FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

July 11, 2016

The Honorable John Thune
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
254 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Thune:

Thank you very much for your letter sharing your views about how the Commission's proceeding for better fostering competition in the set-top box and navigation app marketplace might impact the legal rights of content owners and creators and your interpretation of the authority granted to the Commission under Section 629 of the Communications Act. I take your input on this issue seriously and assure you that it will receive careful consideration.

Section 629 of the Communications Act, adopted by Congress in 1996, requires the Commission to promote competition. Yet, unfortunately, the statutory mandate in section 629 is not yet fulfilled. The lack of competition in this market has meant few choices and high prices for consumers. In a recent Rasmussen Report Study, 84 percent of consumers felt their cable bill was too high. One of the main contributing factors to these high prices is the no-option, add-on fee for set-top box rental that is included on every bill, forcing consumers to spend, on average, $231 in rental fees annually. Even worse, a recent congressional investigation found that the price of most equipment fees is determined by what the market will bear, and not the actual cost of the equipment.[1] With the lack of competition in this market, it should come as little surprise that fees for set-top boxes continue to rise.[2] Clearly, consumers deserve better.

This February the Commission put out for public comment a proposal that would fulfill the statutory requirement of competitive choice for consumers. This action opened a fact-finding dialog to build a record upon which to base any final decisions. Our record already contains more than 280,000 filings, the overwhelming majority of which come from individual consumers. FCC staff is actively engaged in constructive conversations with all stakeholders—content creators, minority and independent programmers, public interest and consumer groups, device manufacturers and app developers, software security developers, and pay-TV providers of all sizes—on how to ensure that consumers have the competition and choice they deserve. I am hopeful that these discussions will yield straight-forward, feasible and effective rules for all.

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[1] U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS COMMITTEE, MINORITY STAFF REPORT, INSIDE THE BOX: CUSTOMER SERVICE AND BILLING PRACTICES IN THE CABLE AND SATELLITE INDUSTRY, 17 (Jun. 23, 2016).

[2] One recent analysis found that the cost of cable set-top boxes has risen 185 percent since 1994 while the cost of computers, television and mobile phones has dropped by 90 percent during that same time period.

You shared your views about this proceeding might affect the legal rights of content owners and creators. The FCC's authority to regulate communications has always existed alongside content owners' rights to control the duplication, distribution, or performance of their works. Starting with broadcast, and continuing with cable, satellite and the internet, the FCC has for more than 80 years regulated networks that content owners use to transmit their works to the public. In these activities, the Commission has always recognized the statutory rights of content owners and has pursued policies that encourage respect for these rights. In addition, several FCC-related statutes explicitly prohibit the alteration of broadcasts or the theft of cable transmissions that contain copyrighted works.

I share your goal of ensuring that the marketplace of legal copyrighted works is not harmed by our proceeding. And I am confident that these FCC-specific authorities and well-practiced contractual arrangements will continue to safeguard the legitimate interests of all of the participants in the video ecosystem. We have seen this work in the cases of the statutory regime governing must carry and of the essentially contractual regime governing retransmission consent, for example.

The goal of this rulemaking is to promote competition, innovation and consumer choice. I can assure you that we do not seek to alter the rights that content owners have under the Copyright Act; nor will we encourage third parties to infringe on these rights. All of the current players in the content distribution stream, including cable and satellite companies, set-top box manufacturers, app developers, and subscribers, are required to respect the exclusive rights of copyright holders. The rulemaking will require any companies that enter this market subsequent to our action to follow the same requirements.

I also share your interest in ensuring that we do not interfere with the licensing agreements and contractual arrangements between pay-TV providers and programmers. Licensing agreements in particular are used to establish usage terms for content that falls outside of the protections afforded by federal copyright law. I believe that such provisions should remain protected, and we are actively seeking input from the programming community on a number of methods to accomplish this.

While the protection of artistic work and the promotion of technological innovation may be presented as conflicting values, I believe that in many situations these two important policy goals can complement each other. While many people feared that the Sony Betamax would harm the ability of content owners to earn money through films and television, it actually created a brand new and profitable market – the videocassette and later the DVD market – for content owners. Our rulemaking will ensure that this rapidly-changing industry continues to strike the proper balance between property rights and consumer choice. None of us can predict exactly what the video marketplace will look like 10 or 20 years from now, but the goal of this rulemaking is that it will be a healthy ecosystem that supports a wide variety of diverse content and gives consumers many convenient ways to purchase and view this content.

I believe that we can foster competition that will improve consumer choice while respecting and protecting the exclusive rights of content creators. This is also the opinion of the

Writers Guild West, who concluded the following in one of its filings in this proceeding: "[t]he proposed rules for a competitive navigation device market are a logical and necessary next step in giving consumers more choice and further opening the content market to competition. While fears of piracy have been raised in this proceeding, the WGAW's careful analysis is that the Commission's rules can promote competition *and* protect content."[3]

I also share your goal of assuring the security of programming and services offered by pay-TV providers. Our proceeding will protect the role of digital rights management (DRM) platforms in the television ecosystem. DRM platforms offer rigorous protection against unauthorized copying and other violations of content owner rights.[4] Importantly, DRM platforms are not developed by content owners or MVPDs, but rather, by businesses with expertise in DRM. Some of the more popular solutions currently on the market are Microsoft PlayReady and Adobe Primetime. The Notice of Proposed Rulemaking (NPRM) adopted by the Commission in February proposed that content owners would remain free to select the DRM platforms that they prefer. Developers of competitive apps and set-top boxes would license the DRM technology and satisfy compliance requirements – in the very same way that current set-top boxes support DRM, and the same way that competitive apps and devices and already support DRM for online video.

To your point that Section 629 was written to address actual physical equipment, the NPRM seeks comment on the extent of the Commission's authority provided under the statute. Specifically, the NPRM seeks comment on the Commission's interpretation that "when Congress adopted Section 629, it intended the term to include software because set-top boxes have run software since before 1996." The NPRM also notes that Congress recognized that Section 629 extended to software "in the [STELA Reauthorization Act of 2014], which called for a study of downloadable software approaches to security issues previously performed in hardware." As we continue to engage with stakeholders on this and other issues raised in this proceeding, I look forward to the record that develops.

The record we are developing will help us preserve strong copyright and content protections while delivering American consumers meaningful choice. Thank you for your engagement in this proceeding, and I look forward to continuing to work with you on this important consumer issue.

Sincerely,

Tom Wheeler

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[3] Writers Guild of America, West Reply Comments, MB Docket No. 16-42, CS Docket No. 97-80, at 15 (May 23, 2016).

[4] *See* DOWNLOADABLE SEC. TECH. ADVISORY COMM., DSTAC FINAL REPORT 262-67 (Aug. 28, 2015), https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf.