

Before the

**FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

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**REPLY COMMENTS OF CALINNOVATES**

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## INTRODUCTION AND EXECUTIVE SUMMARY

In the comment that CALinnovates submitted to this proceeding, we demonstrated that the television device access market is thriving, diverse, and competitive. Additionally, we supplemented our comment with an economic analysis from Dr. Christian M. Dippon of NERA, who concluded that the FCC's proposal will hinder innovation, likely increase prices for consumers, and detrimentally impact consumer welfare.<sup>1</sup> Our argument was bolstered by the dozens of comments—from varying perspectives within the video consumption market—that argued the same. On the other hand, the few comments that supported the proposed rule were either only self-interested or indicated serious reservations, and entirely lacked evidence to support their conclusory declarations.

Equally as concerning as the red flags that were raised by such a large and varied degree of stakeholders in the technology and entertainment industries is the ever-growing chorus of alarm being voiced by Congress. This proceeding has not devolved into a partisan, dialectical food fight, though. Instead, it is punctuated by interjections from a diverse and bipartisan group in Congress raising serious questions about potential harm from this proceeding. In short, this NPRM seems to have had the unintended effect of reinforcing Congress' clearly discernible movement toward reasserting itself, in bipartisan fashion, to play a more demonstrable role in safeguarding the emerging competitive currents in the video programming space from unnecessary governmental intervention.

Thus, we are now left with the somber reality about what this says about how the Commission is using its authority, and the consequences that could result from a failure to appreciate the state of the industry. CALinnovates, along with other commenters, is concerned

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<sup>1</sup> Comments of CALinnovates (“CALi Comments”) at 40.

about the harm this will cause three categories of players in the industry: the innovators, the consumers, and the content creators. We hope that the Commission will take these problems seriously and resist causing irreparable damage to such an exciting and evolving industry.

## **DISCUSSION**

### **I. THE COMMISSION THREATENS A NEW GOLDEN AGE OF TELEVISION.**

The comments in this proceeding reveal a consensus in opposition to the FCC’s proposed intervention into the market for set-top boxes. A broad group of stakeholders—from programmers to MVPDs and from actors to advertisers—commented on the vitality of the video programming marketplace. These commenters agree that the Commission’s interference in the highly competitive video programming marketplace would risk undermining the quality, diversity, and stable costs of video programming. While the FCC’s goal may be well-intentioned, its proposal would represent a hit to consumers’ wallets and a threat to their enjoyment of this new Golden Age of television.

#### **A. Commenters Described the Increasingly Competitive Video Marketplace.**

In its Notice of Proposed Rulemaking (“NPRM”),<sup>2</sup> the FCC summarized its viewpoint by contending that “when it comes to the set-top boxes mandated by pay-TV providers, consumers essentially have no choices.”<sup>3</sup> Many commenters challenged the Commission’s dire diagnosis of the video programming marketplace. The Progressive Policy Institute (“PPI”) described the “hallmark of the current economy” as “the rapid convergence of telecom, Internet, and content

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<sup>2</sup> Notice of Proposed Rulemaking, *Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices*, 81 Fed. Reg. 14,033 (Feb. 18, 2016) [hereinafter NPRM].

<sup>3</sup> NPRM at 57.

services, driven by market forces.”<sup>4</sup> In contrast to consumers’ embrace of new technologies, the FCC “takes an old-fashioned approach to the economy, treating just a narrow slice of the paid video market—box interfaces—as a separate market that needs to be forcibly unlocked.”<sup>5</sup> Indeed, the market for video programming is competitive at every level: MVPDs compete with both other MVPDs and with over-the-top (“OTT”) providers like Netflix, and device manufacturers compete against other device manufacturers.<sup>6</sup> Consumers have never had more options.

This robust competition produces a myriad of high-quality video options, as content creators and providers battle for market share. The number of scripted broadcast, cable, satellite, and online shows nearly doubled between 2009 and 2015, and the number of scripted online shows alone grew from 2 to 45.<sup>7</sup> In 2014, consumers used more than 115 online services to access 66.3 billion television episodes and 7.1 billion movies, up 229% and 1,132%, respectively, from 2009.<sup>8</sup> Consumers have downloaded MVPD apps over 56 million times.<sup>9</sup> And MVPD apps are now available on more than 450 million devices.<sup>10</sup> Consumers “have responded by experimenting among the available OTT products and service offering. Consumers often do not choose one OTT device over another, but rather purchase multiple, low-cost OTT devices and

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<sup>4</sup> Comments of Progressive Policy Institute (“PPI Comments”) at 2.

<sup>5</sup> *Id.*

<sup>6</sup> Comments of CALinnovates (“CALi Comments”) at 26, 31; *see also* Comments of AT&T (“AT&T Comments”) at iii-iv.

<sup>7</sup> Comments of the Motion Picture Association of America and SAG-AFTRA (“MPAA/SAG Comments”) at 2.

<sup>8</sup> *Id.*

<sup>9</sup> Comments of Arris Group, Inc. (“Arris Group Comments”) at 4.

<sup>10</sup> Final Report of the Downloadable Security Technology Advisory Committee, Working Group 4 Report, at 72-73.

then select[ed] their favored method for video consumption.”<sup>11</sup> The FCC claims that the market for navigation devices is not competitive, but it is apparent that the data—illuminated by stakeholders across the industry in their comments—contradict that assessment.

**B. Commenters Expressed Support for Independent and Diverse Networks.**

A core tenet of the new Golden Age of television is the explosion of diverse voices and content. In this competitive market ruled by personalization, content that would have been considered too niche to survive on TV networks thrives amid an increasingly diverse landscape of providers and devices. Independent and diverse networks negotiate agreements with MVPDs on issues like channel placement, advertising, and promotion, which are necessary for smaller providers to build a committed audience. The Commission’s set-top box mandate, however, threatens these arrangements by allowing third-party companies to access and package independent providers’ content. Many commenters rightly expressed concern that the FCC’s proposal would stem the tide of diversity and independence in video programming, stalling years of progress.<sup>12</sup> The Commission should heed these comments, lest it undercuts networks that can least withstand an assault.

Comments from independent and diverse networks cited two primary ways that the Commission’s proposal would threaten their existence. First, the proposal would allow third

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<sup>11</sup> Comments of Roku, Inc. (“Roku Comments”) at 5 (noting that broadband homes own an average of 2.3 OTT devices and that most householders switch among devices depending on the user and the type of content viewed).

<sup>12</sup> *E.g.*, Comments of Creators of Color (“Creators of Color Comments”); Comments of Tower of Babel, LLC (DBA Crossings TV) (“Crossings TV Comments”); Comments of Revolt Media and TV LLC (“Revolt Media Comments”); Comments of Mnet America (“Mnet America Comments”).

parties to gain access to programming without negotiating for rights.<sup>13</sup> One group of minority producers and directors argued that allowing third parties “to scrape our programming and use it for their own purposes . . . [will] drive down the value of our work.”<sup>14</sup> Second, many commenters argued that third-party manufacturers’ search engine algorithms would likely favor already-popular programming over niche programming.<sup>15</sup> Diverse and independent networks rely on locally-driven channel lineup and other promotional agreements to thrive. Therefore, replacing this arrangement with a generic search algorithm for Google or another third party could spell doom for content other than popular mass-market programming.<sup>16</sup> Crossing TV, an independent provider serving largely Asian-Americans audiences, argued that the Commission’s proposal therefore “threatens to bury content with a local or niche focus.”<sup>17</sup> Revolt Media’s comment contended that independent and minority networks “are the canaries in the coalmine for this radical experiment to reshape the video market by FCC fiat—and you know what happens to the canaries.”<sup>18</sup> Consumers and providers alike are benefiting from the surge in diverse and independent content. The FCC should refrain from promulgating the proposed rule, which would turn this programming into an endangered species.

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<sup>13</sup> See, e.g., MPAA/SAG Comments; Comments of CreativeFuture (“CreativeFuture Comments”); Independent Film & Television Alliance (“IFTA Comments”) at 1, 2 (“[T]he Commission’s proposal to enable unaffiliated third-party set top box manufacturers to access content licensed to MVPDs would seriously damage the contractual and commercial environment in which content can be successfully created.”); Comments of Victor Cerda and Other Independent Content Creators (“Victor Cerda et al. Comments”); Recording Industry Association of America et al. (“RIAA Comments”) at 4 (arguing that the proposal would “frustrate the incentives to create and disseminate copyright content via MVPD services and stifle innovation in business models that allow consumers access to music”).

<sup>14</sup> Creators of Color Comments at 1.

<sup>15</sup> See, e.g., Roku Comments; Crossings TV Comments; Revolt Media Comments.

<sup>16</sup> Cf. Roku Comments at 4 (“Roku does not prioritize search results based on source, but rather empowers consumers to discover and access the content of their choosing from a wide selection of channels.”).

<sup>17</sup> Crossings TV Comments at 2.

<sup>18</sup> Revolt Media Comments at 2.

### C. Commenters Challenged the FCC’s Mischaracterization of Prices.

The FCC’s position is that that consumers are “literally paying the price” for a lack of options in the set-top box market.<sup>19</sup> Many commenters confronted this assumption with the reality: “[C]lose analysis of the prices being charged by a variety of MVPDs reveals that third-party boxes like TiVo and the fees charged by smaller cable operators are higher than those charged by large competitors.”<sup>20</sup> These arguments echo the CALinnovates-commissioned economic analysis by Dr. Christian Dippon, who argued that any intervention in a competitive market stands to harm the market, its participants, and consumers.<sup>21</sup> The comments only bolster the contention that the Commission’s reasons for interfering in the video programming market are misguided.<sup>22</sup>

The Commission’s position relies on an estimate—185 percent—of the rate of inflation in the price of set-top boxes from 1994 to 2015.<sup>23</sup> However, this figure not only relies on faulty methodology but also fails to recognize that “the 2015 version of STBs include an array of new features . . . not available in the plain-vanilla boxes of yesteryear.”<sup>24</sup> Moreover, even the Commission’s inflated \$7.43 monthly cost for a set-top box compares favorably to related expenses. Netflix charges consumers \$10 per month for its standard service,<sup>25</sup> Hulu charges \$12

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<sup>19</sup> NPRM ¶ 13 (stating that the average American households spends more than \$231 per year on rental fees).

<sup>20</sup> Comments of David Balto (“Balto Comments”) at 1.

<sup>21</sup> CALi Comments at 40.

<sup>22</sup> *Id.* at 4-8, 9.

<sup>23</sup> Statement of Chairman Tom Wheeler, *Re: Expanding Consumers’ Video Navigation Choices*, MB Docket No. 16-42; *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, at 1.

<sup>24</sup> Balto Comments at 5.

<sup>25</sup> David Goldman, *Netflix Prices Are Going Up, Here’s When You’ll Have To Pay More*, CNN MONEY (Apr. 19, 2016), <http://money.cnn.com/2016/04/19/technology/netflix-prices/>.

per month to watch content without commercials.<sup>26</sup> In fact, consumers are seeing from a stable or decreasing share of their household budgets going to telecom-Internet-content services. The telecom-Internet-content sector accounted for only 4.5% of personal consumer spending in 2015, down slightly from 2000.<sup>27</sup> Therefore, “even as Americans have been consuming ever more content and connectivity in a variety of different ways,” the share of household budget going to these services has been stable, not rising.<sup>28</sup> Moreover, prices in the telecom-Internet-content sector rose at a 0.6% annual rate between 2000 and 2015, compared to a 1.8% inflation rate for all consumer spending.<sup>29</sup> The comments demonstrate the inaccuracy of the Commission’s view that somehow consumers are being gouged by set-top box providers, an interpretation that will become increasingly false as consumers’ options, including the availability of apps that work on third-party devices, continue to grow by the day.

## **II. COMMENTS FROM REGULATION PROPONENTS DEMONSTRATE THE WEAKNESS OF THE COMMISSION’S PROPOSAL.**

In contrast to regulation opponents’ unanimous concern for high-quality, diverse, and affordable video content, the “proponents” of the Commission’s proposal damned it with faint praise. In fact, the “supportive” comments dripped with either self-interest or reservations. Representing the former, Google stands to benefit handsomely from the FCC’s proposal. Indeed, like every for-profit corporation, Google has a legal duty to maximize profits for its shareholders. Given its interest in creating a third-party set-top box, it is therefore no surprise that the company

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<sup>26</sup> Sumit Passary, *Amazon Prime Video vs Netflix vs Hulu: Price Comparison of the Best Streaming Services*, TECH TIMES (Apr. 20, 2016), <http://www.techtimes.com/articles/151513/20160420/amazon-prime-video-vs-netflix-vs-hulu-price-comparison-of-the-best-streaming-services.htm>.

<sup>27</sup> PPI Comments at 2.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 3.

submitted a glowing comment to the FCC. While Google’s comment was long on praise, it was short on specifics, instead resorting to conclusory and unsupported statements such as, “If viewers can seamlessly discover and select lawful content online alongside programming from their pay-TV offerings, a new cycle of innovation will ensue.”<sup>30</sup> When a company has much to gain from the promulgation of a proposed rule but fails to muster a persuasive argument for why regulation is needed for the whole industry, it is an indictment of the lack of soundness of the proposal. Even more damning is the opposition of Roku, a company that stands to benefit financially from the Commission’s proposal but nevertheless opposes it.<sup>31</sup>

Other would-be supporters of the FCC’s mandate submitted comments laden with caveats, reservations, and suggestions. For example, TiVo “strongly supports the Commission’s proposed rules,” yet devotes more than a third of its comment to warnings and recommendations about various aspects of the NPRM.<sup>32</sup> Similarly, Verimatrix “supports the Commission’s decision not to propose a single security standard and instead to allow each MVPD to select one or more licensable content protection systems,” but nevertheless spilt much ink “detailing how one could implement the rule in a secure manner, including recommended changes to the specific language of the proposed rule.”<sup>33</sup> For its part, Netflix CEO Reed Hastings recently said that the FCC’s proposal was not “meaningful” to the company and that “Roku or the Apple TV

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<sup>30</sup> Comments of Google Inc. (“Google Comments”) at 3.

<sup>31</sup> Roku Comments at 2 (“The proposed rules carry a very real and significant risk of impeding the innovation that is occurring today by replacing today’s market-driven advances that are expanding consumer choice with a lengthy rule making and standard-setting process.”).

<sup>32</sup> See Comments of TIVO Inc. (“TiVo Comments”) at i, 19-32.

<sup>33</sup> Comments of Verimatrix, Inc. (“Verimatrix Comments”) at 5.

or the smart TV . . . [is] what we think the future is.”<sup>34</sup> This ambivalence and apathy illustrates the lack of enthusiastic support for the Commission’s rule, a telltale sign of a uninformed proposal.

### **III. THE COMMISSION’S FAILURE TO APPRECIATE THE STATE OF THE INDUSTRY WILL DETER INNOVATION, HARM CONSUMERS, AND HURT CONTENT CREATORS.**

The responsibility of regulators is to promulgate a rule based on evidence and necessity.<sup>35</sup> Regulators “should fit the scale of their remedy to the size of the problem.”<sup>36</sup> Ideally, regulators will fashion interventions that mitigate market inefficiencies or consumer costs; at the very least, federal agencies should strive to do no harm when considering intervening into a rapidly changing market. But rather, as Dr. Dippon pointed out, the regulatory structure proposed in the NPRM, which requires the creation of numerous regulatory bodies, is extraordinarily bureaucratic in concept.<sup>37</sup> Unfortunately, as demonstrated by the comments, the FCC’s interpretation of the market for video programming is inconsistent with reality. And instead of guiding positive outcomes, its proposal would yield pernicious consequences for industry innovation, consumers, and content creators. The Commission should scrap its proposal, lest it “disrupt the vibrant and ever-evolving market for video distribution services, and in particular . . . harm small pay-TV providers and their customers.”<sup>38</sup>

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<sup>34</sup> Kate Tummarello & Alex Byers, *Apple vs. Law Enforcement, Round Two*, POLITICO MORNING TECH (Apr. 19, 2016), <http://www.politico.com/tipsheets/morning-tech/2016/04/morning-tech-apple-vs-law-enforcement-round-two-thune-wants-fcc-leak-investigation-e-c-panel-set-for-lifeline-fight-213838>.

<sup>35</sup> See CALi Comments at 3.

<sup>36</sup> PPI Comments at 3 (“In effect, the FCC is rolling the dice. That sort of guesswork is not the appropriate role of a regulator.”).

<sup>37</sup> CALi Comments at 44.

<sup>38</sup> Letter from Congressman Kevin Cramer et al. to Chairman Tom Wheeler at 1 (May 5, 2016), <http://files.ctctcdn.com/1b2d0b0a401/472771fa-88e3-49a3-99b6-b41f676dc05c.pdf>.

**A. The FCC’s Intervention Would Discourage Innovation by Wasting Time and Allowing Pirates to Profit.**

The FCC’s proposed set-top box mandate threatens to stifle the innovation that has become the hallmark of the video content market. Significant resources are required to create high-quality programming. Instead of investing resources for the latest technological advances, industry stakeholders will be forced to prepare for the possibility, and potentially the implementation, of the proposed rule. Considering the pace of the rulemaking process, the likelihood of legal challenge, and the slow implementation phase, any rule would not have an impact for several years. Moreover, MVPDs would likely need to seek Commission approval for next-generation services and features, stalling advances and chilling innovation while the agency creates news standards. The proposal’s “open standards body” will add additional delay and confusion; while the NPRM assumes that these bodies will be able to operate through consensus among diverse stakeholders, there is little evidence that this pipedream will ever come to pass, much less in a speedy time period.<sup>39</sup> And, of course, even two or three years is an eternity in the video marketplace. While MVPDs, the consumer electronic industry, and content creators spend years trying to implement rules that may never work, technology could render all of that effort obsolete.

The proposal would also have troubling copyright consequences. Under current copyright law, an entity may not use copyrighted content without the permission of the copyright holder. Yet the proposal requires MVPDs to transmit to third-party device, app, and web service providers all the content that the MVPDs license from programmers. This would allow third

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<sup>39</sup> AT&T Comments at 21-22 (noting that “[e]stablishing new standards from scratch has generally taken as long as ten years, even where the parties were aligned in purpose and the task at hand was far simpler”).

parties to use the content for their own services, which “is tantamount to giving third parties a zero-rate compulsory copyright license.”<sup>40</sup> Indeed, TiVo has already “made clear” to the FCC its position 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.”<sup>41</sup> As posed by one independent content creator: “Why would a company like Google ever consider licensing and paying for video programming to launch its own competitive video service if the FCC has already handed it the rights for free?”<sup>42</sup> Content is risky to produce, but “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.”<sup>43</sup> The proposal would frustrate this balance at the expense of innovation and high-quality content.

The Commission’s proposal would also deter innovation and content creation by undermining the security of MVPDs’ services. The set-top box mandate would require MVPDs to support a “Compliant Security System,”<sup>44</sup> which “limits the range of security solutions upon which MVPDs can rely.”<sup>45</sup> This would lead to increased risk of piracy and service theft. This less secure environment would likely discourage content creators from licensing content to MVPDs. Moreover, device and app providers would likely rely on the proposal to offer search

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<sup>40</sup> MPAA/SAG Comments at 2.

<sup>41</sup> Letter from Devendra T. Kumer, Counsel for TiVo Inc., to Marlene H. Dortch at 1 (Jan. 13, 2016), <http://apps.fcc.gov/ecfs/document/view?id=60001404298>.

<sup>42</sup> Victor Cerda et al. Comments at 1.

<sup>43</sup> MPAA/SAG Comments at 2.

<sup>44</sup> NPRM ¶ 60.

<sup>45</sup> Comments of Comcast Corporation and NBCUniversal Media, LLC (“Comcast Comments”) at 87.

engines that “mingle licensed MVPD content with both licensed and unlicensed Internet content . . . increas[ing] 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.”<sup>46</sup> In other words, pay-TV and illegitimate content could be presented in the same guide, allowing equal billing for legitimate and pirated material.<sup>47</sup> Additionally, the proposal may allow for the proliferation of “pirate” set-top boxes: “low-cost boxes which, after being manufactured ‘clean’ to enable them to obtain the programming streams from MVPDs, would then be loaded with piracy apps by third parties and sold at a premium.”<sup>48</sup> All of this piracy promotion would have one major outcome: driving down the value of licensed content and reducing the incentives to create it.

**B. The FCC’s Intervention Would Deter High-Quality Content through Collateral Damage.**

The proposal’s negative consequences for industry innovation and consumer harm means that it would also inflict collateral damage on content creators themselves. The Commission could lead the video programming market down the “same road of devastation that journalism has traveled.”<sup>49</sup> The workers at the bottom of this content chain—actors, videographers, writers,

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<sup>46</sup> MPAA/SAG Comments at 33.

<sup>47</sup> Section 629 of the Communications Act prohibits the FCC from adopting set-top box regulations that “would jeopardize security of [pay-TV] programming and other services offered over [pay-TV] programming systems, or impede the legal rights of a provider of such services to prevent theft of service.” 47 U.S.C. § 549(b).

<sup>48</sup> Comments of CreativeFuture (“CreativeFuture Comments”) at 13.

<sup>49</sup> PPI Comments at 4 (“[M]any programmers and experts have warned that the new FCC rule would seriously undermine their businesses, eroding viewer choice, destroying jobs . . .”).

etc.—share in video content revenue stream and have a lot to lose if the FCC’s proposed rule becomes final. Trade organizations representing these workers argued in their comment<sup>50</sup> that:

[t]o open set-top boxes to services that engage in trafficking illegal content, have no respect for copyright, and even less willingness to compensate those who create films and television programs will cause substantial economic harm to our members who count on the revenue received in the form of residuals and re-use payments to sustain a living, fund both retirement benefits for directors and their teams and for craftspeople, and also health benefits for craftspeople who work in the entertainment industry.

Given the freelance nature of the entertainment industry, these employees sustain themselves and their families through the downstream revenue that their work generates—usually in the form of residuals, pension plans, and health plans.<sup>51</sup> The proposed rule could yield a variety of bad outcomes for workers in the entertainment industry—from providing consumers with access to pirated material to enabling third parties to distribute copyrighted films and TV programs in secondary markets without payment to creators—that could lead to lost income and jobs.<sup>52</sup> Another organization also expressed concern that third-party devices would use advertising overlays and pop-ups that will have a negative impact on the licensing value of the content, and therefore on content producers.<sup>53</sup> It needs to be kept in mind that advertising

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<sup>50</sup> Comments of the Directors Guild of America and the International Alliance of Theatrical Stage Employees (“DGA/IATSE Comments”) at 2.

<sup>51</sup> *Id.* at 3.

<sup>52</sup> *Id.* at 4-8; *see also* IFTA Comments.

<sup>53</sup> IFTA Comments at 12.

represent about 50 percent of program supplier revenue.<sup>54</sup> Reducing this source of revenue would deter talented content creators from entering or staying in the industry.<sup>55</sup> The FCC should refrain from promulgating a rule that would hurt the talented professionals who create the high-quality content that is defining this era of video programming.

**C. The FCC’s Intervention Would Hurt Consumers by Jeopardizing their Privacy and Security.**

The proposed set-top box mandate would not only stifle innovation. It will also hurt consumers. Currently, MVPDs are subject to stringent privacy obligations under the Communications Act and through their negotiated agreements with programmers. Under the FCC’s proposal, however, third-party device manufacturers and app developers would simply pledge to MVPDs that they are complying with privacy protection. Unfortunately, “[t]here is simply no practical way for MVPDs to monitor the activities of third parties, let alone enforce compliance with consumer protection obligations, particularly when these third parties are not directly liable—either by contract or regulation—to MVPDs or the Commission.”<sup>56</sup> The proposed rule would therefore put consumers’ privacy and security at risk.

First, the proposal would make set-top boxes vulnerable to hackers and malware. Under the NPRM, “[m]ost navigation devices will likely be low-cost consumer-grade products that can be easily manipulated by hackers, their owners, or other unauthorized third-parties.”<sup>57</sup> Unlike computers, antivirus software does not exist for navigation devices. Contractual agreements between device manufacturers and MVPDs currently require “hardening the devices against

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<sup>54</sup> CALi Comments at 79.

<sup>55</sup> *See id* at 8-9; DGA/IATSE Comments.

<sup>56</sup> Comcast Comments at 10.

<sup>57</sup> Comments of Digital Citizens Alliance (“DCA Comments”) at 6-7.

unauthorized access” but the FCC threatens to sever these safeguards.<sup>58</sup> Pirated material is often the gateway to harmful malware that can result in identity theft. Moreover, as the Congressional Bipartisan Privacy Caucus noted recently, the only recourse for consumers against set-top box providers that improperly collect personally identifiable information without their consent “would be to end service to the device.”<sup>59</sup>

Second, the FCC’s mandate would usher in a new era of invasive advertising. For example, the proposal would likely allow third-party device vendors to use consumers’ searches and browsing “to inform the types of advertising that appears during television shows.”<sup>60</sup> Some commenters expressed concern that these micro-targeted ads could represent television’s “version of payday lending and subprime mortgages—targeting poor and brown communities with supposedly ‘cheap’ products that come at a painful, long-term price.”<sup>61</sup> The Commission should heed these comments on consumer security and privacy when considering the viability of its proposal.

## CONCLUSION

CALinnovates joins the growing litany of voices questioning the need for this proceeding and the potential for regulatory harm by suddenly injecting an innovation-chilling regime into an ecosystem of clearly discernible competitive vitality and growth. In many ways, the very

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<sup>58</sup> *Id.* at 7.

<sup>59</sup> Jacob Fischler, *FCC Set-Top Box Plan is Weak on Privacy, Reps. Say*, LAW360 (May 12, 2016), <http://www.law360.com/articles/795544/fcc-set-top-box-plan-is-weak-on-privacy-reps-say>.

<sup>60</sup> DCA Comments at 9; *see also* Comments of C-SPAN Networks (“C-SPAN”) (discussing the possibility that the proposed rule could undermine the network’s non-partisanship and non-commerciality by allowing third-party distributors to insert paid advertisements in and around programming) at 1.

<sup>61</sup> *See* Creators of Color Comments at 2.

promulgation of the set-top box NPRM brings into sharper focus the importance of the classic first principle of regulatory decision-making: Does government intervention benefit or harm the operation of markets? Particularly in a dynamic marketplace such as the video ecosystem, which is delivering a blistering stream of ongoing generational cycles of change, any intervention should be handled with caution.

Far beyond the immediate drama at FCC are the unmistakable signs of a rising, bipartisan and bicameral desire by Members to ensure that the FCC balances the organic evolution of new products and services with self-limiting regulatory rules. Whether or not this rule sees the light of day, this renewed level of assertiveness by Congress is a welcome development; driven by consumer demand and the 21st century economy, the video programming market is sprinting toward a hyper-connected future.

There is still time for caution to be exercised in this proceeding. CALinnovates is optimistic that this decision could have the larger, positive effect of re-energizing Congress in the exhausted wake of the 1996 Telecommunications Act to seize the reins of technology policymaking by providing a modernized approach to its oversight of the Commission.