The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

August 3, 2016

Dear Representatives Blackburn, Butterfield, Collins and Deutch:

I am pleased to deliver this response to your letter of July 15, 2016, requesting the views of the United States Copyright Office regarding the Federal Communication Commission's ("FCC's") pending set-top box proposal, referred to herein as the "Proposed Rule," as set forth in its Notice of Proposed Rulemaking ("NPRM"), *In the Matter of Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42. The United States Copyright Office is the expert agency created by Congress in 1897 to administer the Nation's copyright laws and to provide impartial advice to Congress, federal agencies, and others on matters of copyright law and policy.[1]

As set forth in the NPRM, the Proposed Rule would require multichannel video programming distributors ("MVPDs") to provide qualifying third parties with access to copyrighted video content, as well as associated programming information, for use across a broad spectrum of products ranging from physical set-top devices to internet-based software applications. The video programming would be made available according to a content protection standard adopted by an open standards body not substantially controlled by the MVPD industry. The Proposed Rule would not by its terms restrict repackaging, manipulation, or commercial exploitation of the programming made available to the third-party device and application producers, even where private contractual agreements between programmers and MVPDs might prohibit such activities.

As requested, our comments pertain to the potential copyright implications of the Proposed Rule, as well as the general copyright principles at issue. Please note that although the Copyright Office did not file public comments in the FCC proceeding, the FCC did request our advice on the copyright issues raised by its proposal. This response elaborates on guidance provided in those discussions, as well as in meetings requested by Congressional offices.

The Copyright Office understands from speaking with the FCC and from the rulemaking materials that the FCC's ultimate goal is to promote competition and choice in the set-top box marketplace. And we note that, in fact, the FCC proposal has generated robust discussion concerning the existing and future video marketplace and potential alternatives to physical set-top boxes. We welcome and support the FCC's efforts on behalf of consumers in this marketplace. As the FCC itself has recognized, however, the challenge here is determining how

[1] *See* 17 U.S.C. § 701(b).

the FCC can meet its objective without impairing the rights of creators and copyright owners under the Copyright Act.[2]

As discussed below, we have no doubt that a number of the third-party products facilitated by the FCC's rule would enable fair and other noninfringing consumer uses of MVPD programming. The Copyright Office is therefore focused on whether these goals can be accomplished without overriding other concerns of copyright law and policy. The Office's principal reservation is that, as currently proposed, the rule could interfere with copyright owners' rights to license their works as provided by copyright law, and restrict their ability to impose reasonable conditions on the use of those works through the private negotiations that are the hallmark of the vibrant and dynamic MVPD marketplace. Indeed, the Obama Administration[3] and the FCC itself[4] have highlighted the importance of such private licensing arrangements in enabling the production, acquisition, and distribution of MVPD programming.

We note that at the July 12th Congressional oversight hearing, FCC Commissioners acknowledged that they might choose to follow a different approach to achieve the FCC's objectives than that outlined in the NPRM, and that emerging alternative proposals showed promise.[5] The Copyright Office is therefore hopeful that the FCC will refine its approach as necessary to avoid conflicts with copyright law and authors' interests under that law. As a threshold matter, it seems critical that any revised proposal respect the authority of creators to manage the exploitation of their copyrighted works through private licensing arrangements, because regulatory actions that undermine such arrangements would be inconsistent with the rights granted under the Copyright Act, and to some degree, as discussed below, the authority of Congress to decide whether and when limitations on these rights should apply.

I. BACKGROUND

A. Basic Precepts of U.S. Copyright Law

United States copyright law derives from the grant of power to Congress in Article I, Section 8 of the Constitution to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[6] Congress has protected the rights of creators beginning with the first federal copyright act of 1790 and through successive enactments, including the current 1976 Copyright Act (the "Copyright Act"), which grants authors of copyrighted works a bundle of exclusive rights, namely the rights "to do and to authorize" the reproduction, distribution, public

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[2] *See Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, 31 FCC Rcd. 1544, ¶ 80 (Feb. 18, 2016) ("NPRM") (notice of proposed rulemaking and memorandum opinion and order).
[3] Letter from Lawrence E. Strickling, Assistant Secretary of Commerce, Nat'l Telecomm. and Info. Admin. ("NTIA"), to Tom Wheeler, Chairman, FCC 4 (Apr. 14, 2016).
[4] NPRM ¶ 29.
[5] *See Oversight of the FCC: Hearing Before the Subcomm. on Commc'ns and Tech. of the H. Comm. on Energy and Commerce*, 114th Cong. 57-59 (July 12, 2016), *available at* http://docs.house.gov/meetings/IF/IF16/20160712/105179/HHRG-114-IF16-Transcript-20160712.pdf (unofficial transcript) (discussion between Rep. Marsha Blackburn and Comm'rs Wheeler, Clyburn, Rosenworcel, Pai and O'Rielly).
[6] U.S. CONST. art. I, § 8, cl. 8.

performance, and public display of their works, as well as the preparation of derivative works.[7] As the Supreme Court has explained, "[t]he primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public."[8] Thus, "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[9]

The rights protected by the Copyright Act are "exclusive" to the copyright owner, meaning that the copyright owner generally has full control as to whether or how to exploit his or her work, including by entering into licensing agreements. As a leading treatise explains, the default rules within the Copyright Act are only a "starting point," with "collaborators . . . free to alter this statutory allocation of rights and liabilities by contract."[10] Importantly, as noted above, a copyright owner has the exclusive right "*to authorize*" the reproduction, distribution, public performance, or public display of a copyrighted work, or to prepare a derivative work, as well as to perform those acts directly.[11] This language in section 106 affords the copyright owner the sole right to license another to use the work,[12] as well as the right to impose conditions on such use under the license.[13] Moreover, the right to authorize use of a work encompasses the right to grant licenses to some parties and not others, or to decline to license a work at all.[14]

The exclusive rights afforded under the Copyright Act are subject to certain limitations and exceptions within the Act. Such limitations and exceptions have been adopted by Congress in accordance with its authority to establish the Nation's copyright law, as provided in Article I, Section 8 of the Constitution.[15] Perhaps the best-known among these is the fair use limitation, codified in section 107 of the Act, which permits unauthorized uses of copyrighted works under certain circumstances.[16] As discussed further below, fair use has played an important role in the evolution of the video marketplace. The Act also includes several compulsory licenses for

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[7] 17 U.S.C. § 106.

[8] *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994).

[9] *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

[10] 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 4.2 (2016); *see also* 17 U.S.C. § 201(d)(1) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . . .").

[11] 17 U.S.C. § 106 (emphasis added).

[12] *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1003 (9th Cir. 2015) ("The right to 'authorize' [one of the six exclusive rights] is also an 'exclusive right' under the Act."); *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 n.17 (1984) ("[A]n infringer is not merely one who uses a work without authorization by the copyright owner, but also one who authorizes the use of a copyrighted work without actual authority from the copyright owner.").

[13] *See, e.g.*, *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 939-41 (9th Cir. 2010) (discussing conditions and covenants associated with copyright licenses).

[14] *See, e.g.*, *Minden Pictures*, 795 F.3d at 1002-03 (recognizing that the Copyright Act permits the copyright owner to subdivide his or her interests and, "[t]hus, an author of a novel might convey the right to publish a hardcover edition of the novel to one person and the right to create a movie based upon the novel to another"); *Salinger v. Colting*, 607 F.3d 68, 74 (2d Cir. 2010) (recognizing that "there is value in the right *not* to authorize derivative works" (emphasis in original)).

[15] *See* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ."); *see also Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) ("The Copyright Clause [of the Constitution] . . . empowers Congress to *define* the scope of the substantive right." (emphasis in original)).

[16] 17 U.S.C. § 107 (setting forth factors courts should consider in evaluating fair use).

audiovisual content that limit the copyright owner's control by allowing cable and satellite providers to retransmit broadcast television programming provided they adhere to specific conditions, including payment of royalties.[17]

The Office's analysis of the Proposed Rule flows from these defining principles of U.S. copyright law.

B. The Proposed Rule

As described in the NPRM, the Proposed Rule would require MVPDs to provide to all qualifying third-party manufacturers of competing set-top boxes and software applications, free of charge and on a nondiscriminatory basis, the following:

- All of an MVPD's "multichannel video programming (including both linear and on-demand programming)" in "every format and resolution . . . that the MVPD sends to its own devices and applications"[18]
- "Entitlement Data," including information on what content a particular subscriber has rights to access and the limitations on that access[19]
- "Service Discovery Data," including channel lineups and listings of video-on-demand offerings[20]
- A content protection system licensable on reasonable and nondiscriminatory terms, issued by an organization "that is not substantially controlled by an MVPD or by the MVPD industry"[21]

By its terms, the rule would thus appear to provide third-party manufacturers and developers that do not have a contractual relationship with the MVPD (or a license from content owners) access to an MVPD's video stream, program listings, and subscriber data for use in and through a wide range of products, including physical set-top devices and internet-based software applications. Once accessed, the video content and program data could be made available via the third-party device or service to a MVPD subscriber according to that subscriber's privileges reflected in the "Entitlement Data."

It is our understanding that a third party seeking to access the video stream and associated data under the Proposed Rule would need to enter into an agreement with a non-MVPD-controlled organization[22] that would offer content protection technology pursuant to security

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[17] *See id.* §§ 111, 119, 122 (compulsory cable and satellite licenses); *see also id.* §§112, 114-115 (compulsory music licenses).

[18] NPRM ¶ 26.

[19] *Id.* ¶¶ 36, 39.

[20] *Id.* ¶¶ 36, 38.

[21] *Id.* ¶ 50.

[22] *Id.* at 48 (Appendix A) (defining "Compliant Security System" in § 76.1200(k)), ¶¶ 58-60, 71 (outlining proposed framework for third parties to enter into licenses with providers of a "Compliant Security System"). We understand the FCC may be considering a standardized agreement for the prescribed content protection technology akin to the DFAST license implemented in the CableCARD regime. *See id.* ¶ 71 n.192.

standards to be set by a yet-to-be-developed body.[23] As described in the Proposed Rule, the terms of that agreement would apparently be addressed to the use of the prescribed security technology rather than any content-based licensing issues, such as those relating to channel lineup, advertising, etc.[24] While the rule contemplates that third parties would need to undergo a testing and certification process to ensure that their devices would not electronically or physically harm MVPD networks or facilitate theft of service, the NPRM leaves open what this process might be, and suggests that some form of self-certification might be appropriate.[25]

C. The Role of Copyright Licenses in the MVPD Marketplace

With the limited exception of retransmission of broadcast television content under the statutory compulsory licenses set forth in sections 111, 119, and 122 of the Copyright Act,[26] an MVPD must negotiate and obtain licenses directly from copyright owners in order to publicly perform, display, reproduce, or distribute copyrighted video programming. The National Telecommunications and Information Administration ("NTIA"), commenting in the FCC proceeding on behalf of the Obama Administration, observes:

> The selection and organization of [MVPD] programming . . . reflects investment decisions and market assessments made by MVPDs—with attendant business risks—as well as a constellation of licensing arrangements between MVPDs and program producers. Those 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.[27]

The Office agrees that private licensing agreements are critical to the effective functioning of the dynamic video marketplace—a marketplace that has facilitated what many consider to be a new "Golden Age of Television."[28]

As the Copyright Office understands from public comments submitted in response to the Proposed Rule, licenses between content owners and MVPDs generally contain highly detailed provisions concerning the exploitation of the content being licensed, including the following:

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[23] *Id.* at 48 (Appendix A) (defining "Open Standards Body" in § 76.1200(i)), ¶ 41 (describing need for an "open," multi-member standards body).
[24] *Id.* ¶ 71; *see also id.* at 48 (Appendix A) (§ 76.1200(k)).
[25] *Id.* ¶¶ 73-74; *see also* 47 C.F.R. § 76.1203 (allowing MVPDs to restrict use of navigation devices where devices can cause electronic or physical harm or assist in the unauthorized receipt of service).
[26] 17 U.S.C. §§ 111, 119, 122.
[27] Letter from Lawrence E. Strickling, Assistant Secretary of Commerce, NTIA, to Tom Wheeler, Chairman, FCC, 4 (Apr. 14, 2016) (citing Comments of the MPAA at 7, MB Docket No. 15-64, (filed Oct. 8, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001328337).
[28] *See* Katherine Cusumano, *In the "Golden Age" of Television, Casting Directors Expand Their Reach*, FORBES (Jan. 21, 2016), http://www.forbes.com/sites/katherinecusumano/2016/01/21/in-the-golden-age-of-television-casting-directors-expand-their-reach/#19b5a6f61661; *see also* Lisa de Moraes, *FX Study: Record 409 Scripted Series On TV In 2015*, DEADLINE HOLLYWOOD (Dec. 16, 2015), http://deadline.com/2015/12/tv-study-record-number-scripted-series-fx-1201668200/ (noting that, from 2002 through 2015, "the greatest growth in the number of scripted series has come courtesy of basic cable networks with a 484% increase over that span").

- The kinds of platforms and devices to which the programs may be delivered
- Requirements related to advertising, including limitations on an MVPD's ability to replace advertising or add additional advertising as part of the program, and restrictions on embedded advertising in the MVPD's program guide or user interface (*e.g.*, preventing adult programming from being advertised when a user is browsing children's programming)
- The works that may be made available to subscribers to be played on demand (rather than as part of linear programming), and any promotional consideration related to on-demand works, such as advertising for, and placement of, television shows and movies in the on-demand menu
- Channel lineup requirements, including agreements relating to the types of channels that will be grouped together ("neighborhooding") and requirements that certain channels be provided together as a package ("bundling")
- Time-limited licensing arrangements, including "windowing" or "tiering" agreements that allow certain programs to be shown by certain providers or platforms before they are more widely distributed, or expiration terms for content provided on-demand
- Requirements for content protection, including specific security measures the MVPDs must adopt for each kind of platform
- Conditions the MVPDs are required to include in downstream agreements with third-party platform developers (*e.g.*, Amazon Fire TV, Roku, Apple TV) before allowing installation of MVPD applications (*e.g.*, the Xfinity app) on those platforms, such as requirements to exclude applications used for the consumption of pirated works
- Stipulations that the MVPDs will refrain from engaging in activities that might otherwise be considered fair use of the copyrighted works[29]

In other words, the copyrighted works that make up an MVPD's multichannel video programming are produced and made available to the public only as a result of complex, private negotiations between content owners and MVPDs, and on the understanding that the MVPDs will make works available to the public in accordance with the terms of the resulting licenses. Typically, a violation of the license terms by the MVPD will constitute either copyright infringement[30] or a breach of contract.[31] And, traditionally, in order to obtain any contractual remedies, the content owners must have privity of contract with the MVPD.[32]

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[29] *See generally* 21st Century Fox, Inc., A&E Television Networks, LLC, CBS Corp., Scripps Networks Interactive, Time Warner Inc., Viacom Inc., & the Walt Disney Co. (collectively, "Content Companies") Comments at 8-9; NCTA Comments at 100 (discussing licensing terms that restrict cross-platform search results from displaying licensed programming alongside pirated content in search results); *Fox Broad. Co. v. Dish Network LLC*, No. CV 12-4529 DMG, 2015 WL 1137593, at *30 (C.D. Cal. Jan. 20, 2015). References to comments submitted in response to the FCC's February 18, 2016 NPRM in this document are by party name (abbreviated where appropriate) followed by "Comments" (*e.g.*, "Content Companies Comments"). References to reply comments submitted in the same proceeding are by party name (abbreviated where appropriate) followed by "Reply Comments" (*e.g.*, "Content Companies Reply Comments").

[30] 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.15[A][2] (2016) ("[W]hen a license is limited in scope, exploitation of the copyrighted work outside the specified limits constitutes infringement."); *see also, e.g.*, *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 498-504 (2001) (finding infringement when license was exceeded by distributing electronic reprints of individual freelance works); *Sun Microsystems, Inc. v. Microsoft*

To be sure, certain consumer uses of copyrighted video content may qualify as fair uses under copyright law—for example, consumers' time-shifting of programming for later home viewing. Fair use is a critical part of copyright law, and as further discussed below, it will continue to adapt and will likely be invoked in defense of particular business strategies, including in this developing video marketplace. But, at the same time, it is important to understand that "[p]arties are free to bargain away their rights to make fair use of copyrighted material" as a matter of contract.[33] Accordingly, content owners and users can—and frequently do—choose to eliminate uncertainty over fair use questions by negotiating clear usage rights and limitations in advance. Thus, in this marketplace, as a condition of granting access to their works, copyright owners may choose to exclude certain uses of content by an MVPD by contract, regardless of whether such activities could potentially qualify as fair uses under copyright. The ability to delineate and assign value to permissible uses—and to exclude others—through the licensing process flows from the copyright owner's more general right to withhold access to the content altogether if licensing terms cannot be agreed.

II. ANALYSIS OF THE PROPOSED RULE

A. Encroachment on the Exclusive Right to License

In its most basic form, the rule contemplated by the FCC would seem to take a valuable good—bundled video programming created through private effort and agreement under the protections of the Copyright Act—and deliver it to third parties who are not in privity with the copyright owners, but who may nevertheless exploit the content for profit. Under the Proposed Rule, this would be accomplished without compensation to the creators or licensees of the copyrighted programming, and without requiring the third party to adhere to agreed-upon license terms.[34] Indeed, a third party without access to the governing agreement between a content programmer and the MVPD would have no way of knowing all of the requirements and limitations imposed under that license. As a result, it appears inevitable that many negotiated conditions upon which copyright owners license their works to MVPDs would not be honored under the Proposed Rule.

Corp., 188 F.3d 1115, 1121 (9th Cir. 1999) ("If . . . a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement.").

[31] *See Graham v. James*, 144 F.3d 229, 236-37 (2d Cir. 1998) ("Generally, if the licensee's improper conduct constitutes a breach of a covenant undertaken by the licensee . . . and if such covenant constitutes an enforcible contractual obligation, then the licensor will have a cause of action for breach of contract, not copyright infringement." (internal quotation marks and alterations omitted) (quoting 3 *Nimmer on Copyright* § 10.15[A], at 10-120)). We note that "[n]o precise constructional rule separates copyright contract obligations, called 'covenants,' whose breach will give rise only to contract remedies, from those called 'conditions,' whose violation will terminate the agreement and thus constitute copyright infringement as well as contract breach." 1 GOLDSTEIN ON COPYRIGHT § 5.3.5.1.

[32] SAMUEL WILLISTON, 13 A TREATISE ON THE LAW OF CONTRACTS § 37:1 (Richard A. Lord ed. 2013).

[33] *Dish Network LLC*, 2015 WL 1137593, at *30; *see also Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1325-26 (Fed. Cir. 2003) (private parties are allowed to contract away statutory rights and defenses, including fair use).

[34] As explained above, the third party would be required to agree to observe only certain non-customized security-related standards established by a non-MVPD-controlled organization.

Some commenters appear to dispute this characterization of the Proposed Rule, analogizing the third-party set-top boxes and software that might be facilitated by the Proposed Rule to televisions that passively display licensed MVPD programming to the consumer without alteration.[35] To be sure, if the rule were limited to passive hardware devices, the copyright concerns would be greatly reduced, if not eliminated. The analogy, however, appears to be undermined by the Proposed Rule, which would apply not just to passive hardware elements, but also to software that could potentially be used to manipulate, repackage, and monetize the content in ways that would be contrary to contractual conditions imposed by the content owners.[36]

Others have described the rule as essentially equivalent to the existing CableCARD system, under which a subscriber can access MVPD programming through a CableCARD-enabled device connected to the cable in the subscriber's home, rather than leasing an MVPD-provided set-top box.[37] But the Proposed Rule is not limited to hard-wired hardware devices, as under the CableCARD system—rather, the rule seemingly contemplates that content could also be accessed by subscribers directly through internet-based services, which, as noted below, presents different considerations under copyright law. Moreover, the CableCARD regime is administered by an MVPD-governed entity, CableLabs,[38] which licenses the CableCARD technology to third-party device manufacturers in written agreements.[39] This allows MVPDs, and by extension, copyright owners in contractual relationships with MVPDs, to impose and maintain appropriate standards for the delivery of content to consumers. In contrast, the Proposed Rule requires MVPDs to support a content protection system administered by an entity "that is not substantially controlled by an MVPD or by the MVPD industry," and the Proposed Rule does not clearly indicate whether there would be any licensing relationship between an MVPD and the third-party device manufacturer.[40]

As explained above, it is broadly recognized, including by the Obama Administration and members of Congress, that the preservation of contractual arrangements is critical to the video programming marketplace.[41] When a copyright owner licenses its works to an MVPD, it

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[35] *See, e.g.*, Annemarie Bridy, et al. & the Electronic Frontier Foundation Reply Comments at 5 ("A rightsholder might prefer that its programs be viewed on a 42-inch TV or larger, but neither TV manufacturers nor customers can be held to such a condition through copyright law.").

[36] *See* NPRM ¶ 22 (tentatively concluding that the term "navigation device" should be interpreted "far broader than conventional cable boxes or other hardware alone," including by encompassing downloadable software).

[37] A CableCARD is a physical card that, when be inserted into a hardware device, allows that device to play MVPD content. *See* NPRM ¶ 11.

[38] CableLabs is governed entirely by its cable industry member companies. *The Board*, CABLELABS, http://www.cablelabs.com/about-cablelabs/the-board (last visited Aug. 2, 2016).

[39] *See* DFAST Technology License Agreement for Unidirectional Digital Cable Products (Jan. 2014), *available at* https://ecfsapi.fcc.gov/file/60001515605.pdf.

[40] NPRM ¶ 50.

[41] *See, e.g.,* Letter from Lawrence E. Strickling, Assistant Secretary of Commerce, NTIA, to Tom Wheeler, Chairman, FCC 4 (Apr. 14, 2016) (noting that terms of such agreements "are important to enabling parties to defray the costs of producing, acquiring, and distributing [MVPD] programming"); Letter from Sen. Patrick Leahy to Tom Wheeler, Chairman, FCC 1 (May 26, 2016); Letter from Sen. Mitch McConnell to Tom Wheeler, Chairman, FCC 1 (June 10, 2016); Letter from Representatives Doug Collins, Ted Deutch, Marsha Blackburn, et al., to Tom Wheeler,

typically does so, as noted, based on a detailed agreement with the MVPD that governs how the MVPD will deliver those works to consumers and includes conditions that the MVPD, in turn, is obligated to pass through to third-party platform developers. In this way, copyright owners protect their works from piracy and other undesirable forms of exploitation and secure a fair return on their investment in content creation.

The FCC has stated that the Proposed Rule is not intended to negate these private contractual arrangements.[42] However, it is not clear how the FCC would prevent such an outcome under the Proposed Rule, for it appears to obligate MVPDs to deliver licensed works to third parties that could then unfairly exploit the works in ways that would be contrary to the essential conditions upon which the works were originally licensed.[43] For instance:

- The NPRM announces that, under the Proposed Rule, "consumers should be able to choose how they access the multichannel video programming," including "through an application . . . offered by an unaffiliated vendor on a device such as a tablet or smart TV," without consideration of potential restrictions on such modes of delivery that would apply under negotiated agreements[44]
- The Proposed Rule requires MVPDs to make licensed programming feeds available to third-party device or software manufacturers free of charge and without "discrimination," thus potentially undermining copyright owners' ability to enforce exclusivity agreements, including "windowing" or "tiering" agreements that make content available on certain platforms before others[45]
- The Proposed Rule anticipates creation of "competitive user interfaces and features"[46] that could override agreements between copyright owners and MVPDs—for example, provisions that govern what movies or television shows the MVPD has agreed to promote in menus for on-demand programming, and what channels are entitled to favored placement in channel lineups
- The Proposed Rule would seem to allow third-party devices and applications to ignore MVPDs' agreements not to alter agreed-upon channel lineups or neighborhooding restrictions, to replace or alter advertising, or to improperly

Chairman, FCC 1 (Apr. 22, 2016) (all expressing concern that the Proposed Rule may negatively affect the dynamic licensing market for video programming).

[42] NPRM ¶ 17 (stating "our 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").

[43] NPRM ¶ 26. Although we have been asked to analyze the Proposed Rule, we note that some commenters have suggested that "the NPRM's approach could easily be amended to create some form of privity between competitive device makers and MVPDs, provided that it relied on standard, nondiscriminatory agreements and did not require separate negotiations between each MVPD and each competitive device manufacturer." Letter from John Bergmayer, Senior Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, FCC 4 (July 29, 2016). The FCC may wish to consider these issues further.

[44] NPRM ¶ 26.

[45] *Id.* ¶¶ 63, 66-68; *see also* Motion Picture Association of Am. & SAG-AFTRA ("MPAA/SAG-AFTRA") Comments at 9.

[46] NPRM ¶ 66.

manipulate content—even though such acts are almost always prohibited under licensing agreements

- Even if third-party devices and applications did not replace the advertising that appears in the programming itself, the Proposed Rule would appear to allow them to add additional advertising as part of the programming stream, *e.g.*, advertising spots before or after an on-demand video, or banner advertising next to or overlaid on top of a program, without any requirement that resulting advertising revenues be shared with either the MVPD or the content creator[47]

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 having to comply with agreed contractual terms. And even though such activities—for instance, competing or incompatible advertising—could easily lessen the value of the rights licensed by program producers to the MVPDs, no offsetting compensation would flow back to the copyright holders or their actual licensees. 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 works.

The Copyright Office would caution against government action that would interfere with, rather than respect, the flexible legal framework Congress has set forth. In this regard it is important to remember that only Congress, through the exercise of its power under the Copyright Clause, and not the FCC or any other agency, has the constitutional authority to create exceptions and limitations in copyright law.[48] While Congress has enacted compulsory licensing schemes, they have done so in response to demonstrated market failures, and in a carefully circumscribed manner. For example, as noted above, in the audiovisual context, sections 111, 119, and 122 of the Copyright Act establish statutory licenses that allow cable and satellite operators to retransmit broadcast television programming, given evidence of high transaction

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[47] The Office understands that there are certain CableCARD-enabled devices in the marketplace that overlay additional advertising, or provide alternate user interfaces and programming guides that do not adhere to relevant contractual arrangements between content owners and MVPDs. *See TiVo Advertising*, https://www.tivo.com/tivoadvertising/pausemenu.html (last visited Aug. 2, 2016) (example of overlaid advertising in TiVo devices); Consumer Video Choice Coalition Reply Comments at 54 ("CableCARD devices allow manufacturers and subscribers to customize the user experience, irrespective of contracts between programmers and MVPDs that demand special placement."). It is unclear the extent to which content owners have acquiesced to such practices. *See* MPAA Reply Comments at 22-23 (suggesting that third parties using CableCARDs are contractually bound to comply with terms on service presentation and content manipulation). In any event, as the NPRM acknowledges, CableCARD-enabled devices represent only a small fraction of the market. NPRM ¶ 7 ("[T]he nine largest incumbent cable operators have deployed only 618,000 CableCARDs for use in consumer-owned devices."). Thus, in crafting a rule that achieves the objective of allowing consumers to more readily purchase their own set-top boxes, rather than renting them from an MVPD, the FCC should consider how contractual arrangements between content owners and MVPDs over terms such as advertising restrictions and program placement in programming or on-demand guides will continue to be effective.

[48] *Cf. Eldred v. Ashcroft*, 537 U.S. 186, 192-93 (2003).

costs in that market.[49] These compulsory licenses come with a host of specific conditions and require cable and satellite operators to submit detailed statements of account and pay royalties into funds administered by the Copyright Office, which are then distributed to rightsholders through proceedings before the Copyright Royalty Judges.[50]

In effect, absent a mechanism to allow copyright owners to impose reasonable and appropriate licensing conditions, the Proposed Rule may be understood to create a new statutory license that requires the entirety of copyrighted programming offered by MVPDs to be delivered to third parties, including for commercial exploitation.[51] The rule thus raises serious concerns as a matter of copyright policy, because allowing third parties to commercially exploit copyrighted works in this manner could diminish the value of those works. To take one example, as noted above, under the Proposed Rule, MVPDs and content creators would seemingly have no ability to control certain forms of advertising or to share in the ad revenues that might be generated by third-party devices and services. But it seems reasonable to assume that the available pool of advertising dollars would to some degree be redirected to those third parties, and away from the content producers and MVPDs, negatively impacting the value of copyrighted works in the marketplace. Without the ability to exercise commercial judgment with respect to the dissemination of their works in the marketplace—and to seek remuneration for marketplace exploitations—program creators will be hampered in their ability to earn a return on their investments, or to invest in new programming.

B. Considerations Regarding Exclusive Rights of Public Performance, Display, Reproduction, and Distribution

A separate potential issue is the degree to which the Proposed Rule could lead to the adoption of devices and services that could result in direct or indirect infringement of copyright owners' exclusive rights of public performance, display, reproduction, and/or distribution. While some commenters assert that the rule is likely to lead to products or services that infringe these exclusive rights,[52] we caution that any infringement analysis in this area necessarily would be highly fact-specific and depend upon characteristics of the particular device or software at issue, as well as the particular exploitations of copyrighted works through that technology.

Any analysis of copyright infringement would first begin with the question of whether any of the copyright owners' exclusive rights—such as the rights of public performance, display,

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[49] U.S. COPYRIGHT OFFICE, SATELLITE TELEVISION EXTENSION AND LOCALISM ACT: § 302 REPORT 1 (2011), *available at* http://www.copyright.gov/reports/section302-report.pdf.

[50] 17 U.S.C. §§ 111, 119, 122. Licensees must also comply with relevant FCC regulations to be eligible to retransmit content under these provisions. *Id.*

[51] To the extent the Proposed Rule can be understood as delivering MVPD programming to unaffiliated third parties for commercial exploitation without compensation, the rule may also raise Fifth Amendment concerns. As one court has explained, an "interest in a copyright" is also "a property right protected by the due process and just compensation clauses of the Constitution." *See Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983); *cf. Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 641-42 (1999) (holding that patents "are surely included within the 'property' of which no person may be deprived . . . without due process of law").

[52] *See, e.g.*, MPAA/SAG-AFTRA Comments at 26-28; NCTA Comments at 100-06.

reproduction, and distribution—were implicated at all.[53] In some cases—such as passive hardware devices that do not alter or record copyrighted programming—the exclusive rights would not be implicated. But for other types of devices or services, further examination would be necessary. For instance, the right of public performance, as the Supreme Court recently made clear, includes the exclusive right to control "not only the initial rendition or showing [of a work], but also any further act by which that rendition or showing is transmitted or communicated to the public," including using individualized streams over the internet.[54] Thus, depending upon its particular characteristics, a third-party service that retransmitted MVPD programming to subscribers over the internet under the Proposed Rule could implicate copyright owners' right of public performance. Other kinds of services and devices might also implicate the exclusive rights of reproduction, distribution, and public display.[55] Moreover, these exclusive rights can be infringed either *directly*, where the defendant itself publicly performs, reproduces, distributes or displays a copyrighted work without authorization, or *indirectly*, under a theory of secondary copyright liability: contributory infringement,[56] including inducement of infringement,[57] or vicarious infringement.[58]

Assuming any of a copyright owner's exclusive rights was implicated, one would next need to examine the applicability of exemptions or limitations on those exclusive rights, including the fair use doctrine. Section 107 of the Copyright Act sets forth four nonexclusive factors that must be considered in assessing fair use, including "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;" "the nature of the copyrighted work;" "the amount and substantiality of the portion used in relation to the copyrighted work as a whole;" and "the effect of the use upon the potential market for or value of the copyrighted work."[59] Of these, the most important factor is typically understood to be the last—market harm.[60] In cases where the unlicensed use is supplanting an existing market (as could be the case here, for example, in relation to advertising), the use is less

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[53] In addressing these particular rights, the Office does not mean to rule out the possibility that the right to prepare derivative works could also be implicated.

[54] *Am. Broad. Co., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2506, 2509-10 (2014) (quoting H.R. REP. NO. 94-1476, at 63 (1976)).

[55] The Copyright Act provides for the exclusive rights "to reproduce the copyrighted work in copies or phonorecords," "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending," and "to display the copyrighted work publicly," including specifically "individual images of a motion picture or other audiovisual work." 17 U.S.C. § 106(1), (3), (5).

[56] *See, e.g.*, *Davis v. Blige*, 505 F.3d 90, 105 n.13 (2d Cir. 2007) (one can be liable for contributory infringement if, with knowledge of infringing activity, one induces, causes or materially contributes to infringing conduct of another).

[57] *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 934-41 (2005) (applying an inducement theory of liability, based on evidence that the distributor had specifically promoted its software for infringing uses); *see also Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1035-36 (9th Cir. 2013) (relying on the inducement theory in *Grokster* to hold a defendant, who operated peer-to-peer BitTorrent websites, liable for copyright infringement by virtue of "offer[ing] his services with the object of promoting their use to infringe copyrighted material").

[58] *See, e.g.*, *Grokster*, 545 U.S. at 930 (one infringes vicariously "by profiting from direct infringement while declining to exercise a right to stop or limit it").

[59] 17 U.S.C. § 107.

[60] *Harper & Row Publishers Inc. v. Nation Enters., Inc.*, 471 U.S. at 566 ("This last factor [of market harm] is undoubtedly the single most important element of fair use.").

likely to be considered fair.[61] In contrast, where there is not a showing of market harm, there is less likely to be a finding that the use is fair.

Fair use has played an important role in the marketplace for television programming, both in fostering innovation and setting consumer marketplace expectations. For example, in *Sony Corp. of Am. v. Universal City Studios, Inc.*, the Supreme Court considered whether Sony could be held responsible for indirect infringement by virtue of its distribution of the Betamax video recorder, which consumers used to record copyrighted television programming.[62] The Court held that Sony could not be held liable because the VCR was capable of substantial noninfringing use.[63] Specifically, the Court held that individual users' private recording of television programs for later home viewing (*i.e.*, "time-shifting") was a fair use because there was no meaningful likelihood of market harm.[64] As a result of that decision, consumer time-shifting is now an established and valued aspect of the television marketplace.

At the same time, existing case law does not purport to set out the full range of permissible activity under the fair use doctrine, and many open questions remain. *Sony* itself focused on the distribution of an article of commerce where the seller had no ongoing relationship with the purchaser after the sale, and no connection to the content being exploited.[65] Nor did the Court address fair use where the device distributor was *itself* engaged in copying activities, as opposed to private home users.[66] Both of those factors could conceivably be present with respect to devices and services authorized under the Proposed Rule. Nor have courts gone so far as to *obligate* copyright owners to provide content in a manner that would facilitate time-shifting or other noninfringing uses.[67] Thus, as more recent cases demonstrate, questions of fair use require a nuanced approach as the intersection of copyright law with new distribution technologies continues to be the subject of unpredictable litigation and evolving precedent.[68] And, as noted, it is for that reason that many privately negotiated agreements between copyright owners and MVPDs contract around fair use questions to avoid uncertainty.[69]

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[61] *See Campbell*, 510 U.S. at 591; *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 550-51 (S.D.N.Y. 2008); *see also* Bridy, et al. & EFF Reply Comments at 3 ("It is, of course, possible to imagine potential features of a competitive set-top box or service that could infringe copyright.").
[62] 464 U.S. at 420.
[63] *Id.* at 442, 456.
[64] *Id.* at 421, 442, 451-55.
[65] *Id.* at 435-38.
[66] *Id.* at 436-38.
[67] *Cf. Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001) ("Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.").
[68] *See, e.g.*, *Fox News Network, LLC v. TVEyes, Inc.*, 124 F. Supp. 3d 325, 328-29, 331, 334-37 (S.D.N.Y. 2015), *appeal docketed*, Nos. 15-3885, 15-3886 (2d Cir. Dec. 3, 2015) (television news clip service's archiving and keyword search functions found fair, while clip sharing, downloading and other video search functionality were not); *Dish Network LLC*, 2015 WL 1137593 at *17-19, 22-24, 29-31 (finding market harm from satellite subscribers' recording of blocks of licensed content "too speculative to defeat a finding of fair use" in light of time and other limitations on the recordings, but additional service allowing streaming of content to alternative devices violated copyright owners' contractual rights).
[69] *See, e.g.*, *Dish Network LLC*, 2015 WL 1137593 at *30; *see also* TiVo Reply Comments at 10-11 (suggesting that the Proposed Rule consider allowing for privately-negotiated encoding rules in order to "give content owners,

To be sure, under the Proposed Rule, third-party set-top box manufacturers and application developers would be required to comply with restrictions contained in "Entitlement Data" provided by MVPDs, such as whether a consumer is permitted to make DVR copies of particular programs or whether out-of-home streaming were permitted.[70] But compliance with those limitations would not in itself address the potential liability of the device makers or developers who might seek to exploit content under the rule. The proposed definition of "Entitlement Data" addresses only the permitted activities of *subscribers*[71]—not the third parties who would be providing them with content; accordingly, mere adherence to subscriber-specific limitations would not (and could not) ensure that the activities of unlicensed third-party actors were otherwise compliant with copyright law.[72] Again, while fair use would of course be available to these third parties, and will continue to be an important part of this particular marketplace, the full scope of fair use in this context cannot be stated with certainty and any FCC action should account for licensing conditions that are employed to resolve uncertainty in this area.

C. Considerations Regarding MVPD Copyright Interests

The MVPDs claim copyright interests in their selection and bundling of the programs and in the programming data reflecting those choices.[73] At this point, the Office is unable to determine whether the MVPDs' claimed copyright interests are valid.

The Copyright Act protects "compilations," or works "formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[74] For example, copyright protects the selection and organization of pre-existing short stories into an anthology, assuming the selection and organization are sufficiently original.[75] While further

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navigation device manufacturers, and consumers a predictable and consistent set of rules on how content can be treated").

[70] NPRM at 48 (Appendix A); *see also id.* ¶¶ 35, 39 (proposing that "Entitlement Data" include, at a minimum, pass-through of copy control information, whether content is permitted to pass through outputs, information about rights to stream the content out-of-home, the resolutions available on various devices, and recording expiration date information).

[71] *Id.* at 48 (Appendix A) (defined in § 76.1200(g)).

[72] For example, the Supreme Court rejected Aereo's argument that it did not "perform" copyrighted works because it was "simply an equipment provider" that enabled subscribers to watch free over-the-air television programs, finding this logic to be plainly contradicted by the 1976 Copyright Act, which "completely overturned" previous Court decisions holding that the provision of community antenna television (CATV) systems did not result in performances of copyrighted works. *Aereo*, 134 S. Ct. at 2504-06 (quoting H.R. REP. NO. 94-1476, at 86-87 (1976) and citing *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974)).

[73] *See, e.g.*, NCTA Comments at 53-54, 58; *id.* at App. A at 48-55; NCTA Reply Comments at 39-40; AT&T Comments at x, 77-81; AT&T Reply Comments at 51-53; Comcast Corp. & NBCUniversal Media, LLC ("Comcast/NBCUniversal") Comments at 50-51; Echostar Technologies & Dish Network Comments at 22-23.

[74] 17 U.S.C. § 101 (defining the term "compilation" and providing that it includes "collective works."); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991) (explaining that the Copyright Act protects compilations if sufficiently original).

[75] 17 U.S.C. § 101 ("A 'collective work' is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective

analysis of relevant facts would be required to fully assess the question, as this concept applies here, the particular selection and organization of individual copyrighted programs that make up the MVPD video stream could theoretically constitute a protectable compilation, although it would have to be shown that the MVPD has made creative choices in compiling those programs. At the same time, as with the content owners' rights of public performance, display, reproduction, and distribution, an assessment of whether a compilation copyright was actually infringed would turn on the particular features of the third-party service or device at issue.

With respect to the programming data to be supplied under the Proposed Rule, we understand MVPDs may be obligated to provide only underlying factual material, from which third parties would be able to create their own visual interface displays and programming guides.[76] It is true that if factual, or otherwise non-copyrightable, data is collected and assembled with sufficiently creative selection, coordination, or arrangement, the result could be a copyrightable compilation. But "[n]o matter how original the format, . . . the facts themselves do not become original through association. . . . inevitably mean[ing] that the copyright in a factual compilation is thin."[77]

D. Interplay with Section 1201 of the Copyright Act and Security Considerations

We also observe that the approach of the Proposed Rule appears to be in tension with Congress' judgment in enacting the Digital Millennium Copyright Act of 1998 ("DMCA") [78] to allow copyright owners to select and implement technological measures to secure their content on digital delivery platforms.[79] This policy, codified in section 1201 of the Copyright Act, allows copyright owners to take legal action to address the circumvention of such measures.[80] Section 1201 also contains specific exceptions to its anticircumvention provision, and provides for a triennial rulemaking process through which the Librarian of Congress may grant additional exemptions to the bar on the circumvention of technological access controls; exemptions have been granted to allow noninfringing uses of MVPD and other programming.[81] In proscribing the

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whole."); *Tasini*, 533 U.S. at 493-94 (analyzing use of individual articles that were "part of" collective works put out by newspaper publisher and explaining that the "[c]opyright in *each separate contribution to a collective work* is distinct from copyright in *the collective work as a whole*" (emphasis in original)).

[76] *See* NPRM ¶¶ 2, 26-27, 40; App. A at 48 (proposed definitions of Service Discovery Data, Entitlement Data, and Content Delivery Data).

[77] *Feist Publ'ns*, 499 U.S. at 349-51, 357-59; *see* 17 U.S.C. § 101 (defining a "compilation" work); *id.* § 103(a).

[78] Pub. L. No. 105–304, 112 Stat. 2860, 2863-77 (1998). The DMCA implemented aspects of the WIPO Copyright and WIPO Performances and Phonograms Treaties, to which the United States is a party.

[79] *See* H.R. REP. NO. 105-551, pt. 2, at 20 (1998); U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 8 (2015), *available at* http://www.copyright.gov/1201/2015/registers-recommendation.pdf.

[80] *See* 17 U.S.C. § 1201 (prohibiting circumvention of access controls protecting copyrighted content as well as trafficking in circumvention tools).

[81] *Id.* § 1201(a)(1)(C)-(D). Frequently, the Librarian has granted exemptions that would include circumvention of technological measures protecting MVPD-programming feeds. *See, e.g.*, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65,944 (Oct. 28, 2015) (granting seven exemptions to permit the access of motion pictures via a digital transmission protected by a technological measure for purposes of criticism and commentary).

circumvention of protective technologies, Congress explained that such measures were intended to "support new ways of disseminating copyrighted materials to users, and . . . safeguard the availability of legitimate uses of those materials by individuals."[82] Congress also made clear that "product manufacturers should remain free to design and produce the best available products, without the threat of incurring liability for their design decisions."[83] The Proposed Rule would inhibit the ability of MVPDs and content programmers to develop, improve, and customize technological solutions to protect their content in the digital marketplace. It would do so in part by requiring MVPDs to give third-party actors access to copyrighted video content and associated data[84] according to one or more security standards prescribed by an outside organization rather than the through their preferred (and potentially more secure) protocols negotiated between copyright owners and the MVPDs.[85] In addition, the Proposed Rule suggests that the FCC might allow third parties to self-certify their compliance with whatever security standards are adopted. [86] The Proposed Rule would thus undermine content creators' ability to choose how best to protect their content in the marketplace, as Congress intended in enacting the DMCA.

E. Enforcement Issues

It is worth noting that there already exists today a variety of third-party set-top box devices, mainly produced overseas, that are used to view pirated content delivered over the internet.[87] A reasonable concern is that, in response to the Proposed Rule, this market might expand to encompass devices designed to exploit the more readily available MVPD programming streams without adhering to the prescribed security measures. In addition, some commenters have suggested that limiting options for content security in this manner could jeopardize robust content security regimes—including innovations to those systems—thereby opening doors for third parties to acquire content illegally.[88] Therefore, this is an area that is worth more thought, particularly with respect to the ability to enforce compliance.

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[82] STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4, 1998, 6 (Comm. Print 1998).

[83] 144 CONG. REC. S9936 (daily ed. Sept. 3, 1998) (remarks of Sen. John Ashcroft); *see also* 144 CONG. REC. H7100 (daily ed. Aug. 4, 1998) (remarks of Rep. Scott Klug) ("[W]e have eliminated any ambiguity or presumption that products must be designed to affirmatively respond to or accommodate any technological measures . . . . In the end, this language ensures that product designers and manufacturers will have the freedom to innovate.").

[84] NPRM ¶¶ 35, 38-41.

[85] *See* NCTA Comments at App. A at 43, 75 (explaining how MVPDs may implement apps to monitor and detect content security); *id.* at App. B. at 3, 36-45 (explaining how "MVPD security and cybersecurity best practices are maintained today through a combination of conditional access and Digital Rights Management ('DRM') services, apps, and licenses all operating in a well-understood hardware environment").

[86] NPRM ¶¶ 2, 50, 58-60; *id.* ¶ 72 (seeking comment on whether self-certification on security compliance would be sufficient).

[87] *See* Rodrigo Orihuela, *Soccer Pirates Shift to TV From Computers as Set-Top Boxes Surge*, BLOOMBERG TECH. (May 8, 2015), http://www.bloomberg.com/news/articles/2015-05-08/soccer-pirates-shift-to-tv-from-computers-as-set-top-boxes-surge.

[88] *See, e.g.*, MPAA/SAG-AFTRA Comments at 21-28; Copyright Alliance Comments at 2, 15; Comcast/NBCUniversal Comments at 89-90.

As discussed, by its terms, the Proposed Rule does not contemplate direct contractual privity between copyright owners or MVPDs and the third parties who would be receiving video content and data under it. Instead, it would obligate MVPDs to provide access to such content and data to unaffiliated parties who would not be in contractual privity with MVPDs or content owners. Significantly, the FCC lacks the authority to create a cause of action to address potential violations of copyright owners' or MVPDs' rights under the rule.

The FCC appears to recognize this limitation, as the Proposed Rule states that copyright owners would still have "remedies under copyright law."[89] The FCC has also explained that the Proposed Rule "will not alter the rights that content owners have under the Copyright Act; nor will it encourage third parties to infringe on these rights," because new market entrants will still be "required to respect the exclusive rights of copyright holders."[90]

Unfortunately, this view may underestimate the barriers to invoking copyright remedies to redress potential violations by third-party actors purporting to operate under the rule. First, copyright owners and MVPDs presumably will have no obvious means to monitor the activities of these parties and may not even be aware of compliance issues or the misuse of copyrighted materials until considerable damage has been done. Additionally, although the letter suggests that "market participants can consult a series of Federal court decisions made over the past several decades that have carefully distinguished non-infringing uses of copyrighted video content from infringing uses,"[91] the fact is that much of the legal terrain in this area remains uncharted. As noted above, untested platforms and models will require independent analysis to assess whether they are operating lawfully; indeed, a great benefit of contractual relationships is that the parties can agree in advance how to address areas of legal uncertainty. By contrast, litigation is uncertain and highly fact-dependent, so it may be unclear whether a particular precedent will govern future conduct. The Office further observes that federal court actions can be prohibitively expensive,[92] and may take years to resolve.[93] In the case of overseas actors, it may be difficult to pursue litigation or enforce a judgment. As a result, the mere possibility of *ex post* litigation would appear to be an unsatisfying policy choice.

Conclusion

The Copyright Office appreciates the discussion that has been initiated by the FCC concerning ways to enhance consumer choice in the video marketplace. We are hopeful that any rule ultimately adopted in this area will not diminish, but instead will respect, the value of copyrighted video programming in the marketplace. The above analysis suggests that any

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[89] NPRM ¶ 80.

[90] Letter from Tom Wheeler, Chairman, FCC, to Rep. Marsha Blackburn 2 (June 3, 2016).

[91] *Id.*

[92] In 2015, the American Intellectual Property Law Association ("AIPLA") estimated that the median cost for a party to litigate a copyright infringement lawsuit with less than $1 million at stake through appeal in the federal court system was $250,000, and that parties with over $25 million at stake faced litigation costs of $1.2 million through appeal. *See* AIPLA, 2015 REPORT OF THE ECONOMIC SURVEY 39 (2015); *see also* U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS 8 (2013) ("SMALL CLAIMS REPORT"), *available at* http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf.

[93] The median time to trial in a copyright case is currently 2.1 years. BRIAN C. HOWARD, LEXMACHINA COPYRIGHT LITIGATION REPORT 15 (2015) (on file with the Copyright Office); *see also* SMALL CLAIMS REPORT at 26.

revised approach to be taken by the FCC should be crafted to preserve copyright owners' exclusive right under copyright law to authorize—through their contractual relationships with MPVDs and, in turn, MVPDs' relationships with third-party device makers and platforms—the ways in which their works are made available in the marketplace.

Please do not hesitate to contact me should you require further information on this subject.

Respectfully submitted,

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