

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
Expanding Consumers' Video Navigation)	MB Docket No. 16-42
)	
Choices and Commercial Availability of)	
)	
Navigation Devices)	

COMMENTS OF THE COPYRIGHT ALLIANCE

Keith Kupferschmid, CEO
Copyright Alliance
1224 M Street, NW
Washington, D.C. 20005
Telephone: 202.540.2243

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction And Summary	1
II. Copyright Protection Is Based On The Theory That Creators Should Be Able To Reap The Fruits Of Their Labor, And The Existing Licensing Regime Ensures That Copyright Owners Are Able To Maximize The Value Of Their Works.....	2
III. The FCC’s Set-Top Box Mandate Proposal Reflects A Fundamental Misunderstanding Of The Video And Entertainment Industries And The Importance Of Deferred Compensation.....	4
A. Individuals Who Contribute To The Video And Entertainment Industries Rely On Deferred Payments That Are Tied To The Distribution Of Content.....	5
1. Creative Professionals Who Work In Television And Film Rely On Deferred Compensation And Pension And Health Contributions From Secondary Markets.....	6
2. Music Creators Rely On Synchronization Licensing Fees And Performance Royalties.....	8
IV. The Existing Distribution Paradigm Has Facilitated The Creation Of The Most Numerous, Diverse, And High Quality Offerings In Television History.....	10
V. The FCC’s Proposal Will Harm The Creators And Distributors Responsible For This Outpouring Of Creativity, And The Public That Consumes Creative Works.....	12
A. The FCC’s Proposal Will Destroy Existing Incentives For Distributors To Negotiate Exclusive Distribution Deals And Pay Licensing Fees.....	12
B. The FCC’s Proposal Will Reduce Incentives For Companies To Enter The MVPD And OTT Markets, Further Undermining The Bargaining Position Of Creators.....	13
C. The FCC’s Proposal Will Reduce Incentives To Create New Content.....	13
VI. The FCC’s Proposal Will Interfere With The Development Of New Innovative Distribution Models.....	14
VII. Conclusion	15

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
Expanding Consumers' Video Navigation)	MB Docket No. 16-42
)	
Choices and Commercial Availability of)	
)	
Navigation Devices)	

COMMENTS OF THE COPYRIGHT ALLIANCE

I. Introduction And Summary

The Copyright Alliance respectfully submits these comments in response to the Commission's February 18, 2016, Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceedings. The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creative labor. It represents the interests of individual artists from a diverse range of creative industries – including writers, documentarians and filmmakers, musical composers and recording artists, journalists, graphic and visual artists, photographers and software developers – and small businesses that hold copyrights and are adversely affected by the unauthorized use of their works.¹ We submit these comments to emphasize and explain the substantial harm that the FCC's proposal will do to creative professionals and the public by eliminating existing incentives for multichannel video programming distributors ("MVPDs") and over-the-top ("OTT") distributors² to pay to distribute copyrighted content and thereby reducing the gross amount of revenue available to compensate those who contribute to the creation of video and entertainment programming.

By design, copyright law is outside the scope of the FCC's expertise and authority.³ Moreover, the complex compensation system on which creative professionals rely for remuneration for their contributions to copyright protected works is the product of many rounds of collective and individual negotiations, over decades of trial and error, and turns in large part

¹ The Copyright Alliance's membership includes these individual artists and creators, creative union workers, and small businesses in creative industries, as well as the organizations and corporations that support and invest in them.

² "OTT" refers to over-the-top streaming video services, meaning the delivery of audio, video, and other media over the internet without a subscription to a traditional pay-TV service.

³ See, e.g., *Reauthorization Request of the Federal Communications Commission Fiscal Years 1994 and 1995: Hearing Before the Subcomm. on Telecomm. and Fin. of the H. Comm. on Energy and Commerce*, 1993 FCC LEXIS 3090, at *12 (June 17, 1993) (statement of James H. Quello, Chairman, FCC) ("[T]he FCC lacks copyright expertise.").

on exclusive distribution deals that produce residuals and royalties on which creative professionals rely to fund not only their labor but also their health care, insurance, retirement, and other benefits. These and other forms of compensation are determined via complex licensing agreements between MVPDs, studios, production companies, networks, performing rights organizations, unions, guilds, and ultimately, the countless individual writers, directors, actors, songwriters and composers, designers, musicians, and technical artists who create the various elements of video programming. The FCC’s proposal reflects a deep misunderstanding of how this entire system operates.

Although the FCC’s proposal suggests that third parties receiving access to licensed television streams must respect licensing rights and content security, nothing in the proposal imposes any clear obligations on these third parties or delineates any enforcement mechanism by which copyright holders or licensors can protect their licensed content. By forcing MVPDs to make their licensed content available to third parties, who can then retransmit, repackage, and distribute content without a license and without paying any fees, the FCC is eviscerating the incentive for distributors to pay for licenses and thus eliminating both existing and potential sources of compensation for individual creative professionals. While we do not believe that the FCC intends to destabilize the television industry in pursuing its efforts to increase set-top box competition, we are concerned that granting third parties unrestricted access to licensed television program content poses just such a risk, at great cost to people working in the television and entertainment industries and the public, and with few if any benefits to consumers. The Copyright Alliance encourages the development of new technologies to bring licensed works to the public in new and innovative ways. But we are concerned that the Commission’s NPRM will permanently and significantly harm creative professionals in the television and music industries, the entertainment business more generally, and the public at large.

II. Copyright Protection Is Based On The Theory That Creators Should Be Able To Reap The Fruits Of Their Labor, And The Existing Licensing Regime Ensures That Copyright Owners Are Able To Maximize The Value Of Their Works.

Copyright protection in the United States is predicated on the theory that the public benefits from creative works, and creators can and should be incentivized to create by ensuring that they are able to reap the economic fruits of their creative labor.⁴ Indeed, the Supreme Court has repeatedly endorsed the economic rationale for copyright protection and has consistently observed that “copyright supplies the economic incentive to create and disseminate ideas.”⁵

⁴ U.S. Const., art. I, § 8, cl. 8 (“The Congress shall have Power . . . 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.”); *see also* 1-1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.03[A] (Matthew Bender ed. 2015) (“[T]he authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities.”).

⁵ *Golan v. Holder*, 132 S. Ct. 873, 889 (2012) (“Our decisions . . . recognize that copyright supplies the economic incentive to create and disseminate ideas.”) (internal quotation marks omitted); *see also, e.g., Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (observing that “[b]y establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering

(Cont'd on next page)

The Copyright Act creates these economic incentives by vesting copyright owners with a number of exclusive rights, including the rights to reproduce, distribute, publicly perform, publicly display, and digitally transmit the copyrighted work, as well as to prepare derivative works.⁶ Of particular relevance here, a copyright owner’s distribution rights encompass the exclusive right to control the distribution of a copyrighted work, which includes the first distribution of the work as well as subsequent distributions.⁷ Likewise, a copyright owner’s public performance rights include 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 digital transmissions of works over the internet.⁸

Copyright owners reap the benefits of their creative labor by “licens[ing] or assign[ing] separately, and even subdivid[ing]” their exclusive rights in their copyrighted works.⁹ For example, one method commonly used by copyright owners to maximize the value of their works is granting distributors exclusive licenses in return for lucrative licensing fees. The ability to enter into these valuable deals, however, is predicated on the copyright owner’s authority to impose limitations and restrictions upon the rights granted to their licensees, including “limit[ing] licenses to perform his [or her] work in public to defined periods and areas or audiences.”¹⁰ Such licensing limitations are common in the television and video industries where licensing works to MVPDs and establishing the terms of those licenses in various respects—including by controlling the number of performances, the duration, channel placement, tier placement, commercial placement, etc.—is directly tied to copyright owners’ ability to maximize the value of their works, protect their works against infringement, and satisfy their audiences.¹¹

This licensing model, moreover, enables greater consumer choice, as distributors can provide consumers options for accessing and using works beyond purchasing them outright. Consumers have the choice to either buy a physical copy of a work or obtain access on more flexible terms, such as through lower cost, time-limited rentals, by making copies accessible across different devices through an account like Apple’s iTunes, by licensing access to a larger

(Cont’d from previous page)

Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

⁶ 17 U.S.C. § 106.

⁷ See 17 U.S.C. § 106(3); 2-8 Nimmer, *supra* note 4, § 8.11[B][4][d] (“The distribution right accorded by Section 106(3) is to be interpreted broadly, consonant with the intention expressed by its drafters. It extends to the offer to the general public to make a work available for distribution without permission of the copyright owner.”).

⁸ *Am. Broad. Co. v. Aereo*, 134 S. Ct. 2498, 2506 (2014) (quoting H.R. Rep. No. 94-1476, at 63 (1976)).

⁹ 1 Alexander Lindey & Michael Landau, *Lindey on Entertainment, Publ. & the Arts* § 1:3 (3d ed. 2016); see also *Nat’l Broad. Co. v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1293 (D.C. Cir. 1988) (“The Copyright Act aids commercial exploitation of copyrights by allowing the sale of particular rights — such as movie rights or rights to perform a popular song — or of the entire bundle.”).

¹⁰ 3-10 Nimmer, *supra* note 4, § 10.10[C] (quoting *United Artists Television, Inc. v. Fortnightly Corp.*, 377 F.2d 872, 882 (2d Cir. 1967), *rev’d on other grounds*, 392 U.S. 390 (1968)).

¹¹ Report of Working Group 4 to DSTAC at 168 (Aug. 4, 2015).

library of works through a membership service like Netflix or Hulu, or by licensing the right to watch what is being broadcast, streamed, or publicly performed in real time through an MVPD or OTT service.¹²

Critically, though, licensing a right to watch one television program, motion picture, or video, as defined under the terms of the specific distribution model, is not a license to watch that program in other formats or distribution models. Rather, MVPDs and online streaming services pay copyright owners to license certain specific, limited rights, and then sell subscriptions to customers who pay fees *for a monthly license to the distributors' feeds*. At the same time, content owners retain rights to prevent further reuse, redistribution, and public performance of that video content. Like a Russian matryoshka nesting doll, what is licensed to the distributors is less than the full panoply of copyrights, and what is licensed by distributors to their subscribers is even less than that. Typically, it is simply a license to the distributor's feed, not—as the FCC seems to suggest—the right to do whatever one wants with the copyrighted content.

This copyright and licensing regime serves the public interest by enabling creative professionals to protect their work from exploitation and obtain reasonable compensation for their labor, thereby incentivizing more creation. The FCC's NPRM runs roughshod over this system, to the detriment of creative professionals and the public that benefits from their works.

III. The FCC's Set-Top Box Mandate Proposal Reflects A Fundamental Misunderstanding Of The Video And Entertainment Industries And The Importance Of Deferred Compensation.

Chairman Wheeler has suggested that copyright owners need not worry about the NPRM's adverse effects on licensing arrangements with distributors because copyright law will continue to be available to creators seeking to protect their works from infringement.¹³ But Chairman Wheeler's response is both overly simplistic and wholly inconsistent with the principle that regulatory agencies may not “ignore other and equally important Congressional objectives,”¹⁴ including the longstanding and oft-repeated Congressional goal of ensuring that creators are appropriately incentivized and compensated.

Moreover, his remarks ignore the fact that each of the video productions distributed by MVPD services depends on the work product of *hundreds* of different creative professionals who produce individual elements of the final productions, such as the script, story boards, and in

¹² See generally Response of Copyright Alliance to Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, Before the Dep't of Commerce Internet Policy Task Force, U.S. Patent and Trademark Office, Nat'l Telecomm'ns and Info. Admin, Docket No. 130927852-3852-01 (Jan. 17, 2014).

¹³ See *Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 114th Cong. (Mar. 2, 2016), available at <http://www.commerce.senate.gov/public/index.cfm/2016/3/oversight-of-the-federal-communications-commission> (licensing arrangements should somehow remain “sacrosanct and untouched” simply because “copyright law remains in place”) (relevant exchange at 1:07:30).

¹⁴ *Can-Am Plumbing, Inc. v. N.L.R.B.*, 321 F.3d 145, 153 (D.C. Cir. 2003) (quoting *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1942)).

some cases an article, book, film, or play that a television production may be based on, the sets, costumes, and makeup, the original unedited recording of the actors' performances, visual effects, and the score or other musical elements. Although the copyright for a final television program is typically owned by a production company or network, the individual elements comprising these productions would not exist were it not for the creative output of writers, editors, actors, musicians, and other artists.

While some of the constituent elements that are edited into a final work may be subject to separate copyrights, many are not. For example, some of the creative contributors may be employees of the production company or independent contractors who assign their rights to the production company. Furthermore, video productions typically license the right to use sound recordings and musical compositions in television programs from separate copyright owners, such as songwriters, music publishers, recording artists, and record labels, under terms that may limit the redistribution or public performance of those programs and that require payment of performance royalties for subsequent performances of a television program.¹⁵

As a result, most of the creative professionals responsible for desirable video content—directors, writers, actors, composers, designers, costume makers, visual effects specialists, and film crews composed of grips and cameramen—are only indirectly protected and compensated by copyrights in the final video programs themselves. For the creative community, the primary form of compensation derived from these copyrights is payments that are governed by complex contractual or collective bargaining agreements, such as residuals, participation rights, or contributions toward health and pension benefits, that are typically triggered when a work is publicly performed or distributed. Any regulatory regime that allows or encourages distribution and public performance of video and entertainment works outside of direct licensing relationships risks undermining the system by which creators are compensated, thus harming the very people responsible for the works consumers want to watch.

A. Individuals Who Contribute To The Video And Entertainment Industries Rely On Deferred Payments That Are Tied To The Distribution Of Content.

The many individuals who contribute to the original video programming that MVPD subscribers enjoy have one thing in common: they depend on payments that are directly tied to the licensed distribution of creative content. Indeed, for the creative community, the principal promise of emerging communications technologies is the ability to benefit from increased competition for premium content from among greater numbers of distribution services, because the expansion in the number of *paying* distribution vehicles translates into greater revenue. And the converse is also true: when incentives to pay to distribute television and video programming are diminished, so, too, is the revenue available to these creative professionals. Because the FCC's "set-top box mandate" proposal will result in fewer competing distribution services, writers, directors, actors, composers, recording artists, and technical artists will all be harmed.

¹⁵ While the producer generally retains the copyright to the audiovisual work, music publishers retain the copyright to music incorporated into video programming, the public performances of which are licensed separately to broadcasters and cable networks by performing rights organizations.

1. **Creative Professionals Who Work In Television And Film Rely On Deferred Compensation And Pension And Health Contributions From Secondary Markets.**

Countless creative professionals in the television and film industries rely on deferred payments tied to the distribution of content.¹⁶ While some of these individuals have enough bargaining power to negotiate for “profit participations,” which is a form of contingent compensation tied to the profits of a particular entertainment project,¹⁷ the most popular compensation for most creative professionals in film and television are payments and other benefits negotiated and guaranteed via complex agreements between producers and the talent guilds and unions.¹⁸

In particular, these collective bargaining agreements guarantee the payment of residuals, which are payments made to creative professionals from the revenue derived from the release of copyrighted content in new markets. For example, when a writer is hired to write an episode for a network television series, the writer is entitled to residual payments when that episode is released in secondary markets, including reruns on a network or in syndication, as well as distribution in any other market, like the internet. Typically, creative professionals will receive a particular percentage of the revenue generated from licensed distribution, which serves as a significant source of income.¹⁹ Indeed, for working actors, residuals comprise an average of two-thirds of their annual compensation.²⁰ Similarly, the directors that comprise the membership of the Directors Guild of America (“DGA”) derived 23% of their income from the approximately \$360 million in residuals that the DGA distributed to its members in 2015.²¹ Those residuals are also critical to funding the pension plan that benefits all DGA members. And the moving picture technicians and artisans represented by the International Alliance of Theatrical Stage Employees (“IATSE”) also depend on the downstream licensing of copyright protected films and television programs under the terms of their collective bargaining agreement, which funds their health and pension plans. In 2015 alone, the licensing of copyright-protected works through chosen

¹⁶ See 4 Thomas Selz et al., 4 *Entertainment Law 3d: Legal Concepts and Business Practices* § 21:2 (2015); Duncan Crabtree-Ireland, *Labor Law in the Entertainment Industry, Supplemental Payments, Intellectual Property Rights, and the Role of Unions*, 31 Ent. & Sports Law. 4, 4-5 (2015).

¹⁷ See 4 Selz, *supra* note 16, § 21:1; Joe Sisto, *Profit Participation in the Motion Picture Industry*, 21 Ent. & Sports Law. 1, 21 (2003) (“While a set fee (for producers) and a pre-determined salary (for talent) is the norm, occasionally, those above-the-line will have sufficient clout to negotiate for more enviable compensation packages that may include various forms of compensation contingent on the financial success of the films to which they are attached.”).

¹⁸ These include the Directors Guild of America (“DGA”), Writers Guild of America (“WGA”), Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”), and International Alliance of Theatrical Stage Employees (“IATSE”). During these negotiations, the producers are represented by the Alliance of Motion Picture and Television Producers (“AMPTP”). Howard D. Fabrick, *Unique Aspects of Labor Law in the Entertainment Industry*, 31 Ent. & Sports Law. 1, 30-32 (2015) (describing the entertainment labor organizations and their role in negotiating complicated collective labor agreements AMPTP).

¹⁹ See Fabrick, *supra* note 18, at 33.

²⁰ See Crabtree-Ireland, *supra* note 16, at 5.

²¹ Statistics provided by the DGA, <http://www.dga.org/>.

distribution agreements generated \$293.5 million in contributions to health care plans and \$150.2 million in contributions to pension plans for IATSE members.²²

This deferred compensation system is particularly well-suited to the entertainment industry because earnings from a particular project are often received by producers over a long period of time,²³ and it is often difficult for producers to predict whether a particular work will be lucrative or to accumulate enough cash to pay talent an appropriate salary at the time their services are rendered.²⁴ Residuals paid over time enable creative professionals to receive appropriate compensation for the contributions they make to projects that earn significant revenues from exploitation in secondary markets. In addition, creative professionals are often hired on a freelance or project-by-project basis. Consequently, it is not uncommon for them to be unemployed for significant periods of time between projects.²⁵ Residuals help these professionals support themselves and their families, and pay for health care and medical costs, despite the often inconsistent and unpredictable nature of their employment.²⁶ Given the critical importance of residuals to the financial stability and wellbeing of their members, it is not surprising that the talent guilds and unions fight tooth and nail to ensure that their members receive this type of compensation.²⁷

In addition to residuals, the talent collective bargaining agreements provide important health and retirement benefits to their members, which are tied to the revenue earned from the distribution of creative content. Specifically, these agreements provide that programmers will pay a percentage of revenue from secondary markets into the health and pension plans of union and guild members. For example, all employment under the WGA 2014 Theatrical and Television Basic Agreement requires employers to make contributions to the WGA pension plan and health fund equaling specific percentages of the reportable compensation earned.²⁸ Other collective bargaining agreements in the entertainment industry contain similar provisions.

²² Statistics provided by the IATSE, <http://iatse.net/>.

²³ See Catherine L. Fisk, *The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000*, 32 *Berkeley J. Emp. & Lab. L.* 215, 263 (2011).

²⁴ *Id.*

²⁵ See 4 Selz, *supra* note 16, § 21:2 (“Most talent, however, are compensated for each entertainment project for which the talent is hired, rather than by annual salary. . . . [T]he per-project approach to compensation means that many in the entertainment industry are not employed on a full time basis and often are unemployed.”).

²⁶ See Fisk, *supra* note 23, at 263 (“[R]esiduals smooth out the irregularities in income associated with the fact that few writers are continuously employed.”); see also Richard Verrier, *Residual Resentment Slows Hollywood Talks*, *L.A. Times* (Oct. 16, 2007), <http://www.latimes.com/entertainment/envelope/cotown/la-fi-residuals16oct16-story.html> (“Residuals . . . saved my life.”).

²⁷ In fact, a disagreement over residuals precipitated the 2007-2008 WGA strike. See, e.g., Verrier, *supra* note 26 (“You tell me you’re going to cut back on my residuals, you might as well put a gun to my head That’s my lifeblood. It’s my kids’ lifeblood. I’ll go to the mat to defend it.”).

²⁸ Writers Guild of America, Schedule of Minimums, 2014 Theatrical and Television Basic Agreement 5, available at http://www.wga.org/uploadedFiles/writers_resources/contracts/min2014.pdf.

Given the reliance of creative professionals on deferred payments and benefits, it should come as no surprise that ensuring the continued vibrancy of these payments and benefits is of great importance to them. But the public also benefits from this system. Indeed, given the unpredictable and irregular nature of employment for many creative professionals, few would have sufficient resources to sustain a career in the entertainment industry without these supplemental payments and benefits.²⁹ It is because of this deferred compensation system that individual creators can “stay in the labor market pool rather than leaving the industry and taking their considerable industry-specific human capital with them.”³⁰ The continued creation of high-quality original programming that audiences enjoy depends on these creative individuals having the financial stability to pursue entertainment work as a career, and the existing distribution and compensation model is what makes this possible.

2. **Music Creators Rely On Synchronization Licensing Fees And Performance Royalties.**

Like individual creators in the film and television industry, songwriters, composers, music publishers, record companies, and recording artists and musicians also rely on deferred payments tied to the distribution of video programming. These payments include royalties generated from the editor’s use of the music in the program as well as the subsequent performance of copyrighted songs and compositions in film, television, and other video programming, as well as through music channels that are included in virtually all MVPD offerings.

Individual creators whose music is incorporated into audiovisual works receive revenue from a variety of sources.³¹ For example, music creators generally receive some form of up-front compensation. For film and television composers, this typically involves a fixed payment or salary for the creative services rendered.³² When pre-existing music is incorporated into an audiovisual work, the music publishers (and their songwriters), and record labels (and their recording artists) receive up-front payments in the form of synchronization fees and master use

²⁹ See, e.g., Crabtree-Ireland, *supra* note 16, at 5 (“[S]ources of ongoing compensation are important not just to the artists who rely on them, but to all who want an industry driven by and content created by professional artists pursuing such work as a career rather than a hobby. In a world where freelance employment is the norm for artists, few could afford such a career . . . without the support of supplemental payments for ongoing use of prior work.”).

³⁰ Fisk, *supra* note 23, at 264.

³¹ See generally Darren M. Richard, *Music Licensing 101: A Nuts and Bolts Guide for Filmmakers, Television Producers, Music Publishers, and Songwriters*, 29 Ent. & Sports Law. 12 (2012); Vlad Kushnir, *Legal and Practical Aspects of Music Licensing for Motion Pictures*, 8 Vand. J. Ent. & Tech. L. 71 (2005); Cydney A. Tune, *Music Licensing – From the Basics to the Outer Limits, the Myriad World of Music Licenses*, 22 Ent. & Sports Law. 5 (2004).

³² Lionel S. Sobel, *Soundtrack Music*, in 9 *Entertainment Industry Contracts* ¶ 184A.02[1][a] (Donald C. Farber ed., LexisNexis 2015) (describing film composer deals); *Television Series Composer*, in 9 *Entertainment Industry Contracts*, *supra*, ¶ 189.01 (describing television composer deals).

license fees, respectively.³³ For composers, songwriters, and music publishers, these up-front fees, however, are secondary to their main source of income: public performance compensation in the form of royalties from the transmissions of the licensed audiovisual works. Each television broadcast or transmission of a video program involves a public performance of that audiovisual work, as well as the musical compositions that have been synchronized with that content, and that performance triggers an obligation to pay performance royalties to the music publishers and songwriters.³⁴ Typically, these payments come from performing rights organizations (to which the songwriters and music publishers belong or affiliate), including ASCAP and BMI, which provide licenses to television networks, television stations, cable networks, pay-TV companies, and basic cable programmers, and then distribute the amounts collected from licensees to their member and affiliate publishers and songwriters.³⁵ Moreover, cable and satellite music channels (e.g. Music Choice) pay royalties for the public performance of the sound recordings that are distributed to record labels, recording artists and musicians.³⁶

The amounts paid in the form of performance royalties for this music can be “quite substantial.”³⁷ The distribution of music content over cable and satellite services has become an increasingly important source of performance royalties for songwriters and music publishers. For example, during each of the last two years, cable and satellite-delivered entertainment generated the largest portion of BMI’s domestic revenue.³⁸ In fact, the significant income expected from performance royalties often affects the up-front license fees or other payments that individual composers and music publishers receive for the use of their musical works in television programming. For example, music publishers generally offer television synchronization licenses at “relatively inexpensive” and “loss leader prices” in the hope that the public performance of the musical compositions on television will result in substantial performance royalties.³⁹ Similarly, up-front fees or salaries paid to television composers are historically quite low because producers anticipate that these individuals will earn significant public performance income.⁴⁰ Performance royalties are therefore a key source of income for

³³ A synchronization license grants the licensee the “right to synchronize the musical composition in timed relation with the visual content and to reproduce the musical composition, or a portion thereof, in recordings of the audiovisual content.” Richard, *supra* note 31, at 12; 6-30 Nimmer, *supra* note 4, § 30.04[C][1].

³⁴ See Sobel, *supra* note 32, ¶ 184A.03[1][b].

³⁵ *Id.*

³⁶ These royalties are paid to SoundExchange, the statutory license fee receiving agent for record labels, recording artists, and musicians. See Sound Exchange, Preexisting Subscription Service, <http://www.soundexchange.com/service-provider/other-service-providers/preexisting-subscription-service/>.

³⁷ Sobel, *supra* note 32, ¶ 184A.03[1][b] (“[A] network television broadcast of a theme song or one minute of background music will earn approximately \$150 each for the music’s composer and publisher, while a network broadcast of a feature performance of music (for example, a song sung on camera) will earn the publisher and composer more than \$1,400 each. Syndicated television programs earn less for composers and publishers, but nice amounts nonetheless: theme and background music earns about \$50 per broadcast, and a feature performance earns about \$165, for the composer and publisher each.”).

³⁸ BMI, *Annual Review 2014-2015* at 2, 6; BMI, *Annual Review 2013-2014* at 3-4.

³⁹ See Sobel, *supra* note 32, ¶ 184A.02[2][a][i].

⁴⁰ See *Television Series Composer*, *supra* note 32, ¶ 189.01.

creative professionals whose works play a substantial role in the creation of desirable television and video content. Indeed, as music sales have diminished, songwriters, composers, and music publishers are increasingly reliant on sync and performance licensing as a key source of income. In 2014, these royalty streams made up over 70% of total revenue. Any reduction in performance royalties would seriously harm the music creators who depend upon this deferred compensation system to support themselves. And the FCC's NPRM threatens to do just that.

IV. The Existing Distribution Paradigm Has Facilitated The Creation Of The Most Numerous, Diverse, And High Quality Offerings In Television History.

The existing distribution and compensation structures described above have benefited not only creative professionals themselves, but also the public, by incentivizing the creation of an unprecedented number of high-quality television and video programs. Indeed, this explosion in creativity has ushered in what has been called a "golden age" in television.⁴¹

Today, there is more original television programming than ever before. By the end of 2015, the number of original scripted, English-language television shows in primetime across broadcast, cable, and various streaming services exceeded 400.⁴² This expansion is largely attributable to "[a] surge in orders from streaming services and basic cable outlets."⁴³ A research team at FX Networks found that 2014 featured a total of 371 scripted series: 164 from basic cable, 145 from broadcast networks, 35 from pay cable and 27 from online services like Netflix.⁴⁴ This represented a 75 percent increase in the total number of scripted series from five years earlier in 2009.⁴⁵ Although the "highest-profile new entrants were streaming services, the bulk of the increase over those five years came from basic cable . . . , like USA, Lifetime, SyFy, Comedy Central, AMC, TNT, TBS, ABC Family and . . . FX."⁴⁶ In fact, in 2014, basic cable produced 164 scripted shows. Just five years earlier, the number was only 66.⁴⁷ And it is not just the increased number of current television offerings that is remarkable, but the quality and diversity of programming available through numerous distribution channels.⁴⁸

⁴¹ See, e.g., David Carr, *Barely Keeping Up in TV's New Golden Age*, N.Y. Times (Mar. 9, 2014), <http://www.nytimes.com/2014/03/10/business/media/fenced-in-by-televisions-excess-of-excellence.html>.

⁴² Meg James, *2015: Year of 'Peak TV' Hits Record with 409 Original Series*, L.A. Times (Dec. 16, 2015), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-2015-peak-tv-new-record-409-original-series-20151216-story.html>.

⁴³ Cynthia Littleton, *Peak TV: Surge From Streaming Services, Cable Pushes 2015 Scripted Series Tally to 409*, Variety (Dec. 16, 2015), <http://variety.com/2015/tv/news/peak-tv-409-original-series-streaming-cable-1201663212/>.

⁴⁴ Linda Holmes, *Television 2015: Is There Really Too Much TV?*, NPR (Aug. 16, 2015), <http://www.npr.org/sections/monkeysee/2015/08/16/432458841/television-2015-is-there-really-too-much-tv>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See, e.g., Carr, *supra* note 41.

The growth in the quantity and quality of television programming in recent years is obviously the product of efforts by numerous creative professionals throughout the television industry, but it is also attributable to an increase in the number of companies that compete to provide MVPD and OTT services to consumers.⁴⁹ Cable companies, for example, have made substantial investments to improve their technology and viewing platforms.⁵⁰ Likewise, telephone and internet services have invested in research, development, access rights, and physical assets such as fiber optic cable wires that reach the homes of millions of consumers in an effort to offer the “triple play” of voice, video, and data services.⁵¹ These players have expanded the number of potential distribution channels for television and video programming, which benefits content providers by enabling them to license the distribution of their content on a wide variety of platforms and thereby maximize the value of their programming. *See supra* Parts II and III. Similarly, numerous technology companies such as Hulu and Netflix have developed OTT internet services as an alternative to MVPD service for delivery of video content.⁵² Together, these distribution platforms have ushered in a period of the most numerous, diverse, and high quality offerings in television history.⁵³

⁴⁹ *See, e.g.*, Shalini Ramachandran & Thomas Gryta, *Cutting the Cable Cord and Getting ‘Phone TV’: Verizon and AT&T Experiment with Delivery Outside Traditional Cable-TV Bundle*, Wall Street J. (Nov. 1, 2013), <http://www.wsj.com/articles/SB10001424052702303843104579169971029572160> (“The growth of telecom’s share of the TV business could have a significant impact on the television industry AT&T and Verizon are now the fifth and sixth biggest pay-TV providers in the U.S. after Comcast and Time Warner Cable and the two satellite-TV companies, DirecTV and Dish Network Corp.”); *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* (“2015 FCC Report”), 30 FCC Rcd. 3253, 3283, 3289 ¶¶ 65, 83 (Apr. 2, 2015) (“Since 2005, the entry and expansion of video delivery systems by AT&T, Verizon, CenturyLink, and additional telephone company MVPDs may have had the most significant impact on competition Although MVPDs may consider other MVPDs their foremost rivals, MVPDs increasingly compete with OVDs for viewing time, subscription revenue, and advertising revenue.”); Emily Steel, *Netflix, Amazon and Hulu No Longer Find Themselves Upstarts in Online Streaming*, N.Y. Times (Mar. 24, 2015), http://www.nytimes.com/2015/03/25/business/media/netflix-amazon-and-hulu-no-longer-find-themselves-tvs-upstarts.html?_r=0 (“HBO, Apple, Sony, Dish and other companies that were once challenged by services like Netflix have stormed onto the field in recent weeks, making a splash with new streaming offerings and bold pronouncements on reinventing the way people watch and pay for television.”).

⁵⁰ *See, e.g.*, Chad Gutstein, *Comcast-Time Warner Cable: Bigger Doesn’t Mean Badder*, Variety (Feb. 14, 2014), <http://variety.com/2014/digital/news/comcast-time-warner-cable-bigger-doesnt-mean-badder-1201103216/> (“Comcast has been at the forefront of next-generation TV development. It spends hundreds of millions on R&D and does hundreds of software updates each year.”).

⁵¹ *See, e.g.*, Yuki Noguchi, *Battle for the Bundle: Cable, Phone, Internet Companies Seek All-in-One Customers*, Wash. Post (Aug. 8, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/07/AR2005080700585.html>.

⁵² *See, e.g.*, 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?smtp=cur&bicmp=AD&bicmlukp=WT.mc_id&bicmst=1409232722000&bicmet=1419773522000 (providing overview of 13 different streaming services, including Netflix, Hulu, and Amazon Prime).

⁵³ *2015 FCC Report*, 30 FCC Rcd. 3253, 3432 (statement of Ajit Pai, Commissioner, FCC) (“When it comes to video programming, Americans have more choices than ever before. They can select from an amazing variety of programming. They can watch that programming on a wide array of devices. And they can view that programming when it is convenient for them.”).

V. The FCC’s Proposal Will Harm The Creators And Distributors Responsible For This Outpouring Of Creativity, And The Public That Consumes Creative Works.

The FCC proposal will harm the creative professionals responsible for this “golden age” of video and entertainment programming by reducing incentives to pay to license content and thus decreasing distribution-based, deferred compensation.

A. The FCC’s Proposal Will Destroy Existing Incentives For Distributors To Negotiate Exclusive Distribution Deals And Pay Licensing Fees.

According to the FCC’s NPRM, the Commission will require all MVPDs to provide anyone who offers an approved competitive “navigation device” all “video programming” as well as “information about what programming is available to the consumer” that owns the given navigation device and “information about what a device is allowed to do with content, such as record it.”⁵⁴ In other words, the Commission’s proposal will force distributors who have paid for the right to disseminate content through their own platforms to make their content streams available to non-paying third parties who can then repackage and stream the content to their users, thus reducing the value of existing distribution relationships and undermining the incentive to enter into exclusive distribution relationships in the first place.

The NPRM purports to protect existing licensing arrangements by requiring MVPDs to provide these “information flows only to unaffiliated navigation devices that honor copying and recording limits via licenses with content protection system vendors.”⁵⁵ However, rather than offer a proposal that includes rules specifically designed to protect these licensing arrangements, the NPRM explicitly proposes “to leave licensing terms such as channel placement and treatment of advertising to marketplace forces.”⁵⁶ In fact, the NPRM even asks whether all competitive navigation devices should be given access to all content recorded on an MVPD’s “‘cloud recording’ service,” calling this a “Navigable Service” to which all unaffiliated navigation devices should have access.⁵⁷ This proposal, taken to its logical conclusion, would moot the limited protections that the NPRM purports to offer to “honor copying and recording limits.” And many proponents of the Commission’s proposal have made no secret of their desire to ignore such limits.⁵⁸

The Commission’s proposal, by design, favors distributors over content creators. Once the manufacturers of navigation devices are given the unrestricted right to access licensed

⁵⁴ NPRM ¶ 2.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* ¶ 26.

⁵⁸ *See, e.g.*, Letter from Consumer Video Choice Coalition to Marlene H. Dortch, Secretary, FCC, MB Docket 15-64 at 4 (Jan. 21, 2016) (“[M]akers and marketers of competitive devices cannot be expected to respect private, secret, and temporary pacts between and among MVPDs and content owners.”); Letter from Devendra T. Kumar, Counsel for TiVo Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket 15-64 at 1 (Jan. 13, 2016) (“[C]ompetitive device providers are not and should not have to be bound to programming contracts entered into by MVPDs to which they were not party.”).

MVPD content simply by offering a “Navigation Device,” they will have little to no incentive to offer the kinds of returns that have induced television content providers to create this content in the first place. In the NPRM, the FCC disparages programmers’ desire to offer content to certain distribution channels in return for higher compensations as simple “business decisions” that “are made for a variety of reasons” and thus should only be enforced to the extent that they can be applied in a “nondiscriminatory fashion” that does not “interfere with the ability of competitive Navigation Device makers to develop competitive user interfaces and features.”⁵⁹ But the entire point of negotiating—and paying a premium—for desirable video content is to preclude competitors from offering that same content, and to “discriminate” against competing distribution outlets. By purporting to prevent this kind of discrimination, the FCC’s proposal threatens to cannibalize existing distributors who have invested considerable revenue to license and create original content, to the detriment of all creators who rely upon income derived from the fees paid by these distributors.

B. The FCC’s Proposal Will Reduce Incentives For Companies To Enter The MVPD And OTT Markets, Further Undermining The Bargaining Position Of Creators.

The NPRM will also have a harmful effect on the incentives for companies to enter the MVPD or OTT business, which will further reduce the number of players competing to license access to video and entertainment content and will likely reduce investment in the creation of new internet-based video services. Indeed, if distributors no longer need to pay for television programming, and instead receive a free license to provide copyrighted television and video content simply by offering a set-top box device, there will be far less incentive to become anything but a set-top box provider.

Having fewer MVPD and OTT companies competing to pay for licensed content, in turn, undermines the negotiating position of content providers who benefit from a larger number of MVPDs and OTTs with which to negotiate, in order to maximize the license fees paid for their programming. This will result in less revenue for television studios and production companies, who will then have less incentive to hire and compensate creators to develop the kind of new programming options that consumers desire.

C. The FCC’s Proposal Will Reduce Incentives To Create New Content.

The NPRM will also reduce incentives to engage in the far more expensive and risky endeavor of developing new and original content. Creating high-quality video content is costly and involves innumerable creative decisions that may or may not resonate with consumers, from the script, to the choice of actors, to the directorial decisions, to choice of subject matter between existing entertainment properties and new concepts, to the marketing and generation of consumer excitement. Indeed, far more television programs fail than succeed, and production companies lose millions of dollars every year on failed pilots and series.⁶⁰ As a result, to assume these kinds

⁵⁹ NPRM ¶ 66.

⁶⁰ See, e.g., Jeremy Egner, *Fall TV Failures: Five Years of Dashed Hopes*, N.Y. Times (Sept. 30, 2015), http://www.nytimes.com/interactive/2015/09/30/arts/television/new-fall-tv-season-a-look-back.html?_r=0 (74

(Cont'd on next page)

of risks, video content producers must be assured of at least a chance that a successful series will enable them to offset these costs and justify the risks of investment.

The NPRM, however, threatens to increase the risks of failure and decrease the potential rewards by giving unlicensed access to all video content streamed over an MVPD service. This will have the likely effect of depressing the number of film and television projects produced because studios and production companies will not be able to rely upon earning the same returns on their investment as they do under the existing distribution model. And again, individual creative professionals are likely to be harmed as a consequence. The existing system of deferred compensation tied to distribution, in contrast, incentivizes the creation of new video and related programming and gives creative professionals the financial stability to devote their careers to the creation of the high-quality content that consumers enjoy. *See supra* Part III. By disrupting the existing distribution and compensation model, the NPRM threatens serious harm to creators, creativity, the television and entertainment industries, and the public, who will have less programming—and less quality programming—from which to choose

VI. The FCC’s Proposal Will Interfere With The Development Of New Innovative Distribution Models.

The Copyright Alliance and its membership do not advocate for specific technological models for distribution of video and entertainment programming and support the goal of incentivizing the development of new technological distribution channels. But the FCC’s proposal actually undermines incentives to innovate by favoring the makers of products that qualify as “Navigation Devices.” The NPRM will interfere with the development of new and innovative distribution models in three distinct ways.

First, the FCC’s proposal will divert the industry’s energies away from developing new models for distribution, such as apps, in favor of hardware. Today, there are numerous apps competing in the market, and more are being created every day.⁶¹ Indeed, apps appear to be enormously popular with consumers.⁶² MVPD-created apps, alone, have been downloaded over

(Cont’d from previous page)

of 121 fall network shows from 2010 to 2014 were cancelled after one season); *cf.* Neil Genzlinger, *TV Shows That Failed in 2014, by the Month*, N.Y. Times (Dec. 11, 2014), <http://www.nytimes.com/2014/12/14/arts/television/tv-shows-that-failed-in-2014-by-the-month.html> (“The carcasses of dead television shows line 2014 like roadkill. More than 70 shows were canceled during the year.”).

⁶¹ *See, e.g.*, Tim Stenovec, *The First Great Sports Streaming Apps Are Here*, Tech Insider (Jan. 31, 2016), <http://www.techinsider.io/future-of-television-2016-1> (describing the deployment of new apps that allow fans to watch live sporting events); Sarah Perez, *Comcast Debuts Stream, A Cable-TV Like Streaming Service For Cord Cutters*, Tech Crunch (July 13, 2015) <http://techcrunch.com/2015/07/13/comcast-debuts-stream-a-cable-tv-like-streaming-service-for-cord-cutters/> (“Comcast has now become the latest pay TV provider to launch its own alternative to big cable TV packages with the debut of its own internet-based streaming cable service it’s simply calling Stream.”).

⁶² *See, e.g.*, Molly Wood, *TV Apps Are Soaring in Popularity, Report Says*, N.Y. Times (June 4, 2014), http://bits.blogs.nytimes.com/2014/06/04/report-tv-apps-are-soaring-in-popularity/?mtref=www.google.com&gwh=354536638581318FFB18DF20667E2C67&gwt=pay&assetType=nyt_now.

56 million times,⁶³ and the TV apps economy has been forecasted to reach \$14 billion by 2017.⁶⁴ Nonetheless, rather than promote the creation of apps that customers appear to enjoy, that will work on any device, and that may eliminate the need for cumbersome hardware, like a set-top box, the FCC's NPRM makes set-top boxes a permanent and central fixture of television and video consumption. In doing so, the FCC actually stifles, rather than enhances, innovation.⁶⁵

Second, the FCC's proposal interferes with the development of innovative distribution models by undermining the incentives to create new technological protections against piracy. In particular, the NPRM seeks to limit the "flexibility in content protection choices by MVPDs,"⁶⁶ and to prevent "each MVPD [from] hav[ing] its own testing and certification processes."⁶⁷ Instead, the NPRM will cede all technological security decisions to "standard-setting bodies" or a "Trust Authority" that will be developed in the future.⁶⁸ The Copyright Alliance is concerned that giving an undefined government-mandated body exclusive jurisdiction over security issues will undermine the development and implementation of technological solutions necessary to safeguard content creators' works from piracy. For example, if the proposal works as intended, there will be increased price competition among the makers of third-party navigation devices. Among the likely consequences of this new market is an increased likelihood that manufacturers will create new, cheaper boxes with lower security than existing set-top boxes. In addition, the standardization in security measures will make devices easier to hack, thus making copyrighted content easier to steal, and the proliferation of illegal copies will make it more difficult for copyright owners to police their copyrights. All of these developments will invariably result in reduced payments to copyright owners and to the creative professionals who contribute to the creation of copyrighted content.

Third, there is nothing in the FCC's proposal to ensure that new navigation devices will enable users to distinguish licensed from pirated content. To the contrary, the proposal will allow navigation device makers to display copyright-protected content in close proximity to content obtained through third party search engines and platforms that are unwilling or unable to block infringing content. This display of unlawful content in close proximity to licensed content – even if inadvertent – will benefit copyright infringers, while harming creators.

VII. Conclusion

In all of the respects described above, the FCC's proposal will ultimately harm consumers who will have fewer television and video options, lower quality and less diverse television and video offerings, and a smaller number of MVPD and OTT services from which to

⁶³ Report of Working Group 4 to DSTAC at 126.

⁶⁴ Michael Wolf, *Here's Why the TV Apps Economy Will Be a \$14 Billion Business*, Forbes (June 20, 2013), <http://www.forbes.com/sites/michaelwolf/2013/06/20/heres-why-the-tv-apps-economy-will-be-a-14-billion-business/#2474c4b920af>.

⁶⁵ See, e.g., NPRM (Pai Dissent) at 63.

⁶⁶ NPRM ¶ 50.

⁶⁷ *Id.* ¶ 72.

⁶⁸ *Id.* ¶¶ 37, 50.

choose. The net result of the Commission's proposal is likely to be less new content for consumers. In particular, the diversity of content is likely to be affected, as television networks and studios direct their resources to programming with the broadest possible appeal, reducing the amount of programming directed to minority and special interest communities. And on top of these harms, the FCC's proposal will result in consumers being tethered to set-top boxes, rather than mobile apps that eliminate the need for cumbersome hardware.

In light of the serious harm that the FCC's "set-top box mandate" proposal will cause to individual creators in the entertainment industry, the industry as a whole, and the public, the Copyright Alliance urges the FCC not to adopt the proposed rules.

Keith Kupferschmid, CEO
Copyright Alliance
1224 M Street, NW
Washington, D.C. 20005
Telephone: 202.540.2243