

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

In the Matter of)	
)	
Video Device Competition)	MB Docket No. 10-91
)	
Implementation of Section 304 of the Telecommunications Act of 1996)	CS Docket No. 97-80
)	
Commercial Availability of Navigation Devices)	
)	
Compatibility Between Cable Systems and Consumer Electronics Equipment)	PP Docket No. 00-67
)	

**REPLY COMMENTS OF PUBLIC KNOWLEDGE & NEW AMERICA
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August 12, 2010

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Introduction

Sections 629 and 624A of the Communications Act¹ direct the FCC to adopt technical standards and promote a competitive marketplace in compatible, third-party devices that can access the full range of MVPD services. AllVid is the best way for it to do so, and no commenter has offered a compelling reason for the Commission to drop the AllVid approach. Most of the arguments against AllVid, in fact, seem to be centered on a few misunderstandings (e.g., that it would prevent MVPDs from offering their own devices) or are simply off base (e.g., arguments that point to emerging competition in *other* markets). A wide range of MVPDs, electronics manufacturers, industry coalitions, and consumer groups support the Commission’s current approach. Thus, the Commission should issue a Notice of Proposed Rulemaking for AllVid quickly.

I. Some Commenters Misconstrue the AllVid Proposal

Several commenters raise objections that the Commission and other commenters have already addressed. Many of these are premised on simple misunderstandings of the Commission’s proposal, or of some of the arguments raised in its favor. In this section, Public Knowledge (“PK”) and the New America Foundation (“NAF”) respond to a few of them.

A. AllVid Does Not Turn MVPDs into “Dumb Pipes”

Contrary to repeated claims in the docket, AllVid does not turn MVPDs into “dumb pipes.” It places no limits on the services MVPDs may offer. It does not prevent MVPDs from leasing or selling their own devices to their customers—it even allows them to market their devices to the customers of *other* MVPDs. In no way does it prevent

¹ 47 U.S.C. §§ 544a, 549 (2006).

MVPDs from offering their own rich user interfaces to consumers. Nor does anything in the AllVid model “eviscerat[e] the MVPD’s right to provide a comprehensive service of its own.”² Under AllVid, MVPDs remain as free as they are today to act as “video retailers” who offer their customers a complete, packaged experience, and there is no doubt that many consumers might prefer the ease of dealing with a single provider of services and equipment over contending with the choice and variety that a competitive marketplace provides.³ The AllVid approach merely allows competitors to have the same opportunities to innovate as the MVPDs themselves, giving MVPD customers the option of selecting competitive devices, if they find them more suitable.

To accomplish this, the FCC must adopt nationwide standards that allow new entrants to enter the video device market without first getting permission. One of the chief ways to achieve this is “common reliance,” i.e., the requirement that MVPDs use the same communication methods to connect to their own video devices that competitors use. While common reliance neither advantages nor disadvantages MVPDs with respect to third-party competitors, failure to enforce common reliance significantly disadvantages third-party competitors. Indeed, it is the failure to enforce common reliance that hobbled CableCARD.

Creating opportunities for new entrants to the video device market is only a means to an end: increasing and improving consumer choice. AllVid does not merely

² Comments of Time Warner Cable Inc. in Video Device Competition, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 12 (filed July 13, 2010) [hereinafter Comments of Time Warner Cable].

³ See generally BARRY SCHWARTZ, THE PARADOX OF CHOICE (Ecco 2003).

divide the pie among a larger group of companies, and it is not an attempt to “subsidize”⁴ consumer electronics (“CE”) manufacturers on the backs of MVPDs, turning them into “mere providers of inputs”⁵ supplying “raw material”⁶ to their competitors. AllVid merely assures that *consumers* can access the programming they have already paid for on the devices of their choice, in the way that they choose.

It is not clear why so many MVPDs fear giving their customers choice. If they are proud of their video services, they should not. If they offer a compelling user experience, people will choose to use it. Some MVPDs may wish to dictate how consumers consume video programming even after they have paid for it, and would prefer to deny their customers the benefits of a competitive market for video devices. This should not dissuade the Commission from promoting the public interest by implementing AllVid.

B. The Economic Literature Is Not As Clear As the Economists Incorporated Study Suggests

The National Cable & Telecommunications Association (“NCTA”) submitted into the record a study by Economists Incorporated in support of its views.⁷ This study relies on interesting work on the economics of standardization and compatibility. However, it slightly misstates the import of some of the work it cites. The study writes it is “well supported” that “premature standardization” can lead to a “loss of innovation and

⁴ See Comments of AT&T Inc. in Video Device Competition, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 23 (filed July 13, 2010) [hereinafter Comments of AT&T].

⁵ Comments of Time Warner Cable at 12.

⁶ Both AT&T and DirecTV use this phrase, apparently intending it to be pejorative. See Comments of DirecTV, Inc. in Video Device Competition, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 23 (filed July 13, 2010) [hereinafter Comments of DirecTV]; Comments of AT&T at 23.

⁷ Ex Parte Submission of NCTA in Video Device Competition, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (filed July 19, 2010).

variety.”⁸ Among the papers it cites for that claim is “Converters, Compatibility, and the Control of Interfaces” by Joseph Farrell and Garth Saloner, a paper that carefully draws a distinction between “standardization” and “means other than standardization” such as “translators, emulators, adapters, or gateway technologies” as means of attaining compatibility.⁹ They cite Paul A. David and Julie Ann Bunn for the proposition that

[N]etwork technologies are not static, and initial technical incompatibilities between variant formulations of such technologies . . . can have their economic importance mitigated as a result of the *ex post* introduction of gateway innovations.¹⁰

It is ironic, therefore, that a study that purports to critique AllVid’s gateway model in fact lends it support. One of the primary motivations of AllVid was precisely to *avoid* standardizing MVPD technologies and to allow MVPDs to rely on a technologically heterogeneous mix of delivery methods.¹¹ The Farrell and Saloner paper goes on to describe how, like all things, the gateway approach itself may not be without costs. But the two primary costs it gives are inapplicable to the AllVid model. The “single firm” problem seem inapplicable to AllVid, because AllVid adapters will not be supplied or designed by a single dominant MVPD (although this analysis may be

⁸ *Econ. Analysis of the Regulation of MVPD Navigation Devices in Video Device Competition*, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 17 (filed July 19, 2010) [hereinafter *Economists Inc. Study*].

⁹ Joseph Farrell & Garth Saloner, *Converters, Compatibility, and the Control of Interfaces*, J. OF INDUS. ECON., Vol. 40, No. 1, Mar. 1992, at 9, 10.

¹⁰ Farrell & Saloner, *supra* note 9, at 11 (citing Paul A. David & Julie Ann Bunn, *The Economics of Gateway Technologies and Network Evolution: Lessons from Electricity Supply History*, 3 INFO. ECON. & POL’Y 1165 (1988)).

¹¹ AllVid standardizes one thing: the method by which the AllVid adapter communicates with video devices. The record seems to suggest that some subset of DLNA would be best suited for adapter-to-video device communication. But the innovation in video devices that this allows would swamp any loss of diversity in home video delivery methods and, most importantly, the AllVid approach would allow continued innovation in MVPR-to-adapter communication.

interesting as regards the control of CableCARD by CableLabs). Furthermore, because MVPDs *already* use converters in the form of their proprietary set-top boxes, AllVid does not necessarily entail extra protocol conversion costs or deployment costs.¹²

The Economists Incorporated study also purports to find a “contradiction” in comments filed by Public Knowledge et al., who have claimed that cable-supplied video devices are both costly and subsidized.¹³ But these views are not contradictory: Many cable systems subsidize their own equipment by failing to give consumers who do not use cable-supplied equipment a discount, or by continuing to charge consumers rental fees even after the costs (including a return on capital) have been recovered. Other cable systems may also charge consumers who use certain cable-supplied devices, such as DVRs, monthly fees that are out of line with the retail costs of similar devices. The study also criticizes an analysis of the monthly rental fees for an RCN-supplied DVR with the retail cost of a TiVo DVR, concluding that after TiVo service charges are accounted for, the RCN-supplied unit is cheaper.¹⁴ However, this approach unfairly conflates equipment and service fees on TiVo’s side, but not on RCN’s side. A true “total cost of ownership” approach would have to account for all fees, both equipment and service, as well as the kinds of services received. The fact is that the specifics vary per MVPD. This is one

¹² Relatedly, Katz and Shapiro write that there are two methods to achieve compatibility, standardization and adapters, and that “[w]ith adapters, the principle cost is that of the adapters themselves, plus the fact that the adapters may work imperfectly.” Michael L. Katz & Carl Shapiro, *Competition and Network Effects*, J. OF ECON. PERSP., Vol. 8, No. 2, Spring 1994, pp. 93-115. Common reliance assures that MVPDs will have an incentive to deploy properly functioning AllVid adapters, and the costs of deploying an AllVid adapter would probably be less than the cost of deploying a full-featured set-top box (that necessarily already includes MVPD-specific hardware and performs conversion functions).

¹³ *Economists Inc. Study* at 9.

¹⁴ *Economists Inc. Study* at 5.

reason why the Commission, if it hopes to promote third-party device competition, must adopt industry-wide rules preventing device subsidization and ensuring that MVPD equipment and third-party equipment each have a fair shake.

C. AllVid Will Not Subject MVPDs to Legal Jeopardy or Imperil the Availability of Content

MVPDs may well have contracts with content companies that make certain representations about the nature of the MVPD's service. While it is difficult for outsiders to know whether any contracts would be "violated" by AllVid without seeing them, it is straightforward that basic legal principles will ensure that MVPDs will not be subject to "legal jeopardy"¹⁵ as a result of government action.¹⁶ If AllVid is adopted, therefore, MVPDs can comply with the law of the land without fear of being sued. Furthermore, contrary to some claims, it is unlikely that content companies would choose to hold their content back from *all* MVPDs as a result of greater video device competition. No other video distribution channel has the reach or capabilities of MVPDs, and there is no evidence in the record to suggest that independent channels or broadcasters would choose to either withhold their programming from MVPDs or shut down rather than live in a world with greater video device competition.

D. AllVid Will Help, Rather Than Hinder, Broadband Convergence and Adoption

Cisco suggests that, as proposed, AllVid could hinder IP convergence, and suggests that the Commission allow AllVid adapters to be integrated with other devices

¹⁵ Comments of DirecTV at 18.

¹⁶ Such contracts could be considered unenforceable due to "frustration of purpose." *See Krell v. Henry*, [1903] 2 K.B. 740 (Eng.); Restatement (Second) of Contracts § 265 (1981).

(for example, broadband modems or home routers).¹⁷ PK and NAF have previously focused on the importance of common reliance, and the necessity that AllVid adapters not contain functionality that allows MVPDs to use proprietary “back doors” to deliver video service.¹⁸ But the Commission should be cautious of Cisco’s proposal because it, and not AllVid as currently proposed, could hinder IP convergence. This is because Cisco’s vision of IP convergence only sees video, voice, and broadband converging as part of a “triple play” of services all offered by a single company.¹⁹ Of course, this vision disadvantages DBS MVPDs who are not also ISPs. It is a pessimistic view where all communications services are largely provided by a handful of dominant providers, where consumers cannot even mix and match services from cable and telcos. AllVid takes a different approach: IP convergence happens in the home, on the home IP network. A user may provide broadband Internet connectivity to his home network from a DSL modem, and video capability from an AllVid adapter. He may then add network-attached storage devices to the home network, loaded with content downloaded from iTunes. He then accesses these different services, in addition to over-the-top content, on a competitively-provided video device, on a unified user interface that is able to seamlessly integrate different sources of content and connectivity. IP convergence is not the same as a triple play, and if it wishes to promote competition and consumer choice the Commission

¹⁷ Comments of Cisco Systems, Inc. in Video Device Competition, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 11, 18-19 (filed July 13, 2010) [hereinafter Comments of Cisco Systems].

¹⁸ Comments of Public Knowledge and the New American Foundation in Video Device Competition, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 13-19 (filed July 13, 2010) [hereinafter Comments of PK and NAF].

¹⁹ Comments of Cisco Systems at 16.

should be cautious of ideas that view AllVid as merely one service offered by an integrated communications behemoth.

AT&T tries to rebut the Commission's finding that AllVid would encourage AllVid adoption. It offers a button-down, "eat your vegetables" view of communications technology where the only way to promote broadband adoption is to promote its "relevance among certain user groups" by giving them "Internet skills training to point [them] to online job training or employment, government services, or educational opportunities," not access to competitive video devices and the services they may allow.²⁰ This is a very limited understanding of "relevance," and one that AT&T's own experience should counsel against. The recent smartphone explosion, which AT&T helped instigate, is premised on making the Internet more accessible through friendlier, more intuitive devices. Mobile broadband use did not begin to skyrocket because users were able to access "government services" on the go. Nor was it driven by the work-related data traffic of Blackberry-toting professionals. Mobile Internet was embraced by the mainstream, and its usage soared, once ordinary users were able to use it to access *fun* content—entertainment and social media. The Commission's presumption, then, that similar forces could increase home broadband use is entirely justified.

II. The Commission Has a Legal Obligation to Promote MVPD Video Device Competition

MVPDs seem reluctant to admit that the Commission has no choice whether to promote MVPD video device competition—it's the law. DirecTV, for instance, does not cite the Commission's statutory obligation to promote video device competition at all in

²⁰ Comments of AT&T at 15.

its comments.²¹ AT&T at least acknowledges that the FCC has a lawful end when it writes that “[i]t is one thing for the Commission to empower CE manufacturers to join [the video] market.”²² It merely objects to any specific means that the Commission might take to accomplish that goal. It further writes that MVPDs “simply will not support”²³ measures that are designed to allow CE manufacturers to differentiate their products by offering custom user interfaces that access MVPD content. It is not clear what this means. One would hope that, if the Commission determines that AllVid is the best way for it to implement provisions of the Communications Act, MVPDs would comply. Commenters may disagree with the law, but both they and the Commission are bound by it.

A. The Commission is Justified in Recognizing that MVPDs are Different Than Other Video Providers

In addition to being a legal requirement, it makes good policy sense to subject MVPDs to legal obligations that would not cover other video providers, such as rental services or over-the-top video providers such as Netflix and Youtube. Unlike over-the-top video providers, MVPDs control the physical facilities over which their content is transmitted.²⁴ Unlike broadband ISPs,²⁵ they also control the content that flows over their wires or spectrum. The facilities-based, integrated, one-to-many architecture of MVPDs

²¹ See Comments of DirecTV. These comments cite 47 U.S.C. § 549 only once, and in reference to a limitation on the Commission’s authority that it does not propose to bypass. *Id.* at 17 n.53.

²² Comments of AT&T at 23.

²³ Comments of AT&T at 3.

²⁴ See *Sky Angel U.S., LLC, Order*, 25 FCC Rcd. 3879 (2010). Congress also recognized that the “physical characteristics” of cable transmission—which today apply equally to DBS and telco MVPDs—justified increased legal obligations for cable operators. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 632 (1994).

²⁵ Of course, many MVPDs are *also* broadband ISPs, but the usually law regulates MVPDs as MVPDs, ISPs as ISPs, and so on. Any cross-cutting obligations (e.g., that a company not degrade over-the-top video offerings by its competitors in order to advantage its MVPD offerings) are not within the scope of this proceeding.

gives them advantages in delivering video programming that are unmatched by other media today.²⁶ Congress and the FCC have recognized the special nature of MVPDs' offerings for many years, and have long subjected them to heightened legal scrutiny and obligations. For instance, MVPDs have long been required to carry local broadcast signals on the demand of the broadcaster. When it enacted the "must carry" rules, Congress realized that the theoretical option of switching the "mode" of a television set (by switching from cable to an antenna) was not sufficient to protect the interest it saw in promoting local broadcast services.²⁷ When the Supreme Court upheld the must-carry rules, it expressly recognized that "the cable industry today stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources."²⁸ Joined by other MVPDs, cable remains central to American culture. At least 87% of American households subscribe to an MVPD service,²⁹ and MVPD programming is a primary source for entertainment, news, and educational programming. Because of their unique physical characteristics and cultural importance, MVPDs are "affected with a public interest" in a way that other video providers are not.³⁰ Therefore, numerous regulatory requirements—

²⁶ While PK and NAF would not go as far as he does, Mark Cuban is one prominent exponent of the view that one-to-many distribution has advantages unmatched online. See Mark Cuban, *The Great Internet Video Lie*, BLOG MAVERICK (Jan. 27, 2009, 1:25 PM), <http://blogmaverick.com/2009/01/27/the-great-internet-video-lie>.

²⁷ Similarly, the Commission should find that the option of switching a video device from an "MVPD mode" to a user interface controlled by the CE manufacturer is not sufficient to promote video device competition—it must allow third-parties to offer integrated user interfaces.

²⁸ *Turner Broad. Sys.*, 512 U.S. at 627.

²⁹ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Thirteenth Annual Report*, 24 FCC Rcd. 542, ¶ 9 (2009).

³⁰ See *Munn v. Illinois*, 94 U.S. 113, 126 (1887) (

including AllVid—are justifiably applied to MVPDs, but not to other kinds of video services.

B. Despite Competition in Adjacent Markets, the FCC Should Still Promote Competition in the Market for Third-Party Devices That Access MVPD Services

In attempting to persuade the FCC that it does not need to implement the law, some commenters have pointed to evidence of competition between MVPDs.³¹ Some have pointed to the emergence of new forms of video distribution, or competition between consumer electronics manufacturers.³² But any competition in these adjacent markets does not show that there is adequate competition in the relevant market: home video devices that access MVPD programming. To the contrary, that market appears to be moving toward a model that further entrenches the leased approach, whereby MVPD services can only be accessed through MVPD-provided navigation devices or user

[W]hen private property is “affected with a public interest, it ceases to be *juris privati* only.” This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

³¹ See, e.g., Comments of NCTA in Video Device Competition, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at ii (filed July 13, 2010) [hereinafter Comments of NCTA].

³² *Id.*; Comments of AT&T at 12; Comments of Motorola, Inc. in Video Device Competition, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 2 (filed July 13, 2010).

interfaces.³³ This runs contrary to the law and sound policy. It limits innovation, hinders broadband convergence, and burdens MVPD customers with equipment rental fees indefinitely. Developments in adjacent markets should serve as evidence that competition in the video marketplace is possible, and should encourage the FCC to act by issuing a Notice of Proposed Rulemaking enacting AllVid quickly.

III. Some Commenters Present Flawed Copyright Arguments

The Commission's jurisdiction and expertise on copyright matters are limited. The Commission has taken steps to prevent content protection technologies, such as "selectable output control,"³⁴ from interfering with the video marketplace, and it has noted that overbroad copyright laws can interfere with the deployment and use of broadband technologies.³⁵ But its most high-profile attempt to impose content protection technologies was found to exceed its jurisdiction.³⁶ The Commission should continue to recognize that, at times, overbroad copyright measures and content protection technologies can interfere with its policies, and it should not allow specious or incomplete copyright arguments to dissuade it from fulfilling its statutory responsibilities.

³³ DirecTV, for instance, promotes leasing over selling its equipment. *See* DirecTV, Lease Offers for Equipment, http://support.directv.com/app/answers/detail/a_id/750 (last visited Aug. 11, 2010); Comments of DirecTV at 4. Retail cable devices running cable-designed middleware also appear to have lost support. *See* Jeff Baumgartner, *Panasonic Tunes Out Tru2way TVs*, LIGHT READING, July 30, 2010, http://www.lightreading.com/document.asp?doc_id=195169 ("The tru2way TV experiment appears to be over now that Panasonic has reportedly scrubbed its line of widescreen TVs with tru2way built-in."). This is further evidence that MVPD-directed efforts to promote video device competition are unlikely to gain much ground.

³⁴ 47 C.F.R. § 76.1903.

³⁵ *See* FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 248 (2010).

³⁶ *See American Library Ass'n v. FCC*, 406 F. 3d 689 (D.C. Cir. 2005).

A. Open Platforms Do Not Lead to Piracy

MPAA and Time Warner Cable both offer arguments that, if valid, would be applicable to open devices generally. They fear that allowing users and device designers greater freedom could lead some of them to use unlawful sources of content. (This argument is not about AllVid per se, but about video devices that would connect to MVPDs through AllVid.) Commenters have frequently cited the desirability of the seamless integration of, for example, MVPD and over-the-top content; these parties worry that legal and illegal sources could similarly be seamlessly integrated. It is unlikely that device manufacturers would go out of their way to promote unlawfulness: after all, many modern hardware devices (like Apple's iPhone) are tightly controlled environments. More fundamentally, the Commission should be wary of arguments that, if taken to their logical conclusion, would counsel banning the Internet and personal computers. While it is certainly true that the digital revolution has been challenging to some incumbent business models, it is equally clear that this same revolution has grown the market and created new opportunities.

B. Some "Security" Technologies Can Hinder Interoperability

Massillon Cable interestingly observes that many of the problems that AllVid tries to solve are caused by content protection technologies such as scrambling, encryption, or DRM.³⁷ While important to content owners, these technologies can hinder interoperability between devices and restrict lawful uses of content. Massillon evades many of these difficulties by limiting its use of many of these technologies, for example, by providing ClearQAM signals that digital TVs can access directly. When considering

³⁷ See generally Comments of Massillon Cable in Video Device Competition, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (filed July 13, 2010).

the complex issues raised by content protection technology, the Commission should consider Massillon's point that excessive dependence on these methods can be counterproductive. Oftentimes the route to compatibility is less reliance on fragile encryption technology.

Preliminarily, the Commission should be careful to distinguish between access control technologies and post-transmission use technologies. The two issues are technologically and conceptually separable. The first is a set of technologies designed to prevent unauthorized access to MVPD services, and the Commission is precluded from interfering with them.³⁸ The second are technologies designed to limit the uses consumers can put content to once it is in their homes. As these technologies do not constitute "communication by wire or radio," the Commission lacks jurisdiction over them.³⁹ Nothing about the AllVid proposal would interfere with MVPD's continued ability to secure their services, because security technologies would be implemented in head-ends and on the "proprietary side" of an AllVid adapter. Competitive devices need not be aware of or designed to any particular access control technology, since they would only interact with the AllVid adapter on the standards-based "consumer side" of the AllVid adapter. By contrast, although post-transmission access control technologies generally complicate the interoperability of devices, AllVid does not interfere with voluntary industry efforts in this regard, such as DECE's UltraViolet. While AllVid does allow

³⁸ 47 U.S.C. § 549(b). NCTA's statement that this statute prevents the FCC from interfering with "license relationships and chains of trust," Comments of NCTA at 47, is not accurate. This statute simply prevents the FCC from interfering with technologies that prevent theft of service. AllVid does nothing to imperil this kind of security, as MVPDs can continue to use the exact same technologies they do today on the "proprietary side" of the AllVid adapter.

³⁹ See *American Library Ass'n v. FCC*, 406 F. 3d 689, 692-93 (D.C. Cir. 2005).

unaffiliated third parties to deploy devices without first consulting with MVPDs, compatible DRM schemes do not require privity between CE manufacturers and MVPDs. While PK and NAF are generally opposed to DRM technologies as ineffective solutions that run contrary to user rights and the long-term interests of content creators, and would certainly raise legal objections to attempts to get the Commission to *require* such technologies, it is only fair to point out that the AllVid proposal does not itself limit self-help measures by content creators.

C. Electronic Programming Guide Data Is Not Itself Copyrightable, Regardless of Whether It Is Contained in a Compilation That Is Protected by Copyright

As suggested in the NOI,⁴⁰ the factual information contained in electronic programming guides (“EPGs”) is not protectable by copyright. To be copyrightable, a work must be an “original work[] of authorship fixed in any tangible medium of expression.”⁴¹ Facts are not copyrightable because they lack sufficient originality,⁴² and here the EPG data are merely facts reflective of the content delivered by MVPDs. Accordingly, the use of EPG data on video devices does not constitute an unauthorized derivative work⁴³ because video device manufacturers need no such authorization to use uncopyrightable facts.

The uncopyrightable nature of facts holds true regardless of the time and labor used to collect such facts. As partial justification for asserting copyright protection over

⁴⁰ See Video Device Competition, *Notice of Inquiry*, 24 FCC Rcd. 4275, ¶ 44 (2010).

⁴¹ 17 U.S.C. § 102; *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (holding that the names, towns, and telephone numbers of utility subscribers are uncopyrightable facts).

⁴² *Feist Publ’ns*, 499 U.S. at 344.

⁴³ Comments of AT&T at 54-55.

its EPG data, AT&T cites the resources it expends in selecting programming.⁴⁴ However, the fact that AT&T exerts significant effort to select programming does not grant it a monopoly over the *fact* that it has selected such programming. Indeed, the Supreme Court has explicitly ruled that “[t]he primary objective of copyright is not to reward the *labor* of authors,” but rather to promote the sciences and useful arts by protecting works of original expression.⁴⁵ If the Copyright Act protected raw facts simply because they reflected significant labor, the statute would exceed its constitutional boundaries.⁴⁶

Although compilations of facts *may* have sufficient originality to warrant copyright protection,⁴⁷ this protection extends only to the actual selection and arrangement, not to the underlying facts themselves.⁴⁸ Thus, the facts contained within the compilations are not themselves protected by the compilation’s overall copyright.⁴⁹

AT&T contends that MVPDs hold copyrights both in their service offerings and “presentations” related to those offerings.⁵⁰ Although AT&T’s U-verse service is itself not copyrightable—it is an intangible service, not an “original work[] of authorship fixed

⁴⁴ Comments of AT&T at 52. Similarly, as part of its copyrightability argument, Rovi Corporation describes its extensive labor to aggregate and confirm information for its data guides. Comments of Rovi Corp. in Video Device Competition, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 5-6 (filed July 13, 2010) [hereinafter Comments of Rovi Corp.]. Rovi does, however, also contend that it uses creativity in recording the proper metadata for characteristics like the show’s title. Comments of Rovi at 6. Contrary to Rovi’s assertions, the accurate transcription of a show’s pre-determined title does not contain sufficient originality to qualify for copyright protection.

⁴⁵ *Feist Publ’ns*, 499 U.S. at 349-50 (emphasis added).

⁴⁶ *Feist Publ’ns*, 499 U.S. at 349-50.

⁴⁷ *Feist Publ’ns*, 499 U.S. at 350.

⁴⁸ 17 U.S.C. § 103(b) (“The copyright in [a compilation or derivative work] is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”).

⁴⁹ *Feist Publ’ns*, 499 U.S. at 359. Here, NCTA’s argument that a “broadcast day” may be protected as a compilation or collective work is irrelevant. Comments of NCTA at 49 n.74. The EPG guide is not reproducing the actual collection of content in a video programming line-up, but rather simply reporting to consumers what that content is.

⁵⁰ Comments of AT&T at 51-52.

in any tangible medium of expression,”⁵¹—it is possible that certain elements of the user interface design are protectable.⁵² This, however, has absolutely no bearing on other video devices’ ability to use the same underlying facts as the U-verse service to convey information about video programming. While the compilation and graphic design of an EPG may be protectable, the facts that it uses are no more copyrightable than they would be on their own. On this point, AT&T’s citation to *National Geographic Society v. Classified Geographic, Inc.* is inapposite.⁵³ In that case, the defendant distributed entire articles from *The National Geographic Magazine*, which the court noted were clearly protected under copyright.⁵⁴ Even putting aside the unanimous precedent from other jurisdictions criticizing the rule in *National Geographic Society* on this point,⁵⁵ the conveyance of EPG data is entirely distinguishable because it uses factual information, not copyrightable material.

AllVid’s use of EPG data is much more analogous to the use of factual information from a computer database. Courts have held that even if the database and computer system is owned by the plaintiff, the information housed within it remains uncopyrightable, regardless of any contractual terms between the parties.⁵⁶ For example,

⁵¹ 17 U.S.C. § 101.

⁵² Comments of AT&T at 52-54.

⁵³ Comments of AT&T at 55-56.

⁵⁴ 27 F. Supp. 655, 660 (D. Mass. 1939).

⁵⁵ *C.M. Paula Co. v. Logan*, 355 F. Supp. 189 (N.D. Tex. 1973) (holding that manufacturer did not violate copyright in pictorial works by transferring designs to plaques for re-sale); *Burke & Van Heuseun, Inc. v. Arrow Drug, Inc.*, 233 F. Supp. 881 (1964) (citing but declining to follow *Nat’l Geographic Soc’y*, 27 F. Supp 655, and holding that defendants did not violate copyright by separating copyrighted works from another product and selling them separately).

⁵⁶ *See, e.g., Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 418 (2d Cir. 2004) (holding that defendant’s use of database information in violation of contract did not constitute copyright infringement). Additionally, and in contrast Rovi’s argument that licenses for data access prove that EPG data is copyrightable, contractual usage terms between private parties have no bearing on the inquiry as to whether material is protected as intellectual property. *Compare id. with* Comments of Rovi Corp. at 6.

when Ticketmaster brought suit against Tickets.com for crawling its website and scraping ticket information therein, the court held that the collected information (including event names, dates, times, ticket prices, and URL locations) was not protectable by copyright and accordingly dismissed Ticketmaster’s copyright claim on summary judgment.⁵⁷ Thus, neither the compilation of programming data nor contractual licensing agreements may prevent AllVid video devices from conveying bare facts to consumers.

In any event, as PK and NAF explained in their earlier comments in this proceeding, the Commission has authority to require MVPDs to share any copyrightable information that did exist in the EPG data in order to promote competition and increase access for consumers.⁵⁸ The Communications Act grants to the Commission the authority to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions.”⁵⁹ Under this authority, the Commission may take necessary actions to fulfill its primary statutory responsibilities, here embodied in sections 629⁶⁰ and 624A of the Act.⁶¹ Mandating the sharing of EPG data would facilitate access and navigation for consumers, while encouraging competition in the video device marketplace.

⁵⁷ *Ticketmaster Corp. v. Tickets.com, Inc.*, 2003 WL 21406289 at *1 (C.D. Cal. 2003). The court also noted that it was no further violation to collect such information systematically and automatically, as Tickets.com’s actions were equivalent to sitting in front of a computer screen, writing down factual information manually, and publishing that information elsewhere. *Id.* at *4.

⁵⁸ Comments of PK and NAF at 23-24.

⁵⁹ 47 U.S.C. § 154(i).

⁶⁰ 47 U.S.C. § 549.

⁶¹ 47 U.S.C. § 544A.

Conclusion

The Commission should not be swayed by faulty arguments that often mischaracterize or misunderstand its proposals, and it should quickly take the next step in implementing AllVid by issuing a Notice of Proposed Rulemaking.

Respectfully submitted,

Public Knowledge

New America Foundation

August 12, 2010