).

“ensur[ing] integrity of data to prevent fraud and errors” such that “[n]o user . . . may be permitted to modify data items.”¹⁸

When Congress enacted Section 629(b) in 1996, it legislated against a background in which it was understood that the use of the term “security” meant that programming content could not be modified and that all contractual terms related to the display of content must be respected. For example, in the Senate Report on the Cable Television Consumer Protection and Competition Act of 1992, Congress addressed the retransmission of certain broadcast programming. In crafting retransmission provisions, Congress took pains to note that, consistent with the widely held understanding, nothing in the bill would “abrogate or alter existing program licensing agreements between broadcasters and program suppliers or . . . limit the terms of existing or future licensing agreements.”¹⁹

Today, the well-understood meaning of “security” is reflected in the established definition of information security that entails maintaining the “confidentiality, integrity and availability” of information.²⁰ As further detailed by the National Institute for Standards and Technology, integrity means “[g]uarding against improper information modification or destruction, [including] ensuring information non-repudiation and authenticity.”²¹ To avoid “jeopardizing” the security of content under Section 629(b), therefore, the Commission must

¹⁸ David D. Clark & David R. Wilson, *A Comparison of Commercial and Military Computer Security Policies* 186 (May 1987), http://theory.stanford.edu/~ninghui/courses/Fall03/papers/clark_wilson.pdf.

¹⁹ S. Rep. No. 102-92, at 36 (1991).

²⁰ See, e.g., “Information security,” ISO/IEC 27000:2016, <https://www.iso.org/obp/ui/#iso:std:iso-iec:27000:ed-4:vl:en> (defined as the “preservation of confidentiality, integrity and availability of information”); “Information security,” Nat’l Inst. of Sci. & Tech., Special Publication 800-53 rev. 4, *Security and Privacy Controls for Federal Information Systems and Organizations*, B-10 (“SP 800-53”), <http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-53r4.pdf> (defined as “[t]he protection of information and information systems from unauthorized access, use, disclosure, disruption, modification, or destruction in order to provide confidentiality, integrity, and availability”).

²¹ SP 800-53, at B-12.

protect its integrity and ensure that there is no reasonable possibility of modification to the content and the expected content viewing experience.

This reading of Section 629(b) is consistent with other Congressional and Commission interpretations of “security.” When specifically defining the security of information, Congress has consistently recognized integrity as one of the components of that definition.²² Similarly, when addressing security issues, the Commission itself has taken the integrity of information systems into account.²³ The White House has made similar statements.²⁴

In addition, the Content Companies believe that the same “Do Not Disturb” obligation is imposed by the term “MVPD service.” Section 629(a) allows the Commission to create competition only in the market for “equipment used by consumers to access multichannel video programming and other services” offered over MVPDs’ systems.²⁵ For programming to qualify as an “MVPD service” offered via an MVPD “system” – as opposed to some other, new service – it must consist of programming *as transmitted by the MVPD*, pursuant to its licensing contracts, without manipulation or disturbance.

²² For example, the recent Cybersecurity Act of 2015 defined “security control” to mean “[various] controls used to protect against an unauthorized effort to adversely affect the confidentiality, integrity, and availability of an information system or its information.” Cybersecurity Act of 2015, Pub. L. No. 114-113, § 102, 129 Stat. 2935, 2939. Similarly, the Federal Information Security Management Act of 2002 defined “information security” to mean “protecting information and information systems from unauthorized access, use, disclosure, disruption, modification, or destruction in order to provide (A) integrity... (B) confidentiality... and (C) availability....” Federal Information Security Management Act of 2002, Pub. L. No. 107-347, § 301, 116 Stat. 2946, 2947 (codified at 44 U.S.C. § 3542(b)).

²³ In the last two weeks alone, the Wireless Telecommunications Bureau has indicated that it believes its interest in security incorporates an interest in the integrity of end-user devices. *See* Wireless Telecommunications Bureau, Letter to Telecommunications Carriers, May 9, 2016 (stating that “one of the Commission’s top priorities is the promotion of safety and security of communications” and then that this priority has led the Commission to investigate “vulnerabilities associated with mobile operating systems that threaten the security and integrity” of mobile devices.).

²⁴ *See* U.S. Intellectual Property Enforcement Coordinator, Annual Report on Intellectual Property Enforcement: Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy 48 (Feb. 2012) (noting connection between security and accuracy).

²⁵ 47 U.S.C. § 549(a).

As the Content Companies noted previously, the Commission’s proposed rules jeopardize the security of programming not only by failing to establish *protections* for content – such as a prohibition on contravening licensing terms – but also by effectively eliminating the existing rights of the Content Companies to *enforce* their agreement terms and protect their content. Instead, the Commission seems to assume that third-party device manufacturers will simply pass through content without manipulation or modification. With no functional alternative to licensing agreements – which allow programmers to take action when contracts are breached – the Commission’s enforcement regime would be toothless and could not comply with Section 629(b).

In sum, by allowing third parties to abrogate the specific terms of content licensing agreements, the Commission improperly disregards common understandings of the term “security,” misreads the term “MVPD service,” ignores the problem of enforcement, and fails to satisfy its duties under the plain language of Section 629.

IV. COMMENTERS AGREE THAT THE NOTICE, IF ADOPTED, WOULD CONFLICT WITH COPYRIGHT LAW

As emphasized by Content Companies and a number of others in their initial comments, the Commission’s proposals would not only facilitate copyright infringement, but would obligate MVPDs to make programming available to third parties without the authorization of content owners, thereby exceeding the scope of the rights granted to MVPDs under their licenses. In the current marketplace, it is important to note, no distribution service or platform is able to carry programming from the Content Companies without an agreement of some kind given the protections of the Copyright Act. The Commission’s proposals would alter this reality, in contravention of intellectual property law.

The proposed rules would also compel large-scale infringement by innumerable third parties, including providers of online services and applications that perform the same function as MVPDs – transmitting and streaming content to the public – which would violate the content owners’ public performance rights. As the Supreme Court has observed, “the concep[t] of public performance . . . cover[s] not only the initial rendition or showing” – in this case, by the MVPD – “but also any further act by which that rendition or showing is transmitted or communicated to the public.”²⁶

In addition to violating the Copyright Act, the FCC’s proposals also run counter to the obligations of the United States under a number of international agreements and treaties, including the Berne Convention, TRIPS, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. These treaties, as well as various trade agreements, recognize the exclusive rights of foreign and U.S. creators and copyright owners to exclusively authorize the transmission, performance, and reproduction of their content, and, in certain instances, specifically prohibit the unauthorized retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet. The Berne Convention and TRIPS, for example, require that nation-specific limitations to exclusive rights be limited to special cases that do not conflict with the normal exploitation of works and do not unreasonably prejudice the legitimate interests of creators or rights holders.²⁷ In light of the fact that the proposed rules would

²⁶ *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2506 (2014) (quoting H.R. Rep. No. 94-1476, at 63 (1976)).

²⁷ *See, e.g.*, Berne Convention for the Protection of Literary & Artistic Works art. 9(2), July 24, 1971, 828 U.N.T.S. 221.

significantly roll back copyright protections and could cost the Content Companies significant potential revenue, the rules would violate those treaties.²⁸

The proposed rules would also conflict with trademark law, as other commenters have noted.²⁹ By surrounding or overlaying programming with additional advertising or otherwise manipulating content, competitive device makers would be interfering with content owners' branding. This would create a likelihood of confusion over the source of programmers' product and lead to dilution of the content owner's mark, thereby contravening trademark law.³⁰

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

As the Content Companies observed in their opening comments, the Administrative Procedure Act ("APA") requires the Commission to engage in reasoned decision-making. The agency's regulations may be deemed unlawful if its actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."³¹ While the Content Companies raised a number of these concerns in their initial comments, several additional aspects of the Notice suffer from a lack of reasoned decision-making.

First, in proposing the rules, the Commission claimed that the purported successes of the CableCARD regulations in protecting the security of content would continue in the new content

²⁸ See World Trade Organization Report: *United States – Section 110(5) of the US Copyright Act* 69, WT/DS160/R, June 15, 2000, http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf (finding that Section 110(5)(B) of the Copyright Act does not "meet the requirements of Article 13 of the TRIPS Agreement [incorporating the three-step test above] and is thus inconsistent with . . . the Berne Convention").

²⁹ Comcast Comments at 52-53; Theodore B. Olson et al., *The FCC's "Competitive Navigation" Mandate: A Legal Analysis of Statutory and Constitutional Limits on FCC Authority* at 55-59, in NCTA Comments, App. A.

³⁰ See, e.g., *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144 (4th Cir. 2012); *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036 (9th Cir. 1999).

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

distribution marketplace.³² A number of commenters, including both content creators and MVPDs, refuted this assertion. Indeed, it has become increasingly evident that even the CableCARD regime as enacted and implemented has proved inadequate to prevent damage to or manipulation of content presentation. For instance, the CableCARD regime itself has become subject to abuse by DFAST licensees, including TiVo and others, who have altered content in a manner that cannot be properly authorized by Section 629 or sanctioned by the Commission.³³

Moreover, other parties correctly noted that the currently limited (albeit increasing) harm from CableCARD devices is not probative of whether the proposals will harm programmers. Contrary to the Commission's misunderstanding, there are a number of important differences between even the CableCARD approach to content security and the Commission's proposals. The Commission has not carefully evaluated each of these differences to understand how its proposals would affect content security.

The CableCARD regime relies on a license that was carefully negotiated between MVPDs and consumer electronics device manufacturers and submitted to the Commission, where it was subject to third-party comment. The DFAST license contains a number of specific robustness and compliance terms, which have changed over time with the emergence of new

³² See Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,046 (The Commission notes its views that "the CableCARD standard largely appears to align with our proposed rules.").

³³ See Deborah Yao, *More Ads Coming to TV Even to One-Time Havens*, ABCNews.com, <http://abcnews.go.com/Technology/story?id=8237990&page=1> (last visited Apr. 20, 2016) ("TiVo, the creator of the digital video recorder that panicked the TV business by making it simple to skip ads, now flashes banners on TV screens when users pause, fast-forward or delete shows," including "layering an ad on top of" programming.); see also Michael Hiltzik, *TiVo Finally Tells TV Broadcasters to Stuff It*, L.A. Times, Oct 5, 2015, <http://www.latimes.com/business/hiltzik/la-fi-mh-tivo-finally-tells-tv-broadcasters-20151005-column.html> (noting that one service offered on TiVo's new Bolt unit is its Quick Mode service, "which allows playback of recorded shows 30% faster, with the audio electronically tweaked"); Associated Press, *New TiVo DVR Will Skip Through Entire Commercial Break*, CNBC.com (Sept. 30, 2015), <http://www.cnbc.com/2015/09/30/new-tivo-dvr-will-skip-through-entire-commercial-break.html>.

dangers to content security. CableCARD technology also contains a hardware point-of-presence issued by an MVPD within the end-user set-top box to ensure that the endpoint can be trusted to receive programming.

In stark contrast to the CableCARD approach, the Commission's proposals only promise a licensing regime at some future date without any specific details or defined roles for content companies (or the Commission) to play in its development. The Commission's proposals do not contain any specific set of robustness and compliance terms to secure and maintain the integrity of transmitted content. The proposals would also eliminate the MVPD point-of-presence and permit the use of software and mobile navigation devices, greatly increasing the security risk for content.

Second, the proposed rules ignore the effect of the Commission's proposals in terms of both positive incentives for navigation device makers to manipulate content and negative incentives for programmers to continue producing high-quality content. As Steven Wildman, the Commission's former Chief Economist, pointed out, under the Commission's approach, a navigation device maker apparently could "profitably enter the market and displace MVPDs and networks as sellers of commercial time" – for example, by overlaying advertising – even if "advertisers value [time sold by navigation devices] less than access to the same audiences when sold by networks and MVPDs."³⁴ Under the proposed rules, therefore, navigation device makers would be able to sell less-valuable advertising space on top of pre-existing advertisements, diluting programmers' ability to recoup their expenses, and could still turn a profit off of content creators' intellectual property. This sort of activity would have a negative impact on the Content

³⁴ Steven S. Wildman, *The Scary Economics of the NPRM's Navigation Device Rules* at 5 (Apr. 18, 2016), in NCTA Comments, App. C.

Companies' ability to produce vibrant and diverse programming. As Wildman noted, "the conclusion that media production budgets decline and the amount of content supplied falls if the pool of revenue for which producers can compete is reduced is quite clear."³⁵ Multiple other studies in the record reached the same conclusion.³⁶ It would be arbitrary and capricious for the Commission to ignore these incentives or to conclude that programming would not be impacted by the Commission's proposal. Similarly, it would be arbitrary and capricious for the Commission to proceed with its proposals without taking these incentives into account and ensuring that its proposals do not result in substantial harm to the diverse and vibrant market for programming.

Third, the proposed rules fail to develop a sufficient record on Compliant Security Systems, the licensable "downloadable security" solutions responsible for ensuring robustness and compliance and preventing theft. The Commission describes both an HTML5 proposal and a Media Server proposal for downloadable security, but then rejects mandating either. Instead, in a cursory analysis, the Commission vaguely suggests that an MVPD might make one or both "available as part of a 'toolkit' of approaches."³⁷ The Commission has provided so little information on this proposed conclusion that the Notice can only be considered to have provided

³⁵ *Id.* at 6.

³⁶ *See, e.g.*, Decl. of Dr. Stanley M. Besen, An Economic Analysis of the Commission's Set-Top Box Mandate at 12, 17, in Comment of Comcast, App. B; Decl. of Michael L. Katz, An Economic Assessment of the Commission's Proposed MVPD Access Device Regulation at 51, 61-62 (Apr. 22, 2016), in AT&T Comments, Attach. 2.

³⁷ Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,042.

no notice at all on the subject of Compliant Security Systems. *See, e.g., Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2d Cir. 2013).³⁸

Finally, even the possibility that the proposed rules might approve of a Media Server-like approach would violate the Commission’s obligation to “prevent theft of service.” The Commission itself admits the Media Server approach “would create too much potential for vulnerability” for large swaths of programming and limit the options for “develop[ing] a new, more robust version in the event of a hack.”³⁹ By its own admission, the Commission’s proposals thus provide a downloadable security option to MVPDs that is patently insecure, even in the most narrow sense of that term. Providing such an option cannot be consistent with reasoned decision-making.

VI. CONCLUSION

The record in this proceeding confirms that the proposed rules would abrogate Content Companies’ intellectual property rights and licensing agreements, while turning programming over to third parties without adequate protection of either – indeed, without *any* meaningful protection. The rules, as currently drafted, would violate the terms of Section 629 as well as many other provisions of law, including the APA. Accordingly, the Commission must fundamentally rethink its proposed approach to enhancing competition in the set-top box marketplace.

³⁸ Indeed, overall the Commission’s proposal is not sufficient to provide the “fair notice” required by the APA. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007); *see Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (An agency must “describe the range of alternatives being considered with reasonable specificity.”); *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (“[G]eneral notice that a new standard will be adopted affords the parties scant opportunity for comment.”). Here, the Commission’s notice includes, on critical issues, highly amorphous and open-ended questions and conflicting proposals.

³⁹ Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed. Reg. at 14,042.

Respectfully submitted,

By:

/s/

Clifford M. Sloan

John M. Beahn

Joshua F. Gruenspecht

Caroline S. Van Zile

Skadden, Arps, Slate, Meagher & Flom LLP

1440 New York Avenue, N.W.

Washington, D.C. 20005

*Counsel to 21st Century Fox, Inc., A&E
Television Networks, LLC, CBS Corporation,
Scripps Networks Interactive, Viacom Inc.,
and The Walt Disney Company*

21st CENTURY FOX, INC.

Ellen S. Agress

Senior Vice President, Deputy General Counsel
& Chief Privacy Officer

1211 Avenue of the Americas

New York, NY 10036

Jared S. Sher

Senior Vice President & Assoc. General Counsel
400 N. Capitol Street, N.W., Suite 890

Washington, D.C. 20001

SCRIPPS NETWORKS INTERACTIVE

Kimberly Hulsey

Vice President, Legal and Government Affairs

5425 Wisconsin Avenue, 5th Floor

Chevy Chase, MD 20815

A&E TELEVISION NETWORKS, LLC

Henry S. Hoberman

Executive Vice President & General Counsel

235 E. 45th Street

New York, NY 10017

CBS CORPORATION

Anne Lucey

Senior Vice President for Regulatory Policy

601 Pennsylvania Avenue, N.W., Suite 540

Washington, D.C. 20004

TIME WARNER INC.

Kyle D. Dixon

Vice President, Public Policy

800 Connecticut Avenue, N.W., Suite 1200

Washington, D.C. 20006

VIACOM INC.

Keith R. Murphy
Senior Vice President, Government Relations
and Regulatory Counsel
1275 Pennsylvania Avenue, N.W., Suite 710
Washington, D.C. 20004

**THE WALT DISNEY COMPANY &
ESPN, INC.**

Susan L. Fox
Vice President, Government Relations
425 Third Street, S.W., Suite 1100
Washington, D.C. 20024

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