



September 7, 2016

**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth St., SW  
Washington, DC 20554

**Re: *Ex Parte* Letter, In the Matter of Expanding Consumers' Video Navigation Choices, Commercial Availability of Navigation Devices, MB Docket No. 16-42, CS Docket No. 97-80**

Dear Ms. Dortch:

The Consumer Video Choice Coalition (CVCC) respectfully submits this *ex parte* letter in the above-referenced proceedings to respond to arguments made by several representatives of the content industry in an *ex parte* letter dated September 6, 2016.<sup>1</sup> The content industry representatives noted that, based on their understanding of the Commission's proposed approach to fulfill its obligations under Section 629 to ensure consumer choice in the market for video navigation devices, the Commission has taken into consideration and addressed the content industry's concerns regarding the security of pay-TV content. The content industry representatives also recognize the need for parity between offerings on MVPD devices and third-party devices, noting that parity is essential to promoting competition, consumer choice, and continued investment.<sup>2</sup>

However, the content industry representatives maintain that the terms of the license under which retail consumer electronics devices use MVPD apps must be determined by programmers and MVPDs alone.<sup>3</sup> This would preclude input from other affected parties and oversight by the Commission. It would also unnecessarily restrict the ability of third parties to develop new features that help consumers gain access to lawful content that they have purchased and take away rights that consumers enjoy today, like home recording and time-shifting.<sup>4</sup> Moreover, it

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<sup>1</sup> Notice of Ex Parte Communication from Jared S. Sher, 21st Century Fox, to Marlene H. Dortch, Secretary, Fed. Comm'n's Comm'n, MB Docket No. 16-42, CS Docket No. 97-80 (Sept. 6, 2016).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See generally *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

would deny consumer devices the very same parity that programmers seek for their own apps. For example, without any Commission oversight, nothing would prevent programmers and MVPDs from entering into agreements that would:

- Eliminate the ability of consumers to time-shift and record programming for in-home viewing;
- Deny programming or features to certain devices or classes of devices for anticompetitive reasons;
- Prevent viewers from accessing non-MVPD programming, including programming from minority or other non-mainstream programming or user-generated content platforms, like YouTube or Vimeo; or
- Require that devices give MVPD content priority in search results, recommendations, and related features.

The desire of the content industry to exclusively control all terms of the license is antithetical to the Commission's responsibility to implement Section 629 and to protect the public interest. Unless the Commission exercises its authority as a backstop for the public interest, there is no assurance that the proffered license will be fair, reasonable, or nondiscriminatory. Indeed, a license created and controlled by a group of MVPDs and content companies may well become the means to restrain the very competition Section 629 was intended to promote. Moreover, it is possible that any arrangement where programmers and MVPDs jointly determine the terms of app licenses would raise serious antitrust concerns, yet antitrust immunity might be claimed due to the FCC regulatory context.

It is imperative that license terms cannot be used as means to undermine the goals of competition, consumer choice, and innovation. While the terms of this license may address, for example, certain security, compatibility, and other matters, licenses should not seek to interfere with other functionality of devices (e.g., what other apps the device may run, or other aspects of how the device functions that are not related to running the MVPD app), nor should licenses prevent MVPD apps from having parity with MVPD-provided devices in terms of video programming and features. There can be no competition if the rules of the road are written entirely by programmers and MVPDs with no Commission oversight to protect the interests of consumers and ensure that the goals of Section 629 are fulfilled.

This letter is being provided to your office in accordance with Section 1.1206 of the Commission's rules.

Marlene H. Dortch  
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Respectfully submitted,

*Consumer Video Choice Coalition*

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