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September 6, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Communication
        <u>MB Docket No. 16-42, CS Docket No. 97-80</u>

Dear Ms. Dortch:

On September 1, 2016, the undersigned and Susan Fox of The Walt Disney Company, Anne Lucey of CBS Corp., DeDe Lea of Viacom Inc., Kyle Dixon of Time Warner Inc. and Kimberly Hulsey of Scripps Networks Inc. met with Jessica Almond and Louisa Terrell of Chairman Wheeler's office, John Williams of the Office of General Counsel, and Scott Jordan of the Office of Strategic Planning & Policy Analysis to discuss the above-referenced proceeding. The purpose of the meeting was to continue to hear from Commission staff about the Chairman's latest views about a proposed rule framework for promoting competition in the marketplace for multichannel video programming navigation equipment while protecting the security of the highly-popular programming that programmers create for the enjoyment of tens of millions of Americans every day.

The programmer representatives began the meeting by expressing their appreciation for the Chairman's decision to seriously consider a revised approach to this proceeding that would ensure that all of programmers' valuable content would remain inside of, and under the control of, apps developed exclusively by multichannel video programming distributors (MVPDs) with whom programmers have a direct contractual relationship. We also noted our appreciation for the Commission's explanation that third party platforms, when distributing these MVPD apps, would be required to honor and abide by all of the terms and conditions set forth in programmers' licenses with MVPDs. The programmer representatives then stressed that, in order to protect the security of valuable content, third party device manufacturers must be prohibited from piercing into or otherwise interfering with the MVPD app or the content it presents and precluded from overlaying advertising on top of, into, or surrounding any content presented in the MVPD app.

Furthermore, the programmer representatives explained that, in order to promote competition, consumer choice, and the continued investment in content, any final FCC rules need to ensure parity for programmer apps, provide programmers with effective means to enforce

compliance with their licensing agreements, and ensure that programmers can continue to engage directly with their viewers. To that end, the programmer representatives shared with the Commission sample language, enclosed at Exhibit A to this letter, which could form the basis for the text of any FCC rules. We also said that any parity rule should reflect the intent of the Commission to ensure that consumers can freely access programmer apps without programmers being subjected to any MVPD-imposed conditions and to ensure that a consumer using a programmer's app to view video programming should encounter the same ease of experience that the customer would have using an MVPD app to view the corresponding content. In evaluating any complaint brought under a parity rule, the Commission should review the extent to which consumers receive terms of authentication and means of authentication that are equivalent and equal as between an MVPD app and a programmer's app that provides at least in part the same content. To be clear, we said, the Commission should expect that if a consumer is auto-authenticated to access video programming within an MVPD app (e.g., is recognized and validated without having to enter login credentials), that same consumer should be auto-authenticated with the same ease of use when seeking to access content in a programmer's app. Furthermore, we noted that the Commission should evaluate whether an MVPD is making available to programmers the same information and statistics the MVPD collects and compiles as the result of consumer usage of an MVPD app, including that provided to device manufacturers in connection with user initiated searches.

Finally, the programmer representatives stated that they remain strongly opposed to any licensing construct in which the Commission or any third party has the ability to alter the terms or conditions that would be contained in any license permitting a device manufacturer to distribute copyrighted video programming. In particular, the programmer representatives noted that any arrangement in which they are forced to allow their content to be distributed on terms or conditions to which programmers would not agree would be tantamount to a compulsory copyright license, which the Commission lacks authority to impose. The Commission therefore should refrain from exercising oversight over the terms and conditions of any license that results in the distribution of content.

This letter is being submitted electronically in the above-referenced dockets, which have been granted permit-but-disclose status, pursuant to Section 1.1206(b) of the Commission's Rules. Should you have any questions concerning this submission, kindly contact the undersigned.

Respectfully submitted,

/s/

Jared S. Sher

cc: Jessica Almond
        Louisa Terrell
        Howard Symons
        John Williams
        Scott Jordan

EXHIBIT A

Definitions

MVPD Access Application: a specialized software application developed by an MVPD and licensed to a Navigation Device, which presents to Navigation Device users any of that MVPD's subscription video programming service.

Program Provider Access Application: a specialized software application developed by a Video Programming Vendor and licensed to a Navigation Device, which presents to Navigation Device users any of that Video Programming Vendor's owned or licensed video programming that also is made available to consumers by an authorized MVPD.

Video Programming Vendor: a party engaged in the production, creation, or wholesale distribution of video programming for sale.

Parity Rule

Each MVPD must treat any Program Provider Access Application no less favorably than the MVPD treats its own MVPD Access Application(s), including without limitation with respect to:
(1) **Authentication of consumers' access to video programming**: Each MVPD shall enable authentication of any Program Provider Access Application on every Navigation Device on which an MVPD's MVPD Access Application is made available and in a manner that ensures that consumers receive the same or a functionally equivalent authentication experience whether using an MVPD Access Application or a Program Provider Access Application, including without limitation, by employing the same technological and operational mechanisms and methodologies to confirm the validity of access to video programming and applying the same rules to govern the duration of authentication validity, in each case to the extent technically feasible and, to the extent not technically feasible, an MVPD shall adopt all means necessary to create a functionally equivalent authentication experience for the consumer; and

(2) **Information and statistics regarding consumer use of an MVPD Access Application:** Each MVPD shall provide, upon request to each Video Programming Vendor, the same information and statistics (in the same frequency and level of detail) compiled or collected by such MVPD with respect to viewing of that Video Programming Vendor's video programming within the MVPD Access Application, including that shared with a Navigation Device to facilitate consumer use, anonymized only as necessary to comply with applicable law.

Search Rule

(1) Any Navigation Device that makes available an MVPD Access Application pursuant to Section [xx] and that incorporates user initiated search functionality to enable consumers to search for video programming inclusive of content in an MVPD Access Application shall:
   (a) Not discriminate in the presentation of search results or recommendations in favor of video programming affiliated with the Navigation Device and shall not charge programmers for nondiscriminatory presentation or search results in relation to any other search results;
   (b) Treat Program Provider Access Applications no less favorably than the treatment provided to MVPD Access Applications in the presentation of search results and recommendations;
   (c) Return search results and recommendations only from applications and services that can demonstrate that they are the copyright holder of, or have been authorized or licensed to make publicly available, the video programming available in such application or service;
   (d) Not refuse to include in search results applications and services on the basis that such applications and services make available video programming that is not part of any MVPD's subscription video service; and
   (e) Not commingle search results or recommendations for video programming available via websites on the World Wide Web with search results or recommendations for video programming available in an MVPD Access Application.

(2) Any Navigation Device that obtains from an MVPD metadata and related information to enable user initiated search functionality may use such metadata, together with any and all information and statistics derived from a user initiated search, for the purposes of generating search results and facilitating consumers' ability to navigate to video programming, including recommendations to consumers of video programming available via the Navigation Device, provided:

(a) such recommendations otherwise comply with the requirements of preceding paragraph (1);

(b) the Navigation Device does not use any such metadata or related information in connection with the sale of any advertising;

(c) the recommendation engine and generated results do not commingle information, statistics or other data derived from user initiated searches with information, statistics or data derived from any other source; and

(d) the metadata and related information is used for no other purpose.