

September 6, 2016

VIA ELECTRONIC FILING

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

Re: *Commercial Availability of Navigation Devices*, MB Docket No. 16-42, CS
Docket No. 97-80

Dear Ms. Dortch:

On September 1, 2016, Rick Chessen and Neal Goldberg of the National Cable & Telecommunications Association; Stacy Fuller, Alex Starr, and Raquel Noriega of AT&T/DIRECTV; Sean Lev of Kellogg, Huber, Hansen, Todd, Evans & Figel (counsel for AT&T); Jordan Goldstein of Comcast; Jonathan Friedman of Willkie Farr & Gallagher LLP (counsel for Comcast); Alex Hoehn-Saric of Charter; and Barry Ohlson of Cox met with Gigi Sohn, Counselor to Chairman Wheeler; Jessica Almond, Legal Advisor to the Chairman; John Williams of the Office of General Counsel; and Scott Jordan, Chief Technologist (by phone) regarding the above-referenced proceeding. Rick Chessen, Neal Goldberg, Stacy Fuller, Jordan Goldstein, and Jonathan Friedman also had a separate phone call with Marc Paul, Legal Advisor to Commissioner Rosenworcel, on September 2, 2016. We discussed concepts and approaches raised by Commission staff in meetings that we and other stakeholders have recently held regarding the above-captioned proceeding.

Licensing Body and Process

We discussed the new concept of a central licensing body that would establish and enforce a single license for MVPD apps. Under this approach, the Commission would play a role in defining the terms of the license and overseeing the work of the licensing body, including seeking public comment on the license developed by the licensing body. The licensing body would be responsible for issuing the license to qualifying device manufacturers and enforcing the terms of the license, and handling device testing and certification. We raised our significant legal, policy, and practical objections to such an approach. As detailed further below, this approach is unnecessary and unworkable; exceeds the Commission's authority under Section 629; essentially imposes a royalty-free compulsory copyright license on MVPDs and programmers, which would also be well beyond the Commission's authority to adopt; and raises other legal issues.¹ The approach would ultimately have the effect of chilling innovation and

¹ The Commission also did not provide adequate notice that it would be pursuing this licensing model in the NPRM in this rulemaking, thus raising issues under the Administrative Procedure Act. *See Shell Oil Co. v. EPA*, 950 F.2d 741, 750-51 (D.C. Cir. 1991) (vacating two rules because "neither . . . was to be found among the proposed regulations" and "[i]nterested parties cannot be expected to divine the EPA's unspoken thoughts"); *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 253 (3d Cir. 2010) (finding a provision of a rule that "was not mentioned in

upending a robust app marketplace that is already providing consumers with a wide and growing array of retail device options for accessing their MVPD service.

MVPDs have committed to develop apps for in-home devices based on open HTML5 standards, while also preserving the ability of MVPDs to negotiate other business-to-business agreements, including with non-HTML5 (i.e., native) platforms.² HTML5 standards were developed by an international standards body and reflect marketplace movement to IP streaming standards under HTML5. The HTML5 Apps-Based Approach we put forth is based on these standards and marketplace developments, providing a common denominator app that all device manufacturers could build to. As we previously stated,³ MVPDs would make the HTML5 app licensing process as frictionless as possible for device manufacturers. Each MVPD would offer a standard license on commercially reasonable terms.⁴ This would be a simple process for device manufacturers. And because only seven or eight MVPDs would be involved, accepting seven or eight additional licenses would not be onerous for device platforms that may already support hundreds or thousands of apps.⁵

In light of these MVPD commitments, a central licensing body is unnecessary. It is also unworkable as it does not reflect how licensing is handled in the marketplace today. Programmers today do not pool and offer uniform rights across all platforms and uses. They segment the market, license some rights to OVDs and other rights to MVPDs, and make refined judgments about devices, device security, and how to distribute their content on various platforms.⁶ This market-driven licensing process is providing enormous choice to consumers in how they access content, and it is unclear why this successful model should be displaced with a totally unproven government-driven process. We also raised concerns that the licensing body concept would slow innovation since changes to the license to account for security, technological, and other developments over time would presumably have to be approved by the licensing body and reviewed by the Commission. In contrast, the existing app environment can

the [NPRM]” inadequate under the APA); *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1252, 1260 (D.C. Cir. 2005) (vacating a rule setting a maximum air velocity for ventilation in coal mines because the NPRM proposed a minimum velocity and “did not indicate the possibility of a maximum cap”).

² See Letter from Paul Glist, Davis Wright Tremaine LLP, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (June 16, 2016); NCTA, Response to Questions About Open Standards HTML5 Apps-Based Approach, MB Docket No. 16-42, CS Docket No. 97-80, at 8-26 (July 22, 2016) (“*NCTA Response*”).

³ See Letter from Paul Glist, Davis Wright Tremaine LLP, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80, at 16-18 (Aug. 19, 2016) (“*Aug. 19 Rebuttal Ex Parte*”).

⁴ *Id.*

⁵ As we have explained, the HTML5 Apps-Based Approach would only apply to MVPDs with one million or more subscribers. Today, only eight MVPDs meet this threshold (seven if the FCC adopts a two million subscriber threshold as some parties have urged). *Id.*

⁶ See *id.* at 17-18.

accommodate such changes quickly. We further discussed that, in the event that the Commission decides to adopt licensing rules for apps, it should not preclude business-to-business agreements between individual MVPDs and device manufacturers or disturb any existing business-to-business agreements.

We also raised numerous concerns if the license developed by the central licensing body would apply to non-HTML5 (i.e., native) device platforms. As a threshold matter, there is no justification for government intervention with respect to such platforms. Native apps have been enormously successful in the marketplace today, as evidenced by the more than 460 million retail devices supporting native MVPD apps. Native device platforms, such as iOS and Android, have also set their own agreements and licensing structure,⁷ further undercutting any rationale for government involvement.

In addition, license terms developed for the HTML5 platform may not translate readily to license terms for other platforms. Among other things, the basic business models for HTML5 and non-HTML5 platforms can be fundamentally different. For example, iOS restricts app providers to the Apple payment platform and charges a “tax” for transactions, such as for on-demand purchases. Consequently, app providers may restrict their offerings on the iOS platform or increase their prices for iOS apps. For example, Google’s YouTube Red service costs \$10 on HTML5 platforms and \$13 on iOS.⁸ By contrast, the HTML5 proposal was crafted to be without charge for the app to manufacturers, consumers, or programmers, on the express premise that there would be no device platform transaction tax. Aside from these different business models, there are also major technology differences between HTML5 and non-HTML5 platforms.⁹ HTML5 uses the HTML5 playback to insure that the content is protected through the HTML5 implementation. Non-HTML5 platforms are not so tightly integrated, and would need different technical and licensing requirements.¹⁰ Moreover, the notion that MVPDs can easily develop apps for every new non-HTML5 platform ignores the substantial costs and efforts that MVPDs would have to incur and undertake in app development, integration work, and ongoing support (e.g., app updates, bug fixes). The central licensing concept does not appear to assure cost recovery for MVPDs.

⁷ Because MVPDs have already made native apps widely available on a variety of retail devices, there is no legal basis for the Commission to regulate the licensing of native apps. As discussed further below, a central licensing body and mandated app license terms are beyond the scope of the Commission’s authority under Section 629, and attempting to extend this oversight to non-HTML5 apps is even more clearly beyond the Commission’s authority.

⁸ Ryan Nakashima, *YouTube To Launch \$10-a-Month Ad-Free Video, Music Plan Red*, Business Insider (Oct. 21, 2015), <http://www.businessinsider.com/ap-youtube-to-launch-10-a-month-ad-free-video-music-plan-red-2015-10> (noting that “the service will cost \$13 a month if purchased through Apple’s iTunes – but only because Apple takes a 30 percent cut”).

⁹ See DSTAC Final Report at 39 (DSTAC WG2 at 12) (“each have their own unique development environment, interface, streaming platform and encryption technology”).

¹⁰ When new platforms seek apps, they work out business-to-business agreements, development arrangements and licenses designed for the capabilities, security, privacy protections, and rights associated with that platform.

We also responded to staff's comment that the DFAST license administered by CableLabs for CableCARD-enabled devices provides a model for a central licensing body. The DFAST license is completely inapposite to a central licensing body in this context. DFAST was a private license developed *voluntarily* by the cable industry for specific security technology to decrypt unenhanced one-way cable linear channels received via CableCARD, with enforcement rights for cable operators and a limited role for the FCC in adjudicating disputes. In contrast, among other differences, there is no specific technology being licensed, and the central licensing body in this context would have broad authority over licensing, enforcement, and testing across all apps and devices, administering the complex rights associated with modern MVPD service and overseeing product features and business-to-business relationships that are far beyond the scope of Section 629, and the Commission would have an expansive role in the creation and oversight of the licensing body and the development of license terms themselves.¹¹ Given these stark differences, any comparison between DFAST and the central licensing concept is baseless.

The central licensing concept also raises a host of legal issues.¹² Mandating that a central licensing body must control the licensing of MVPD apps on device platforms – including dictating the specific license terms and conditions – is well beyond the scope of the Commission's authority under Section 629.¹³ Nothing in the statute empowers the Commission to hand over to a third party MVPDs' rights to the proprietary technologies and service that make up their apps, and such an approach would mark an unprecedented, and unlawful, expansion of the Commission's authority in this area.¹⁴ And, to the extent the licensing process impedes MVPDs' ability to update security requirements in the app license and respond to security threats, this could jeopardize MVPD security in contravention of Section 629(b).¹⁵

¹¹ The Commission has opted to take a more limited role in licensing matters in other regulatory contexts as well. For example, the Commission has declined to dictate license terms in the *Broadcast Flags Order* and the *Basic Service Tier Encryption Order*. See *NCTA Response* at 22 n.28. There is no reason – or legal basis – for the Commission to take a different approach there.

¹² We noted certain legal concerns in our meeting as noted here, but this is not an exhaustive list.

¹³ The Commission also has no authority to regulate MVPDs' TV Everywhere apps. Section 629 is focused on the delivery of MVPD service to TVs and other retail devices in customers' homes. It does not cover services, like TV Everywhere, that can be delivered over an Internet connection anywhere in the country.

¹⁴ The courts have expressly warned the Commission against "unbridled" interpretations of Section 629, stating that the Commission "cannot simply impose any regulation . . . as a means of promoting the commercial availability of navigation devices, no matter how tenuous its actual connection to § 629's mandate." *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 997-98 (D.C. Cir. 2013); see also *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005) (rejecting FCC's attempt to impose "broadcast flag" rules on the industry).

¹⁵ See NCTA Comments, App. A, *The FCC's "Competitive Navigation" Mandate: A Legal Analysis of Statutory and Constitutional Limits on FCC Authority*, MB Docket No. 16-42, CS Docket No. 97-90, at 26-29 (Apr. 22, 2016) ("*NCTA Legal White Paper*") (explaining that Section 629(b) unambiguously prohibits rules that "would jeopardize security of multichannel video programming" (quoting 47 U.S.C. § 549(b)). The central licensing concept also would violate limits on the Commission's authority under Section 624(f) not to "impos[e] requirements regarding the provision of content of cable services, except as expressly provided in [Title VI]," and conflict with the directive in Section 621(c) that the Commission not impose any type of common carrier regulation on a cable operator's provision of cable services. See *id.* at 31-36 (explaining how the NPRM would exceed the limitations on

Moreover, the central licensing concept would essentially impose a royalty-free compulsory copyright license on MVPDs and programmers by having the Commission and central licensing authority determine specific licensing terms and requiring MVPDs to provide apps across device platforms. As noted above, programmers today do not pool and offer uniform rights across all platforms and uses. They segment the market, license some rights to OVDs and other rights to MVPDs, and make refined judgments about devices, device security, and how to distribute their content on various platforms. Mandating a royalty-free compulsory license across all devices and platforms would interfere with the rights of programmers and content owners to control how their original copyrighted content is distributed, and infringe the same copyright interests as have been highlighted in the recent Copyright Office letter.¹⁶ Only Congress may establish a compulsory copyright license, and the Commission has no authority to take such action.¹⁷ Giving the Commission discretion to modify license terms and seeking public comment on the license would only underscore further the lack of recognition of the copyright issues involved with the central licensing concept here.

Furthermore, if a central licensing body is developing, controlling, and enforcing the license and the Commission can add or eliminate license terms, MVPDs would not be able to assure compliance with their individual programming agreements. In contrast, under the HTML5 Apps-Based Approach, MVPD service is delivered consistent with contractual arrangements with programmers, as the MVPD controls how content is handled on an end-to-end basis, and the MVPD's license with device manufacturers would provide further assurance that these contractual requirements are met.¹⁸

Entitlements and Privacy Concerns

We also discussed issues related to integrated search and entitlements. Notwithstanding the fact that integrated search is not required under Section 629, the HTML5 Apps-Based Approach includes an unprecedented commitment to support integrated search of MVPD and

the Commission's authority in Section 624(f) and 621(c) by regulating the provision and content of cable service and effectively relegating cable operators to common carriers).

¹⁶ See Letter from Maria Pallante, U.S. Copyright Office, to Rep. Blackburn *et al.* at 10 (Aug. 3, 2016) ("Thus, rather than being passive conduits for licensed programming, it seems that a broad array of the third-party devices and services that would be enabled by the Proposed Rule would essentially be given access to a valuable bundle of copyrighted works, and could repackage and retransmit those works for a profit, without have to comply with agreed contractual terms. . . . The Proposed Rule would thus appear to inappropriately restrict copyright owners' exclusive right to authorize parties of their choosing to publicly perform, display, reproduce and distribute their works according to agreed conditions, and to seek remuneration for additional uses of their work.").

¹⁷ The central licensing concept also would interfere with MVPDs' trademark rights by compelling that MVPD trademarks be licensed across all devices and platforms on uniform terms, regardless of platform differences. See *NCTA Legal White Paper* at 55-59.

¹⁸ Moreover, if MVPDs cannot directly enforce their rights against device manufacturers, as appears to be contemplated under the central licensing approach, that would not only be a radical departure from the DFAST license model, but would also violate an MVPD's right to protect the copyright interests in its service. See *Aug. 19 Rebuttal Ex Parte* at 15.

OVD content on retail devices. We discussed our significant concerns with proposals that would go well beyond integrated search and require MVPDs to provide individual consumer entitlement data to device manufacturers. Entitlements reveal personally identifiable information, such as subscriptions to channels, previous viewing, and financial transactions. MVPDs cannot be expected to release such entitlement information – in violation of their obligations under Sections 631 and 338 – to device manufacturers who are not subject to these provisions. Nor does the Commission have the statutory authority to require the sharing of such information.

We also reiterated that, as a technical matter, there is no uniform or fixed MVPD entitlement language that could communicate all search variations to a device. MVPDs today do not deliver entitlements in a standardized way, and trying to standardize the delivery of entitlements would require significant changes to MVPDs' networks and freeze innovation.¹⁹ Moreover, requiring MVPDs to indicate whether a customer is subscribed to a particular asset in the search results on the device platform is the equivalent of transmitting all personally-identifiable subscription information to third-party devices, posing the same threats to personal privacy rights that have been present in this proceeding since the NPRM first proposed an unbundled “information flow” of entitlement data. Furthermore, entitlements can change frequently with promotions and changes to customers' subscriptions, and it is not possible to account for these changes and deliver this information correctly in advance.²⁰

App Functionality

Finally, we discussed the functionality of MVPD apps as compared to MVPD-supplied set-top boxes. Staff indicated that there should be “parity of consumer experience” between MVPD apps and set-top boxes to the extent such parity complies with programming contracts and is technically feasible. Under this approach, MVPD apps would support channel lineups, fast-forward/rewind/start-over, and other features integral to the multichannel video service, but not other features, such as apps available on set-top boxes today. In this regard, MVPDs have repeatedly committed that the apps would include the full suite of the MVPD's linear and on-demand programming the MVPD has the rights to include, as well as the MVPD's user interface and guide.²¹

We have previously noted that MVPDs have every incentive to provide their fullest and best service to all devices and to compete with other video services on those platforms. But we have also explained that certain other set-top box-related features depend more upon what the

¹⁹ See *Aug. 19 Rebuttal Ex Parte* at 8 & n.35; Letter from Jordan B. Goldstein, Vice President, Regulatory Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80, at 2 (May 11, 2016). More generally, there is no uniform technical approach for implementing integrated search across different device platforms. MVPDs and device manufacturers work together to develop the best ways to build search and provide unique and competitive products for consumers. Commission regulations threaten to stifle such innovation, to the detriment of consumers.

²⁰ See *Aug. 19 Rebuttal Ex Parte* at 8-9.

²¹ See *NCTA Response* at 8-10; *Aug. 19 Rebuttal Ex Parte* at 11-12.

Ms. Marlene H. Dortch
September 6, 2016
Page 7

device manufacturer – not the MVPD – decides about the operating systems and hardware it deploys.²² Voice controls for an MVPD’s guide to operate through a specialized remote control provided by that MVPD would not be replicated in the app. Furthermore, device capabilities vary from platform to platform, and those differences would become even more pronounced if the Commission were to impose a one-size-fits-all requirement to license apps on all platforms, including platforms that do not support HTML5.

Please direct any questions to the undersigned.

Sincerely,

/s/ Rick Chessen
Rick Chessen
Senior Vice President,
Law and Regulatory Policy
National Cable &
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/s/ Stacy Fuller
Stacy Fuller
Vice President,
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cc: Jessica Almond
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²² *Aug. 19 Rebuttal Ex Parte* at 11-12.