

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

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

**Reply Comments of
the Motion Picture Association of America
and SAG-AFTRA**

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Executive Summary

We appreciate Chairman Wheeler's commitment to honor copyright law, the agreements between programmers and multichannel video programming distributors, and the security of content in his effort to promote set-top box competition. Unfortunately, the proposal itself falls short of that commitment, abrogating the rights of copyright holders and jeopardizing the creation of high-value programming.

The Motion Picture Association of America and SAG-AFTRA are committed to encouraging the availability of content to audiences through a wide variety of platforms and distributors. We file these reply comments to urge that in pursuit of its goal of increasing consumer choice in the video marketplace, the FCC not undermine the production and distribution of the very content audiences are endeavoring to watch.

Our ask is straightforward: that in seeking to ensure set-top box competition, the FCC not give third parties our content without our permission and without compensation, not put our content at risk of theft, and not threaten the economics underpinning the creation of programming that is fostering a Second Golden Age of Television.

And in addition to being our ask, it's the law.

The Copyright Act grants copyright holders the exclusive rights to reproduce, distribute, publicly perform, or publicly display copyrighted works, as well as to prepare derivative works based on copyrighted works. Yet the proposal would compel MVPDs to transmit disaggregated streams of copyright holders' works to all third-party set-top box, Internet application, and web service providers, for those providers to use and manipulate without the copyright holders' permission.

Section 629 of the Communications Act prohibits the FCC, when promoting set-top box competition, from jeopardizing content security or impeding programmers' rights to prevent content theft. Yet the proposal would force copyright holders to allow third-party set-top box,

Internet application, and web service providers to use content outside of the license agreements necessary to effectively administer and enforce content protection. It would limit the content protection systems copyright holders may use. It would eliminate safeguards that prevent an influx of Internet piracy into the MVPD world. And it would make it easier for devices and applications that traffic in pirated content to interact with MVPD programming and flourish.

The First Amendment guarantees the right of speakers to determine what to say and how to say it. Yet the proposal would force programmers to allow third-party set-top box, Internet application, and web service providers not only to convey their programming, but also to alter the content and the way it is presented.

The Fifth Amendment prohibits the government from taking property without just compensation. Yet the proposal would force programmers to allow third-party set-top box, Internet application, and web service providers to use and manipulate their content for no compensation.

These are among the reasons the overwhelming majority of the creative community has expressed reservations about the proposal, and among the reasons more than 150 Republicans and Democrats from the House and Senate have sent letters of concern to the FCC. The National Telecommunications and Information Administration flagged similar issues in FCC comments it filed. It stated that the final rule should “ensure[] the security of multichannel video programming,” and observed that license agreements “typically include a variety of provisions beyond price—issues such as brand protection, advertising, program availability windows, and duration—that are important to enabling parties to defray the costs of producing, acquiring, and distributing that programming.”

In attempting to refute the argument that the proposal abrogates copyright holders’ rights, proponents focus on potential violations by the third-party set-top box, Internet application, and web service providers. They argue either that the providers’ conduct would not violate copyright

holders' exclusive rights or, if it does, that copyright holders are not harmed because the proposal does not disrupt their rights and remedies, allowing them still to bring suit.

This overlooks that—before we even analyze whether third-party conduct violates copyright holders' exclusive rights—the FCC would already have abrogated copyright holders' exclusive rights by adopting the proposed rules. The proposal would compel MVPDs to transmit licensed programming to third parties for manipulation in ways not permitted by the license agreements, creating a zero-rate compulsory license, something the FCC does not have authority to grant. It would interfere with the ability of copyright holders to enter into exclusive arrangements or windowing agreements. And it would jeopardize the ability of copyright holders to adopt technical protection measures.

Their argument also misses the point that a main purpose of copyright law and license agreements is to promote the creation and dissemination of content by preventing misappropriation of another's work; litigation is an after-the-fact remedy. The proponents' position is tantamount to arguing that forcing people to leave open their doors and let strangers in would not infringe their rights or cause them harm because if someone damaged or walked off with their things they could still sue for theft.

Proponents argue that the proposal merely allows third-party devices and applications to render programming, and that consumer use of device or application functions never entails a public performance in violation of a copyright holder's exclusive rights. This overlooks that the proposal does not involve passive rendering of programming, but transmissions of copyrighted works that the FCC compels to be made in ways not authorized by the copyright holder, as well as similarly unauthorized manipulation of content. It also ignores the lessons of the Supreme Court's *Aereo* decision, which held that facilitating device or application functions through unlicensed transmission of copyrighted works to a broad array of subscribers can be a public performance,

regardless of the precise technology employed and even if the transmissions are received or initiated by the viewer.

The fair use doctrine is also unavailing. First, the issue is the compelled transmission by the FCC, as well as the exploitation and manipulation of content by commercial entities, not the mere provision of third-party devices, applications and services, or the conduct of the viewers. Courts have rejected commercial entities' attempts to stand in the shoes of their customers making noncommercial uses. Second, fair use cannot be definitively determined until adjudicated by a court, based on the specific facts of the case after the conduct has already occurred. The doctrine cannot be used anticipatorily to bless all manner of potential encroachments on content owners' rights. And third, the Copyright Office has repeatedly concluded that existing precedent does not establish space- and format-shifting as fair uses.

Perhaps the easiest way to understand that the proposal abrogates copyright holders' exclusive rights is to recognize that, today, an Internet application or web service provider would not be able to obtain a movie or television programming for distribution without entering into a license agreement with the copyright holder. But if the FCC adopts these rules, an Internet application or web service provider would be able to obtain without a license agreement any content that an MVPD happens to carry, when serving viewers who also happen to subscribe to that MVPD. This is a large universe of content, and the intent of some Internet application and web service providers to avoid entering into license agreements may well underlie their support for the proposal.

Even if the proposal did not abrogate copyright holders' exclusive rights under copyright law, Section 629 of the Communications Act does not give the FCC the authority to adopt it. Section 629(a) grants the FCC limited power to ensure the availability from third parties of the equipment that subscribers to MVPD services may choose to access the MVPD service in a secure

manner. It does not authorize the FCC to require MVPDs to transmit content to third parties in a form that the third parties can manipulate as inputs into a different service, or to facilitate the use of Internet applications and web services, as opposed to devices.

High-quality and innovative programming is expensive to produce, and license and advertising revenue is what funds production and acquisition. Allowing third parties to use that programming at zero cost—as well as to monetize and manipulate it in ways contrary to the license agreements that protect advertising and other programmer revenues—would jeopardize the creation of the programming in the first place. Thus, the proposal would make it harder to raise the capital needed to produce quality content, and reduce profits that might otherwise be invested into the next production. Exacerbating matters, the decrease in production and drop in revenues would reduce the compensation available to directors, artists, and crew; jeopardize their livelihood, making it harder to find talent for production of the next project; and further decrease production and revenues, creating a non-virtuous circle for creators and audiences alike.

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I. Compelling MVPDs to Transmit Disaggregated Streams of Licensed Programming to all Third-Party Set-Top Box, Internet Application, and Web Service Providers for Their Exploitation and Manipulation Without Copyright Holders' Permission Would Abrogate Copyright Holders' Exclusive Rights

We appreciate Chairman Wheeler's commitment—in his effort to promote set-top box competition—to honor copyright law, the agreements between programmers and multichannel video programming distributors, and the security of content,¹ as we said in our initial comments.² Unfortunately, the proposal itself falls short of that commitment, abrogating copyright holders' rights and jeopardizing the creation of high-value programming.

Indeed, copyright issues and harm to the programming ecosystem are among the reasons the overwhelming majority of the creative community has expressed reservations about the proposal,³ and among the reasons more than 150 Republicans and Democrats from the House and

¹ See Statement of Chairman Tom Wheeler at 2, *In re* Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42, *NPRM*, FCC 16-18 (rel. Feb. 18, 2016) (stating that the proposal “will not interfere with the business relationships or content agreements between MVPDs and their content providers or between MVPDs and their customers” nor “open up content to compromised security”). See also Remarks of Jon Sallet, General Counsel, FCC, “20th Anniversary of the Telecom Act,” *as prepared for delivery at Incompas 2016 Policy Summit*, Newseum, Washington, D.C. (Feb. 10, 2016), at https://apps.fcc.gov/edocs_public/attachmatch/DOC-337681A1.pdf (stating that “[i]t is always critical that copyright be protected, not just as a matter of law, but in recognition of its role in powering innovation, investment and, of course, the creative arts. The Chairman's proposal fully respects the copyright interests of content creators.”); *NPRM* at ¶¶ 17, 80 (stating that the proposal's “goal is to preserve the contractual arrangements between programmers and MVPDs, while creating additional opportunities for programmers, who may not have an arrangement with an MVPD, to reach consumers,” and that “nothing in [the] proposal will change or affect content creators' rights or remedies under copyright law.”).

² See MPAA and SAG-AFTRA comments at i, 4.

³ Creative community parties expressing concern include 21st Century Fox; A&E Television Networks; the American Association of Independent Music; the American Federation of Musicians; C-SPAN; CBS Corporation; the Copyright Alliance; Creative Future; Crossings TV; the DGA; Feel Good TV; Freemind Ventures; Hola! LA, Latin Heat Media; the Independent Film & Television Alliance; Creators of Color, including: Val Benning, Roger Bobb, Bailey Brown,

Senate have sent letters of concern to the FCC.⁴ The National Telecommunications and Information Administration flagged similar issues in FCC comments it filed, stating that the final rule should “respect[] the security and integrity of MVPD programming,”⁵ as well as “permit[] continued innovation in the development and distribution of that programming.”⁶ The NTIA

Holly Carter, Devon Franklin, Tamra Goins, Rob Hardy, Elijah Kelley, Rasheena Nash, Elrick Williams; the International Alliance of Theatrical Stage Employees; Manteca Media; Mnet America; the MPAA; the National Music Publishers Association; Perfect Day Media; the RIAA; Revolt Media and TV; SAG-AFTRA; Scripps Network Interactive; SoundExchange, Inc; Stateless Media; The Walt Disney Company & ESPN; Time Warner; TV One; Viacom; and VMe TV.

Creative community parties expressing support include BLQBOX; Fandor; GFNTV; iSwop Networks; Kweli TV; the National Black Programming Consortium; New England Broadband; The Townsend Group; UnifyMe.TV; Urban Broadcasting Company; and the Writers Guild of America, West.

⁴ See, e.g., Letter from Rep. Yvette Clark *et al.* to FCC Chairman Tom Wheeler (Dec. 1, 2015) (expressing concerns of 30 members of the Congressional Black Caucus); Letter from Senate Commerce Committee Ranking Member Bill Nelson to FCC Chairman Tom Wheeler (Feb. 12, 2016); Letter from Reps. Tom Marino and Ted Deutch to FCC Chairman Tom Wheeler (Feb. 12, 2016); Letter from Rep. Tony Cardenas *et al.* to FCC Chairman Tom Wheeler (Feb. 16, 2016) (expressing concerns of 25 members of the Congressional Hispanic Caucus and House moderates); Letter from Reps. Doug Collins, Judy Chu., *et al.* to the FCC (Feb. 16, 2016) (expressing concerns of five Republicans and Democrats on the House Judiciary Committee); Letter from Reps. Jerry McNerney, Joe Barton, and Renee Ellmers to FCC Chairman Tom Wheeler (Feb. 17, 2016); Letter from House Subcommittee on Communications and Technology Chairman Greg Walden and Rep. Yvette Clark to GAO (April 1, 2016) (seeking a study on the potential harms of the proposal); Letter from Senate Commerce Committee Chairman John Thune to FCC Chairman Tom Wheeler (April 22, 2016); Letter from House Subcommittee on Courts, Intellectual Property and the Internet Chairman Darrell Issa to FCC Chairman Tom Wheeler (April 22, 2016); Letter from Reps. Doug Collins, Ted Deutch, *et al.* to FCC Chairman Tom Wheeler (April 22, 2016) (expressing concern of 23 House Republicans and Democrats); Letter from House Judiciary Committee Chairman Bob Goodlatte and Ranking Member John Conyers to FCC Chairman Tom Wheeler (April 29, 2016); Letter from Reps. Kevin Cramer, Kurt Schrader, *et al.* to FCC Chairman Tom Wheeler (May 5, 2016) (expressing concern of 60 House Republicans and Democrats); Letter from Sen. Orin Hatch to FCC Chairman Tom Wheeler (May 18, 2016); Letter from Sen. Robert Menendez to FCC Chairman Tom Wheeler (May 19, 2016); Letter from Senate Judiciary Committee Chairman Charles Grassley to FCC Chairman Tom Wheeler (May 23, 2016). See also Written Statement of Sen. Patrick Leahy, Ranking Member, Senate Judiciary Committee, Hearing Before the Senate Judiciary Subcommittee on Privacy, Technology and the Law on “Examining the Proposed FCC Privacy Rules,” at 2 (May 11, 2016).

⁵ NTIA comments at 4.

⁶ *Id.* at 2.

observed that license agreements between program producers and MVPDs “typically include a variety of provisions beyond price—issues such as brand protection, advertising, program availability windows, and duration—that are important to enabling parties to defray the costs of producing, acquiring, and distributing that programming.”⁷

Even a few stakeholders supporting the proposal have emphasized the importance of respecting copyright and programming agreements.⁸ In some cases, however, they appear to be construing “copyright” narrowly to include just the right of copyright holders to secure content, and not their rights over how to disseminate it.⁹

The Motion Picture Association of America, as the voice and advocate of the American motion picture, home video, and television industries, and SAG-AFTRA, as the representative of approximately 160,000 actors, announcers, broadcast journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists and other media professionals, are committed to encouraging the availability of content to audiences through a wide variety of platforms and distributors. We file these reply comments to urge that in pursuit of its goal of increasing consumer choice in the video marketplace, the FCC not undermine the production and distribution of the very content audiences are endeavoring to watch.

⁷ *Id.* at 4 (citing MPAA Comments a 7, *In re* Request for Comment by the Media Bureau on the Report of the Downloadable Security Technology Advisory Committee, MB Docket No. 15-64 (filed Oct. 8, 2015)).

⁸ *See* Amazon comments at 5; Google comments at 4; DiMA comments at 5; Writers Guild of America, West comments at 11-12.

⁹ *See* Amazon comments at 5-6, 8-9; DiMA comments at 5; Google comments at 4-5.

A. Proposal Proponents Overlook that the FCC's Action Would Abrogate Copyright Holders' Exclusive Rights

Many parties expressed concern in the initial comments that the proposal would abrogate copyright holders' exclusive rights under the Copyright Act.¹⁰ In attempting to refute that argument, proponents concede that the Commission does not have authority to alter copyright law, but argue that the proposal does not alter copyright holders' rights and remedies.¹¹ Consequently, they claim, copyright holders can still sue third parties that violate their exclusive rights, and so are not harmed by the proposal.¹² This misses the point that a main purpose of copyright law and license agreements is to promote the creation and dissemination of content by preventing misappropriation of another's work; litigation is an after-the-fact remedy. The proponents' position is tantamount to arguing that forcing people to leave open their doors and let strangers in would not infringe their rights or cause them harm because if someone damaged or walked off with their things they could still sue for theft.

This argument also ignores that the primary way copyright holders exercise and protect their rights is through license agreements, not litigation, as we explained in our comments.¹³ Prospective tailoring of license agreements enables copyright holders to negotiate distribution deals specifically designed to the economic and technical realities of a potential partner's particular

¹⁰ See MPAA and SAG-AFTRA comments at 4-12; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 35-41; AT&T comments at 77-82; ATR comments at 1; Comcast and NBCUniversal comments at 47-51, 76; C-Span comments at 1-2; CWA comments at 3-4; EchoStar and DISH comments at 23; Free State Foundation comments at 3, 13-14; ICLE comments at 28-30; IFTA comments at 3-5; Intellectual Property Law Scholars comments at 4-5; IPI comments at 3-4; ITTA comments at 21-24; MMTC *et al.* comments at 2-3; NCTA comments at 33-40, 53-54, 58, 93, 167-68; Small Business & Entrepreneurship Council comments at 2-3; TechFreedom and CEI comments at 39-42; TPA *et al.* comments at 3-4; U.S. Chamber of Commerce comments at 2.

¹¹ See EFF comments at 3.

¹² See CCIA comments at 24.

¹³ See MPAA and SAG-AFTRA comments at 17-18.

business model. Limiting options to after-the-fact copyright litigation against parties with whom the copyright holder has no contractual relationship prevents such tailoring. Litigation is also expensive and time consuming, especially when the plaintiff has no prior relationship with the opposing party, and it could be difficult to sue some third parties, particularly if they are abroad. Moreover, forcing years of uncertainty tied to litigation will only impede, not foster, innovation, as well as slow the development of competition.

Most fundamentally, however, proponents' argument overlooks that—before we even analyze whether particular third-party conduct under the proposal would violate copyright law—the FCC would have already abrogated copyright holders' exclusive rights by adopting the proposed rules.

The Copyright Act grants copyright holders the exclusive rights to reproduce, distribute, publicly perform, publicly display, or prepare derivative works of, copyrighted works.¹⁴ Thus, before an MVPD may transmit copyrighted content, it must obtain the necessary licenses from programmers. Those licenses are memorialized in license agreements that specify the manner in which MVPDs may transmit the programming, and include terms on matters such as compensation, content manipulation, program presentation, channel placement, advertising, and security. The MVPD may not transmit that programming in another way, or to another party for use in that party's own commercial services, except as allowed by the license agreement.

Under the proposal, however, the FCC would compel MVPDs to transmit to all third-party set-top box, Internet application, and web service providers all the content that copyright holders' license to MVPDs, and allow those third parties to use and manipulate the content in ways not

¹⁴ See 17 U.S.C. § 106.

authorized by the license agreements—without the copyright holders’ permission and without compensating them.¹⁵ In that regard, the proposal shares the salient, programming-related flaw of the FCC’s ill-fated, 2010 AllVid proposal¹⁶—which was so called because it mandated MVPDs to pass through to third parties “all the video” they licensed—despite proposal proponent’s attempts to distinguish the two.¹⁷ What the proposal would require would abrogate copyright holders’ exclusive rights and is tantamount to an unrestricted, zero-rate compulsory license, something the FCC does not have the authority to grant, as we explained in our initial comments to this proceeding.¹⁸

Copyright holders’ exclusive rights under the Copyright Act also allow them to enter into exclusive license arrangements, making particular distributors the sole sources of their content, either altogether, for a limited time, in a particular territory, on a particular platform, or on a particular device.¹⁹ The proposal, however, imposes a parity requirement mandating that MVPDs

¹⁵ See *NPRM* at ¶¶ 1-2, 11, 21-22, 24, 35-37, 40.

¹⁶ See *In re Video Device Competition*, MB Docket No. 10-91, *Notice of Inquiry*, FCC 10-60 (rel. April 21, 2010).

¹⁷ See CCIA comments at 16-17.

¹⁸ See MPAA and SAG-AFTRA comments at 4-9.

¹⁹ See *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (stating that “[t]he owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.”); *In re Indep. Serv. Organizations Antitrust Litig.*, 85 F. Supp. 2d 1130, 1176 (D. Kan. 2000) (stating that “[a] copyright gives its holder the right to refuse to license its original expression to others.”). Cf. *Orson Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3rd Cir. 1999) (partially pre-empting a Pennsylvania statute restricting a motion picture distributor from entering into an exclusive first-run exhibition agreement with an exhibitor because it violated the distributor’s rights under the Copyright Act); *Syufy Enterprises v. National General Theatres*, 575 F.2d 233, 236 (9th Cir. 1978) (supporting proposition that a movie distributor may license a movie exclusively); *Naumkeag Theatres Co. v. New England Theatres, Inc.*, 345 F.2d 910, 912 (1st Cir. 1965) (supporting proposition that a movie distributor is under no obligation to make its motion picture available in all markets at the same time); *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101, 124 (5th Cir. 1954) (stating that “a distributor has the right to license or refuse to license his film to any exhibitor, pursuant to his own reasoning, so

enable all third parties to offer all the programming the MVPDs have licensed and in all the formats and to all the devices the MVPDs may offer, and prohibits “discrimination” based on affiliation of the device.²⁰ This means once a copyright holder has allowed a particular MVPD to offer a movie or television show to a viewer in a particular way, it must allow an unlimited range of third parties to do the same. As we explained in our comments, this would impermissibly treat copyright holders like common carriers and violate their rights to enter into exclusive arrangements or windowing agreements.²¹

This interferes with the copyright holders’ rights to decide whether and how to license content to particular distributors. At the same time, it potentially interferes with any of the copyright holders’ existing license agreements that grant other distributors exclusivity. The NPRM similarly contemplates interfering with license agreements themselves when it asks whether the Commission should prohibit copyright holders from negotiating provisions regarding the devices on which MVPDs may display content,²² as we also pointed out in our comments.²³ Some proposal proponents also suggest that the FCC should place limits on content license terms,²⁴ a clear attempt to abrogate copyright holders’ rights and something beyond the authority of the FCC.

long as he acts independently”); *Westway Theatre Inc. v. Twentieth Century Fox Film Corp.*, 30 F. Supp. 830, 836-37 (D. Md.) (stating “it is clearly the established law that the distributors have the right to select their customers, and therefore the plaintiff has no absolute right to demand exhibition rights for the pictures of any of the distributors”) (citations omitted), *aff’d*, 113 F.2d 932 (4th Cir. 1940).

²⁰ See NPRM at ¶¶ 63, 66-68.

²¹ See MPAA and SAG-AFTRA comments at 9-11.

²² See NPRM at ¶ 18.

²³ See MPAA and SAG-AFTRA comments at 11.

²⁴ See TiVo comments at ii, 20-21.

Finally, we observed that the proposal conflicts with Section 1201 of the Digital Millennium Copyright Act.²⁵ Section 1201 recognizes and buttresses copyright holders' rights to secure their works with the technological protection measures of their choice by making it unlawful to circumvent those protection measures or to traffic in technologies, products, services, or devices aimed primarily at circumventing them.²⁶ The proposal, however, would prohibit an MVPD—when securing content transmitted through third-party devices, Internet applications, and web services—from using a content protection measure negotiated with a copyright holder if the measure was not FCC “compliant.”

To be compliant, a content protection measure must be licensed under FCC-acceptable terms, “independently controlled” by an organization not affiliated with MVPDs, and have an unaffiliated trust authority.²⁷ This restricts the content protection measures copyright holders can implement for content transmitted through third-party devices, Internet applications, and web services, and may even mean that copyright holders have little or no input into the content protection measures these third parties use, despite contractual conditions with MVPDs to the contrary. Congress chose to give copyright holders protection against circumvention of technological protection measures and created a process for providing exemptions: the triennial rulemaking.²⁸ The proposal would rewrite Section 1201 for third-party set-top box, Internet application, and web service providers when they are offering copyright holders' video programming.

²⁵ See MPAA and SAG-AFTRA comments at 11-12.

²⁶ See 17 U.S.C. § 1201(a)(1)(A), (a)(2).

²⁷ See *NPRM* at ¶¶ 2, 50, 58-60.

²⁸ See 17 U.S.C. § 1201(a)(1)(C).

Proponents try to counter arguments that the proposal would abrogate copyright holders' rights by pointing out that Congress passed both the Copyright Act and the Communications Act, that one does not trump the other, and thus that no rule the FCC adopts under Section 629 can conflict with copyright law.²⁹ They further claim that license provisions restricting whether and how MVPDs may transmit programming to third parties are not enforceable: 1) because, by definition, third parties are not parties to the agreements with MVPDs;³⁰ and 2) because the provisions amount only to ancillary contractual requirements, not an exercise of rights under the Copyright Act, and that such ancillary contractual requirements could not take precedence over Section 629 of the Communications Act and the FCC's new rules.³¹

Proponents are correct that the Communications Act and Copyright Act do not trump one another, but that means that the Communications Act can no more trump the Copyright Act than the Copyright Act can trump the Communications Act. Absent explicit language, the two must be read in concert. Because the Communications Act does not authorize the FCC to alter copyright law, the FCC may not read Section 629 as altering the rights of copyright holders, and the FCC may not adopt rules under Section 629 that do so. Requiring MVPDs to provide copyrighted content to third parties in a manner not permitted by their licenses would abrogate core copyright holder rights, because the permitted scope of distribution of a copyrighted work falls squarely within the exclusive rights set forth in Section 106 of the Copyright Act, as we explained above and in our initial comments.³²

²⁹ See Public Knowledge comments at 10-11.

³⁰ See TiVo comments at ii, 19-20

³¹ See Public Knowledge comments at 12; EFF comments at 4-5.

³² See MPAA and SAG-AFTRA comments at 4-8.

Additionally, license terms regarding content retransmission, manipulation of content, program presentation, content security, and permissible devices are material conditions that underpin a copyright holder’s decision whether to license content to a given distributor, and thus connect directly to the copyright holder’s right “to do and to authorize”³³ the exercise of its exclusive rights.³⁴ And the fact that the device, application, and service providers are not parties to the programming agreements with MVPDs is precisely why it is inappropriate to compel access to content outside such agreements.

Consequently, proponents have it exactly backwards: the license provisions would not impermissibly take precedence over Section 629 of the Communications Act; the new rules would impermissibly take precedence over the Copyright Act.

The FCC regulation cannot change copyright law, as proposal proponents have conceded.³⁵ Had Congress wanted copyright law to operate differently in Section 629 matters, it either would have explicitly said the FCC could take action notwithstanding the provisions of the Copyright Act, or created a complementary compulsory license, as it has for cable and satellite retransmission of local broadcast signals and satellite retransmission of distant broadcast signals into local markets.³⁶ And even in the case of those cable and satellite compulsory licenses, Congress still prohibited alteration of the programming or advertisements.³⁷

³³ 17 U.S.C. § 106.

³⁴ See Nimmer and Dodd, *Modern Licensing Law* § 6.5 (Westlaw 2015); *Foad Consulting Group v. Musil Govan Azzalino*, 270 F.3d 821, 827 (9th Cir. 2001).

³⁵ See EFF comments at 3.

³⁶ See 17 U.S.C. §§ 111, 119, 122.

³⁷ See *id.* §§ 111(c)(3), 119(a)(5), 122(e).

Cannons of legislative construction require interpreting statutes to avoid conflict with each other wherever possible, and the far simpler reading is that Congress intended the FCC to find ways to promote set-top box competition under Section 629 without interfering with the exclusive rights the Copyright Act grants to copyright holders. This is especially true in light of Section 629(f), which states that “[n]othing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996,”³⁸ as we explained in our initial comments.³⁹

B. The Proposal Does Not Require the Mere Rendering of Content on Third-Party Devices, But Rather the Transmission and Manipulation of Licensed Content for Use in a Different Service

Proponents also argue that the proposal does not raise copyright concerns because it does not allow third parties to engage in unauthorized copying, distribution, or performances of copyrighted works in violation of copyright holders’ exclusive rights under Section 106 of the Copyright Act.⁴⁰ In particular, they argue that provision and consumer use of device or application functions never implicate the exclusive rights of a copyright holder because they do not amount to a public performance.⁴¹ But this ignores the role the proposal would have in facilitating unauthorized use by third-party devices, Internet applications, and web services. Indeed, the

³⁸ 47 U.S.C. § 549(f).

³⁹ See MPAA and SAG-AFTRA comments at 13.

⁴⁰ EFF comments at 3-4; Public Knowledge comments at 11.

⁴¹ EFF comments at 3 (citing *Fortnightly*, 392 U.S. 390, 398; *Sony*, 464 US 417, 456 (1984); *Cartoon Network*, 536 F.3d 121 (2d. Cir. 2008)); Public Knowledge Comments at 11-12.

proposal is doing more than merely enabling third parties to render programming, as we and other commenters pointed out.⁴²

First, rather than third parties simply passively receiving programming in the way the MVPDs would otherwise transmit it, the FCC would be compelling MVPDs to provide special, disaggregated transmissions to third parties—pursuant to particular, yet-to-be-developed open standards and security protocols—for the third parties to use as components of their own services. Second, the proposal explicitly refuses to prohibit third parties from changing “service presentation (such as agreed-upon channel lineups and neighborhoods), replac[ing] or alter[ing] advertising, or improperly manipul[at]ing content.”⁴³ Manipulating content and altering program presentation without the permission of the copyright holder directly implicates the copyright holder’s exclusive rights.⁴⁴ Third, the proponents are ignoring the lessons of the Supreme Court’s decision in *Aereo*, which demonstrates that facilitating device or application functions through unlicensed transmission of copyrighted works to a broad array of subscribers can be a public performance,

⁴² See MPAA and SAG-AFTRA comments at 6-8; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 11-12; ANA comments at 4; AT&T comments at 37-45; Comcast and NBCUniversal comments at 10, 48, 74, 76-79, 85; C-SPAN comments at 1-2; ICLE comments at 20; IFTA comments at 6-8; MMTTC *et al.* comments at 2, 8; NCTA comments at 41-47; PRA comments at 3; Small Business & Entrepreneurship Council comments at 2; TV One comments at 7-13; U.S. Chamber of Commerce comments at 4.

⁴³ See *NPRM* at ¶ 80 & n.231.

⁴⁴ See, e.g., *New York Times v. Tasini*, 533 U.S. 483, 503-04 (2001) (concluding that licensees that had licenses to distribute individual copyrighted works as parts of collected works violated the copyrights in the individual copyrighted works when they permitted third parties to distribute the works individually, as well as manipulate the formatting and presentation of the works, and that the third parties violated the underlying copyrights as well).

regardless of the precise technology employed, and even if the transmissions are received or initiated by the viewer.⁴⁵

Proponents claim the proposal does no harm because copyright holders and MVPDs will continue to be able to enter into contracts with each other with respect to channel placement, user interface, and advertising.⁴⁶ This ignores, of course, both that copyright encompasses more than just rights to channel placement, user interface, and advertising, and that copyright holders would lose their ability under the proposal to ensure compliance regarding even those terms with respect to any third party the moment they license their content to an MVPD.

The fair use doctrine would also not exonerate the FCC or third parties, despite claims of proposal proponents.⁴⁷ First, the issue is the compelled transmission by the FCC, as well as the exploitation and manipulation of content by commercial entities—not the mere provision of the third-party devices, applications and services, or the conduct of the viewers. Under the fair use doctrine, “[t]he courts have ... properly rejected attempts by for-profit users to stand in the shoes of their customers making nonprofit or noncommercial uses.”⁴⁸ Second, fair use is an affirmative defense to a claim of copyright infringement. It cannot be definitively determined until adjudicated

⁴⁵ See *ABC v. Aereo*, 134 S. Ct. 2498, 2506-10 (2014) (stating that “the concep[t] of public performance ... cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public”) (quoting H.R. Rep. No. 94-1476, at 63; 2-8 Nimmer on Copyrights § 8.11(B)(4)(d) (stating that under the 1976 Copyright Act, “[t]he distribution right accorded by Section 106(3) is to be interpreted broadly, consonant with the intention expressed by its drafters” and that “it extends to [any] offer to the general public to make a work available for distribution without permission of the copyright owner”)).

⁴⁶ See EFF comments at 5, Public Knowledge comments at 45-47; CCIA comments at 24.

⁴⁷ EFF comments at 4 (citing *Cartoon Network*, 536 F.3d at 140; *Fox v. DISH*, 2015 WL 1137593, at *21 (C.D. Cal. Jan. 20, 2015)).

⁴⁸ *Princeton Univ. Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (quoting Patry, *Fair Use in Copyright Law*, at 420 n. 34).

by a court based on the specific facts of the particular case after the conduct in question has occurred, and after carefully analyzing the factors set forth in Section 107 of the Copyright Act.⁴⁹ It therefore cannot be used anticipatorily to bless all manner of potential encroachments on copyright holders' rights. And third, the Copyright Office has consistently found that there is "insufficient legal authority to support the claim that [space- and format-shifting] are likely to constitute fair uses under current law," a finding it reaffirmed in its most recent detailed analysis of the types of uses proposed here.⁵⁰

Proponents also continue to insist that the proposal does nothing more than enable viewers to access content to which they are already entitled, and that copyright holders are trying to double charge.⁵¹ This is faulty logic, as we and others explained in the initial comments.⁵² The proposal both mandates dissemination to third parties and allows manipulation of content by those third parties. Moreover, copyright holders do not sell content directly to television viewers. Rather, they license content to distributors, who in turn make it available to viewers in exchange for some combination of subscription fees, advertising revenue, or other compensation. Just because a copyright holder has licensed programming for a particular MVPD to disseminate to a viewer in a particular way, does not mean a different company may disseminate that same programming to that same or other viewers in that or any other way. For example, a decision by Sony Pictures Entertainment to grant Comcast a license to make an episode of *Breaking Bad* available to a

⁴⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) ("The task [of fair use analysis] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").

⁵⁰ See *Section 1201 Rulemaking: Sixth Triennial Proceeding October 2015, Recommendation of the Register of Copyrights*, at 109 (October 2015), available at <http://copyright.gov/1201/2015/registers-recommendation.pdf>.

⁵¹ See EFF comments at 3; Public Knowledge comments at 45; CVCC comments at 6, 9, 32; TiVo comments at 13.

⁵² MPA and SAG-AFTRA comments at iii, 16; Copyright Alliance comments at 4.

Comcast subscriber, does not allow Netflix to make that episode available as part of its own service—even to that same Comcast subscriber—unless Netflix strikes its own license agreement with Sony Pictures Entertainment.

Similarly, even though a viewer may be entitled to access a broadcast program over the air, cable and satellite operators may not retransmit that same program to that same viewer absent a copyright license. Congress has granted such permission in limited circumstances through compulsory copyright licenses,⁵³ but copyright permission to retransmit programming could also be obtained through a negotiated license.⁵⁴ Here, third-party set-top box, Internet application, and web service providers would have neither a congressionally created compulsory copyright license nor one negotiated in the marketplace.

Perhaps the easiest way to understand that the proposal abrogates the exclusive rights that the Copyright Act grants copyright holders is to recognize that, today, an Internet application or web service provider would not be able to obtain a movie or television programming for distribution without entering into a license agreement. But if the FCC adopts these rules, an Internet application or web service provider would be able to obtain—without a license agreement with the copyright holders—any content that an MVPD happens to carry, when serving viewers who also happen to subscribe to that MVPD. That is a large universe of content, and the intent of some Internet application and web service providers to avoid entering into license agreements may well underlie their support for the proposal.

⁵³ See 17 U.S.C. §§ 111, 122.

⁵⁴ See Government Accountability Office, *Statutory Copyright Licenses: Stakeholders Views on a Phaseout of Licenses for Broadcaster Programming* 1-3, 17-26 (May 2016), at <http://www.gao.gov/assets/680/676935.pdf>.

II. Compelling MVPDs to Transmit Disaggregated Streams of Programming to Third-Party Set-Top Box, Internet Application, and Web Service Providers for Use and Manipulation in Those Providers' Services Without the Permission of Programmers Would Exceed the FCC's Authority

Even if the proposal did not abrogate the rights of copyright holders, the FCC would still need authority under the Communications Act before it could compel MVPDs to transmit disaggregated streams of programming to third parties for use and manipulation in those third parties' services without the permission of programmers. The Communications Act provides no such authority.

A. Neither Sections 629, 624A, or 335 of the Communications Act, nor the Satellite Television Extension and Localism Act Reauthorization, Authorize the FCC to Compel MVPDs to Transmit Disaggregated Streams of Programming

Proposal proponents claim that the FCC would have authority to implement the proposal under sections 629,⁵⁵ 624A,⁵⁶ and 335⁵⁷ of the Communications Act, as well as the 2014 Satellite Television Extension and Localism Act Reauthorization provisions under which the FCC created the Downloadable Security Technology Advisory Committee.⁵⁸ Their arguments are unavailing.

Section 629(a) of the Communications Act gives the FCC limited power to ensure the availability from third parties of the equipment that consumers of MVPD services may choose to

⁵⁵ See Public Knowledge comments at 4-10; CVCC comments at 5, 8, 11-13, 25, 27; CFA Comments at 3-6; CCIA Comments at 6-7; Incompas comments at 8-9; Writers Guild of America, West comments at 11; TiVo comments at 10.

⁵⁶ See Public Knowledge comments at 6-7; CVCC comments at 24-25, 29; CFA comments at 5 n.11; Incompas comments at 10; TiVo comments at 11-12.

⁵⁷ See CFA comments at 5 n.11; CVCC comments at 24-25.

⁵⁸ See Public Knowledge Comments at 7, 11; CVCC comments at 11, 21, 22, 26, 30; CCIA comments at 6-7; Incompas comments at 9; TiVo comments at 10-11.

access the MVPD service in a secure manner.⁵⁹ It does not authorize the FCC to require MVPDs to transmit disaggregated streams of content to third parties in a form that the third parties can manipulate as inputs into a different service, or to facilitate the use of Internet applications and web services, as opposed to devices, as we and others pointed out in the initial comments.⁶⁰ Congress knows how to mandate disaggregation of facilities and services when it wants to.⁶¹ It did not provide for such disaggregation here. “To read §629 in this way would leave the FCC’s regulatory power unbridled—so long as the agency claimed to be working to make navigation devices commercially available,” something the D.C. Circuit has said is beyond the pale.⁶² Section 629 does not allow the FCC to justify a regulation merely because it believes the regulation will remove a “stumbling block” to the retail availability of set-top box alternatives.⁶³

Proposal proponents cite the “shall ... adopt regulations to assure” language of Section 629(a) to support their claim that inaction is not an option and the FCC must adopt this proposal.⁶⁴ That claim is dubious, as the FCC could certainly conclude that prior navigation device rules, other existing rules, or the marketplace have assured or are assuring competitive availability of

⁵⁹ See 47 U.S.C. § 549(a).

⁶⁰ See MPAA and SAG-AFTRA comments at 12-13; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 13-17; ACA comments at 13, 59, 68-71; ARRIS comments at 6-7; AT&T comments at 59-74; CenturyLink comments at 4-12; Cisco comments at 13; Comcast and NBCUniversal comments at 33, 38-44; CWA comments at 2-3; Frontier comments at 17-18; MMTC *et al.* comments at 1, 6; NCTA comments at 161-66; NTCA comments at 26-27; Roku comments at 14-15; Tech Freedom and CEI comments at 10-28; Tech Knowledge comments at 3-4; USTelecom Association comments at 15-16.

⁶¹ See 47 U.S.C. § 251(c)(3).

⁶² *EchoStar v. FCC*, 704 F.3d 992, 997 (D.C. Cir. 2013).

⁶³ *Id.* at 998.

⁶⁴ Public Knowledge comments at 5.

navigation devices. This is particularly true in light of Section 629(e), which allows the FCC to sunset the rules.⁶⁵ And even if the FCC concludes additional action is necessary, nothing requires the FCC to adopt this proposal, as opposed to other approaches, especially considering the complications and legal questions, including the fact that the proposal jeopardizes content security in violation of Section 629(b), as discussed below.

Section 624A of the Communications Act is similarly unavailing. All Section 624A provides is that the FCC shall ensure compatibility of televisions and cassette recorders with cable systems for the purpose of watching the programming on the cable system and enjoying the features of the television, as well as to promote the competitive availability of converter boxes and remote controls.⁶⁶ It is by its terms technology specific. It does not authorize the FCC to require MVPDs to transmit content to third parties in a form that the third parties can manipulate as inputs into a different service, or to facilitate the use of Internet applications and web services, which are not contemplated by Section 624A, as we and other commenters explained.⁶⁷

Proponents make much of the language in Section 624A(d)⁶⁸ that the FCC must “modify the regulations issued pursuant to [Section 624A] ... to reflect improvements and changes in cable systems, television systems, television receivers, video cassette recorders, and similar technology.”⁶⁹ But this language does not expand the scope of the FCC’s authority delineated in the rest of the section. It merely indicates that the FCC shall modify whether and how it ensures

⁶⁵ See 47 U.S.C. § 549(e).

⁶⁶ See 47 U.S.C. § 544a(b)(1), (c)(2)(C).

⁶⁷ See MPAA and SAG-AFTRA comments at 13-14; ACA comments at 60, 71-73; AT&T comments at 74-76; Comcast and NBCUniversal comments at 42, 45; NCTA comments at 163-64; Tech Freedom and CEI comments at 29-31.

⁶⁸ See TiVo comments at 11-12.

⁶⁹ 47 U.S.C. § 544a(d).

compatibility and commercial availability of televisions, cassette recorders, converter boxes, and remote controls as technology changes.

Section 335 only applies to satellite operators, and makes no mention of facilitating the devices or services of third parties, as a number of commenters pointed out.⁷⁰ Indeed, Section 335 imposes carriage-type obligations on satellite operators, such as those governing political broadcasting, localism, and non-commercial channel set-asides, and thus has nothing to do with transmission-type, wholesale obligations.⁷¹

The Satellite Television Extension and Localism Act Reauthorization of 2014 also does not grant the FCC the authority to adopt this proposal, as a number of parties observed.⁷² Section 106(d) of the reauthorization merely directs the FCC to create a technical working group, not adopt rules. Moreover, it instructs the working group simply “to identify, report, and recommend performance objectives, technical capabilities, and technical standards of a not unduly burdensome, uniform, and technology- and platform-neutral software-based downloadable security system designed to promote the competitive availability of navigation devices in furtherance of Section 629 of the Communications Act of 1934.”⁷³

Thus, Section 106(d) does not direct the working group to recommend just any performance objectives, technical capabilities, or technical standards that allegedly further the goals of Section 629. It directs the working group to recommend only those performance objectives, technical capabilities, and technical standards related to designing a downloadable

⁷⁰ See ACA comments at 60, 71-73; AT&T comments at 74-76; TechFreedom and CEI comments at 31-32.

⁷¹ See 47 U.S.C. § 335.

⁷² CenturyLink comments at 12-14.

⁷³ Pub. L. No. 113-200, 128 Stat. 2059, 2063, § 106(d) (2014) (emphasis added).

security system that further the goals of Section 629. Congressmen Robert Latta and Gene Green—the authors of the amendment that led to the inclusion of set-top box issues in the satellite reauthorization—explained this very point in a bipartisan, 2015 letter to the FCC.⁷⁴ Congress did not empower the working group to do anything beyond that. Nor did Congress authorize the FCC to adopt regulations, whether involving non-security related programming issues or otherwise. Indeed, a Senate amendment that would have required the working group to propose and the FCC to adopt a “methodology for access to a system’s programming, features, functions, and services” was withdrawn for lack of support.⁷⁵

This is consistent with the narrow scope of the set-top box-related provisions of the satellite reauthorization. The satellite reauthorization’s set-top box provisions only ended the FCC’s integration ban prohibiting cable operators from incorporating security functionality within their set-top boxes, and left untouched the FCC’s compatibility requirements.⁷⁶

The current proposal goes far beyond security issues into programming matters and involves rules rather than just a report. The proposal is also unduly burdensome, as discussed below. It therefore goes beyond the remit of the satellite reauthorization.

Some proponents claim the FCC can find authority in the White House’s recent executive order asking agencies to seek ways of promoting competition,⁷⁷ but an executive order does not

⁷⁴ Letter from Reps. Robert Latta and Gene Green to Chairman Tom Wheeler, FCC (June 18, 2014).

⁷⁵ See Amendment of Sen. Edward Markey to the Satellite Television Access and Viewer Rights Act, S. 2799 (2014).

⁷⁶ See Pub. L. No. 113-200, 128 Stat. 2059, 2063, § 106(a)-(c) (2014).

⁷⁷ See CFA comments at 4, 6-7 (citing Executive Order, *Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy* (April 15, 2016), at <https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers>).

confer authority on an independent agency.⁷⁸ And while the executive order “strongly encourages” independent agencies to comply,⁷⁹ a previous executive order also states that independent agencies should engage in cost-benefit analyses before adopting regulations.⁸⁰ The FCC has engaged in no such cost-benefit analysis here. Moreover, the executive order asks agencies to seek out both regulatory and *deregulatory* ways of promoting competition.⁸¹ Lastly, the NTIA said in its comments on behalf of the Administration that the Commission should protect content security, be careful not to stifle programming innovation, and be mindful of license agreements.⁸²

Proponents also argue that the proposal is consistent with the FCC’s 1968 *Carterfone* decision requiring Ma Bell to allow connection of non-harmful devices to the telephone network.⁸³ Ma Bell, however, was a common carrier, and *Carterfone* did not implicate video programming and the attendant copyright and First Amendment issues, as parties pointed out in the initial comments.⁸⁴

⁷⁸ See *Executive Order, Steps to Increase Competition*, Sec. 2 (directing that “[e]xecutive departments and agencies with authorities that could be used to enhance competition (agencies) shall, where consistent with other laws, use those authorities to promote competition”) (emphasis added).

⁷⁹ *Id.*, Sec. 3(b).

⁸⁰ Executive Order 13579—*Regulation and Independent Regulatory Agencies*, at Sec. 1 (July 11, 2011).

⁸¹ *Executive Order, Steps to Increase Competition* at Sec. 2.

⁸² NTIA comments at 2, 4.

⁸³ See CFA comments at 11, 14-16, 17-19, 23-24; CCIA comments at 29-30; Google comments at 2; Incompas comments at 8; Public Knowledge comments at 7-9; TiVo comments at i, 2-3; Writers Guild of America, West comments at 1-2.

⁸⁴ See NCTA comments at 155-59; USTelecom Association comments at 15-16.

B. The Proposal is Fundamentally Different than the CableCARD Regime

Some proponents argue that the proposal must be within the FCC's jurisdiction and consistent with copyright policy because it is comparable to the existing CableCARD regime.⁸⁵ The NPRM also says that use of CableCARDs has not raised content manipulation, program presentation, or advertising issues, making it unnecessary to adopt rules to address such issues as part of this new proposal.⁸⁶ Neither position is accurate, as we and others pointed out in the opening comments.⁸⁷

The CableCARD regime is fundamentally different than the current proposal.

- CableCARDs enable unidirectional services, not two-way, Internet-based services.
- The CableCARD enables use of alternative consumer electronics equipment; it does not facilitate the provision of cable service over Internet applications or web services.
- The CableCARD and associated FCC rules merely implement for third parties the security functionality that enables third-party devices to render the cable service; they do not require the cable operator to transmit disaggregated streams of content and data to third parties in a form that the third parties can manipulate as inputs into a new service.
- The Dynamic Feedback Arrangement Scrambling Technique license by which CableLabs authorizes third parties to use CableCARDs is only a license for the security functionality; it is not a content license that authorizes third parties to make their own, different uses of programming. If a third party asks CableLabs for permission to use the content in a different way, CableLabs responds that is something it cannot authorize.⁸⁸
- The DFAST license is a contract-based mechanism for addressing the security of third-party set-top boxes; the proposal prohibits contract-based security relationships between MVPDs and third-party navigation device providers.

⁸⁵ Public Knowledge comments at 10, 12; CVCC comments at 27-28, 32-33, 41-42.

⁸⁶ *NPRM* at ¶ 80.

⁸⁷ *See* MPAA and SAG-AFTRA comments at 14-15; NCTA comments at 60-62.

⁸⁸ *See, e.g.*, Letter from Judson D. Cary, Deputy General Counsel, CableLabs to Jim Denney, Vice President, TiVo. Inc. (March 13, 2015).

- Third parties using CableCARDS are contractually bound to comply with terms on service presentation and content manipulation; the current proposal refuses to require that third parties that are provided with the three streams abide by terms on service presentation and content manipulation.
- CableLabs is an organization affiliated with the cable industry, and thus would likely not qualify to provide the security solution envisioned by the proposal, which requires that the solution be provided by an entity “not substantially controlled by an MVPD or by the MVPD industry.”⁸⁹

Because of all this, the proposal raises far more concerns regarding FCC authority, copyright, and content security. There is also evidence suggesting TiVo is manipulating advertising and other content under the CableCARD regime,⁹⁰ undermining the FCC’s rationale for not adopting prohibitions on content manipulation.

III. The Proposal Violates Section 629 of the Communications Act by Jeopardizing Content Security and Impeding Programmers’ Rights to Prevent Content Theft

The proposal would restrict copyright holders’ ability to secure their content, as we and other parties explained in the initial comments, which would violate Section 629.⁹¹ Section 629 prohibits the FCC from jeopardizing content security or impeding programmers’ rights to prevent content theft.⁹² The FCC impermissibly does both, however, by: A) mandating content use outside

⁸⁹ See NPRM at ¶ 50. *See also id.* at ¶¶ 2, 58-60.

⁹⁰ See MPAA and SAG-AFTRA comments at 15; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 29; Comcast and NBCUniversal comments at 81; NAB comments at 11.

⁹¹ See MPAA and SAG-AFTRA comments at 20-28; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 11-12, 16-25; ACA comments at 42, 49-40; ANA comments at 8; ARRIS comments at 13-15; AT&T comments at 45-47; CenturyLink comments at 15-16; Cisco comments at 6-13; Comcast and NBCUniversal comments at 86-91; Copyright Alliance comments at 15; CreativeFuture comments at 4, 6-7; DGA and IATSE comments at 2, 6; IFTA comments at 3, 9-10; IPI comments at 4; ITTA comments at 25; NCTA comments at 20-21, 60-62, 93-106, 165; RIAA comments at 5-6.

⁹² See 47 U.S.C. § 549(b); MPAA and SAG-AFTRA comments at 20-21 (explaining that the statute and legislative history indicate that Section 629 addresses jeopardy to the security of both

license agreements; B) requiring MVPDs to support at least one “compliant” content protection system licensed under FCC-acceptable terms, “independently controlled” by an organization not affiliated with MVPDs, and having an unaffiliated trust authority; C) eliminating safeguards against an influx of Internet piracy into the MVPD world; and D) facilitating businesses based on piracy.

Proponents argue that by making content more readily available, the proposal will diminish incentives to steal content and thus reduce, rather than increase, piracy.⁹³ But content is already readily available through lawful online sources. Today there are more than 120 legal online video services,⁹⁴ and U.S. audiences used those services to access 8.4 billion movies and 76.1 billion TV episodes in 2015, alone.⁹⁵ The figures are expected to grow to 111.1 billion and 12.7 billion by 2020,⁹⁶ without any government mandate.

As long as programming costs more than zero, illicit enterprises will always have a built-in profit margin when offering stolen content, and thus will continue to have an incentive to make a business out of content theft. And to the extent this proposal will enable thieves to make their services look more legitimate, viewers may not even realize that what they are watching is not coming from a legitimate source. Regardless how high the incentives are for illicit businesses to steal, the FCC has a statutory obligation not to make it easier to do so—an obligation that this proposal does not meet.

content and MVPD service, as well as to limitations on the rights of both programmers and MVPDs to prevent theft).

⁹³ See Public Knowledge comments at 3, 47-50 & n.66; CCIA comments at 22.

⁹⁴ See www.WhereToWatch.com.

⁹⁵ Underlying data available from IHS. See <https://www.ihs.com/>.

⁹⁶ *Id.*

A. Mandating Access to Content Outside License Agreements Would Jeopardize Content Security and Impede Programmers' Rights to Prevent Content Theft

Securing content is more complex than selecting a particular content protection technology and committing to adhere to a narrow set of rules and policies. Content security cannot effectively be implemented or enforced outside a license agreement, as we and others explained in our initial comments.⁹⁷ Security requires implementing details that determine the robustness of solutions for a variety of use cases. Copyright holders must consider the value of—and how much they have invested in—particular content, the size of the intended audience and potential revenue stream, the particular technology and business model of each potential distribution partner, the security risks the technology and business model may present, and the level of trust with the partner.

Relevant factors include the resolution of the content, the distribution technology, functionality of the distribution service and receiving device, the features and interactivity available to the viewer, the revenue models of the programmer and the distributor, any windowing or exclusivity offered to the potential partner or others, and the portability of the content. These are the types of issues that content providers must examine, with the resulting analysis guiding the decisions on what devices and device types to deliver content to and how. Consequently, copyright holders often tailor security solutions to particular partners in conjunction with—and dependent upon—other terms in the relationship.

Discussions with respect to security are part of the negotiation of any deal, often involving technology testing to explore potential business models and security solutions along with their attendant risks, and compliance with negotiated terms extends beyond execution of an agreement through auditing and other compliance procedures. Copyright holders embody and implement

⁹⁷ See MPAA and SAG-AFTRA comments at 21-22; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 11-12, 25-26; AT&T comments at 45-47; Copyright Alliance comments at 15; CreativeFuture comments at 7.

these arrangements through rigorously negotiated license agreements that incorporate provisions on distribution technology, security solutions, testing, auditing, remediation, and redress. Agreements and security solutions can vary by studio, as well as within a given studio depending on the content, distributor, and distribution technology. The content provider typically reserves a unilateral right to require a service to take down content in the event of an identified security breach. This can only be achieved through a license agreement.

Similarly, preventing abuse and fraud can only be assured through license terms, such as limits on the number of devices onto which a movie or television show can be downloaded, or on the number of simultaneous streams allowed per account. Without such agreements, content could be downloaded to 100 different devices or streamed to 1,000 different users using a single subscriber's credentials, improperly turning one subscription into many.

By mandating content use outside of license agreements, the proposal hinders specialized content protection discussions and negotiations, jeopardizing the security of the programming. Mandating access outside of license agreements similarly would impede programmers' rights to prevent content theft, because it is the agreements that enable them to create and enforce the content security they deem necessary.

The proposal tries to compensate by creating a regulatory regime to develop the security solutions that will apply to third parties, as well as the mechanism for imposing and enforcing the solutions. Such a regime cannot account, however, for the complexity and variety of security solutions that negotiated licenses can, and trying to create and manage the different solutions needed through a one-size-fits-all regulatory process will produce fundamentally weaker security. Enforcing that regulatory security regime will also be far more complex, difficult, and time consuming. And during whatever protracted proceedings are available to address gaps, problems

with, or violations of the security regime, programming will be vulnerable and programmers will be reluctant to make new content and new content formats available.

B. Requiring MVPDs to Support a “Compliant” Content Protection System Under FCC-Restricted Terms, “Independently Controlled” by an Organization Not Affiliated with MVPDs, and Having an Unaffiliated Trust Authority, Would Jeopardize Content Security

The proposal would jeopardize the security of multichannel video programming by requiring each MVPD to support, for the benefit of third parties, at least one “compliant” content protection system, as we and others explained in the initial comments.⁹⁸ To be compliant, the system must be licensed under FCC-restricted terms, “independently controlled” by an organization not affiliated with MVPDs, and have a trust authority unaffiliated with MVPDs.⁹⁹

Securing content involves a “chain of trust” that follows a trust model managed by a trust authority. An effective trust model includes a complex compliance and robustness framework that helps ensure the content protection system will behave in the expected manner with a sufficient level of resistance to attacks. It will list viewer authentication methods, specify the provisioning methods for cryptographic material, define the expected response to a breach, and rely on both software and hardware implementations.

The trust authority authenticates a viewer and a device before granting access to the “keys” for viewing content. It must define the compliance and robustness regime, usually in negotiation with copyright holders. It must enforce this compliance and robustness regime using license terms. It must then generate and securely distribute cryptographic material to licensees, manage revocation and respond to hacks, and manage the timely evolution of the security solution. For

⁹⁸ See MPAA and SAG-AFTRA comments at 22-26; AT&T comments at 82; Copyright Alliance comments at 15; CreativeFuture comments at 7.

⁹⁹ See *NPRM* at ¶¶ 2, 50, 58-60.

content owners to preserve an environment in which they can secure their content, recoup their investments, and experiment with new distribution models, they must be intimately involved in these decisions, including the selection of the trust authority itself.

By limiting the entities that may design and manage the system, interfering in the relationship with the trust authority, and constraining the terms under which content protection systems may be licensed, the proposal restricts the options available to copyright holders for securing their content. Copyright holders may even end up having little or no input into the initial content protection measures third parties use to secure the copyright holders' own content, either because they are denied an opportunity to participate in the process or because their views are not adequately reflected in the final specifications.

The proposal also makes it more difficult to ensure changes to the system as programming, services, devices, and business models evolve; as content security technologies improve; and when existing security systems suffer a breach. Compliance and robustness rules change as frequently as once a year based on new services, new technologies, and new threats. Today, MVPDs have end-to-end control over the security system, subject to their license agreements with programmers, which facilitates evolution of security solutions. Under the proposal, however, control is split between the MVPD and one or more unaffiliated entities. Moreover, there is no license agreement, making the relationship between programmers, MVPDs, and those designing and managing the content security system unclear.

As a result, any security changes must be run through consensus-based standards bodies and unaffiliated entities. This will take time and provide programmers no assurances that security updates needed to protect their content will receive approval in a timely manner or at all. The parity requirement exacerbates this problem, as MVPDs cannot implement any security solution unless and until they can do so for all third parties. Absent license agreements, delineation of

responsibilities will be unclear, and when problems arise, the odds are good there will be an enforcement gap. Moreover, open standards groups are inherently ones of compromise, which will dilute security solutions to least common denominators rather than let different parties adopt the security solutions that best serve their purposes.

This also means that one or maybe a few centralized entities will be developing security solutions, rather than a distributed network of parties each working bilaterally on a variety of approaches. This is ironic, because the Internet was built on the philosophy that distributed, non-regulatory efforts are typically more resilient and more fruitful. The proposal also sets out to “assure competitors and those considering entering the market that they can build to what is likely to be a limited number of content protection standards.”¹⁰⁰ Proposal proponents echoed that sentiment.¹⁰¹ For security to be resilient, it must be diverse and redundant. To the extent the proposal limits the number of security technologies third parties might implement for a particular MVPD, and produces a uniform third-party security solution for a particular MVPD or across MVPDs, it weakens security and runs the risk of creating a single point of failure.

It is true that the proposal allows MVPDs to use one or more content protection systems of their choosing in addition to those they support for third parties.¹⁰² There will, however, always be at least one restricted content protection system for third parties to access programmers’ content, providing a weak link.

¹⁰⁰ See *NPRM* at ¶ 59.

¹⁰¹ See, e.g., TiVo comments at 18-19.

¹⁰² See *NPRM* at ¶ 58.

C. Eliminating Safeguards Against an Influx of Internet Piracy Into the MVPD World Would Jeopardize Content Security

Proponents claim that one of the proposal's most salutary effects is to promote "universal" or "cross-platform" searches of content from the various providers.¹⁰³ But cross-platform search capability exists today in varying forms,¹⁰⁴ including from AppleTV, Roku, and the MPAA's own WhereToWatch.com. Currently, such cross-platform search occurs consistent with license agreements, which provide safeguards to ensure that the searches do not present unlicensed material. By allowing third-party set-top box, Internet application, and web service providers to use disaggregated content streams outside of license agreements, the proposal eliminates those safeguards, allowing an influx of Internet piracy into the MVPD world, as we and others pointed out in the initial comments.¹⁰⁵

Indeed, while there already is a substantial problem with search engines directing consumers to unlicensed or pirated content on the Internet, today's MVPD environment is free from piracy due, in part, to license agreements. Once third-party set-top box, Internet application, and web service providers have access to disaggregated content streams outside of license agreements, there is little to stop them from prominently displaying to MVPD subscribers pirated content from the Internet alongside authorized MVPD content in "cross-platform searches" and "recommendation engines."

¹⁰³ See Amazon comments at 4, 5; Google comments at 3-4; Incompas comments at 7; TiVo comments at 6-7, 15.

¹⁰⁴ See NCTA comments at 66-67.

¹⁰⁵ See MPAA and SAG-AFTRA comments at 26-27; CreativeFuture comments at 8; CIF comments at 5-6; IFTA comments at 3, 9-10; IPI comments at 4; PRA comments at 4; RIAA comments at 5-6.

This will increase the potential for viewers to see pirated content, which ultimately affects the incentives to create the very content that the viewer is trying to access. According to *Walking Dead* producer Gale Anne Hurd, this “would spell disaster for those [creators] who are trying to figure out how to keep making the movies and TV shows audiences love.”¹⁰⁶ For example, when MVPD subscribers search for specific content on their MVPD service using a third-party device, application, or web service, they may be presented with an opportunity to view a pirated version of a show or movie for free right next to an authorized version for a fee.

Absent a license agreement or contractual relationship, third-party set-top box, Internet application, and web service providers may be indifferent to such occurrences, especially if they garner revenue from advertising in conjunction with the search and recommendation results. This will increase the consumption of pirated programming by MVPD users, who may not even be aware of the pirated nature of the show or movie.

To be clear, we do not impose cross-platform search or recommendation engines, so long as they are implemented responsibly, and abide by copyright law and license agreements. And the FCC certainly should not abrogate copyright holders’ rights under the Copyright Act, or their license agreements, as a means of promoting them.

¹⁰⁶ Gale Anne Hurd, *Stop Piracy Apocalypse: 'Walking Dead' Producer—FCC Proposal Would Make Zombies of Your Favorite TV Shows*, USA Today (April 12, 2016), at <http://www.usatoday.com/story/opinion/2016/04/12/fcc-set-top-box-proposal-cable-internet-piracy-walking-dead-zombies-gale-hurd-column/82919704/>.

D. Facilitating Businesses Based on Piracy Would Jeopardize Content Security

“Black-market” boxes and applications that aggregate pirated content from the Internet are a growing concern, especially abroad.¹⁰⁷ Today, such boxes and applications are an Internet problem. By mandating that MVPDs allow third-party boxes and applications to connect to their systems using constrained and unaffiliated security systems outside of licensing agreement, and by allowing them to use disaggregated “information flows,” the proposal will make black-market devices and applications an MVPD problem, as we and others explained in the initial comments.¹⁰⁸

Devices and applications to facilitate piracy exist today, but the proposal would make them more attractive and more harmful. They would become more attractive because they could co-mingle authorized content from MVPD service with pirated content from the Internet, offering viewers “one-stop shopping.” They would become more harmful because they could both import into the MVPD world pirated content from the Internet, and unlawfully export to the Internet authorized content from MVPD systems.

While the proposal would allow MVPDs to deny the information flows to such black-market devices, applications, and services, it is unclear how they will discover and track them down, especially if they are fly-by-night device or application providers on the Internet. Moreover, discontinuing such flows might stop that particular instance of harm from continuing, but would do nothing to compensate programmers for the harm that has already occurred. And the harm could continue for quite some time, in light of suggestions by some commenters that MVPDs must not

¹⁰⁷ See Troy Dreier, *CES Report: Irdeto Highlights Ease and Growth of Set-Top Piracy* (Jan. 6, 2015), at <http://www.streamingmedia.com/Articles/Editorial/Featured-Articles/CES-Report-Irdeto-Highlights-Ease-and-Growth-of-Set-Top-Piracy-101362.aspx>.

¹⁰⁸ See MVPD and SAG-AFTRA comments at 27-28; CreativeFuture comments at 8, 12, 14, 18.

discontinue the information flows until after an extensive process and notice period in order to minimize harm to viewers relying on the third-party devices, applications, or services.¹⁰⁹

Programmers would ordinarily have a license agreement to fall back on for remediation and remuneration. By contrast, it is unclear under the proposal what authority the FCC would have to fine such entities, let alone to award damages to programmers, especially if the entities are located abroad, are an application or web service provider rather than a device manufacturer, or are simply a middle man that loaded software onto an otherwise lawful device.

IV. The Proposal is Infeasible, Harmful to Innovation, and Unduly Burdensome

Proponents argue that the proposal enables “permissionless innovation” for third parties.¹¹⁰ They overlook, however, that the proposal denies such permissionless innovation to the content community. The sheer complexity of the proposal makes it infeasible, harmful to innovation, and unduly burdensome, as we and others explained in the initial comments.¹¹¹

MVPD service is an intricate amalgam of licensed content, disparate networks, different security and content protection measures, hardware, software, licensed metadata, diagnostics, application data synchronized with content, interactivity, user interfaces, advertising, ad reporting, and audit paths, among other items. The proposal’s two-year deadline for the open standards process offers an unrealistically short timeline. Even in the best of circumstances, video-related standards can take five years or more to develop, let alone deploy widely. The standards needed

¹⁰⁹ See CVCC comments at 43; EFF comments at 6-7; Incompas comments at 22.

¹¹⁰ See CFA comments at 9; TiVo comments at i, 13, 15-17.

¹¹¹ See MPAA and SAG-AFTRA comments at 28-32; ACA comments at 9, 13, 41-42, 46-50; ARRIS comments at 9-12; AT&T comments at 19-28; Cisco comments at 10-11; Comcast and NBCU comments at 61-66, 70, 98-99, 103-07; DLNA comments at 2; EchoStar and DISH comments at 8-11, 15-18; ITTA comments at 11-12, 25; NCTA comments at 52-53, 71-73, 85-90, 106-13, 119-26, 130; NTCA comments at 18-20; USTelecom Association at 12-15; WTA comments at 4.

to implement this proposal will be extraordinarily complex, including mandates for the rendering of the information required in each of the three data flows, for which there is no existing format that will translate from distributor to distributor, device to device, content type to content type, and business model to business model.

The proposed self-certification regime, or certification to the MVPD, is also insufficient. In 2006, MPAA purchased and tested about 100 products subject to “self-certification” in the CSS license for DVDs. All of the products failed to comply with at least one content security rule. It took 10 lawsuits and about 30 other legal settlements to materially enhance the compliance level. Moreover, no such certification can fully test today’s complex systems and even if a device passes certification, the device manufacturer, application provider, or end user can change the software the next day. That is why video-related license agreements ordinarily include auditing and testing provisions to verify compliance with security requirements, and provide programmers either a role in assessing compliance, rights against a third party that has failed to comply adequately, or both. Indeed, even the EFF recognizes that navigation devices are high-value targets, that independent security testing is needed, and that pre-release testing is insufficient.¹¹²

License agreements change continually to accommodate new technology, business models, and content formats. The current model allows each copyright holder and each distributor to decide when to negotiate new license terms to accommodate these types of changes. Requiring MVPDs to provide service discovery, entitlement, and content delivery data to third parties pursuant to open standards and constrained security solutions without the benefit of license agreements, however, will prevent roll out of new content, formats, features, business models, and security

¹¹² See EFF comments at 7-8.

solutions until the associated standards are developed. And third parties will have an incentive to stall the open standards process so they can trigger the proposed default standard¹¹³ or benefit from the new content, formats, features, and business models before MVPDs can,¹¹⁴ hindering programmers' distribution channels.

The proposal also does not comply with the Downloadable Security Technology Advisory Committee's remit to produce a downloadable security solution that is "not unduly burdensome."¹¹⁵ Programmers will need to revisit all their license agreements, either to ensure compliance with the new rules or to try to fill gaps the rules leave behind, assuming those gaps can even be filled. They will need to participate on potentially multiple open standards bodies to design protocols for and implement the three information flows. They will similarly need to work with potentially multiple unaffiliated organizations to design and implement new security protocols. The proposal's own provisions expect this to take two years, although realistically it will take quite longer than that.

¹¹³ See *NPRM*, at ¶ 43. See also MPAA and SAG-AFTRA comments at 30; NCTA comments at 127-28; NTCA comments at 19.

¹¹⁴ See *Allied Tube v. Indian Head*, 486 U.S. 492, 500 (1988) (observing that open standards bodies are traditionally subject to antitrust scrutiny because of members' economic incentives to use them to restrain competition).

¹¹⁵ See Satellite Television Extension and Localism Reauthorization of 2014, Pub. L. No. 113-200, 128 Stat. 2059, 2063, § 106(d) (2014).

V. **Compelling MVPDs to Transmit Disaggregated Streams of Programming to Third-Party Set-Top Box, Internet Application, and Web Service Providers for Use and Manipulation Without Seeking the Permission of Programmers or Compensating them Would Violate the First and Fifth Amendments**

We also pointed out that forcing MVPDs to transmit disaggregated streams for use and manipulation by third parties without seeking the permission of the copyright holders and compensating them would violate the First and Fifth Amendments.¹¹⁶

Under the First Amendment, content creators have a right to determine what they say and how they say it.¹¹⁷ As a number of commenters explained, forcing MVPDs to transmit streams of programming for use by third parties without the content creators' consent violates this right, especially if the third parties alter the content or programming presentation.¹¹⁸ Congress has been careful to minimize the Communication Act's impact on speech,¹¹⁹ and is explicit when it wants the FCC to regulate in ways that bear upon the First Amendment.¹²⁰ Thus, to avoid potential First Amendment issues, the FCC must not interpret provisions of the Communications Act as

¹¹⁶ See MPAA and SAG-AFTRA comments at 18-20.

¹¹⁷ See *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988) (stating that "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it").

¹¹⁸ See AT&T comments at 87-92; Comcast and NBCUniversal comments at 55-56; Comments of 21st Century Fox, A&E, CBS, Scripps, Time Warner, Viacom, and the Walt Disney Company at 41-42; NCTA comments at 166; Free State Foundation comments at 4, 15-16; Tech Knowledge comments at 11-31

¹¹⁹ See, e.g., 47 U.S.C. § 326 (providing that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication"); 47 U.S.C. § 544(f) (providing that "[a]ny Federal agency ... may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title").

¹²⁰ See, e.g., 18 U.S.C. § 1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."); 47 U.S.C. § 315 (governing provision of broadcast time to candidates for public office); 47 U.S.C. § 399 ("No noncommercial educational broadcasting station may support or oppose any candidate for political office.").

authorizing regulation of speech in the absence of express statutory language.¹²¹ Because nothing in Section 629 specifically authorizes the FCC to compel speech, the FCC may not construe it in a manner that does so.

Proponents argue that the proposal does not affect the content of programming, prevent programmers from speaking, or force them to speak or endorse messages they do not agree with, and that the First Amendment does not let speakers decide who may listen.¹²² But the proposal does affect the content of programming and force them to speak messages. As discussed above, after mandating transmission to third-party set-top box, Internet application, or web service providers of all the licensed content, the proposal does not prohibit them from changing “service presentation (such as agreed- upon channel lineups and neighborhoods), replac[ing] or alter[ing] advertising, or improperly manipul[at]ing content.”¹²³

Programmers are not trying here to determine who may “listen” to their content. The same viewers will have access to the programming whether they watch it over an MVPD-provided device or one from a third party. The issue is that the FCC is trying to compel programmers to allow third parties to distribute their speech.

A number of commenters also agreed with us that the proposal would violate the Fifth Amendment prohibition on government takings of property without compensation.¹²⁴ The Supreme Court has made clear that government action conveying someone’s intellectual property

¹²¹ See *MPAA v. FCC*, 309 F. 3d 796 (D.C. Cir. 2002) (holding that the First Amendment precluded the FCC from imposing video description rules absent a direct Congressional authorization to do so).

¹²² Public Knowledge comments at 13, CVCC comments at 34.

¹²³ See *NPRM* at ¶ 80 & n.231.

¹²⁴ AT&T comments at 93-95; Comments of 21st Century Fox, A&E, CBS, Scripps, Time Warner, Viacom, and the Walt Disney Company at 42; USTelecom Association comments at 17.

to another in violation of his or her reasonable, investment-backed expectation runs afoul of the Takings Clause.¹²⁵ Programmers have a reasonable investment-backed expectation that the government will not appropriate their content for public use. Indeed, the government assures them of that expectation by recognizing copyright in the first place, which gives them the confidence to invest hundreds of millions of dollars in their movies and television shows.

Forcing MVPDs to allow third parties to use the programmers' content without licensing it from the programmers and paying a negotiated royalty, as well as to generate their own revenue through fees, advertising, or other means, deprives programmers the benefit of their intellectual property. That remains true even though the programmers may still be able to license the content to others, as the economic value of intellectual property is the ability to competitively benefit from it over others that are not the creators.¹²⁶

VI. Allowing Third-Party Set-Top Box, Internet Application, and Web Service Providers to Use and Manipulate Content Without Seeking the Permission of Programmers and Compensating Them Would Harm Production of Television Content

High-value programming is expensive to produce. Allowing third parties to use and manipulate it without seeking the permission of and compensating the creators would jeopardize the economic underpinnings that enable the creation of that content in the first place, as we and others pointed out in the initial comments.¹²⁷

¹²⁵ See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (ruling that the EPA violated the Fifth Amendment when it required a chemical company to submit intangible property for use by commercial competitors).

¹²⁶ *Id.* at 1012.

¹²⁷ See MPAA and SAG-AFTRA comments at i-iii, 26, 33; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 11-12; Advanced Communications Law & Policy Institute at New York Law School comments at 9; ANA comments at 1; AT&T comments at 37-47; Comcast comments 76, 83; Copyright Alliance comments at 2, 12-14; Creators of Color comments at 1-2; C-Span comments at 1-2; Frontier

License and advertising revenue help fund the production and acquisition of innovative programming. A major motion picture costs on average \$100 million and today's television programming can cost millions of dollars *per episode*. These are up-front costs. A content creator and a programming network are far less likely to invest in high-value content or take a risk on anything other than mass appeal programming unless they believe there is a reasonable likelihood it will generate enough license and advertising revenue to cover their costs, plus a reasonable return on their investments. And because purchasers of programming have a higher likelihood of recouping their investment through programming fees and advertising if the audience for the content is not divided among multiple distributors, they are often willing to pay a premium for exclusivity based on time, territory, or platform. For reasons such as these, the FCC has long held that "the ability to show programs on an exclusive basis is generally recognized as a valuable and legitimate business practice in the television and cable industries."¹²⁸

By allowing third parties to use content for their own services without licensing it, the proposal deprives copyright holders of license revenue. As discussed above, allowing third parties to use and manipulate content outside a license agreement also makes it harder to secure the content, and thus also hurts license revenue. And by restricting the ability of copyright holders to enter into exclusive arrangements and windowing agreements, the proposal's parity requirement

comments at 7; ICLE comments at 20, 25-26; IFTA comments at 6-8; MMTC *et al.* comments at 2, 4, 8-15; NCTA comments at 20, 31, 41-47, 55-58; NetCompetition comments at 22; PPI comments at 4; PRA comments at 3; Small Business & Entrepreneurship Council comments at 2; TPA comments at 3-4; TV One comments at 10-18; U.S. Chamber of Commerce comments at 4; Verizon comments at 5, 8.

¹²⁸ *In re* Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Gen. Docket No. 87-24, *Report and Order*, 3 FCC Rcd 5299, 5300 ¶ 5 (1988).

prevents copyright holders from earning a premium from distributors, further reducing license revenue.

Allowing third parties to change “service presentation (such as agreed- upon channel lineups and neighborhoods), replace or alter advertising, or improperly manipulate content”¹²⁹ takes an additional financial toll. If third-party set-top box, Internet application, and web service providers can drop programming and remove commercials, programmers lose eyeballs along with the license fees and advertising revenues that go with them. And if third-party set-top box, Internet application, and web service providers can insert advertising in and around content streams, menus, search results, and “recommendations,” as well as monetize viewer watching habits, copyright holders must compete for advertising dollars within their own programming. Advertisers will pay less for advertising if there is a risk their ads will be dropped or overlaid, the programming their ads are in will be dropped or given less prominence, or if multiple parties can suddenly place their ads on the exact same programming being viewed by the exact same viewers.

All of this makes it harder to raise the capital needed to produce quality content in the first place, and also reduces profits that might otherwise be invested into the next production.

Diminishing the number of productions, and reducing the profit from those productions that do get made, also jeopardizes the livelihoods of directors, artists, and crew. As the Directors Guild of America, the International Alliance of Theatrical Stage Employees, and the Copyright Alliance explain in their comments, their members earn a living not just from the paychecks for each movie or television show they make, but also indirectly from the productions’ revenues, which are the source of their residuals, as well as retirement and health benefits.¹³⁰ If directors, artists, and crews are having a harder time earning a living, studios in turn will have a harder time

¹²⁹ See *NPRM* at ¶ 80 & n.231.

¹³⁰ See *DGA* and *IATSE* comments at 2; *Copyright Alliance* comments at 5-7.

finding the talent to produce high-value movies and shows. With fewer high-value movies and shows in production, directors, artists, and crews will continue having a harder time earning a living, creating a non-virtuous circle, harming creators and audiences alike.

Proponents argue that the proposal will increase the ways viewers can access content and give programmers more avenues for distribution.¹³¹ That's questionable, as viewers must already have access to both MVPD service and broadband to benefit from the proposal, and programmers already can and do distribute their content over the Internet. Indeed, there are already more than 120 legal online video services,¹³² and U.S. audiences used those services to access 8.4 billion movies and 76.1 billion TV episodes in 2015, alone.¹³³ The figures are expected to grow to 111.1 billion and 12.7 billion by 2020,¹³⁴ without any government mandate. The overwhelming majority of the creative community believes that the proposal will do far more harm to existing business models and the ability to reach viewers than it will open up new avenues of discovery.¹³⁵

VII. Conclusion

Increasing MVPD set-top box competition is certainly a laudable goal. What concerns the MPAA, SAG-AFTRA, and the overwhelming majority of the creative community, however, is that in the service of that goal the proposal would: 1) abrogate rights that the Copyright Act grants to copyright holders; 2) exceed the authority of the FCC; 3) jeopardize content security and

¹³¹ See Amazon comments at 4; Google Comments 2-4; Greenlining Institute comments at 5; Incompas comments at 7, 15-17; ITIC comments at 6; Public Knowledge comments at 13; TiVo comments at i, 6-7, 15; Writers Guild of America, West comments at 2-3, 14, 16-17.

¹³² See www.WhereToWatch.com.

¹³³ Underlying data available from IHS. See <https://www.ihs.com/>.

¹³⁴ *Id.*

¹³⁵ See MPAA and SAG-AFTRA comments at i-iii, 26, 33; 21st Century Fox, A&E, CBS, Scripps Network Interactive, Time Warner, Viacom, and The Walt Disney Company comments at 11-12; Creators of Color comments at 1-2; C-Span comments at 1-2; DGA and IATSE comments at 1-8; IFTA comments at 6-8; MMTC *et al.* comments at 2-4, 8-15; TV One comments at 10-18.

programmers' rights to prevent content theft; 4) impose infeasible, anti-innovation, and unduly burdensome obligations on content creators; 5) violate the First and Fifth Amendments; and 6) undermine the economics of program production.

No matter how laudable the goal, this cannot be the answer.

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Appendix: Party Abbreviations

ACA:	American Cable Association
AFTRA:	American Federation of Television and Radio Artists
ANA:	Association of National Advertisers
ATR:	Americans for Tax Reform
CCIA:	Computer & Communications Industry Association
CEI:	Competitive Enterprise Institute
CFA:	Consumer Federation of America
CIF:	Center for Individual Freedom
CVCC:	Consumer Video Choice Coalition
CWA:	Communications Workers of America
DGA:	Directors Guild of America
DiMA:	Digital Media Association
DLNA:	Digital Living Network Alliance
EFF:	Electronic Frontier Foundation
ICLE:	International Center for Law and Economics
IFTA:	Independent Film & Television Alliance
IPI:	Institute for Policy Innovation
ITIC:	Information Technology Industry Council
ITTA:	Independent Telephone & Telecommunications Alliance
MMTC:	Multicultural Media, Telecom, and Internet Council
MPAA:	Motion Picture Association of America
NAB:	National Association of Broadcasters
NCTA:	National Cable & Telecommunications Association
NTCA:	National Telephone Cooperative Association
NTIA:	National Telecommunications and Information Administration
PPI:	Progressive Policy Institute
PRA:	Property Rights Alliance
RIAA:	Recording Industry Association of America
SAG:	Screen Actors Guild
TPA:	Taxpayers Protection Alliance