

June 15, 2016

By Electronic Filing

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

Re: MB Docket 16-42, CS Docket 97-80

Dear Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai and O'Rielly:

On April 22, 2016, the undersigned intellectual property law scholars submitted comments to the FCC in response to the notice of proposed rulemaking in the matter of “Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices.”¹ Our comments expressed concerns with the proposed rules’ harmful impact on the property rights of creators and copyright owners. Specifically, we warned that the Commission’s proposed rules would undermine the exclusive property rights guaranteed to copyright owners under the Copyright Act by severely limiting their ability to determine whom to license their property rights to and on what terms. In so doing, the proposed rules risk fundamentally disrupting the vibrant creative ecosystem that those property rights support.

Together with the Electronic Frontier Foundation (EFF), another group of intellectual property law academics submitted reply comments framed as a rebuttal to the many comments that dutifully explained how the Commission’s proposed rules would violate copyright law and imperil the property rights of creators and copyright owners.² The EFF/professors offer “observations” on copyright law and conclude that “the proposed rules are consistent with copyright in both letter and spirit.” To reach this conclusion, the EFF/professors broadly defend navigational devices, arguing that “products and services that touch copyrighted works do not infringe copyright, and do not require a license,” and that the “devices and services under the proposed rules” would be non-infringing just like televisions and VCRs.

Surprisingly, despite claiming that the proposed rules are consistent with copyright law, the EFF/professors fail to address the primary copyright concern raised by us and by many other commenters. By focusing on the navigational devices themselves, rather than on how creative works are delivered to those devices, the EFF/professors perform a sleight of hand that masks the real problem. The issue is not what consumers do with the creative works they receive in the privacy of their own homes—the issue is *how* those creative works are delivered to consumers’ homes in the first place.

¹ See Comments on Behalf of Intellectual Property Law Scholars, <http://apps.fcc.gov/ecfs/document/view?id=60001689335>.

² See Reply Comments of Copyright Law Scholars and the Electronic Frontier Foundation, <https://www.eff.org/files/2016/05/27/set-top-box-reply-comments.pdf>.

The creative works that pay-TV consumers watch on their televisions come from multiple sources, including satellite, cable, and telephony-based transmissions. These transmissions are public performances or public distributions, and as a result, they must be licensed. Ignoring this simple principle of copyright law, the Commission would require pay-TV providers to send copyrighted works to third parties even if doing so exceeds the scope of pay-TV providers' licenses with copyright owners. By forcing pay-TV providers to exceed the scope of their licenses, the proposed rules would undermine the property rights of creators and copyright owners, effectively creating a zero-rate compulsory license to the benefit of third parties that have no contractual relationship with either copyright owners or pay-TV providers that copyright owners license their works to. Furthermore, the Commission seeks to create this zero-rate compulsory license despite lacking any authority to do so; the Communications Act certainly does not give the Commission authority to amend the Copyright Act and create a new compulsory license for copyrighted works.

The reply comments of the EFF/professors do not address this concern at all. Committing the bulk of their reply to a broad discussion articulating their principles for copyright law, the EFF/professors fail to respond to the distinct copyright issues that inevitably result from this newly-created compulsory license. It is unclear why the EFF/professors do not address this issue, as it was echoed again and again in the comments to which they purport to respond. Because the proposed rules would brazenly undercut copyright owners' property rights, we believe it is important to call attention to the inability of the EFF/professors to even mention this fundamental problem in their response.

Put simply, the proposed rules would take away the ability of creators and copyright owners to license their works on their own terms. It would give third parties all of the benefits afforded to pay-TV providers by their agreements with copyright owners without the burdens of paying a license or agreeing to the underlying contract terms. This isn't about "the box," and it isn't about what consumers do with the creative works they receive in their homes. The issue is what goes into "the box," and more importantly, *how* it gets there. That the EFF/professors ignore this primary issue speaks volumes. The fact that third parties currently need a license from copyright owners to do the very things the proposed rules would countenance demonstrates that the rules would undermine the property rights of creators and copyright owners.

The EFF/professors properly note that the "ultimate goal" of copyright is to benefit the public good. What they fail to understand is that by securing to 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. We urge the Commission to consider and address—as the EFF/professors do not—how the proposed rules inappropriately interfere with the property rights of creators and copyright owners and the damage they stand to cause to our diverse and vibrant creative marketplace.

Respectfully submitted,

/s/

Matthew Barblan
Executive Director
Center for the Protection of Intellectual Property
George Mason University School of Law

Kevin Madigan
Research Fellow
Center for the Protection of Intellectual Property
George Mason University School of Law

Devlin Hartline
Assistant Director
Center for the Protection of Intellectual Property
George Mason University School of Law

Sandra Aistars
Clinical Professor
George Mason University School of Law
Director of Copyright Research and Policy
Center for the Protection of Intellectual Property

Mark Schultz
Co-Founder and Director of Academic Programs
Center for the Protection of Intellectual Property
George Mason University School of Law
Professor of Law
Southern Illinois University School of Law

Adam Mossoff
Professor of Law
George Mason University School of Law
Co-Founder and Director of Academic Programs
Center for the Protection of Intellectual Property

Hugh C. Hansen
Professor of Law
Director, Fordham IP Institute & IP Conference
Fordham University School of Law

Stan Liebowitz
Ashbel Smith Professor of Economics
School of Management
University of Texas—Dallas

Sean O'Connor
Boeing International Professor of Law
Chair, Center for Advanced Research and Studies on Innovation Policy
University of Washington School of Law

Stephen M. Carlisle
Attorney at Law

Cc:

Gigi Sohn
Jessica Almond
David Grossman
Marc Paul
Matthew Berry
Robin Colwell
William Lake
Michelle Carey
Nancy Murphy
Mary Beth Murphy
Brendan Murray
Lyle Elder
Martha Heller
Kelsie Rutherford
Susan Singer
Arian Attar
Maria Mullarkey
Kathy Berthot
Antonio Sweet
Paul LaFontaine
Jonathan Levy
Susan Aaron
Marilyn Sonn
Matthew Collins