

UNLOCKING THE BOX: HOW THE FCC IS REVAMPING THE CABLE INDUSTRY

Nicholas Festa *

CITE AS: 1 GEO. L. TECH. REV. 178 (2016)

<https://perma.cc/B4UK-9C3A>

Despite the spate of articles on the rise of television cord cutting, 76 percent of Americans still subscribe to a multichannel video programming distributor (“MVPD”)¹ at home.² Nearly all paid television subscribers lease a set-top box (also known as a cable box) from their television provider, at an average cost of \$231 per year.³ It is estimated that the cost of set-top boxes has increased 185 percent in the past 20 years.⁴

In response to these growing costs, Federal Communications Commission (“FCC”) Chairman Tom Wheeler proposed a Notice of Proposed Rulemaking (“NPRM”) on the issue of set-top box competition in January 2016.⁵ The NPRM began in February, and the Commission was scheduled to consider a subsequent Report and Order on September 29, 2016, but this vote was delayed.⁶

The set-top box market in paid television is currently dominated by large-scale distributors, such as Comcast, Verizon, and Time Warner, as

* GTLR Staff Member; Georgetown Law, J.D. expected 2018. St. John’s University, B.A. 2015. © 2016, Nicholas Festa.

¹ A television provider that provides a number of TV channels, e.g. satellite TV or cable TV. *Definition of: MPVD*, PCMAG, <http://www.pcmag.com/encyclopedia/term/63309/mpvd> (last visited Nov. 23, 2016)

² John B. Horrigan & Maeve Duggan, *One-in-seven Americans are Television “Cord Cutters,”* PEW RESEARCH CENTER (Dec. 21, 2015), <http://www.pewinternet.org/2015/12/21/4-one-in-seven-americans-are-television-cord-cutters/>.

³ Tom Wheeler, *It’s Time To Unlock the Set-Top Box*, RECODE (Jan. 27, 2016), <http://www.recode.net/2016/1/27/11589108/its-time-to-unlock-the-set-top-box-market>.

⁴ *Id.*

⁵ F.C.C., *F.C.C Chairman Proposal to Unlock the Set-Top Box: Creating Choice and Innovation* (Jan. 27, 2016), https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0127/DOC-337449A1.pdf.

⁶ Jon Brodtkin, *FCC Changes Cable Box Rules To Please Industry, Gets Blow Back Anyway*, ARS TECHNICA, Sept. 8, 2016, <http://arstechnica.com/information-technology/2016/09/fcc-changes-cable-box-rules-to-please-industry-gets-blowback-anyway/>; Ian Paul, *The FCC’s plan to replace your cable box with apps hits a snag*, PCWORLD (Sep. 30, 2016), <http://www.pcworld.com/article/3126103/tech-events-dupe/fcc-delays-voting-on-unlock-the-box-cable-overhaul.html>.

consumers are locked into leasing set-top boxes from their television providers in order to receive their multichannel programming.⁷ The FCC's NPRM seeks to change this by allowing tech companies to create competing hardware and software to rival the standard set-top box.⁸

Under the initial proposal, the FCC sought to increase competition by requiring MPVDs to allow three flows of information to outside parties under a standard licensing agreement to be created by a third party.⁹ The three information flows include: (1) service discovery (information about what programming is available to the consumer, such as the channel listing and video-on-demand lineup, and what is on those channels), (2) entitlements (information about what a device is allowed to do with content, such as record it), and (3) content delivery (the video programming itself, along with information necessary to make the programming accessible to persons with disabilities).¹⁰

The three flows would allow third parties to manipulate the way the consumer searches and experiences the content that MPVD provides. It would allow companies like Apple, Google, or any other company willing to develop their own hardware or software to produce a new user interface for consumers to watch multichannel content. Currently, devices such as Roku, Apple TV, and Smart TVs can provide consumers with access to digital content, like Netflix, but are preventing from using the content MPVDs provide.¹¹ Meanwhile, MPVD set-top boxes meanwhile do not equip users with the digital content just mentioned. This prevents consumers from having all their digital content in one place and necessitates multiple devices.

Chairman Wheeler's proposal seeks to allow third parties to use multichannel content so that businesses can compete over consumers to bring them the best hardware and software that allows them to view all their digital content in one place.¹² Set-top boxes are no longer a technological necessity, and facilitate restricted consumer choice without providing the benefits of an integrated digital system.¹³

⁷ Wheeler, *supra* note 3.

⁸ Brodtkin, *supra* note 6.

⁹ FED. COMM. COMM'N, FCC Rcd. 16-18, 2016, https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1.pdf).

¹⁰ *Id.*

¹¹ Consumers are sometimes able to access specific channels using the broadcasters' app, however, a paid cable subscription is required.

¹² Wheeler, *supra* note 3.

¹³ *Fact Sheet: Chairman Wheeler's Proposal to Increase Consumer Choice & Innovation in the Video Marketplace*, FCC (Nov. 8, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0908/DOC-341152A1.pdf.

MPVDs made a counter-proposal in which they would provide their multichannel cable services via an app, which will be freely given to third-party device creators.¹⁴ This offer has been incorporated into a newly revised FCC proposal.¹⁵ The revised proposal relies on distributors to develop their apps within the next two years which must be compatible with all widely used entertainment devices.¹⁶ The revised proposal serves both industry and FCC interests, as consumers will now have the option to stop leasing set-top boxes and distributors will have control of their content's user interface. The proposal does, however, stipulate that the content provided through the app must be fully integrated with the search function for other content, and should still be able to be recorded.¹⁷

The revised proposal also specifies a central licensing body that would issue standard licenses for MPVD content to qualifying third parties.¹⁸ MPVDs have raised numerous concerns over this proposal. First, the MPVDs argue that a central licensing body is unnecessary and fails to reflect the reality of licensing in the current marketplace.¹⁹ Licensing agreements are segmented, and programmers do not offer uniform licenses across uses and platforms.²⁰ Second, the proposal states that MPVD apps should be both HTML5 and non-HTML5.²¹ MPVDs argue that licensing terms for HTML5 platforms do not necessarily apply to non-HTML5 platforms and that a decision to create a non-HTML5 platform should be left to the decision of the MPVDs and should not be imposed by the FCC.²² In fact, MPVDs advocate that a standard license goes against the current licensing practices and would illegally force upon them a compulsory license.²³ Third, the central licensing for non-HTML5 platforms would not allow MPVDs to recover costs.²⁴ Fourth, the MPVDs state that the proposed compulsory licenses are beyond the scope of the FCC's authority under §629

¹⁴ Brodtkin, *supra* note 6.

¹⁵ FED. COMM. COMM'N, *supra* note 9.

¹⁶ *Id.*

¹⁷ Brodtkin, *supra* note 6.

¹⁸ FED. COMM. COMM'N, *supra* note 9.

¹⁹ Rick Chessen, Senior Vice President of Law and Regulatory Policy, National Cable & Telecommunications Association, and Stacy Fuller, Vice President of Federal Regulatory, AT&T Services, Inc., Comment Letter on Proposed Rule on the Commercial Availability of Navigation Devices (Sept. 6, 2016), [https://ecfsapi.fcc.gov/file/109061991629473/2016-09-06%20As-Filed%20NCTA-AT&T%20Ex%20Parte%20\(9-1-16%20FCC%20Mtg.\).pdf](https://ecfsapi.fcc.gov/file/109061991629473/2016-09-06%20As-Filed%20NCTA-AT&T%20Ex%20Parte%20(9-1-16%20FCC%20Mtg.).pdf).

²⁰ *Id.* at 2.

²¹ *Id.*

²² *Id.* at 3.

²³ *Id.* at 2.

²⁴ *Id.* at 3.

of the FCCA.²⁵ Requiring compulsory copyright licenses is under the authority of Congress.²⁶ This final concern has been supported by a letter from the Copyright Office.²⁷ The potential copyright issues have also been echoed by Commissioner Rosenworcel.²⁸

It remains to be seen whether the FCC will vote on Chairman Wheeler's proposal, or whether further changes will be made taking into considerations concern within the industry, government, and the Commission itself. With the pressure of a change in administration, it is likely that this delay will not be too lengthy.²⁹

²⁵ *Id.* at 4.

²⁶ *Id.* at 5.

²⁷ Letter from Maria Pallante, Director, United States Copyright Office, to Rep. Blackburn, Butterfield, Collins, Deutch, United States Congress (Aug. 3, 2016), <https://www.eff.org/document/letter-maria-pallante-fcc-re-set-top-boxes>.

²⁸ Cecilia Kang, *A Choice beyond Cable Box Rentals? It May Hinge on a Swing Voter*, N.Y. TIMES (Sept. 25, 2016), <http://www.nytimes.com/2016/09/26/technology/a-choice-beyond-cable-box-rentals-it-may-hinge-on-a-swing-voter.html>.

²⁹ *Id.*