

**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

COMMENTS ON BEHALF OF INTELLECTUAL PROPERTY LAW SCHOLARS

The undersigned intellectual property law scholars respectfully submit these comments in response to the notice of proposed rulemaking in the matter of “Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices.”

We write to express our concerns with the Commission’s proposed rules and their potential harmful impact on the property rights of creators and copyright owners. Under the Copyright Act, creators and copyright owners are guaranteed certain exclusive property rights in their creative works, including the exclusive rights to publicly distribute and perform those works.¹ Unfortunately, the Commission’s proposed rules would undermine these property rights by severely limiting creators’ and copyright owners’ ability to determine whom to license their property rights to and on what terms. In so doing, the proposed rules further risk disrupting the free market for creative works that has long been the bedrock of our vibrant creative economy.

We thank the Commission for the opportunity to submit these comments.

I. The Foundation and Economic Importance of Copyright

In order to understand the harmful consequences that flow from the Commission’s proposed rules, it is helpful at the outset to understand both the nature of the property rights at stake and the economic role those property rights play in fostering a thriving free market for the development and distribution of creative works.

A. Copyright Law is Grounded in the U.S. Constitution and Principles of Natural Property Rights

The U.S. Constitution grants Congress the power “To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings[.]”² This grant of power—which gave rise to the Copyright Act and modern copyright protection—flows from the Founders’ belief that the interests of creators and the interest of the public in

¹ See 17 U.S.C. §§ 106(3)-(4).

² U.S. Const. art. I, § 8, cl. 8.

securing property rights in creative works are one and the same.³ In support of copyright protection, James Madison famously observed in Federalist Paper 43 that “the public good fully coincides . . . with the claims of individuals.”⁴ The Founders properly understood that by securing all individual rights—including intellectual property rights—the government empowers individuals and nurtures a prosperous and flourishing society.⁵

The idea of copyright in the early American Republic was consistent with the dominant property theory of natural rights philosophy and the understanding that every person has a natural right to the fruits of his labors.⁶ Copyright’s philosophical foundations date back to the classic liberal political philosophy exemplified by the works of John Locke.⁷ Locke believed in a social contract between government and the people in which life, liberty, and property are guaranteed natural rights. Importantly, he defined “property” broadly to include not only tangible assets, but anything for which a person labors and attaches value—or put simply, the fruits of one’s labors.⁸ Because the Founders believed that the right to the fruits of one’s labors was unalienable and not surrendered to the government, it naturally followed that the government should provide copyright protection to those who labor to produce creative works.

In his seminal work *The Wealth of Nations*, Adam Smith also championed promoting the public interest by recognizing the importance of individual interests.⁹ Smith explained that concerted efforts to benefit the public are often less effective—and less helpful to society—than uncoordinated individual efforts to pursue private interests.¹⁰ Society benefits the most when individuals are empowered to create valuable goods and services by pursuing their own interests.¹¹

Copyright embodies these principles by enabling creators to pursue their interests and by granting them exclusive property rights in their works.¹² Not only does copyright allow creators to justly reap the fruits of their labors, it also reflects the reciprocal premise that “one should not reap what another has sown.”¹³ The reward and value that result from authors’ creative works should not be misappropriated by those who have no rights in those works. By granting creators property rights in the fruits of their productive labors, copyright incentivizes creativity and innovation that benefits creators and the public alike.

³ See Sandra Aistars, Devlin Hartline, & Mark Schultz, *Copyright Principles and Priorities to Foster a Creative Digital Marketplace*, 3 (Ctr. for the Prot. of Intell. Prop., Dec. 2013), <http://cpip.gmu.edu/wp-content/uploads/2015/12/Aistars-Hartline-Schultz-Copyright-Principles-and-Priorities.pdf>.

⁴ The Federalist No. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961).

⁵ See Aistars et. al, *supra* note 3, at 3.

⁶ See Randolph J. May, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective*, at 4 (2015).

⁷ See *id.* at 15

⁸ See Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 *Social Philosophy & Policy* 283 (2012), available at <http://ssrn.com/abstract=1983614>.

⁹ See Adam Smith, *The Wealth of Nations*, at 160-61 (P. F. Collier & Son 1902) (1776).

¹⁰ See *id.* See also Aistars et. al, *supra* note 3, at 3

¹¹ See Aistars et. al, *supra* note 3, at 3.

¹² See *id.*

¹³ See May, *supra* note 6, at 4.

B. Copyright Supports a Thriving Free Market for the Production and Distribution of Creative Works

By securing property rights in creative works, copyright supports our creative industries and provides significant benefits to our economy. Industries that focus on the creation, production, distribution, and exhibition of copyrighted material added \$1.1 trillion to U.S. gross domestic product in 2013—more than 6.7% of the total U.S. economy.¹⁴ These industries also accounted for over 4% of the entire U.S. workforce, employing nearly 5.5 million workers in 2013 and paying them 34% more than the average U.S. worker.¹⁵ Furthermore, growth rates in these industries outpaced the rest of the economy by 70% between 2009 and 2013.¹⁶ These numbers reflect an intricate and extensive creative ecosystem built upon our longstanding tradition of empowering creators and the industries that support them by protecting the fruits of their labors.

But the economic importance of the creative industries doesn't end there. The outputs of the creative industries serve as the inputs that spur the development of countless innovative goods and services in other industries, including in the telecommunications industry. By creating marketable property rights in creative works, copyright plays a key role in facilitating the myriad transactions that contribute to a thriving creative economy grounded in free market principles. Among other things, these property rights enable the division of labor, encourage product differentiation and competition, and spur investments in the development and distribution of creative works.

It is important to remember that copyright incentivizes not only the initial creation of movies, music, and other creative works, but also the *commercialization* of these works through further development, marketing, and distribution. In addition to authors and artists, copyright supports the intermediaries that bear the costs and risks involved in commercializing creative works.¹⁷ Though often overlooked, marketing and delivering creative works to a mass audience involves capital-intensive tasks that intermediaries would be far less willing to undertake in the absence of secure property rights to protect the value of their investment.¹⁸

To take just one example from television and film, writing a script may be a relatively low-cost endeavor, but bringing that script to screen requires a technical crew and cast, a production and editing team, specialists to market and distribute the finished product, and the list goes on.¹⁹ As a result, it is not uncommon for a feature film to have a budget of over \$200 million, and that doesn't take into account the overhead costs of maintaining the studio infrastructure.²⁰ It's hard to imagine that anyone would undertake this considerable investment absent a marketable property right in the finished product.

¹⁴ *Copyright Industries in the U.S. Economy: The 2014 Report*, by Stephen E. Siwek of Economists Incorporated, prepared for the International Intellectual Property Alliance (IIPA), December 2014, at 2, available at http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_us_2015.pdf.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Jonathan M. Barnett, *Copyright Without Creators*, 9 Rev. L. & Econ. 389, at 390 (2013).

¹⁸ *Id.* at 390-91.

¹⁹ *Id.* at 396-97.

²⁰ *Id.*

Given copyright's essential role in supporting our creative economy, the Commission should proceed with an abundance of caution lest it disrupt the property rights that form the foundation of our creative ecosystem.

II. By Conveying Copyrighted Works to Third Parties Without the Consent of Copyright Owners, the Commission's Proposed Rules Risk Severely Damaging Our Vibrant Creative Economy

From the outset, the Commission's proposed rules fail to respect the property rights of creators and copyright owners. These rights include, among others, exclusive rights to publicly distribute and perform their copyrighted works.²¹ The proposed rules would require pay-TV providers²² to send three "information flows" to unaffiliated third parties so that the third parties can "design and build competitive navigation devices."²³ Shockingly, one of these information flows, termed "content delivery" by the Commission, consists of the copyrighted video programming itself.²⁴ The Commission claims that conveying these copyrighted works to unaffiliated navigation device makers will create a commercial market for third-party devices that customers can use to access their pay-TV programming.²⁵ Unfortunately, the Commission fails to understand that by requiring pay-TV providers to hand over these copyrighted works to third parties, the Commission would trample on the property rights of copyright owners.

The Commission's proposed rules would require pay-TV providers to deliver massive amounts of copyrighted works to unaffiliated third parties *without requiring the consent of the creators and owners of those copyrighted works*. Nothing in the proposed rules suggests that pay-TV providers' obligation to transfer these copyrighted works will be dependent upon permission from the copyright owners. In fact, it appears that the Commission believes that copyright owners need not be included in the process at all. But the creative works that pay-TV providers distribute to their customers are packaged and delivered pursuant to detailed contracts between the pay-TV providers and copyright owners. By forcing pay-TV providers to convey these copyrighted works to third parties without requiring the consent of copyright owners, the Commission effectively seeks to create a zero-rate compulsory license for the benefit of third parties who may have no involvement in the licensing contracts that copyright owners use to disseminate their works.

This zero-rate compulsory license fundamentally disrupts copyright owners' ability to exercise control over their property. The ability to choose whom to license their works to and on what terms is a key to component of copyright owners' property interests. As the creators and investors in copyrighted works, and as the people whose livelihoods most directly depend on the commercial success of those works, copyright owners are well-positioned and incentivized to determine the best way to commercialize their works. And their property interests in those works—secured by copyright—give them the ability to pursue the wide variety of business

²¹ See 17 U.S.C. §§ 106(3)-(4).

²² These include cable TV providers, direct-broadcast satellite TV providers, and telephony-based TV providers, collectively referred to as "multichannel video programming distributors" (MVPDs).

²³ Notice of Proposed Rulemaking, *In the Matter of Expanding Consumers' Video Navigation Choices and Commercial Availability of Navigation Devices*, F.C.C., at 2 (2016), [hereinafter "NPRM"].

²⁴ *Id.*

²⁵ *Id.* at 18.

models, licensing and contract arrangements, and investment strategies that enable the success of our creative economy. By disrupting copyright owners' property rights, the Commission's proposed rules risk severely damaging the vibrant creative ecosystem that these property rights support.

Furthermore, it is entirely unclear where the Commission would draw the legal authority to change the nature of copyright owners' property rights. It appears the Commission believes it has the legal authority to implement its proposed rules under Section 629 of the Communications Act, which directs the Commission to "adopt regulations to assure the commercial availability . . . of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor."²⁶ While the Commission makes many references to Section 629, nowhere in its analysis does it cite to language granting it the authority to rewrite copyright law. In its justification of authority, the Commission repeatedly states that it will broadly interpret ambiguous terms in the Communications Act and that "a broad interpretation is necessary."²⁷ But even under the broadest of interpretations, it is clear that the Communications Act does not give the Commission the authority to amend the Copyright Act and create a zero-royalty compulsory license out of thin air.

The Commission's proposed rules would improperly modify and undermine the property rights of creators and copyright owners, thus jeopardizing the tremendously successful creative economy that those property rights support.

III. The Commission's Proposed Rules Fail to Respect the Contractual Terms That Guide and Control the Dissemination of Copyrighted Works

When deciding how best to disseminate their copyrighted works to various audiences, copyright owners negotiate detailed contracts with pay-TV providers that outline the manner in which their works will be disseminated. In addition to improperly granting a zero-rate compulsory license to third parties that may not be involved in the underlying contracts between copyright owners and pay-TV providers, the Commission's proposed rules further undermine these contracts by failing to require that the recipients of the compulsory license abide by the underlying contract terms. These terms can include things like channel "neighborhood" assignments, branding requirements, advertising limits, platform restrictions, and the list goes on. While paying lip service to the importance of honoring the terms of the underlying contracts, the proposed rules are woefully inadequate to protect copyright owners' contractual interests.

The Commission states that "our goal is to preserve the contractual arrangements between programmers [*i.e.*, copyright owners] and MVPDs [*i.e.*, pay-TV providers], while creating additional opportunities for programmers, who may not have an arrangement with an MVPD, to reach consumers."²⁸ Despite this claim, the proposed rules fail to require that third-party recipients of the copyrighted works to abide by the underlying contract terms between copyright

²⁶ 47 U.S.C. § 549(a).

²⁷ NPRM at 12.

²⁸ *Id.* at 10.

owners and pay-TV providers. Instead, the Commission proposes to honor these contractual terms through “compliance and robustness” requirements that would transfer some, *but not all*, of the underlying contractual obligations to the third-party recipients of the copyrighted works. In particular, the compliance and robustness requirements would require the third-party recipients to honor “the limits on the rights . . . communicated in the Entitlement Information Flow.”²⁹

In a purported attempt to “reflect identical rights” that consumers have with respect to their pay-TV services, the Commission proposes to define the Entitlement Information Flow to include “(1) which Navigable Services a subscriber has the rights to access and (2) the rights the subscriber has to use those Navigable Services,” including “(1) copy control information and (2) whether the content may be passed through outputs, and if so, any information pertaining to passing through outputs such as further content protection and resolution, (3) information about rights to stream the content out-of-home, (4) the resolutions that are available on various devices, and (5) recording expiration date information, if any.”³⁰ While this information would certainly include several of the contractual terms governing the dissemination of the copyrighted works, it fails to include important terms that affect both viewer experience and the value of the underlying license.

For example, under the Commission’s proposal, third-party recipients of the copyrighted works would not be required to abide by contractual terms about channel placement designed to protect viewer experience and brand value. One twisted (and extreme) consequence of this is that third parties would be able to offer children’s programming in the same channel “neighborhoods” as violent or sexual content, even if copyright owners’ contracts with pay-TV providers explicitly prevents this. On a more general level, even if the channel placement isn’t obviously distasteful, the Commission’s proposal would still interfere with copyright owners’ right to contractually establish the manner in which their property will be disseminated.

Another flaw in the Commission’s proposal is that it does not require third-party recipients of copyrighted works to abide by contractual terms concerning advertising in the delivery of those works. This not only raises similar concerns as those in the example above regarding viewer experience and copyright owners’ brand integrity, it also has serious negative implications for the overall value of copyright owners’ licensing contracts. By repackaging and offering different advertising when delivering the copyrighted works to customers, third parties will be able to generate additional advertising revenue (beyond the advertising revenue received by pay-TV providers) when disseminating copyright owners’ property. Importantly, these third parties will be able to do this without any obligation to negotiate a license with or to compensate copyright owners. This in turn risks reducing the advertising revenue that pay-TV providers can earn from disseminating copyrighted works, thereby reducing the value of the license agreements that copyright owners negotiate with pay-TV providers.

By failing to require third-party recipients of copyrighted works to abide by *all* the underlying contractual terms governing the dissemination of those works, the Commission’s proposal adds insult to injury. In effect, the Commission proposes to violate copyright owners’ property rights

²⁹ *Id.* at 34.

³⁰ *Id.* at 20.

and dilute the value of copyright owners' contractual interests in order to enrich third parties and without requiring those third parties to pay any compensation back to copyright owners.

IV. The Commission's Proposed Rules Risk Jeopardizing the Safety of Copyright Owners' Creative Works

The Commission proposes to require pay-TV providers (referred to as MVPDs) "to support at least one content protection system to protect its multichannel video programming that is licensable on reasonable and nondiscriminatory terms by an organization that is not affiliated with MVPDs."³¹ The Commission reasons that its proposal will "allow for a competitive market for innovative retail navigational devices, including software, that also affords MVPDs significant flexibility to protect their content, evolve their content protection, and respond to security concerns."³² Unfortunately, the Commission's proposal fails to account for copyright owners who may want to protect their copyrighted works by disseminating them exclusively through proprietary (and not widely licensable) content protection mechanisms.

Under the Commission's proposal, creators and copyright owners would be denied the right to determine—through contractual agreement—the security mechanisms to be used in disseminating their works. Instead, copyright owners must risk exposing their property to any security threats that may be associated with using widely-licensable content protection mechanisms. This is especially concerning when it comes to dissemination of creative works online, where copyright owners already find it extremely difficult to protect the safety of their property. By limiting copyright owners' options in this regard, the Commission risks adding to the piracy epidemic that creators and copyright owners struggle with every day.

Furthermore, by failing to require third-party recipients of copyrighted works to abide by the underlying contractual terms between copyright owners and pay-TV providers, the Commission's proposal would allow these third parties to contribute to the spread of piracy in more subtle ways. For example, nothing in the Commission's proposal would prevent third parties from delivering the copyrighted works side-by-side with stolen versions of the same works. It is easy to imagine a search function that aggregates copies of creative works from a variety of platforms and displays the search results side-by-side. In fact, anyone who has run an internet search for a movie or TV show has likely seen results that mix links to both legitimate and stolen works. With pay-TV providers, copyright owners are able to negotiate contracts to avoid these kinds of problems. Unfortunately, by transferring copyright owners' property to third parties without requiring the recipients to negotiate a license or abide by the underlying contracts, the Commission's proposal places the safety of copyright owners' property in further jeopardy.

Copyright owners' ability to protect their creative works is essential both to preserve the value of their property and to give them the confidence to enter into arrangements with intermediaries (like pay-TV providers) to disseminate their works to a wide variety of audiences. This is especially true in light of the unique security challenges involved in portable, online, and short-term access to copyrighted works. Any reasonable proposal in this space would help copyright

³¹ *Id.* at 2.

³² *Id.* at 29.

owners move forward in the ongoing battle to prevent the rampant theft and illegal dissemination of their works that has accompanied the rise of the internet. Unfortunately, the Commission's proposal does just the opposite, limiting copyright owners' ability to protect their property and pushing them backwards in the ongoing struggle against piracy.

V. The Commission's Proposed Rules are Unnecessary Given Consumers' Unprecedented Choices in Video Programming

The Commission claims that the proposed rules are necessary because the vast majority of pay-TV subscribers lease set-top boxes from their pay-TV providers.³³ In a recent op-ed, Chairman Wheeler noted that "American consumers enjoy unprecedented choice in how they view entertainment, news and sports programming. You can pretty much watch what you want, where you want, when you want. But there's one glaring exception in the competitive video marketplace: The 'set-top box.'"³⁴ Unfortunately, this short-sighted focus on the set-top box ignores the amazing amount of creative video programming being produced and made available legally across a variety of devices and apps beyond set-top boxes, a trend that does not appear to be slowing down.³⁵ "Cord-cutters" are more and more common, and several networks and cable providers are already offering apps that allow subscribers to stream their programming through a wide variety of internet-based devices.³⁶

A recent study on the availability of film and television works in the digital age found that 98% of premium films and 94% of premium TV series were digitally available on at least one of the online services reviewed, including online video-on-demand and TV Everywhere on-demand services.³⁷ Additionally, the study revealed that the digital home video market was not dominated by any one player, but that the majority of video programming content is available from at least five sources.³⁸ Anyone who is paying attention can see that the future of television lies beyond the set-top box, as more and more consumers turn to apps to watch their favorite programs.

The proposed rules claim to address a lack of competition and choices in the distribution of video programming caused by the dreaded set-top box, but real-world evidence shows an exceptional range of choices among not only creative works, but also among the services viewers can use to access them. The Commission should take note of these realities before interfering with the property rights of creators and copyright owners and risking disruption of our vibrant and competitive creative economy. The problem the Commission is trying to solve may not even exist in the first place

³³ See *id.* at 8.

³⁴ Tom Wheeler, *It's Time to Unlock the Set-Top Box Market*, Re/code (Jan. 27, 2016), <http://recode.net/2016/01/27/its-time-to-unlock-the-set-top-box-market/>.

³⁵ See Emily Steel, *Suddenly, Plenty of Options for Cord Cutters*, N.Y. Times, (Sept. 8, 2015), http://www.nytimes.com/interactive/2015/business/media/streaming-tv-cord-cutting-guide.html?_r=0.

³⁶ See Keach Hagey, *Cord-Cutting Is Accelerating*, WALL STREET JOURNAL, (Dec. 10, 2015) <http://www.wsj.com/articles/cord-cutting-is-accelerating-1449745201>.

³⁷ SNL Kagan, U.S. Availability of Film and TV Titles in the Digital Age, 4 (Mar. 2016), <http://go.snl.com/rs/080-PQS-123/images/U.S.%20Availability%20of%20Film%20and%20TV%20Titles%20in%20the%20Digital%20Age.pdf>.

³⁸ *Id.*

VI. Conclusion

By granting artists and creators property rights in the fruits of their labors, copyright serves the interests of creators and the public alike, fulfilling its constitutional purpose and forming the bedrock of our creative economy. Copyright supports a diverse and multifaceted ecosystem that enables the development, distribution, and enjoyment of creative works, and that provides significant economic and cultural benefits to our society. But this ecosystem only works if copyright owners are able to safely and freely deploy their property in the marketplace. In considering its proposed rules, the Commission should proceed with an abundance of caution to ensure that it respects the property rights of creators and copyright owners, lest it irreparably disrupt the very same creative marketplace that it seeks to promote.

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