

August 23, 2016

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

Re: *In the Matter of Expanding Consumers' Video Navigation Choices and Commercial Availability of Navigation Devices*, MB Docket Number 16-42

Dear Ms. Dortch:

The Copyright Alliance respectfully submits for the record the August 3rd letter from Register of Copyrights Maria A. Pallante (the “Letter”), which reduces to writing the analysis Chairman Wheeler sought from the Copyright Office regarding his proposed set-top box mandate in MB Docket No. 16-42. Representatives Marsha Blackburn, G.K. Butterfield, Doug Collins, and Ted Deutch asked for the Letter to ensure that all interested parties had the benefit of the Copyright Office’s expertise.

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 creators from a diverse range of disciplines—including writers, documentarians and filmmakers, musical composers and recording artists, journalists, graphic and visual artists, photographers and software developers—and small and large businesses that hold copyrights and are adversely affected by the unauthorized use of their works. The Copyright Alliance previously submitted comments in response to the Notice of Proposed Rulemaking (“NPRM”).¹

In her Letter, the Register identified a number of deficiencies in the proposed requirements set forth in the NPRM for multichannel video programming distributors (“MVPDs”) to provide their programming content and other data to third-party manufacturers and apps developers without a license or fee, so that those third parties can develop competing video services (“Proposal”). Given the Copyright Office’s role as the expert, nonpartisan federal entity tasked by statute with advising Congress, other agencies, and the courts regarding copyright law and policy, it is incumbent on the Commission to take into account the Register’s views on the Proposal. We write to reaffirm the serious harms posed by the Proposal as identified by the Register’s Letter, especially as it relates to the Proposal’s encroachment on the exclusive rights granted to copyright owners by the Copyright Act. We also emphasize and explain the harm that the FCC’s Proposal would do to creative professionals and the public by undermining existing incentives for MVPDs and over-the-top (“OTT”) distributors² to pay to

¹ Copyright Alliance, Comment on *In the Matter of Expanding Consumers' Video Navigation Choices and Commercial Availability of Navigation Devices*, MB Docket No. 16-42 (Apr. 22, 2016) (hereinafter “Copyright Alliance Comment”).

² “OTT” refers to over-the-top streaming video services, meaning the delivery of audio, video, and other media

distribute copyrighted content, thereby reducing the gross amount of revenue available to compensate those who contribute to the creation of video and entertainment programming. Like the Copyright Office, we are concerned that adoption of the Proposal would irreparably harm creative professionals, the entertainment industry more generally, and the public at large. On behalf of the Copyright Alliance, I respectfully request that the Commission ensure that the serious issues raised in the Register's Letter, and as set forth in greater detail below, are adequately addressed in any final rule or other development of the Proposal.

A. As the Recognized Expert on Matters of Copyright Law and Policy, the Register's Concerns Regarding the Proposal Should Be Taken Seriously.

Congress created the Copyright Office in 1897 after recognizing that the growing complexities of copyright law required an entity that could provide expertise and leadership in this important area of the law.³ The Copyright Office, which is led by the Office of the Register of Copyrights, has done just that by developing an extensive expertise on copyright law and related issues, and consequently bears the statutory responsibility of serving as an expert, nonpartisan advisor to Congress, federal agencies, the courts, and others on copyright-related legal issues and policy matters.⁴

This long-standing advisory function of the Copyright Office is codified in the Copyright Act. Section 701 provides that the responsibilities of the Copyright Office include “[a]dvis[ing] Congress on national and international issues relating to copyright” and “[p]rovid[ing] information and assistance to Federal departments and agencies and the Judiciary on national and international issues relating to copyright.”⁵ The Register of Copyrights bears the responsibility of ensuring that the Copyright Office fulfills its statutorily-required advisory duties, with the assistance of the Office of Policy and International Affairs, which is the division of the Copyright Office tasked with aiding the Register in providing guidance on copyright law and performing other policy-related functions.⁶

There are many different ways that the Copyright Office fulfills its statutorily mandated responsibilities of “[a]dvis[ing]” and “assist[ing]” the U.S. government on matters of copyright

over the internet without a subscription to a traditional pay-TV service.

³ Act of Feb. 19, 1897, ch. 265, 29 Stat. 538, 545 (1897); *see also* U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 101.1 (3d ed. 2014) (hereinafter “*Compendium*”).

⁴ *Compendium* § 101.1 (“[A]t the dawn of the twentieth century, Congress had not only created a formal foundation for copyright administration, but also created the Register as the central position of related expertise within the U.S. government, who in turn developed an expert staff.”); *see also* U.S. Copyright Office, *Strategic Plan 2016-2020: Positioning the United States Copyright Office for the Future 5* (Dec. 1, 2015), *available at* <http://www.copyright.gov/reports/strategic-plan/USCO-strategic.pdf> (hereinafter “*Strategic Plan*”) (“The Copyright Office’s staff has wide-ranging expertise in all facets of domestic and international copyright law, including the Copyright Act and related provisions of Title 17, foreign copyright laws, international copyright treaties, and trade agreements.”).

⁵ 17 U.S.C. § 701(b).

⁶ *Compendium* § 101.2.

law and policy. For example, the Copyright Office regularly assists Congress by giving expert advice on copyright policy and the interpretation of copyright law, providing drafting support for copyright legislation and legislative reports, and offering guidance regarding compliance with treaties and trade agreements.⁷ Indeed, Congress has asked the Copyright Office to prepare formal studies and analyses of a wide variety of copyright issues, including digital first sale, orphan works, mass digitization, and statutory licensing reform.⁸ Since 1976, the Copyright Office has issued more than thirty reports and studies on various provisions of the Copyright Act.⁹ This is precisely why courts also look to the Copyright Office for guidance, noting its expertise and specialized experience dealing with copyright issues.¹⁰

The Copyright Office also assists various executive branch offices, such as the Department of Justice, the White House, the U.S. Patent and Trademark Office, and the Department of State, by, among other things, providing analyses of copyright policy, contributing to litigation relating to copyright issues via *amicus curiae* briefs, and participating in U.S. delegations at various international events.¹¹

Therefore, by providing the FCC with the Copyright Office's analysis at the request of Chairman Wheeler, and reducing it to writing at the request of Representatives Blackburn, Butterfield, Collins, and Deutch, the Register was fulfilling her long-standing responsibility of advising agencies and Congress on copyright-related issues. In light of the recognized copyright expertise of the Register of Copyrights and the Copyright Office more generally, the advice and

⁷ *Compendium* § 101.1. See also S. Rep. No. 101-268, 2d Sess., at 6 (1990), reprinted in 1990 U.S.C.C.A.N. 237, 241 (“Congress relies extensively on the Copyright Office to provide its technical expertise in the legislative process.”); 144 Cong. Rec. S11,891 (daily ed. Oct. 8, 1998) (statement of Sen. Patrick Leahy) (“The Copyright Office was there at every step along the way—from the negotiation of the WIPO treaties to the negotiations and the drafting of the implementing legislation and the other issues in the DMCA. Given [the Copyright Office’s] expertise in copyright law, they will play a significant role in the implementation of the legislation.”); cf. 35 U.S.C. § 2 (requiring the Director of the USPTO to “consult with the Register of Copyrights on all copyright and related matters”).

⁸ Maria A. Pallante, *The Next Great Copyright Act*, 36 Colum. J.L. & Arts 315, 321-22 (2015).

⁹ *The Register’s Perspective on Copyright Review Before the H. Comm. on the Judiciary* (Apr. 29, 2015) (statement of Maria A. Pallante, U.S. Register of Copyrights, U.S. Copyright Office), available at <http://www.copyright.gov/laws/testimonies/042915-testimony-pallante.pdf>.

¹⁰ See, e.g., *Garcia v. Google, Inc.*, 786 F.3d 733, 741-42 (9th Cir. 2015) (“We credit this expert opinion of the Copyright Office—the office charged with administration and enforcement of the copyright laws and registration. The Copyright Office’s well-reasoned position reflects a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”) (internal citation and quotation marks omitted); *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 284 (2d Cir. 2012) (“In light of the Copyright Office’s expertise, the validity of its reasoning, the consistency of its earlier and later pronouncements, and the consistency of its opinions with Congress’s purpose in enacting § 111, we conclude that the Copyright Office’s position is reasonable and persuasive.”); *Rogers v. Better Business Bureau of Metropolitan Houston, Inc.*, 887 F. Supp. 2d 722, 732 (S.D. Tex. 2012) (“The Copyright Office’s ‘policy statements, agency manuals, and enforcement guidelines’ do not carry ‘the force of law,’ but they are entitled to some deference given the ‘specialized experience and broader investigations and information’ of the agency.”).

¹¹ *Compendium* § 101.1.

guidance in this Letter are entitled to respect and deference, and the FCC—which lacks expertise and authority in copyright law¹²—must respect its views on the Proposal.

B. The Copyright Office Concerns Regarding the FCC’s Proposal Are Valid and Consistent with Well-Established Copyright Law.

In her Letter, the Register offers a comprehensive overview of the copyright laws and policies implicated by the Proposal as well as a detailed analysis of the ways in which the Proposal threatens to undermine the exclusive rights granted to copyright owners by the Copyright Act. The Register’s persuasive Letter is fully consistent with copyright law and should cause the FCC to abandon its Proposal and adopt an alternative approach that fully respects, preserves, and protects intellectual property rights and licensing restrictions.

The “principal reservation” concerning the Proposal set forth by the Register in her Letter is that “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 private negotiations that are the hallmark of the vibrant and dynamic MVPD marketplace.”¹³ The Register’s Letter accurately points out the ways in which the Proposal would harm copyright owners by undermining their ability to reap the benefits of their creative labor through licensing their copyrighted works.

As noted by the Copyright Office, copyright law is predicated on the theory that creators are incentivized to create new works by the prospect of reaping the economic fruits of their creative labor, which in turn benefits the public by increasing the number of creative works available for their enjoyment.¹⁴ This economic rationale behind copyright protection has been repeatedly confirmed by the Supreme Court.¹⁵ The Copyright Act creates these incentives by granting copyright owners a bundle of exclusive rights in their works,¹⁶ which they can assign and/or license to third parties in their discretion. The detailed contractual arrangements governing the release of copyrighted works into the commercial marketplace are what enable copyright owners to realize the full value of their works.¹⁷ The FCC’s Proposal undermines this licensing structure by forcing MVPDs to deliver copyrighted content—including all content the MVPDs license from programmers and other content creators—to unlicensed third parties,

¹² 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.”).

¹³ Letter at 2.

¹⁴ Letter at 2-3.

¹⁵ See, e.g., *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).

¹⁶ 17 U.S.C. § 106.

¹⁷ See *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.”).

without the authorization of those copyright holders, while offering no mechanism to ensure that the detailed license arrangements between MVPDs and programmers/copyright owners are respected.¹⁸ Therefore, the Register is correct in her observation that the Proposal threatens to harm copyright owners by encroaching on their exclusive prerogatives to both exercise and license their rights to reproduce, distribute, display, and perform their creative works, as well as by undermining their ability to earn a return on their investment in those works.¹⁹

From the perspective of the Copyright Alliance and its membership, the harm threatened by the Proposal goes even further than the harm described in the Register’s Letter. Although the Register correctly focuses on the harm that the Proposal would inflict on copyright owners, it would not only be copyright owners who would be negatively affected, but also the thousands of individual creative professionals who are responsible for creating video content, and who are only indirectly protected and compensated by copyrights in the video programming that is the product of their work. These creative professionals are primarily compensated through payments that are directly tied to the licensed distribution of creative content, such as residuals, participation rights, or contributions toward health and pension benefits, which are typically governed by complex contractual or collective bargaining agreements.²⁰ By mandating that MVPDs transmit copyrighted programming to third parties, the Proposal would reduce the incentives for third parties to license content from copyright owners. Thus, the Proposal would reduce existing and potential sources of compensation for the thousands of individual creative professionals who are responsible for creating the content that audiences desire.²¹

These concerns underscore the Register’s statement that the Proposal “underestimate[s] the barriers to invoking copyright remedies to redress potential violations by third-party actors purporting to operate under the rule.”²² As noted by the Register, the FCC has suggested that the Proposal will not adversely affect licensing arrangements because copyright law is available to content creators to protect their works from infringement.²³ However, the Register is quite correct in pointing out that “the mere possibility of *ex post* litigation” is insufficient to protect the copyright interests at stake here, especially given the difficulties that copyright owners will have identifying the misuse of their content by third-party navigation devices, as well as the

¹⁸ NPRM ¶ 2.

¹⁹ Letter at 7-11.

²⁰ 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).

²¹ See Copyright Alliance Comment at 5-10, 12-14. Moreover, this risks driving these talented professionals out of the entertainment industry, harming the public who enjoys the entertainment programming that these individuals create. See, e.g., Crabtree-Ireland, 31 Ent. & Sports Law. 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.”).

²² Letter at 17.

²³ *Id.* at 17 (citing NPRM ¶ 80).

considerable cost and delay frequently involved in copyright litigation.²⁴ Furthermore, Copyright Alliance members who contribute to video content—and depend on licensing fees generated by that content for their income and benefits—cannot bring lawsuits to assert violations of copyrights held by other parties such as production companies and television networks or breaches of licensing arrangements to which creative professionals are not parties.²⁵ As a result, the regulatory scheme envisioned by the Proposal necessarily leaves creative professionals *without any remedy* if the owners of the copyrights on which they depend do not—or cannot—underwrite the costly litigation that would be required to enforce rights that the Proposal makes easier to infringe.

The Register’s Letter raises a number of additional valid concerns regarding the Proposal. For example, the Register notes that the Proposal 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.”²⁶ This concern is also well-taken. The Copyright Act provides copyright owners with a number of exclusive rights in their copyrighted works, including the rights to reproduce, distribute, publicly perform, publicly display, and digitally transmit the copyrighted work, as well as to prepare derivative works.²⁷ These rights are designed to protect copyright owners against the unauthorized exploitation of their copyrighted works.

For example, in *American Broadcasting Co. v. Aereo, Inc.*, the Supreme Court recently held that the defendant’s unauthorized transmission of copyrighted broadcast television programs to its subscribers violated the plaintiff copyright owners’ exclusive right to publicly perform that content.²⁸ In so holding, the Supreme Court confirmed that 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.²⁹ In light of the Court’s opinion and its broad reading of public performance rights, the Register of Copyrights was justified in noting that the Proposal could encourage the development of infringing devices or services by both enabling and encouraging unlicensed third parties to stream copyright-protected video content to their subscribers without authorization from copyright holders—thereby further depressing the market for original television content and reducing demand for the services of creative professionals who create that content.

²⁴ Letter at 17.

²⁵ See Copyright Alliance Comment at 5-10. See also 17 U.S.C. § 501(b) (conferring standing on “the legal or beneficial owner” of a copyright to bring an infringement suit); *CSI Inv. Partners II, L.P. v. Cendant Corp.*, 507 F. Supp. 2d 384, 412 (S.D.N.Y. 2007) (“Only parties to a contract have standing to assert a claim for breach of contract.”).

²⁶ Letter at 11.

²⁷ 17 U.S.C. § 106.

²⁸ 134 S. Ct. 2498, 2503 (2014).

²⁹ *Id.* at 2506 (quoting H.R. Rep. No. 94-1476, at 63 (1976)).

The Register’s Letter also points out the “tension” between the Proposal and the Digital Millennium Copyright Act (“DMCA”) enacted by Congress in 1998.³⁰ Among other things, the DMCA imposes liability on individuals who circumvent technological measures designed to control access to copyrighted works.³¹ The DMCA was designed to “encourage[] technological solutions, in general, by enforcing private parties’ use of technological protection measures with legal sanctions for circumvention and for producing and distributing products or providing services that are aimed at circumventing technological protection measures that effectively protect copyrighted works.”³² Yet the Proposal undermines this statutory purpose by forcing MVPDs to make their content available to third parties, preventing MVPDs from developing their own testing and certification processes, and leaving technological security decisions to “standard-setting bodies” or a “Trust Authority” that will be developed in the future.³³ It also limits the DMCA-recognized discretion copyright holders have to determine for themselves what technological protection methods are adequate. The removal of security protection measures from the MVPDs—at best replaced by measures that are required to be known industry-wide—risks making devices more vulnerable to hackers, thereby making it easier to steal copyright-protected content. Again, as explained in the Copyright Alliance’s prior comment to the FCC, additional victims of this theft will be the creative professionals who depend on lawful, licensed distribution of the content that they produce.

In short, the Proposal threatens to seriously harm both creators and the public by reducing incentives to invest in creating new original programming, in selecting and curating the dissemination of that content, and in developing new and creative ways to deliver that content to the public. The Register’s detailed analysis is entirely consistent with the goals of the Copyright Act and case law construing that statute, and therefore should cause the FCC to abandon its Proposal in favor of an alternative approach that fully protects copyright and other interests and enforces licensing restrictions.

C. Recent Criticisms of the Register’s Letter Do Not Withstand Scrutiny.

Hours after the Register’s Letter was released, Public Knowledge published an attack on the Register’s analysis of copyright law, accusing her of “rel[ying] on factual inaccuracies and a deeply flawed legal analysis.”³⁴ Public Knowledge’s criticisms are wrong on both counts.

First, without providing any factual support, Public Knowledge accuses the Copyright Office of being “dedicated to the interests of some copyright holders—as opposed to providing

³⁰ Letter at 15-16.

³¹ 17 U.S.C. § 1201.

³² S. Rep. No. 105-190, 11 (1998).

³³ NPRM ¶¶ 2, 37, 50, 72.

³⁴ Shiva Stella, Public Knowledge Responds to Copyright Office Attack on Set-top Box Competition (Aug. 3, 2016) (hereinafter “Public Knowledge Press Release”), *available at* <https://www.publicknowledge.org/press-release/public-knowledge-responds-to-copyright-office-attack-on-set-top-box-competition>.

an accurate interpretation of copyright law.”³⁵ That accusation is wholly unfounded. In fact, evidence abounds of the Copyright Office’s neutrality in matters of copyright policy. The sentiments of Congress, numerous courts, agencies, and others set forth above, which have consistently reaffirmed the Copyright Office’s well-established, independent, expert judgment and guidance on copyright law and policy issues, provide a complete answer to Public Knowledge’s baseless attacks. Beyond this, the Copyright Office has repeatedly expressed its commitment not only to protect the rights of creators, but also to encourage the development of new technology and the promotion of the public interest through the establishment of exceptions to and limitations of the exclusive rights granted to copyright owners. For example, in a statement to the House Committee of the Judiciary last year, the Register reiterated her belief that “a sound copyright law must recognize and promote the many businesses that identify, license, and disseminate creative works [because] [t]hese sectors are at the heart of copyright commerce.”³⁶ She further emphasized that the “law should provide the flexibility [these businesses] require to innovate and the certainty that they need to protect and enforce their investments,” as well as “balance the application of exclusive rights with the availability of necessary and reasonable exceptions,” including “the ongoing availability of a flexible fair use defense.”³⁷ Moreover, the Mission Statement of the Copyright Office affirms its commitment to “provid[ing] expert *impartial* assistance to Congress, the courts, and executive branch agencies on questions of copyright law and policy.”³⁸ In contrast, it is the *ad hominem* attack on the Copyright Office’s integrity that betrays its accusers’ bias and lack of impartiality.

Second, Public Knowledge attempts to discredit the Register’s analysis by contending that the Copyright Office is “merely an office within the Library of Congress,” and that courts give its opinions “no particular weight.”³⁹ Again, this claim has no basis in fact. There can be no serious dispute that courts *regularly* consider the positions of the Copyright Office when evaluating copyright law issues.⁴⁰ Indeed, the Copyright Office’s statutory mandate makes clear that it is intended to function as an expert on copyright law and policy and that the Office “shall . . . [p]rovide information and assistance to Federal departments and agencies and the Judiciary on national and international issues relating to copyright.”⁴¹ It is thus pure fantasy for Public

³⁵ Public Knowledge Press Release.

³⁶ *The Register’s Perspective on Copyright Review Before the H. Comm. on the Judiciary* (Apr. 29, 2015) (statement of Maria A. Pallante, U.S. Register of Copyrights, U.S. Copyright Office), available at <http://www.copyright.gov/laws/testimonies/042915-testimony-pallante.pdf>.

³⁷ *Id.*

³⁸ U.S. Copyright Office, Mission Statement, available at <http://www.copyright.gov/about/> (emphasis added); see also Strategic Plan at 5 (The Copyright Office’s “services support the exclusive rights, remedies, and remunerations that are afforded authors under the law, and which are essential for publishers, producers, and other entrepreneurs who invest in and bring these works to market. At the same time, the Office has long supported and facilitated exceptions, limitations, statutory licenses, safe harbors, and other flexibilities that provide safeguards for the public and bring efficiencies to the copyright system.”).

³⁹ Public Knowledge Press Release.

⁴⁰ See Section A, *supra*.

⁴¹ 17 U.S.C. § 701.

Knowledge to suggest otherwise. Accordingly, it would be arbitrary and capricious for the FCC—an agency purporting to regulate in an area that plainly implicates copyright—to simply dismiss the Copyright Office’s analysis.

Third, Public Knowledge claims that “[n]othing in the FCC’s Proposal would allow for the repackaging and public performance of content.”⁴² That is also false. By its terms, the Proposal would require MVPDs to re-engineer their service to allow third-party device manufacturers and apps developers to slice, dice, and repackage an MVPD’s content into a service vastly different from that originally offered by the MVPD. In particular, the Proposal invents a new concept, so-called “Navigable Services,” which consists of the components of MVPD service that must be made available on an unbundled basis to such third parties for use in creating their derivative services.⁴³ The Proposal further envisions that these third parties would necessarily alter aspects of MVPD service in providing their derivative services to MVPD customers.⁴⁴ Many of the Proposal’s proponents have been even clearer in stating their intention to use the access they receive as set-top box manufacturers to store and repackage content.⁴⁵

Fourth, Public Knowledge incorrectly accuses the Copyright Office of treating the interests of consumers as “irrelevant” and fair use as “an obstacle to be overcome.”⁴⁶ To the contrary, the Register’s Letter expressly acknowledges 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”⁴⁷ and that “certain consumer uses of copyrighted video content may qualify as fair uses under copyright law”⁴⁸ Furthermore, the Register explicitly recognizes that “[f]air use has played an important role in the marketplace for television programming, both in fostering

⁴² Public Knowledge Press Release.

⁴³ NPRM ¶ 26.

⁴⁴ *See, e.g., id.* ¶ 1 (describing the aim of the Proposal as “promot[ing] innovation in the display, selection, and use of [multichannel video] programming”); *id.* ¶ 12 (explaining that third parties should be able to offer a competing “user interface and complementary features”); *id.* ¶ 25 (asserting that “companies unaffiliated with an MVPD [must be] able to offer innovative user interfaces and functionality to customers wishing to access” multichannel video programming); *id.* ¶ 40 (stating that MVPD services such as “news headlines, weather information, sports scores, and social networking” are “unnecessary to include” in the Information Flows to third parties because “that information is freely available from other sources”); *id.* ¶ 80 (stating that no new rules are required to prevent the third parties from changing or repackaging the MVPD’s content or channel lineups, because “[w]e do not currently have evidence that regulations are needed to address concerns raised by MVPDs and content providers that competitive navigation solutions will disrupt elements of service presentation (such as agreed-upon channel lineups and neighborhoods), replace or alter advertising, or improperly manipulate content.”).

⁴⁵ At a DSTAC meeting, TiVo’s representative stated that “operators have made agreements where there’s not a disaggregation perhaps with the content owners, [but] that those should not necessarily apply to a third party device which should have the freedom to not be bound.” *See* Transcript of March 24, 2015 DSTAC meeting at 96-97.

⁴⁶ Public Knowledge Press Release.

⁴⁷ Letter at 2.

⁴⁸ *Id.* at 7.

innovation and setting consumer marketplace expectations.”⁴⁹ As an example, the Register points to the Supreme Court’s decision in *Sony Corp. of America v. Universal City Studios, Inc.*⁵⁰ There, the Supreme Court held that Sony could not be held liable for contributory copyright infringement by virtue of its distribution of the Betamax video recorder—which consumers used to record copyrighted television programming—because the VCR was capable of substantial noninfringing use: namely, both authorized and unauthorized time-shifting (where an individual user records programming for his or her later viewing).⁵¹ According to the Court, unauthorized time-shifting qualified as fair use because the record did not reveal “any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works.”⁵²

That rationale does not apply to the FCC’s proposed rule. As noted by the Register, *Sony* did not address “fair use where the device distributor was *itself* engaged in copying activities, as opposed to private home users.”⁵³ Yet that is precisely the type of infringing conduct authorized by the Proposal. Specifically, the Proposal *requires* the transmission of content, and then allows the commercial exploitation of that content *by third-party companies*, so that infringement occurs long before end-user consumers have any role in the process. Third parties cannot “stand in the shoes of their customers” and rely on fair use as a defense against liability for their own unauthorized commercial exploitation of copyrighted video content.⁵⁴ Nothing in the Supreme Court’s *Sony* decision *requires* copyright owners to provide access to their works to device makers in whatever format they prefer. This important distinction was also noted by the Register in her Letter.⁵⁵

Indeed, there is no reasonable dispute that the Proposal impermissibly permits commercial third-party manufacturers and apps developers, rather than end-users, to actively engage in the copying, manipulation, and retransmission of copyrighted content. The proposal explicitly states that it is leaving choices that have been negotiated between content owners and MVPDs “such as channel placement and treatment of advertising to marketplace forces” and requires that set top box manufacturers be free to establish relationships with MVPD customers even if those manufacturers “have no business relationship with any MVPD” so that these “unaffiliated vendors” can “differentiate themselves in order to effectively compete based on the user interface and complementary features they offer users” such as features that allows consumers to integrate other OTT subscription services and other “future innovations.”⁵⁶ But courts have drawn an important distinction between the sale of devices to consumers for their

⁴⁹ *Id.* at 13.

⁵⁰ *Id.* (citing 464 U.S. 417 (1984)).

⁵¹ 464 U.S. at 421, 442, 451-56.

⁵² *Id.*

⁵³ Letter at 13.

⁵⁴ See *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (internal quotation marks and citation omitted).

⁵⁵ Letter at 13.

⁵⁶ NPRM ¶¶ 2, 23, 27.

own recording and personal use and the type of ongoing relationship involved, for example, when subscription services are sold to consumers.⁵⁷ As explained by the Copyright Office, the Proposal goes far beyond encouraging third parties to develop “passive conduits for licensed programming,” instead enabling “a broad array of ... devices and services” that “could repack and transmit those works for a profit, without having to comply with agreed contractual terms.”⁵⁸ As noted by the Register, depending on the characteristics of such devices, they may very well implicate the exclusive rights of copyright holders to reproduce, distribute, publicly display, and publicly perform their copyrighted works.⁵⁹ If the defendant in *American Broadcasting v. Aereo*, which merely transmitted specific programs *selected by the user* at specific times, can be found by the Supreme Court to have violated the Copyright Act, then a third-party device manufacturer or apps developer that copies a data stream in order to capture, repack, and transmit to subscribers a virtually limitless supply of copyright-protected content surely violates the same public performance right, not to mention the other exclusive rights conveyed by the Copyright Act.

In condemning the work of the Copyright Office, Public Knowledge ignores the fact that MVPDs are granted a limited license from copyright owners and cannot license more rights to others than those they license from the content owners.⁶⁰ In her Letter, the Register simply concluded that the FCC cannot upend these consensual contract restrictions without severely undermining the value of the copyrights protected by these arrangements. As a result, it is irrelevant that consumers “need to be subscribers in order to receive programming.”⁶¹ The FCC should not be allowed to rewrite the rules that protect the value of video content simply because that content is transmitted into subscribers’ homes through cable wires. Proponents of the Proposal, in contrast, have candidly asserted that they will not consider themselves to be bound by the terms of these contractual arrangements.⁶² Indeed, Public Knowledge has expressly

⁵⁷ See, e.g., *Sony*, 464 U.S. at 437 (distinguishing Sony’s sale of Betamax recorders from “cases involving an ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred”); *Aereo*, 134 S. Ct. at 2506 (“Aereo is not simply an equipment provider ... Aereo sells a service that allows subscribers to watch television programs, many of which are copyrighted, almost as they are being broadcast. In providing this service, Aereo uses its own equipment, housed in a centralized warehouse, outside of its users’ homes.”); *BMG Rights Mgmt. v. Cox Commc’ns, Inc.*, No. 1:14-cv-1611, 2016 WL 4224964, at *12 (E.D. Va. Aug. 8, 2016) (rejecting defendant’s reliance on *Sony* because, “unlike in *Sony*, [defendant] maintains an ongoing relationship with users of its service”).

⁵⁸ Letter at 10.

⁵⁹ *Id.* at 12.

⁶⁰ Copyright Alliance Comment at 4.

⁶¹ Public Knowledge Press Release.

⁶² 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.”); CCIA Reply Comments, MB Docket 15-64 at 10 (Nov. 19, 2015) (“[D]evice manufacturers, of course, cannot violate contracts to which they are not a party.”).

acknowledged that its intent is to use the Proposal process to eliminate these licensing arrangements.⁶³

We note that even before the Register issued her Letter, a group of law professors had already issued their own attack on what they presumed would be the Copyright Office's analysis.⁶⁴ Specifically, these law professors accused the Register of attempting to expand copyright owners' rights beyond those recognized by the Supreme Court in *Sony*. As explained above, though, the fair use doctrine is not implicated by the third party navigation devices authorized by the Proposal.⁶⁵ It is these law professors who are misreading *Sony* to serve their agenda, not the Copyright Office.

Among the victims, again, would be the creative professionals who created the content that such third parties seek to exploit, and who would be denied contractually and collectively bargained for compensation when that programming is used for free, as well as the public, who would have fewer programming options from which to choose due to the reduction of incentives to create original works.

⁶³ See Transcript of March 24, 2015 DSTAC meeting at 38-39, *available at* <https://www.fcc.gov/news-events/events/2015/03/downloadable-security-technology-advisory-committee> (“[A]n operator might have agreed to channel numbers and channel line ups but ... a lot of those sorts of restrictions that operators have agreed to may not make any sense in a retail place.”).

⁶⁴ IP Law Professor Letter to Library of Congress on Unlocking the Box (July 22, 2016), *available at* <https://www.publicknowledge.org/documents/ip-law-professor-letter-to-library-of-congress-on-unlocking-the-box>.

⁶⁵ See discussion of *Sony*, *supra*.

Conclusion

The Copyright Office is the widely recognized expert, nonpartisan agency whose role in advising Congress, federal agencies, and the courts on issues of copyright law and policy is codified in the Copyright Act. Given the Office's expertise in matters of copyright law, its concerns regarding the copyright implications of the Proposal are exceedingly valuable and cannot be ignored. Indeed, the significant deficiencies in the Proposal identified by the Copyright Office demonstrate that the FCC must set the Proposal aside in favor of an alternative that will respect and protect the exclusive rights of copyright owners in their copyrighted works, including their right to control the exploitation of their works through private licensing arrangements.⁶⁶

Respectfully submitted,

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⁶⁶ One such alternative has already been proposed by the MVPDs and programmers. *See* Notice of Ex Parte Presentation, MB Docket 16-42, CS Docket 97-80 (June 27, 2016). This proposal would allow consumers to eliminate their set-top boxes and instead download free apps designed by their pay TV providers that would allow them to search and view content on third-party retail devices. These apps would use HTML5 open standards, allowing smart TVs and other hardware to easily support the app. In addition, the proposal includes a number of technical and contract-based provisions to protect intellectual property rights and the enforcement of underlying program licensing agreements.