Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: 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,

We write to clarify a few points with respect to the intersection of copyright and communications law as they relate to this proceeding. As we understand it, the FCC is considering measures that would permit viewers to watch pay-TV programming on devices of their choice, through apps created by multi-channel video programming distributors, or MVPDs. For example, a cable operator might create an app for a smart TV, allowing viewers to access their subscriptions without the use of a rented set-top box. Apps would only be made available to devices or platforms whose developers sign agreements with each MVPD.

We also understand that some programmers object to this proposal, characterizing it as a "compulsory license," or in some way interfering with their copyright interests. However, it is clear that, whatever the merits of a specific FCC proposal, the apps proposal does not amount to a compulsory license. In fact, it doesn't implicate any of the exclusive rights the Copyright Act grants to programmers. With respect to copyright law, the current proposal is no different than the existing CableCARD rules, which require cable operators to make their programming available on unaffiliated, third-party devices.

Fundamentally, under the apps proposal, additional copyright licenses are not needed by MVPDs, consumers, or device or platform developers. Any given app is really just a virtualized CableCARD. Moving to app-based delivery may have implications for competition, innovation, and consumer welfare that are within the FCC's remit to assess, but it raises no new copyright questions. When MVPDs carry programming, they negotiate carriage agreements that grant them the public performance licenses they need to transmit programming to subscribers. Programmers are free to place conditions on these agreements, provided they comply with applicable law, including FCC rules. For example, programmers cannot demand that cable operators exclude their programming from CableCARD devices, since CableCARD support is required by law. But that requirement is in no way inconsistent with programmers' copyright interests.

Beyond this initial public performance license, no further copyright permission is required. The public performance license that MVPDs acquire encompasses delivery of programming to end-user display devices. The transmission of programming from an MVPD end-point to an app does not require any additional copyright license. Such a transmission is not a distribution or reproduction as those terms are defined in the Copyright Act. It is either a private performance that falls outside of the scope of the copyright holder's exclusive rights or part of the already-licensed public performance.[1]

[1] The right to distribute encompasses the distribution of physical copies of a work, not electronic transmissions. 17 U.S.C. § 106 ("the owner of copyright under this title has the exclusive right[]…to

Neither does a device or platform that runs an MVPD-controlled app require a license for the programming delivered via that app. Analogously, Apple does not need to obtain licenses from the creators of programming carried by Netflix simply because Apple devices run the Netflix app. Likewise, Cisco does not need a copyright license for its current set-top boxes; Sony does not need a license for its TVs; and viewers, while they must pay their subscription fees, do not need licenses to watch programming at home. Merely viewing a lawful public performance made by another does not implicate copyright law and thus does not require a license. Simply put, not every use of copyrighted material requires a license,[2] and certainly not by every actor along the chain between producer and consumer.

We cannot offer a full analysis of the merits of the apps proposal; its implementation may be complex, and we have not seen the final text of any rules. However, it is clear from media reports, filings in this docket, and from the FCC's public materials, that this proposal does not interfere with any legitimate copyright interests of programmers, and that it is within the Commission's authority to implement.

Sincerely,

Annemarie Bridy
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University of Idaho College of Law

Brandon Butler
Director of Information Policy
University of Virginia Library

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distribute copies … of the copyrighted work to the public"); 17 U.S.C. § 101 ("[c]opies" are material objects"). The relevant public performance involved in providing video data to apps extends from MVPD facilities to end-user apps. American Broadcasting v. Aereo, Inc., 134 S. Ct. 2498 at 2509 (2014) ("when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes"). Even if that public performance is viewed as terminating at some other point, *e.g.* an in-home device such as a cable modem, any subsequent transmissions are new (private) performances. Because this new transmission is not transmitted "publicly" as defined by 17 U.S.C. § 101, but only to a specific viewer and possibly her "normal circle of a family and … social acquaintances," *id.*, it falls outside the scope of copyright and requires no license. Finally, the electronic transmission of video to apps does not involve the creation of new copies of works "for a period of more than transitory duration," *id.*, and therefore does not come within the scope of the exclusive rights of a copyright holder under 17 U.S.C. § 106. Any reproductions of copyrighted works that the MVPD app itself creates in the course of its operation are likely either transient, fair uses, or covered by the scope of the MVPD's carriage agreement.

[2] *See Sony Pictures, Inc. v. Universal Studios, Inc*., 464 U.S. 417, 447 (1984) ("Even unauthorized uses of a copyrighted work are not necessarily infringing. An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute.").

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