



National Cable & Telecommunications Association
25 Massachusetts Avenue, NW – Suite 100
Washington, DC 20001
(202) 222-2300

www.ncta.com

Neal M. Goldberg
Vice President and General Counsel

(202) 222-2445
(202) 222-2446 Fax

February 8, 2011

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte, MB 10-91, CS Docket No. 97-80, PP Docket No. 00-67

Dear Ms. Dortch:

In a January 26, 2011, *ex parte* letter, Sony, Google, CEA, and others called for the Commission to adopt “technical standards that enable any device to present a unified interface,” combining the content from MVPD services, non-MVPD services, and home network content.¹ They went on to ask for rules that would require MVPDs to disassemble the programming, data, and program guide metadata used to create and provide each MVPD’s service, so that each consumer electronics (“CE”) manufacturer may remake them into a service of its own design. Their letter claims that the absence of this approach has led to “archaic” and “artificial” distinctions among devices and services in the marketplace and that the Commission could take the steps they advocate pursuant to Section 629 of the Communications Act. These claims are without merit. As we describe below:

- Access to MVPD offerings via retail devices, more than ever contemplated by Section 629, is already well underway. CE manufacturers have successfully negotiated complex programming distribution rights directly with content providers and have enabled a vast array of retail video devices to provide access to video content online. MVPDs are bringing MVPD offerings to retail devices via Internet-based televisions, tablets and PCs in a “shopping mall” experience, the way Netflix appears on Blu-Ray players. From the cloud, from gateways, from CableCARD-enabled devices, from home networks, and from other new distribution paths, the marketplace is meeting consumer demand for access to video content across a range of platforms. And all of these market-based approaches offer access to video content in a way that respects the complicated programming and distribution rights defining the retail offerings of all video providers, including MVPDs.

¹ See Letter from Robert S. Schwartz, Counsel, Consumer Electronics Association (CEA) and the Consumer Electronics Retailers Coalition (CERC), to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (Jan. 26, 2011) (describing *ex parte* meeting between representatives of Sony Electronics, Google, Public Knowledge, Free Press, Media Access, CEA and CERC and FCC personnel) (“*Sony/Google Letter*”).

- Sony/Google want much more, which will yield much less for consumers. They seek a Commission mandate for CE device manufacturers to extract piece parts of a multichannel offering for each CE manufacturer to remake into a service of its own design, as though each MVPD were a wholesale distributor of all content in all windows for delivery to all devices on every platform. Such a mandate would not only violate the affiliation agreements and intellectual property licenses under which multichannel programming is obtained and retailed, but it would also stunt the innovations that are taking place to provide consumers flexible access to content that programmers are incented to offer. The programming contracts and licenses define such critical features as channel placement, the type of advertising suitable for use with a particular programmer's brand, uniform nationwide presentation of programming, and how MVPDs market to and retain their subscribers. Such terms cannot be replaced by merely passing along a "copy once" command, as Sony/Google suggest.
- Sony/Google claim that these market realities are "archaic" and "artificial." But rights holders make programming and other intellectual property available based on specific distribution paths, security, audiences, and advertising opportunities. If a distributor (such as an MVPD under the Sony/Google scheme) cannot respect its license terms, a content provider can simply stop making content available to the distributor – and to all of that distributor's customers.
- Moreover, Sony/Google are not proposing "may the best device win." Amazon, Apple, Netflix, Sony, and Google make their content available only through a retail presence that they themselves define. They do not open their storerooms and databases for MVPDs to take as wholesale inventory and make a part of a "unified offering" in a "store" provided by an MVPD. Under the Sony/Google proposal, retail device manufacturers could convert MVPDs into wholesale suppliers, but MVPDs would have no comparable right to incorporate the content of other types of video distributors into their own offerings – thereby locking traditional MVPDs out of a potential new video marketplace.
- In a nutshell, Sony/Google are asking the Commission to ignore copyright, patent, trademark, contract privity, licensing, and other legal rights and limitations that have been thoroughly documented in this proceeding. Section 629 is not a blank check that can override these legal limitations and the fundamental policy objectives (*e.g.*, protection of intellectual property rights) underlying them.
- The Sony/Google approach is also inconsistent with the mandate of Section 629 in that it disclaims any obligation by CE manufacturers to provide devices that would give customers access to the MVPD video services as they are offered to MVPD customers by the MVPD. As the terms of the statute make clear, Section 629 only authorizes the Commission to adopt regulations that would facilitate the commercial availability of devices to be "used by consumers to access multichannel video programming and other services *offered* over multichannel video programming systems."² The piece parts that

² 47 C.F.R. §549(a) (emphasis added).

the Sony/Google approach contemplates being made available in CE retail devices are not services “offered over [MVPD] systems.”

Today’s Marketplace Reflects a Wide Variety of Video Devices That Respect the Complicated Programming and Distribution Rights of All Video Providers

Contrary to the Sony/Google claims, their call for technology mandates is rooted in a world long past. As NCTA’s Kyle McSillarow recounted in his January 27, 2011 letter to Chairman Genachowski,³ the 2011 Consumer Electronics Show punctuated the astonishing progress that has been made toward the availability of multichannel content to consumers where and when they want it on a wide variety of video devices; the emergence of the video shopping mall Chairman Genachowski envisioned a year ago; and other, unpredictable ways to enjoy video programming.

If the Commission accepts Sony/Google’s invitation to observe “what is possible”⁴ in the video device marketplace, it will find that CE manufacturers have successfully developed and deployed a wide range of Internet-based televisions and other video devices that can distribute a wide range of online video. They have successfully negotiated complex programming and distribution rights directly with content providers to turn televisions, tablets, PCs, and gaming devices into online video distribution networks.⁵ To be sure, not every online video provider has been able to obtain rights to all content in all release windows for delivery to all devices. Amazon, Apple iTunes, Sony PlayStation Network, Hulu, Microsoft Xbox, and Netflix all have their own programming deals; Google accesses and displays only the web content either voluntarily made available to it, or for which it has contracted (as with Twitter), rather than having automatic access to all web content. And Facebook launched with its own domain not subject to Google search.⁶ The negotiation of programming rights is as complicated for online video providers as it is for MVPDs. But they have been able to create a staggering variety of service offerings and video devices, and there is no doubt that their variety and services will continue to increase exponentially even without any regulatory mandate.

For their part, MVPDs have joined with Samsung, Sony, Apple, Microsoft, TiVo, and many others to combine the worlds of retail devices and MVPD service.⁷ One recent example is Samsung’s CES 2011 demonstration of a new “Smart TV” in which Comcast and Time Warner Cable icons appear alongside icons for Netflix and Hulu, in a shopping mall format similar to

³ See Letter from Kyle McSillarow, President and CEO, National Cable & Telecommunications Association, to Chairman Julius Genachowski, FCC, MB Docket No. 10-91, CS Docket No. 97-80 (Jan. 26, 2011) (describing marketplace developments and innovation over the past year) (“*NCTA Letter*”).

⁴ *Sony/Google Letter* at 1.

⁵ See *NCTA Letter* at 7-8 (discussing negotiations between manufacturers and content providers to provide content directly to devices).

⁶ See *id.*; Comments of NCTA on the Commission’s Notice of Inquiry, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (filed July 13, 2010) at 15-17 (“*NCTA NOI Comments*”).

⁷ See *NCTA Letter* at 3-7.

smart phones apps, on a platform which has the capacity to search across all sources – linear cable programming, video on demand, content recorded on a DVR, and Internet sources.⁸ As with Netflix, by clicking on the icon, the consumer enters a distinctive retail experience designed and delivered by the MVPD as a retail offering. Also at CES 2011, Time Warner Cable announced an agreement to deliver its content directly to Sony televisions.⁹ But there is also a vibrant mix of other video delivery approaches in the marketplace – enabling access to video content via retail devices from the cloud, from gateways, from CableCARD-enabled devices, from home networks, and from new distribution paths like the UltraViolet digital rights system – for retail devices to access video from many sources and through many vibrant and varied stores.¹⁰ What these approaches share is that they offer access to multichannel service in a way that respects the complicated programming and distribution rights of all video providers, whether they be MVPDs or new platforms for distribution of video content. These innovative approaches have emerged precisely *because* the Commission has not stifled innovation by imposing prescriptive technology mandates during a period of intense experimentation.¹¹ Avoiding such technology mandates is faithful to the instruction Congress gave when it enacted Section 629:

⁸ Time Warner Cable and Samsung’s “Smart TV” are DTLA-compliant, with the Samsung devices including enough browser, memory, and processor horsepower to run cable services through an HTML5 cable guide. The same approach could be followed by any manufacturer – but many manufacturers are pursuing other approaches. For example, the iPad is not DLNA compliant, so cable applications are written in the native code of the iPad, and then must be approved by Apple. Other devices are sold with very limited browsers, memory, and processors, and would be unable to render cable service.

⁹ See Todd Spangler, *CES: Sony Plans IPTV Hookup With Time Warner Cable*, MULTICHANNEL NEWS, Jan. 5, 2011, available at http://www.multichannel.com/article/461932-CES_Sony_Plans_IPTV_Hookup_With_Time_Warner_Cable.php (“Time Warner Cable will deliver its entire video programming lineup to customers with Sony’s Internet-connected Bravia HDTVs this year, the consumer-electronics giant announced at the Consumer Electronics Show.”); Brian Stelter, *A TV-Internet Marriage Awaits Blessings of All Parties*, N.Y. TIMES, Jan. 9, 2011, available at <http://www.nytimes.com/2011/01/10/business/media/10tv.html> (“Time Warner Cable, one of the biggest cable operators, announced that it would start delivering programming via its network straight into some Sony and Samsung television sets, removing the need for a set-top cable television box.”).

¹⁰ See, e.g., *NCTA Letter* at 3 (noting that innovation has led to “a diverse mix of approaches – video from MVPDs, video from the Internet or other edge devices, home networking of content, and a wide variety of video devices in (and out of) the home that can access content”); *id.* at 10 (explaining the UltraViolet digital rights system). Late last year, a wide range of MVPDs and CE/IT companies agreed upon an HTML5-based remote user interface approach that would allow networked retail devices to receive the full retail MVPD experience, including MVPD interactive services. See *id.* at 9 (discussing developments in home networking).

¹¹ See MICHAEL G. BAUMANN & JOHN M. GALE, *ECONOMIC ANALYSIS OF THE REGULATION OF MVPD NAVIGATION DEVICES* 16 (2010), available at http://www.ei.com/downloadables/mgb_report.pdf (“The process of regulatory standard setting can also delay innovation and entry in addition to possibly locking in sub-optimal technology. The mere presence of the regulatory process may discourage market-based and voluntary attempts at improving services and technology.”); T. RANDOLPH BEARD ET AL., *WOBBLING BACK TO THE FIRE: ECONOMIC EFFICIENCY AND THE CREATION OF A RETAIL MARKET FOR SET-TOP BOXES* 36 (2010), available at <http://www.phoenix-center.org/pcpp/PCPP41Final.pdf> (concluding that “a regulation-forced commercial market for such devices [set-top equipment] is likely to produce higher prices and lower economic and consumer welfare”).

that “the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services.”¹²

Sony/Google Are Asking the Commission to Ignore Copyright, Patent, Trademark, Contract Privity, Licensing, and Other Legal Rights and Limitations

What Sony/Google seek is quite different from access to MVPD services via retail devices, which was contemplated by Section 629 and is already well underway. They seek a Commission mandate for CE device manufacturers to extract from MVPDs the disassembled piece parts of multichannel service – programs, metadata, applications, and more – for each CE manufacturer to remake into a service of its own design, as though each MVPD were a wholesale distributor of all content in all windows for delivery to all devices on every platform. As we will explain, this approach runs afoul of the very concerns that Sony/Google tell the Commission not to worry about.

Sony’s own studio was among the first to agree that programming rights do not work the way Sony/Google propose.¹³ In the real market, content suppliers license their content for distribution on MVPD platforms through private bilateral affiliation agreements that define placement of the channel in the electronic programming guide (“EPG”), tier placement of the channel, content descriptions in the EPG, the type of advertising suitable for use with that programmer’s brand, and many other terms.¹⁴ As content providers have told the Commission, “these requirements ensure a uniform nationwide presentation, and provide consumers with a consistent experience that they value.”¹⁵

On behalf of Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment, Inc., MPAA explained how dismantling those restrictions would break the “chain of privity” in contracts and licenses that allow content owners to preserve the value of the brands they have built, and would instead invite commercials or

¹² H.R. REP. NO. 104-458, at 181 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 194.

¹³ See Letter from Alicia W. Smith, Senior Vice President, The Smith-Free Group, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (July 1, 2010) at 2 (discussing *ex parte* presentation by Sony Pictures Entertainment Inc. and noting concerns regarding EPG designs and search mechanisms).

¹⁴ Comments of the Motion Picture Ass’n of Am., Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (filed July 13, 2010) at 8 (“MPAA NOI Comments”) (“Private agreements between MVPDs and content providers also cover a wide range of content terms, such as placement of channel in the electronic programming guide (EPG), tier placement of the channel, content description in the EPG, and advertising conditions associated with the content.”)

¹⁵ MPAA NOI Comments at 8-9. See Comments of Time Warner Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (filed July 13, 2010) at 8 (explaining that “content creators and programmers invest considerable time and resources to create a uniform consumer experience nationwide, regardless of the specific equipment or software used by consumers to view the content”) (“Time Warner NOI Comments”); see also NCTA NOI Comments at 37-39, 44; Reply Comments of NCTA, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (filed Aug. 12, 2010) at 9-10, 12, 13-14 (“NCTA NOI Reply Comments”).

inappropriate content to be overlaid on its members' content and "the purveyor of counterfeit goods to set up shop alongside respected brand-name retailers."¹⁶ Time Warner explained how "content creators and program networks are constantly adding new features, enhancements, and services to video content to improve the consumer's experience," but that "AllVid" interfaces "may not respect the intended presentation of multichannel video content and in the process may damage the brands that consumers trust."¹⁷ "Content creators and programmers," explained Time Warner, "develop different models for the distribution of their content to provide consumers with choices and flexibility [with] different price points, time frames and distribution media. ... [D]evices throughout the distribution chain must be able to recognize and honor their parameters."¹⁸ If those models are disregarded, "inappropriate content or commercials could be overlaid onto children's programming or premium ad-free environments."¹⁹ It specifically warned that "the disaggregation of program networks ... would fundamentally disrupt the editorial discretion and strategy that programmers exercise in the assembly of their content."²⁰

Programs are licensed to distributors as retailers, not as wholesalers who can supply every other platform, device, or customer base regardless of license terms or ownership. The content providers have explained in their comments to the Commission and demonstrated in the marketplace that programming rights must be obtained from the copyright owner.²¹ Rovi has explained that program guide data is not owned by the MVPDs, but must be licensed from them.²² MVPDs have explained that their services are distinctive, carefully integrated services that subscribers expect and pay for, and are an essential part of how MVPDs market to and retain their subscribers.²³ Sony/Google disclaim any obligation by CE manufacturers to provide

¹⁶ *MPAA NOI Comments* at 8-9.

¹⁷ *Time Warner NOI Comments* at 8-9.

¹⁸ *Id.*

¹⁹ *Time Warner NOI Comments* at 9.

²⁰ *Time Warner NOI Comments* at 9 ("In addition, to the extent that the user interface in All-Vid retail equipment could permit the disaggregation of program networks, it would fundamentally disrupt the editorial discretion and strategy that programmers exercise in the assembly of their content. This could ultimately undermine the ability of programmers to sustain the production of high quality content that consumers demand, and it could impair the brands that content producers and programmers work hard to create and sustain, and that consumers rely on and value.")

²¹ *See MPAA NOI Comments* at 7-8; *Time Warner NOI Comments* at 7-10; Reply Comments of the Motion Picture Ass'n of Am., Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (filed Aug. 12, 2010) at 7 (stating that "content providers remain concerned that the proposed AllVid concept would ... impinge on private contractual and licensing agreements on the protection of MVPD content and services").

²² *See Comments of Rovi Corp.*, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (filed July 13, 2010) at 4-6 (stating that Rovi's guide data is protected by copyright and is licensed to cable operators for use on devices); *see also NCTA NOI Comments* at 40-41 (explaining that "[c]able operators do not own the electronic program guide metadata they use in their own guides," and that "the structure of the guide itself is subject to complex intellectual property rights"); Letter from Stephen H. Kay, Executive Vice President & General Counsel, Gemstar-TV Guide, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, MB Docket No. 00-67 (Nov. 14, 2007).

²³ *See, e.g., NCTA NOI Reply Comments* at 30-36.

devices that would give customers access to those MVPD services as provided by the MVPD, despite the fact that Section 629 only authorizes the Commission to adopt regulations that would facilitate development of a market for devices to be “used by consumers to access multichannel video programming and other services *offered* over multichannel video programming systems.”²⁴

Sony/Google claim that the Commission can rely on a “secure copy protection handoff” and that concerns over “privity of contract” are “misplaced.”²⁵ But none of these complex license terms – channel location, tier placement, suitable ads, security, uniform presentation – are protected by passing along a “copy once” command. Despite their vague assurances to the contrary,²⁶ the Sony/Google approach would in fact “diminish” and “denigrate” the rights that define the video programming marketplace. Sony/Google are asking the Commission to ignore copyright, patent, trademark, contract privity, licensing, and legal rights and limitations that have been thoroughly documented in this proceeding.²⁷ Section 629 is not a blank check that overrides these crucial limitations.²⁸

Sony/Google Are Asking the Commission to Lock MVPDs Out of Tomorrow’s Video Marketplace

Sony/Google seek to discount this marketplace and legal reality as “archaic” and “artificial” and in need of Commission intervention.²⁹ But even if it had the authority, the Commission would be ill-advised to ignore these realities, because the Commission would be risking both the availability of programming to consumers and the competition among video providers that is fueling innovative offerings to consumers.

First, any approach that undermines the confidence of content owners in their ability to enforce the terms under which they license content risks reducing the flow of content to all of that provider’s customers. A content provider may be willing to make programming available to multichannel distributors based on distribution paths, security, audiences, and advertising opportunities particular to that distributor, and to make programming available to other platforms on other terms appropriate to the security, audiences, and advertising opportunities particular to that platform. If licensing terms are ignored, a content provider can simply stop making content

²⁴ 47 C.F.R. §549(a) (emphasis added).

²⁵ *Sony/Google Letter* at 2.

²⁶ *See id.* (suggesting that “an AllVid rulemaking that references private sector industry standards... would not diminish or denigrate the rights of MVPDs”).

²⁷ *See NCTA NOI Comments* at 47-52; *NCTA NOI Reply Comments* at 30-36 (addressing legal concerns raised by the Commission in the NOI).

²⁸ *See, e.g.,* 47 U.S.C. § 549(f) (“Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before February 8, 1996.”).

²⁹ *Sony/Google Letter* at 2, 3.

available to the platform that cannot or will not respect its license terms – making that programming unavailable to all of that distributor’s customers.³⁰

Second, the offerings of MVPDs and online video distributors (“OVDs”) are all assembled, crafted, and sold in an environment in which each provider operates as a retailer—but in which Sony/Google are trying to convert only MVPDs into wholesalers. Sony/Google inexplicably claim that cable operators and other MVPDs could offer all MVPD programming and all Internet content through a single unified user interface.³¹ That is absurd. Amazon, Apple, Netflix, Sony, Google, and many others negotiate to obtain their own rights, and to construct retail offerings that they define. They do not open their storerooms and databases for MVPDs to take as inventory and make a part of their own “unified offering” in another “store.” Instead, these video providers make their content available, if at all, only through a retail presence that they themselves define. But Sony/Google wish to deny that same right to MVPDs. Under the Sony/Google approach, MVPD content could be dismantled, assimilated into OVD service, used to sell advertising, and treated as content licensed to that OVD even if no content provider has ever authorized that OVD to distribute that content. In contrast, under the Sony/Google scheme, MVPDs would have no comparable right to incorporate the content of other video distributors such as OVD providers into their own offerings. As one commenter put it, this approach “threatens to close off tomorrow’s video marketplace to MVPDs – in the name of opening it to CE manufacturers.”³²

³⁰ See, e.g., *NCTA NOI Comments* at 37-39, 44; *NCTA NOI Reply Comments* at 13-14; *MPAA NOI Comments* at 8-9.

³¹ See *Sony/Google Letter* at 2 (claiming that MVPDs may offer “any device” with a “unified user interface that offers choices of both MVPD and non-MVPD programs and services”).

³² Comments of AT&T Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (filed July 13, 2010) at 19.

Conclusion

As NCTA's Kyle McSarrow explained in his recent letter, allowing MVPDs the continued flexibility to innovate in network technology, services, and in a variety of delivery systems, and to select their own interface solutions, is essential in a dynamic market with rapidly changing technology and consumer demand. The staggering innovation that has arisen in just the last year has emerged without any regulatory mandate, and it has provided a path for access to retail multichannel service in a way that actually respects the complicated programming and distribution rights of all types of video providers. Mandating specific technical requirements, particularly requirements that do not respect programming rights, would undermine – not promote – innovation. Using the seven consumer principles NCTA has previously advanced remains the most promising framework for assessing inter-industry progress and for promoting innovation and progress in the video services and video devices marketplaces.

Sincerely,

/s/ Neal M. Goldberg

Neal M. Goldberg

cc. Marilyn Sonn
Bill Lake
Nancy Murphy
Mary Beth Murphy
Steve Broeckaert
Allison Neplokh
Jeff Neumann
Brendan Murray