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Closing the Lid on "Unlock the Box" Should End Video Device Regulation

by

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I. Introduction and Summary

On September 4, 2020, the FCC formally terminated the dormant and highly problematic "navigation device" rulemaking initiated in 2016 by then-Chairman Tom Wheeler. The so-called "unlock the box" proposal, like prior agency attempts to implement a statutory "set-top box" mandate long ago rendered unachievable – and, more importantly, unnecessary – by subsequent competitive developments, suffered from numerous flaws. Most notable among them was the proposal's infringement of the intellectual property and contractual rights of content owners. The Commission's decision to close the lid is a positive deregulatory step, one that recognizes that the video device marketplace on its own has accomplished what government intervention could not.

The *Report and Order* therefore should signal the end, once and for all, of unsuccessful regulatory activity to satisfy Section 629 of the Communications Act, which for twenty-five years has compelled wasteful agency attempts to assure the commercial availability of set-top boxes and other navigation devices used to access multichannel video programming. As the Commission recognizes, consumers today are able to access both traditional, regulated multichannel video programming distributor (MVPD) offerings and Internet-delivered services on a wide range of products sold at retail: dedicated streaming devices, smart TVs, gaming

consoles, smartphones, tablets, and more. These products are sold by a multitude of unaffiliated entities, including Amazon, Apple, Facebook, Google, Microsoft, Roku, Samsung, and Sony. This marketplace abundance has been achieved in spite of, not due to, repeated Commission attempts to regulate navigation device competition into existence.

The failure of one-way cable-compatible devices to gain a foothold in the early 2000s revealed the absence of the amount of consumer demand necessary for the FCC to achieve the task assigned by Congress. Devices were expensive and, as a result of rapid innovation within the increasingly competitive MVPD marketplace, quickly became obsolete. The FCC, however, remains to this day on the hook, by virtue of the statute, to assure their commercial availability.

Recognizing the competitive advantage that this government mandate could provide, third parties repeatedly have put forth proposals premised upon the promise that, should the Commission grant them, through regulation, direct and free access to the video programming and other intellectual property that MVPDs license for their integrated video offerings, the goal of Section 629 could be realized. With no other options available, the agency repeatedly has proceeded down this pro-interventionist path, each time hitting a dead end.

There is a simple explanation for that: what those who seek to disaggregate MVPD services and repackage their underlying assets into differentiated user interfaces in fact hope to gain – the ability to use, without contractual authorization or limitation, those inputs that MVPDs obtain via contract – the FCC simply cannot provide. A 2016 letter from the U.S. Copyright Office, relied upon by the *Report and Order*, made clear that rules establishing such a right by FCC fiat inevitably and impermissibly would infringe upon the rights of content owners.

Unless and until the specter of additional activity pursuant to Section 629 is removed, however, the possibility that the Commission might endeavor once again to find a way to satisfy these demands will serve as powerful motivation. Should a pro-regulatory environment once again prove receptive, those hoping to avoid negotiating with copyright holders for access to video programming and other intellectual property assets might once again try their luck.

The *Report and Order* encouragingly concludes "that further Commission intervention in the navigation device marketplace is not necessary at this time." But the FCC can and should do more to prevent future longshot attempts to leverage this statutory mandate. Section 629 uniquely includes a sunset provision that, when triggered, requires that any implementing rules "cease to apply." Specifically, subsection (e) states that, upon a finding by the agency that (1) the MVPD market is "fully competitive," (2) the navigation device market is "fully competitive," and (3) sunset of the rules would "promote competition and the public interest," all regulations adopted under Section 629 shall no longer have force. All three conditions without question have been met, as the *Report and Order* itself tacitly concedes. And although the Commission commendably does eliminate some, though not all, of those rules, it fails to even mention subsection (e). In light of existing, well-established facts, invocation of the sunset provision is warranted. This would lead to elimination of *all* implementing regulations and serve as an effective bar to any subsequent regulatory action.

Even better, Congress could repeal this quarter-century old statute altogether. Decades of failed efforts leave no doubt: rulemaking activity thereunder serves only to waste limited agency resources and impose unjustified costs upon consumers. It therefore is well beyond time for legislators to recognize that government intervention in the navigation device marketplace is not needed and, at long last, remove Section 629 from the books.

II. Initial Commission Efforts to Implement Section 629 Exposed Its Flawed Premise

For the time being, at least, it appears that the Commission will refrain from additional attempts to implement Section 629. The *Report and Order* adopted on September 4 formally terminated the inactive, but still technically open, rulemaking initiated in 2016, concluding that:

[F]urther Commission intervention in the navigation device marketplace is not necessary at this time.... [W]e have serious and unresolved concerns about the security of multichannel video programming and copyright licensing under the proposed rules. Moreover, we conclude that the record raises other substantial doubts about the wisdom and necessity of the complex regulations proposed in the *NPRM*.¹

It also eliminated rules expressly requiring that cable operators (1) support the CableCARD™, a separate-security module that allows retail one-way cable devices to access encrypted content,² and (2) file quarterly reports addressing CableCARD support and deployment.³

These actions reflect the reality of the marketplace and provide considerable certainty that no new proposals will be forthcoming. The *Report and Order* does not, however, close the lid completely on future proceedings. To appreciate why that remains a problematic possibility, it is useful to review the history of Section 629 – in particular, prior FCC efforts to satisfy its mandate.

In the mid-1990s, there was a push, at least by consumer electronics retailers,⁴ to allow consumers to buy cable set-top boxes from third parties rather than lease them from operators.

¹ *Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42; *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order, FCC 20-124 (September 4, 2020), available at <https://docs.fcc.gov/public/attachments/FCC-20-124A1.pdf> (2020 R&O), at ¶ 4. *See also id.* at ¶ 5 (noting "the substantial doubts in the record as to whether [the proposed regulations] will help assure a commercial market for devices that consumers can use to access multichannel video programming" and pointing out that "the Commission last sought comment on these issues more than four years ago, and since then important changes have occurred in the video programming marketplace and delivery of those services via applications that run on subscriber-owned devices").

² *See id.* at ¶ 9. However, the *Report and Order* left in place the general requirement to make available some form of separated security. *See id.* at ¶ 11 ("As NCTA points out, cable operators are still required to provide separable security under section 76.1204 of the Commission's rules.").

³ *See id.* at ¶ 12.

⁴ *See, e.g.*, Brent Skorup, "Why is the FCC Doubling Down on Regulating the TV Industry and Set Top Boxes?," *The Technology Liberation Front* (September 21, 2016), available at <https://techliberation.com/2016/09/21/why-is-the-fcc-doubling-down-on-regulating-the-tv-industry-and-set-top-boxes/> (describing Section 629 as "a small addition to the [1996] Act, presumably added at the behest of Circuit City, so that electronics retailers and device companies could sell more consumer devices").

Section 629 therefore directed the Commission to "adopt regulations to assure the commercial availability" of what it referred to as "navigation devices."⁵ Specifically, one assumes, the type of navigation device predominantly in use at that time: rudimentary digital cable set-top boxes that provided access to encrypted linear channels and, perhaps, an Electronic Programming Guide (EPG).

In 1998, the FCC did as Congress instructed.⁶ Several years later the cable and consumer electronics (CE) industries successfully negotiated, and the agency incorporated into its regulations, a Memorandum of Understanding (MOU) detailing technical specifications that allowed third parties to manufacture and sell at retail Unidirectional Digital Cable Products (UDCPs) – that is, one-way devices able to access encrypted content through the use of a CableCARD.⁷ UDCPs, most notably Digital Video Recorders (DVRs) manufactured by TiVo, Inc., subsequently appeared on store shelves and enjoyed limited commercial success.

By any reasonable measure, at that point the FCC had completed successfully its assigned task. One-way devices were, in fact, commercially available. To be sure, they did not catch on with the masses.⁸ That likely was because, not surprisingly, cable distribution technology in the interim had evolved beyond one-way services. Interactivity – advanced EPGs, video-on-demand, complex menu systems, and other capabilities – quickly gained traction with subscribers, and consumers who had invested in expensive one-way retail devices found themselves unable to access these compelling features. Whatever the reason, the hoped-for vibrant marketplace for third-party devices did not materialize. As was confirmed once again, policymakers cannot regulate into existence consumer demand.

Sadly, however, this is not the end of the story. The MOU noted above was but step one in a larger plan. Step two, it was hoped, would produce an agreement pursuant to which third-party devices would support interactive capabilities, as well. The cable industry,⁹ whose members were investing heavily to develop holistic, integrated, and compelling user interfaces in order to remain competitive with Direct Broadcast Satellite (DBS) providers, anticipated that cable service would have the same "look and feel" on retail hardware as it did on leased equipment. CE

⁵ 47 U.S.C. § 549(a).

⁶ See generally *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order, 13 FCC Rcd 14775 (1998).

⁷ See generally *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80; *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885 (2003).

⁸ As of July 28, 2020, NCTA – The Internet & Television Association reported that the top three cable operators – Comcast, Charter, and Cox – combined had only 432,850 total CableCARDS in active service. See Letter from Neal M. Goldberg, General Counsel, to Marlene H. Dortch, Secretary, Federal Communications Commission, CS Docket No. 97-80 (July 28, 2020), available at <https://ecfsapi.fcc.gov/file/10728079126400/072820%2097-80%2020Q2020%20CableCARDS%20Report%20-%20Final.pdf>. That number likely overstates the total number of supported devices, as certain UDCP models require more than one CableCARD per unit. See also *2020 R&O* at ¶ 10 ("[D]uring the ten years in which these rules have been in effect, consumer demand for retail CableCARD devices never developed as anticipated. Indeed, in the four years since the *NPRM* in this proceeding was issued, consumer demand for retail CableCARD devices has steadily declined.") (citations omitted).

⁹ Although I refer to both cable operators specifically and MVPDs generally in this *Perspectives*, as a practical and historical matter, only the former have faced substantial regulation pursuant to the FCC's authority under Section 629.

manufacturers, on the other hand, became convinced that, in order to achieve commercial success, they must be able to deconstruct and repackage the cable experience into a wholly new, differentiated offering. In the early 2000s, the battle lines thus were drawn.

From the consumer perspective, at this point the story indeed does end. Despite relentless efforts, the agency has failed to produce any subsequent tangible positive results. Some estimate that the integration ban, a since-eliminated requirement that cable operators utilize CableCARDs in their leased devices in furtherance of the goal of common reliance, on its own imposed as much as \$600 million per year in costs, with no significant offsetting benefits.¹⁰

III. Marketplace Forces Have Achieved the Goal of Section 629

In the real world, as it happens, an organic, unregulated marketplace has achieved what Section 629's heavy hand could not. Widespread entry has transformed beyond recognition the video distribution marketplace.¹¹ Competitive pressures and technological innovation have inspired new, unregulated providers to make content available on a variety of inexpensive hardware options.¹² In its *Report and Order*, the FCC acknowledged this game-changing reality:

We ... note that it appears the policy goals that the Commission set forth in the *NPRM* are well underway to being met without additional government regulation.... [W]ithout Commission intervention, many MVPD subscribers can watch the services that they pay for wherever, however, and whenever they want on an array of innovative devices via many different applications.¹³

The Commission also highlighted a 2017 report prepared by the U.S. Government Accountability Office (GAO), "Video Programming: FCC Should Conduct Additional Analysis to Evaluate Need for Set-Top Box Regulation,"¹⁴ that was issued after the "unlock the box" proceeding moved to the back burner. In that report, the GAO raised questions about "the extent to which Internet-based providers affect consumer choice for video programming and what that change means for the importance of consumer choice for devices in the context of" Section 629.

¹⁰ See, e.g., Paul Glist, "The Digital Television Two-Way Memorandum of Understanding: Cable industry, manufacturers agree on box-free interactive service delivery" (June 17, 2008), available at <https://www.dwt.com/insights/2008/06/the-digital-television-twoway-memorandum-of-unders>. See also by Zack Christenson, "Government Failure – FCC Should Stop Imposing Costly Set Top Box Regulations," *The American Consumer Institute Center for Citizen Research* (April 7, 2011), available at <https://www.theamericanconsumer.org/2011/04/government-failure-fcc-should-stop-imposing-costly-set-top-box-regulations/> (reporting that the requirement to include little-used FireWire ports on leased cable set-top boxes indirectly cost consumers as much as \$400 million per year).

¹¹ See generally Comments of the Free State Foundation, *The State of Competition in the Communications Marketplace*, GN Docket No. 20-60 (filed April 27, 2020), available at <https://freestatefoundation.org/wp-content/uploads/2020/04/FSF-Comments-Communications-Marketplace-Competition-042720.pdf>, at 17-21 (detailing the growth of Online Video Distributors (OVDs) and virtual MVPDs (vMPVDs)).

¹² See *id.* at 24-25 (documenting the range of retail devices upon which both traditional MVPD and Internet-based video programming services can be accessed).

¹³ See 2020 *R&O* at ¶ 7.

¹⁴ United States Government Accountability Office Report to Congressional Requestors, "Video Programming: FCC Should Conduct Additional Analysis to Evaluate Need for Set-Top Box Regulation" (September 2017), available at <https://www.gao.gov/assets/690/687512.pdf> (*GAO Report*).

It therefore recommended that the "FCC, as part of its future annual video competition reports, analyze how the ongoing evolution in the video programming market affects competition in the related market for set-top boxes and devices, including how it affects the extent to which consumer choice for devices to access MVPD content remains a relevant aspect of the competitive environment."¹⁵ In the *Report and Order*, the Commission notes that it will do exactly that.¹⁶

Make no mistake, device competition is here. Indeed, recent press reports indicate that Comcast, unable to negotiate commercial agreements to make the Peacock over-the-top service accessible on some of the more popular retail streaming devices, is looking to port its X1 platform, which serves as the operating system for Xfinity and Cox Contour set-top boxes, to smart TVs.¹⁷ My, how things have changed.

IV. Service Disaggregation Is a Dead End, Not a Path to Commercial Availability

Despite the success realized by the marketplace, Section 629 nevertheless remains on the books. With its mandate always hovering and no other options available, the FCC has taken repeated and increasingly intrusive steps to satisfy the demands of those – at first primarily CE manufacturers, later online video distributors as well – who promised to help it achieve this impossible task. The inescapable problem, however, is that what they seek, the Commission cannot provide. Repeated, fruitless efforts make it plain: for regulations to allow the creation by third parties of the differentiated user experiences they contend are essential, the FCC would have to force MVPDs to make available video programming, and other intellectual property (such as the program-related data used to populate EPGs) that they license, to entities not a party to those agreements. This the agency lacks the authority to do.

Between 2007 and 2016, facing ever-greater pressure to show progress, the FCC put out for public comment a series of proposals that would allow third parties piece-part access to cable service, one more invasive – and problematic – than the next:

- DCR+, in 2007,¹⁸ "would have required the cable industry to invent a new solution that would squeeze a limited set of existing cable applications (VOD and the cable guide) into a fixed protocol that could run without middleware."¹⁹

¹⁵ *Id.* at 22-23.

¹⁶ *See 2020 R&O* at ¶ 8.

¹⁷ *See* Janko Roettgers, "Comcast is looking to enter the smart TV wars," *Protocol* (August 28, 2020), available at <https://www.protocol.com/comcast-x1-smart-tv-system> (noting that "Peacock's apps are still not available on Roku or Amazon streaming devices, or on smart TVs running Roku's and Amazon's operating systems").

¹⁸ *See generally Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80; *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, Third Further Notice of Proposed Rulemaking, FCC 07-120 (2007). *See also* Letter from Michael T. Williams, Executive Vice President, Secretary & General Counsel, Sony Electronics Inc., *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, CS Docket No. 97-80 (November 7, 2006), at 2 ("If implemented, the [DCR+] Proposal would give every competitive manufacturer the freedom to develop and deploy its own user interface, if it so chooses").

¹⁹ Paul Glist, "The Digital Television Two-Way Memorandum of Understanding: Cable industry, manufacturers agree on box-free interactive service delivery" (June 17, 2008), available at <https://www.dwt.com/insights/2008/06/the-digital-television-twoway-memorandum-of-unders>.

- AllVid,²⁰ in 2010, introduced the concept of new hardware, either a set-back device or a home gateway, that "would communicate with the MVPD service, performing the tuning and security decryption functions that may be specific to a particular MVPD; the [third-party] smart video device would perform navigation functions, including presentation of programming guides and search functionality."²¹
- The 2016 "unlock the box" rulemaking, which started out as a proposal to deconstruct cable service into three "information flows" (service discovery, entitlements, and content delivery) around which third parties could construct their own user interfaces.²²

In their focus on satisfying the demands of third parties, each of these proposals triggered multiple concerns. Writings by my fellow Free State Foundation scholars, to which I provide links in the "Further Readings" section, below, document these serious issues, including:

- Imposing undefined, and likely unjustified, costs upon MVPDs – and, indirectly, their subscribers – by mandating the development and deployment of new technical standards and, in some cases, hardware.
- Impeding innovation by requiring MVPDs to establish fixed technical interfaces and maintain them well beyond their useful life.
- Jeopardizing consumer privacy by forcing MVPDs to provide subscriber information to third parties not subject to Commission rules.
- Interfering with MVPDs' editorial choices regarding the "look and feel" and presentation of their services, which involve the exercise of free speech protected by the First Amendment.

But in every instance, grand plans, and what appeared to be substantial progress, ultimately were stopped in their tracks specifically by one inescapable hurdle: intellectual property and contract-related concerns.

The original "unlock the box" proposal, which then-Commissioner Pai described as yet another problematic instance of "centralized planning,"²³ provides a definitive example. Critics of the radical "information flows" concept pointed out that, because third parties would not be required to enter contracts with programmers, they would not be bound by the same provisions as

²⁰ See generally *Video Device Competition*, MB Docket No. 10-91; *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80; *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, Notice of Inquiry, FCC 10-60 (2010). See also *id.* at ¶ 12 ("We are not convinced that the tru2way solution will assure the development of a commercial retail market as directed by Congress.... For example, the agreement limits a device's ability to integrate video from multiple sources into a consistent viewing experience by limiting the presentation and content of a tru2way device's graphical user interface.").

²¹ *Id.* at ¶ 2.

²² See *Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42; *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 16-18 (2016), at ¶ 36.

²³ Dissenting Statement of Commissioner Ajit Pai, *Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42; *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 16-18 (2016), available at <https://docs.fcc.gov/public/attachments/FCC-16-18A5.pdf>, at 1 ("Let's start with one indisputable fact: When it comes to navigation devices, the FCC has not embraced free-market policies. Instead, it has embraced a form of centralized planning.").

MVPDs.²⁴ Those objections proved to be effective, forcing Wheeler to scale back and ultimately abandon his efforts in September 2016.²⁵

Four years later, when now-Chairman Pai placed on circulation an item to bring that proceeding to an official close, his spokesperson Wil Wiquist emphasized that that item "would terminate the proceeding in which the prior Commission proposed imposing complex and unnecessary regulations on the navigation device market that generated bipartisan opposition within and outside the agency, and serious concerns from a wide range of stakeholders and experts, including the U.S. Copyright Office."²⁶

The Copyright Office agreed with the content-related objections to the "unlock the box" proposal, explaining in an August 2016 letter that its "principal reservation is that, as currently proposed, the rule could interfere with copyright owners' rights to license their works as provided by copyright law, and restrict their ability to impose reasonable conditions on the use of those works through the private negotiations that are the hallmark of the vibrant and dynamic MVPD marketplace."²⁷ Additional statements from that letter on the topic include the following:

- "As a threshold matter, it seems critical that any revised proposal respect the authority of creators to manage the exploitation of their copyrighted works through private licensing arrangements, because regulatory actions that undermine such arrangements would be inconsistent with the rights granted under the Copyright Act, and to some degree, ... the authority of Congress to decide whether and when limitations on these rights should apply."²⁸
- "[T]he copyrighted works that make up an MVPD's multichannel video programming are produced and made available to the public only as a result of complex, private

²⁴ See, e.g., Letter from Anne Lucey, CBS Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 16-42, CS Docket No. 97-80 (July 21, 2006), available at https://ecfsapi.fcc.gov/file/1072142894865/exparte%2007_21_16.pdf, at 1 ("[T]he FCC's initial proposal concerns programmers because of the lack of sufficient mechanisms to respect and enforce the myriad provisions of the contractual agreements between programmers and MVPDs."). See also Comments of the Free State Foundation, *Expanding Consumers' Video Navigation Choices*, MB Docket No. 16-42; *Commercial Availability of Navigation Devices*, CS Docket No. 97-80 (April 22, 2016), available at <https://ecfsapi.fcc.gov/file/60001688291.pdf>, at 3 ("Under the proposed regulations, third-party video device makers would gain a special right to use video programming commercially without having to negotiate with the copyright owners.... [T]he Commission's approach would warp contractual relations, impair the exclusive rights of video programming owners, and diminish the value of video programmers' intellectual property rights.").

²⁵ By the time then-Chairman Wheeler pulled the item from the agenda for the September 2016 Commission Open Meeting, it had been revised substantially. See "Fact Sheet: Chairman Wheeler's Proposal to Increase Consumer Choice & Innovation in the Video Marketplace" (September 8, 2016), available at <https://docs.fcc.gov/public/attachments/DOC-341152A1.pdf>, at 1 ("The new rules will require pay-TV providers to offer to consumers a free app, *controlled by the pay-TV provider*, to access all the programming they pay for on a variety of devices, including tablets, smartphones, gaming systems, streaming devices or smart TVs.") (emphasis added).

²⁶ John Hendel, "Tech Republicans boost Biden," *Politico Morning Tech* (August 18, 2020), available at <https://www.politico.com/newsletters/morning-tech/2020/08/18/tech-republicans-boost-biden-790011>.

²⁷ Letter from Maria A. Pallante, United States Copyright Office, to Representatives Blackburn, Butterfield, Collins, and Deutch (August 3, 2016), available at <https://www.copyright.gov/laws/hearings/fcc-set-top-box-proposal.pdf>, at 2.

²⁸ *Id.*

negotiations between content owners and MVPDs, and on the understanding that the MVPDs will make works available to the public in accordance with the terms of the resulting licenses."²⁹

- "Typically, a violation of the license terms by the MVPD will constitute either copyright infringement or a breach of contract. And, traditionally, in order to obtain any contractual remedies, the content owners must have privity of contract with the MVPD."³⁰
- "In its most basic form, the rule contemplated by the FCC would seem to take a valuable good – bundled video programming created through private effort and agreement under the protections of the Copyright Act – and deliver it to third parties who are not in privity with the copyright owners, but who may nevertheless exploit the content for profit. Under the Proposed Rule, this would be accomplished without compensation to the creators or licensees of the copyrighted programming, and without requiring the third party to adhere to agreed-upon license terms."³¹
- "When a copyright owner licenses its works to an MVPD, it typically does so ... based on a detailed agreement with the MVPD that governs how the MVPD will deliver those works to consumers and includes conditions that the MVPD, in turn, is obligated to pass through to third-party platform developers. In this way, copyright owners protect their works from piracy and other undesirable forms of exploitation and secure a fair return on their investment in content creation."³²

These clear pronouncements, from no less an authority than the Copyright Office, back in 2016 effectively dashed third parties' hopes of uncompensated use of video programming and other intellectual property via regulation. And in formally terminating the "unlock the box" rulemaking, the Commission explicitly ties these concerns back to the plain text of Section 629 itself. Specifically, to subsection (b), which states that the agency "shall not prescribe regulations ... which would jeopardize security of multichannel video programming and other services offered over multichannel video programming systems, or impede the legal rights of a provider of such services to prevent theft of service."³³

The *Report and Order* notes that:

Several programmers, MVPDs, and the U.S. Copyright Office express serious concerns that the proposed rules and the applications-based alternative would jeopardize the security of programming and licensing contracts between programmers and MVPDs.... [W]e have ongoing concerns about the security risks and licensing issues the proposed rules could introduce. For instance, many commenters argue that the proposed rules would undermine anti-piracy protections, reducing the incentives of parties to invest in new content. In addition, the Commission's proposal could force MVPDs, programmers, and

²⁹ *Id.* at 6

³⁰ *Id.* (citations omitted).

³¹ *Id.* at 7 (citation omitted).

³² *Id.* at 8-9.

³³ 47 U.S.C. § 549(b).

copyright holders to violate the copyright licensing contract obligations to which they agreed, leading to costly and time-consuming litigation.³⁴

Third parties claim that they must be able to develop differentiated user interfaces in order to sell navigation devices. They therefore argue that the Commission, obligated by Congress to satisfy Section 629, must provide them with free access to video content and other intellectual property via implementing regulation. But content owners, and the U.S. Copyright Office, point out, and the *Report and Order* acknowledges, that doing so likely would infringe the intellectual property and contractual rights of content owners and violate Section 629(b). Disaggregation, in other words, appears to be a dead end. However, there is no guarantee that third parties, under different circumstances, won't roll the dice yet again. Based upon prior history, the risk-reward proposition seems too favorable to ignore.

V. Marketplace Conditions Acknowledged in the *Report and Order* Compel Application of Section 629(e)'s Sunset Provision

Unlike the vast majority of statutory provisions that make up the Communications Act – or, indeed, other regulation-enabling statutes – Section 629 includes an express sunset provision. One whose prerequisites have been met. Indeed, the *Report and Order* recites facts sufficient to trigger subsection (e), yet curiously fails to even mention it.

Specifically, Section 629(e) states the following:

The regulations adopted under this section shall cease to apply when the Commission determines that (1) the market for the multichannel video programming distributors is fully competitive; (2) the market for converter boxes, and interactive communications equipment, used in conjunction with that service is fully competitive; and (3) elimination of the regulations would promote competition and the public interest.³⁵

With respect to the first condition – full competition amongst MVPDs – the *Report and Order* acknowledges the existence of "[c]ompetitive market forces" and notes that:

The number of cable television subscribers has declined sharply since the CableCARD support rules were adopted in 2010, as more and more subscribers have opted to cut the cord and move to online streaming services. Specifically, the number of cable subscribers decreased from 59.8 million in 2010 to 48.6 million in 2019, a nearly 19 percent decline. Given this continuing decline in subscribership and the vast array of streaming service options available to consumers today, we expect that cable operators will make every effort to retain

³⁴ 2020 *R&O* at ¶ 6 (citations omitted). *See also id.* (noting that "section 629(b) of the Act prohibits the Commission from adopting regulations under section 629 that would jeopardize the security of multichannel video programming").

³⁵ 47 U.S.C. § 549(e).

subscribers by continuing to support retail CableCARD devices, even in the absence of the CableCARD support rules.³⁶

On the subject of full navigation device competition, as noted above, the *Report & Order* concludes that "without Commission intervention, many MVPD subscribers can watch the services that they pay for wherever, however, and whenever they want on an array of innovative devices via many different applications."³⁷

Finally, with regard to promoting competition and the public interest, the *Report and Order* concludes that "further Commission intervention ... is not necessary";³⁸ that there are "substantial doubts in the record as to whether [additional rules] will help assure a commercial market for devices that consumers can use to access multichannel video programming";³⁹ and that the GAO found in 2017 that fundamental questions exist regarding "the extent to which Internet-based providers affect consumer choice for video programming and what that change means for the importance of consumer choice for devices in the context of the Act."⁴⁰

Given the level of competition that exists in the marketplace, one easily can point to abundant additional evidence outside the scope of the present record to support a determination, pursuant to subsection (e), that all rules adopted pursuant to Section 629 "shall cease to apply." Indeed, the Free State Foundation did so in comments recently filed with the Commission.⁴¹ But what's important to consider is that the *Report and Order* reaches that conclusion on the facts before it from 2016, albeit without stating so explicitly. The FCC now should embrace the inevitable consequences of its findings and invoke the sunset provision. Doing so would remove *all* implementing rules, including the separate security requirement,⁴² and serve as an imposing bar to future attempts to leverage Section 629's outdated statutory mandate.

VI. Conclusion

The *Report and Order* terminating officially the "unlock the box" proceeding could well be the last we hear of Section 629. It certainly should be. Consumers today can choose between a wide range of retail devices, from companies that include Amazon, Apple, Facebook, Google, Microsoft, Roku, Samsung, and Sony, to access video provided by both traditional MVPDs and new entrants. On that basis alone, one must concede that the intent of this statute has been realized. To be sure, that occurred in spite of, not due to, government intervention. Regardless,

³⁶ 2020 R&O at ¶ 11 (citations omitted).

³⁷ *Id.* at ¶ 7. *See also id.* ("[A]ccording to NCTA, the nine largest MVPDs 'support apps that can be used to watch their content on *hundreds of millions* of consumer-owned devices, such as smart TVs; tablets; streaming sticks and devices such as Apple TV, Roku, Google Chromecast, and Amazon Fire; smartphones; game consoles; and personal computers.'") (emphasis added) (citations omitted).

³⁸ *Id.* at ¶ 4.

³⁹ *Id.* at ¶ 5.

⁴⁰ *Id.*

⁴¹ *See* Comments of the Free State Foundation, *The State of Competition in the Communications Marketplace*, GN Docket No. 20-60 (filed April 27, 2020), available at <https://freestatefoundation.org/wp-content/uploads/2020/04/FSF-Comments-Communications-Marketplace-Competition-042720.pdf>, at 24-25.

⁴² *See* 47 C.F.R. § 76.1204.

success has been achieved, and it is time to close the lid on attempts to regulate the retail availability of navigation devices.

The fact remains, however, that, by its plain language, Section 629 creates significant leverage that third parties find difficult to resist, no matter how low the odds of success. As a result, it certainly is within the realm of possibility that the FCC at some point in the future will consider yet another navigation device regulatory proposal. Should that happen, no consumer benefits will be achieved, agency resources will be wasted, harms will be threatened, and – in the end – the rights of the content community once again likely will prevail. The Commission therefore should make an official determination that the conditions underlying Section 629(e)'s sunset provision have been satisfied, that all existing rules accordingly "shall cease to apply," and that, as a consequence, additional regulatory actions cannot be justified.⁴³

Better yet, Congress should acknowledge the unjustified costs that Section 629 imposes – costs that ultimately are borne by consumers through higher subscription costs and taxes – and repeal this failed attempt to predict and manage a future that never came.

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Further Readings

["The FCC's Attempt to Make Choices for Consumers Will End up Harming Them,"](#) *FSF Blog* (September 28, 2016).

Randolph J. May, ["Constitution Day at the FCC,"](#) *FSF Blog* (September 15, 2016).

["Copyright Problems Put FCC's Set-top Box Proposal Beyond Repair,"](#) *FSF Blog* (August 18, 2016).

Randolph J. May & Seth L. Cooper, ["Terminate the FCC's 'Enable Copyright Violations' Proposal,"](#) *FSF Blog* (August 8, 2016).

Randolph J. May & Seth L. Cooper, [Reply Comments of the Free State Foundation, Expanding Consumers' Video Navigation Choices](#), MB Docket No. 16-42; [Commercial Availability of Navigation Devices](#), CS Docket No. 97-80 (May 23, 2016).

Randolph J. May & Seth L. Cooper, [Comments of the Free State Foundation, Expanding Consumers' Video Navigation Choices](#), MB Docket No. 16-42; [Commercial Availability of Navigation Devices](#), CS Docket No. 97-80 (April 22, 2016).

⁴³ See *GAO Report* at 19 (noting that the "FCC conducted limited analysis to support the need for its 2016 proposed rule" and, while it does not apply to independent agencies such as the FCC, "[t]he Office of Management and Budget's *Circular A-4* states that regulatory agencies could use regulatory analyses to analyze the need for proposed actions").

Seth L. Cooper, "[Copyright Problems Plague FCC's Proposed Video Device Regulations](#)," *FSF Blog* (February 29, 2016).

Seth L. Cooper, "[FCC Shouldn't Push Video Device and Content Controls on Advisory Committee](#)," *FSF Blog* (May 11, 2015).

Seth L. Cooper, "[The AllVid Proposal's First Amendment Problem: Exploring the FCC's Constitutionally Defective Device Regulation](#)," *Perspectives from FSF Scholars*, Vol. 6, No. 8 (March 30, 2011).

Seth L. Cooper, "[Government Shouldn't Design Devices in Dynamic Markets](#)," *FSF Blog* (September 23, 2010).