

Congress of the United States
Washington, DC 20515

February 12, 2016

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: MB Docket No. 15-64

Dear Chairman Wheeler:

We write to ask that you fully consider the impact of your announced set top box proposal on the rights of creators involved in the production of television programming. As Members of the House Judiciary Committee, we have jurisdiction over the Copyright Act, which provides creators exclusive rights in their works and thus incentivizes creativity that benefits our society as a whole. As a result, it is our responsibility to ensure that no government action weakens these incentives or undermines the exclusive rights Congress has granted.

We understand it is not, nor should it be, in the jurisdiction of the Federal Communications Commission (FCC) to regulate either the exclusive rights of copyright owners or the licensing of these rights. However, there is no doubt that telecommunications and copyright law affect one another and even overlap.¹ Therefore, it is sometimes the case that FCC actions designed either to further or implement telecommunications policy affect the rights of copyright holders.

You have acknowledged that your set top box proposal has implications for copyright protection.² Even proponents, in referencing the copyright fair use defense, acknowledge that your proposal has copyright implications.³ Others, including many in the creative community, have raised concerns that your proposal may impact the rights Congress has granted to them under the Copyright Act and that an apps-based approach would better protect the rights of copyright rightsholders. Therefore, we must take seriously the potential that this proceeding, depending on the path chosen, could upset the delicate system that underlies the creation, licensing, and distribution of copyrighted television programming and potentially jeopardize efforts to prevent copyright infringement.

Production of professional motion picture and television programming is a complex undertaking that requires creative contributions from hundreds, and sometimes thousands, of creative professionals. Due to the high costs and risks associated with these productions, and the number of different copyrighted works involved, a complex system has been developed that finances production, compensates the myriad creators, and licenses rights from many

¹ Sections 111, 119, and 122 of the Copyright Act of 1976

² Tom Wheeler, "It's Time to Unlock the Set-Top Box Market," *<re/code>*, January 27, 2016, <http://recode.net/2016/01/27/its-time-to-unlock-the-set-top-box-market/>

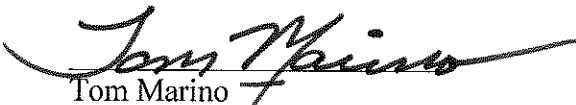
³ Filing of Consumers Union, MB Docket No. 15-64 at 5 (Oct. 8, 2015) and Filing of Public Knowledge, MB Docket No. 15-64 at 15 (Oct. 7, 2015)


rightsholders. Creators often bargain to receive payments derived from the advertising revenue and subscriber fees collected by distributors of television programming. So, for example, each subsequent time a program airs on television: directors, actors, and writers may receive direct payments ("residuals" or "participations"); below-the-line film crews may receive contributions toward their pension and health care plans; and songwriters, composers, and music publishers receive performance royalties for the music synched with the television programming. Songwriters, music publishers, recording artists and record labels similarly receive performance royalties generated by cable music channels, which may also be impacted by your proposal. Producers of television programming finance production by bargaining for compensation from television distributors and often separately license rights by geography, format, and time.

Any regulatory action that threatens the revenue sources from which these myriad creators receive compensation could shift revenues to unlicensed sources or sources that pay less. This action could also facilitate copyright infringement, negatively affecting the entire creative ecosystem underpinning television programming. Enforcement of copyright law and protection of the rights granted to holders of copyrights are not subjects natural to the pursuits of the FCC. Accordingly, we urge you to ensure that your notice of proposed rulemaking (NPRM) is balanced, fully considers information related to both your announced set-top box proposal and other approaches such as an apps-based model, and gauges the impact of each on the creative community. Due to the complexity of these issues, we suggest you consult with agencies more familiar with rightsholder issues, like the USPTO and Copyright Office, both when crafting those aspects of the NPRM and as a resource for understanding the copyright issues raised during the rulemaking process.

Thank you for your careful consideration in this regard.

Sincerely,


Tom Marino
Member of Congress


Ted Deutch
Member of Congress

Cc: Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O'Reilly