The Commission Has the Legal Authority to Promote App and Device Competition

A. Section 629 Unambiguously Directs the Commission to Adopt Rules to Promote Competitive Navigation Devices from Independent Providers

The Commission's legal basis for promoting app and device competition is straightforward: Section 629 of the Communications Act (as amended) directs the FCC to

> **adopt regulations** to **assure** the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, **from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor**.[1]

This is perhaps one of the most straightforward examples of an unambiguous legal directive in the telecommunications practice.[2] Congress has told the FCC what to do, and to carry out its goals through positive regulation. Congress has already settled the basic policy question of whether the FCC should act and what its goals should be. The statute does not mandate that the FCC follow any particular path—apps-based, protocol based, physical hardware based, or otherwise. The Commission's responsibility is determine how best to carry out Congress' directive, using its expert judgment and the record before it.

The emphasized areas of text merit further elaboration. First, the Commission is told to "adopt regulations." Inaction and further delay are therefore not permissible. Second, the Commission is told to "assure" the availability of competitive navigation solutions. This means that its regulations must be effective. The Commission must therefore adopt the reforms actual competitors—including those with experience in CableCARD—have indicated are necessary to

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[1] 47 U.S.C. § 549 (emphasis added).

[2] This legal mandate is framed as a directive to the Commission to use its existing authority, *e.g.*, under Section 624A of the Communications Act as amended, 47 U.S.C. § 544a. Section 629 demonstrates, however, that the Commission's authority is sufficient to carry out the directive Congress gave it.

assure a competitive market, such as competitive user interfaces and cross-MVPD standardization. Finally, competitive navigation solutions **must** be available from vendors "not affiliated with any multichannel video programming distributor." While these comments will describe how MVPD-provided solutions generally fall short from a consumer perspective and in other ways, it is also the case that, as a legal matter, they are immaterial. The Commission's statutory mandate is not fulfilled unless there is competition from unaffiliated, independent providers. Apps-based approaches that are solely controlled by MVPD and programmer discretion would not permit "unaffiliated" competition.

The Commission's authority extends to promoting competition from software-based interfaces ("apps") as well as from hardware solutions, and it has explained how, consistent with past agency practice and norms of statutory interpretation, the term "equipment" includes apps.[3] There are additional reasons to read the statute to apply to app competition, as well. Simply put, apps run on hardware. An app can change the functionality of a general-purpose computing device, like an iPad, giving it the ability "to access multichannel video programming and other services offered over multichannel video programming systems," where otherwise it would not have that ability. In effect, an app turns a device *into* a competitive navigation device while it is being run. Thus, even if one were to interpret Section 629 as directly applying only to hardware devices—and there is no reason to do so—an unaffiliated app running on an unaffiliated piece of hardware is a "competitive navigation device" in the same sense as a TiVo.

Section 629 does not stand by itself as a legal directive or as a signal of Congressional intent. In the 1992 Cable Act, for instance, Congress recognized that new "cable scrambling,

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[3] NPRM at 21-22.

encoding, or encryption technologies and devices" could "disable[] or inhibit[]"[4] the third-party video equipment that consumers purchased from the competitive market to watch, record, and interact with subscription programming. It found that "if these problems are allowed to persist, consumers will be less likely to purchase, and electronics equipment manufacturers will be less likely to develop, manufacture, or offer for sale, television receivers and video cassette recorders with new and innovative features and functions,"[5] and therefore directed the Commission to adopt regulations that enact "narrow technical standards that mandate a minimum degree of common design and operation, leaving all features, functions, protocols, and other product and service options for selection through open competition in the market,"[6] while considering "the need to maximize open competition in the market for all features, functions, protocols, and other product and service options of converter boxes and other cable converters unrelated to the descrambling or decryption of cable television signals."[7]

Furthermore, Congress effectively re-authorized Section 629 in the STELA Reauthorization Act of 2014,which directed the Commission to "establish a working group of technical experts representing a wide range of stakeholders, to identify, report, and recommend performance objectives, technical capabilities, and technical standards of a not unduly burdensome, uniform, and technology- and platform-neutral software-based downloadable

[4] Cable Television Consumer Protection and Competition Act of 1992, PL 102–385, 106 Stat 1460, Sec. 17 ("Consumer Electronics Equipment Compatibility"), codified at 47 USC 544a(a)(1).

[5] 47 USC 544a(a)(2).

[6] 47 USC § 544a(a)(4).

[7] 47 USC § 544a(c)(1)(A).

security system designed to promote the competitive availability of navigation devices **in furtherance of section 629** of the Communications Act of 1934 (47 U.S.C. 549)."[8] In the current proceeding, the Commission is acting consistently with a recommendation of the technical committee it established to carry out this law, and to carry out the underlying policies of Section 629. The last Congressional word on this matter is a directive to the Commission to proceed with its work in promoting a competitive market for unaffiliated navigation devices.

Finally, it bears repeating in this context that there are even deeper roots to the communications policies the 1992, 1996, and 2014 Acts addressed. With its *Carterfone* decision in 1968,[9] the Commission remedied problems in a market analogous in many ways to the video devices market today. Prior to *Carterfone*, most telephones were rented from AT&T for prices substantially higher than consumers would have paid in a competitive market.[10] The telephones they rented changed little from year to year, decade to decade. The innovation let loose by *Carterfone* set the stage for the Internet by allowing computers to access the telephone network via modems. But more immediately, it allowed a competitive market in telephone equipment to develop, with telephones of all shapes and sizes available at every price point, and allowed previously rare devices like answering machines to become commonplace. On other occasions, the Commission has found that promoting interconnection standards benefits consumers. The Commission's Part 68 regulations, which define the physical interface for attaching equipment to

[8] Pub. L. No. 113-200, 128 Stat. 2059, § 106 (emphasis added).

[9] *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968).

[10] For one example of how uneconomic it can be to rent rather than own telecommunications equipment, *see* USA TODAY, *Woman Paid Thousands to Rent Rotary Phone*, (Sept. 14, 2006), http://www.usatoday.com/news/offbeat/2006-09-14-phone_x.htm.

a telephone network, were essential in realizing the policy goals behind *Carterfone*. By ensuring that ISPs had access to essential telecommunications facilities in the *Computer Proceedings*, the Commission laid the groundwork for the ISP boom of the 1990s. Additionally, in the 1970s, the Commission laid the regulatory groundwork for the emergence of competitive markets in telecommunications services such as long distance. In each of these cases, the Commission promoted competition by adopting frameworks expressly designed to foster it.

The Commission has always recognized the similarity between *Carterfone* and Section 629. In the 1998 order, the Commission wrote that

> Just as the *Carterfone* decision resulted in the availability to the consumer of an expanding series of features and functions related to the use of the telephone, we believe that Section 629 is intended to result in the widest possible variety of navigation devices being commercially available to the consumer.[11]

It later elaborated that

> The competitive market for consumer equipment in the telephone context provides the model of a market we have sought to emulate in this proceeding. Previously, consumers leased telephones from their service provider and no marketplace existed for those wishing to purchase their own phone.… As a result of *Carterfone* … the choice of features and functions incorporated into a telephone has increased substantially, while the cost of equipment has decreased.[12]

Of course, the Commission was not the first to see the analogy between the creation of a competitive market in set-top boxes and *Carterfone*. The same analogy was noted by then-Representative Markey,[13] Section 629's chief advocate in the House, and by Representative

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[11]Implementation of Section 304 of the Telecommunications Act of 1996, Report & Order, 13 FCC Rcd. 14775, ¶ 26 (1998).

[12] *Id.* at ¶ 11.

[13] Representative Markey noted that the provision would

> [H]elp to replicate for the interactive communications equipment market the success that manufacturers of customer premises equipment (CPE) have had in creating and selling all sorts of new phones, faxes, and other equipment

Bliley[14] when he introduced the earlier Competitive Consumer Electronics Availability Act. The *Carterfone* precedent is clear: when the Commission opens the door to a competitive market in devices that attach to a communications network, consumers benefit.

The Commission should therefore act under its statutory authority, and consistent with past practice and Congressional directive, to promote a competitive market for devices a subscriber can use to access her MVPD programming.

B. Generalized and Baseless References to Copyright, Contracts, or the First Amendment Do Not Overcome a Clear Statutory Directive

Despite the wishes of opponents, there are no legal trump cards that somehow nullify the Commission's clear statutory mandate to promote device and app competition. For example, the MPAA has maintained that competitive navigation solutions "could interfere with contracts, upset copyright law, and run afoul of the First and Fifth Amendments to the U.S. Constitution."[15] As an initial matter, the FCC's current proposal is simply a successor to CableCARD that gives competitors the same rights and abilities they enjoyed under that system. CableCARD devices

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> subsequent to the implementation of rules unbundling CPE from common carrier networks.

Comments of Representative Markey, 142 Cong. Rec. H1170 (1996).

[14] Representative Bliley observed that under his bill,

> Commission regulations will assure that converter boxes, interactive communications devices, and other customer premises equipment [would] be available on a competitive basis from manufacturers, retailers, and other vendors who are not affiliated with the operators of telecommunications systems, as is the case in our telephone system today.

Comments of Representative Bliley, 141 CONG. REC. E635 (1995).

[15] Comments of Motion Picture Association of America in MB Docket No. 15-64 (Oct. 8, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001328337. Copyright holders have made similar arguments, which have been rejected, in other contexts. *See* John Bergmayer, *Private Interests Don't Override the Law—in Music Publishing, Cable Boxes, or Anywhere Else*, Public Knowledge (Aug. 5, 2016), https://www.publicknowledge.org/news-blog/blogs/private-interests-dont-override-the-law-in-music-publishing-cable-boxes-or-anywhere-else (discussion of arguments in relation to PROs).

can provide competitive user interfaces, integrated search functionality, and even home recording features that go beyond what cable-provided devices allow. A single CableCARD device can even stream cable programming to other devices in a consumers' household—allowing consumers to watch and record their cable and broadcast programming on devices like mobile phones, PCs, and TV-connected streaming devices like the Apple TV. Because CableCARD has withstood repeated legal challenges[16] there is every reason to expect the FCC's new proposal would, as well.

1. The Interests of Copyright Holders Are Aligned with the Commission's Proposal

The Commission's proposal to promote new ways for content creators to reach viewers will benefit the creative community, particularly diverse and independent programmers who currently have no place in the cable bundle, or who have to give up flexibility to be included.

Nevertheless, opponents of the Commission's proposal have attempted to enlist copyright law as a grounds for the Commission to ignore its Congressional mandate. But these efforts fail. First, of course, both the Copyright Act and Section 629 were enacted by Congress. It would be unorthodox, to say the least, to conclude that copyright law takes away Congress's power to enact communications law, or the FCC's ability to enforce it. Many statutes and Commission policies, such as program access, must-carry, program carriage, and retransmission consent implicate copyrighted content in some way. Just as the invocation of the concept of copyright is not enough to abrogate these and many other long-standing rules and policies, neither is "copyright" a grounds for ignoring Section 629 of the Communications Act.

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[16] *Comcast Corp. v. FCC*, 526 F. 3d 763 (DC Cir. 2008) ("Petitioners, for the third time, challenge the FCC's policy regarding set-top converter boxes. We again deny their petition for review."); *Charter Communications v. FCC*, 460 F.3d 31 (DC Cir. 2006); *General Instrument Corp. v. FCC*, 213 F.3d 724 (DC Cir. 2000).

But more fundamentally it is not necessary to resolve any purported conflicts between Section 629 and copyright, because none exist. The Commission cannot, and is not proposing to, limit or otherwise condition any of a copyright holder's exclusive rights under section 106 of the Copyright Act. After the Commission's proposal is in effect, as today, copyright holders will retain the exclusive right to authorize reproductions, distributions, performances of their works, and the preparation of derivative works based on them, subject to existing limitations and exceptions. Specifically, the FCC's efforts to promote app and device competition do not transfer any copyright interests to competitive app and device makers, nor do the specific functions of competitive apps and devices infringe on any section 106 rights.

As a basic matter, a competitive app or video device no more "performs" or "distributes"[17] (or even makes commercial use of) the video programming it displays than a television set does. An FM radio manufacturer does not need a license from ASCAP or BMI, and the maker of a web browser or laptop computer does not need a license from Yahoo or Buzzfeed. Similarly, the manufacturer of a video display device or app does not need a license to enable viewers to access their lawful and paid-for MVPD subscriptions. Distributors such as MVPDs who engage in public performance, not end-user devices like television sets, need licenses. To stretch copyright law to give major content studios and MVPDs end-to-end control over user

[17] Even to the extent that devices create transitory, *de minimis*, or other (e.g. fair use) copies of programming in the course of their operation, the case law straightforwardly indicates that viewers, not the device or the device manufacturers, are the "volitional actors" in such circumstances. *See, e.g.*, *Cartoon Network v. CSC Holdings*, 536 F. 3d 121, 131 (2d Cir. 2008) ("it seems clear — and we know of no case holding otherwise — that the operator of the VCR, the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine."); *Fox Broadcasting v. DISH*, 905 F. Supp. 2d 1088 (2012); *Religious Tech. Center v. Netcom On-line Comm.*, 907 F. Supp. 1361, 1370, 1381-82 (ND Cal. 1995); *Fox Broadcasting v. DISH*, 905 F. Supp. 2d 1088 (2012).

behavior, in a way that does not exist in other contexts, is contrary to the traditional contours of copyright and harmful economically, from the perspective of technological innovation, and for consumers.

The Commission has proposed a set of policies that will protect and promote the legitimate copyright interests of creators, and we strongly support such protections. The Commission should be confident that promoting app and device competition will benefit the entire content ecosystem.

2. Private Contracts Do Not Supersede Statutes or FCC Regulations

The Commission's proposal does not change copyright law, but it does change marketplace facts. A hypothetical programmer may want to grant a license to an MVPD only under the condition that the MVPD not support competitive devices. Such conditions, of course, would be legally ineffective. But this does not limit the programmer's rights under copyright. Copyright law has never given copyright holders the power to circumvent other areas of law.

Similarly, MVPD arguments that complying with FCC rules would put them at legal risk for breach of contract should be disregarded. First year law students learn that there can be no liability for breach of an impossible, impracticable, or unlawful contract or contractual condition. A private agreement negotiated between two parties does not take precedence over Congress or the FCC.

3. The Commission's Proposal Will Further the First Amendment Interests of Programmers

Similarly, the First Amendment does not limit FCC or Congressional authority in this area in any way that opponents suggest. Indeed, as in the case of copyright or contract-based arguments, First Amendment arguments in this area tend to "prove too much": If the First Amendment prohibited Congress and the FCC from promoting a competitive market for video

navigation devices, it would also prohibit much of existing media policy. This may be a desirable scenario for ideological opponents of media regulation, but it is not an interpretation of the First Amendment likely to find much traction with neutral observers, or the courts.

Far from being in conflict, the Commission's proposal will further the speech interests of programmers and any purported speech interests of MVPDs by increasing the ways in which viewers can access their content. A programmer is better able to express itself when viewers have more, not fewer, ways they can access programming.

a) As Applied to Programmers

The FCC's proposal for competitive apps and devices does not affect the content of programming, prevent programmers from speaking, or force them to endorse messages they do not agree with. Simply put, giving viewers options as to the devices and apps they use to watch programming does not implicate the First Amendment interests of programmers, because the First Amendment has never given speakers the right to assert control over who can listen. Indeed, the speech interests of programmers are furthered when viewers can more easily access programming.

b) As Applied to MVPDs

The FCC's proposal does not take away any rights MVPDs now have in the basic sense that they will retain the ability to create their own proprietary apps and devices, and to structure their programming bundles just as they do today. To the extent they have speech interests in those outlets, they will continue to be able to exploit them.

Nor does requiring that MVPDs allow viewers to use the apps and devices of their choice burden any speech rights they might have. While some courts have held that MVPDs have

limited speech rights in the selection of programs and channels they carry,[18] no court has ever held that this extends to giving them control over the manner in which viewers watch programming. But as with programmers, to the extent that the FCC's proposal increases the number of ways viewers can access the MVPD bundle of programming, it furthers any speech interests they may have.

C. The Commission's Effort to Promote Competitive Apps and Devices is Well-Timed

The Commission should act now. Of course, the imperative for the FCC to implement the law, and the benefits of competition are as clear today as they were in 1996. But the technology and business models that exist today are more likely than ever to deliver clear and tangible benefits to consumers.

As the FCC recognized most clearly in the National Broadband Plan,[19] open and competitive video devices will benefit broadband by making it easier for viewers to watch online video right alongside their MVPD programming. There is clear enough benefit in a competitive market of MVPD-only devices. But this benefit is magnified when it also creates new competition in video delivery while boosting demand for new broadband build-out. This is a benefit of Section 629 that was not foreseen in 1996.

For these and other reasons, the Commission should use its clear statutory authority to promote video device competition expeditiously.

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[18] *Turner Broadcasting System v. FCC*, 512 US 622, 641 (1994).

[19] Connecting America: The National Broadband Plan 49-52 (2010).