Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Expanding Consumers' Video Navigation Choices	)	MB Docket No. 16-42
	)	
	)	
Commercial Availability of Navigation Devices	)	CS Docket No. 97-80
	)	

REPLY COMMENTS OF THE

INTERNATIONAL CENTER FOR LAW & ECONOMICS

MAY 23, 2016

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Summary

The Commission undertakes this rulemaking with the commendable goal of enhancing competition. But even the noblest of goals cannot be pursued by plainly illegal means. Unfortunately, that's exactly what these proposed rules would do.

In our Comments we took issue with the disconnect between the stated goal of competition and the mechanism used to implement it, the unintended results, the vast underestimation of the existing vibrant video marketplace, and the fatal inconsistencies in the logic used to justify the Chairman's NPRM.[1] In this Reply Comment we highlight another overlooked, but crucial, problem with the proposed rules: they directly violate United States treaty obligations.

As we discussed in our Comments, the proposed rules would violate a number of exclusive rights guaranteed to copyright holders — including the right to license their content to MVPDs on narrow, specific grounds —and will create a high likelihood of exposing MVPDs to secondary liability.[2] But the rules *also* threaten to violate a host of free trade agreements, to substantially interfere with rights holders' exclusive right of public performance, and to upend the system of retransmission consent agreements authorized by the Cable Act.

The free trade agreements enacted between the United States and other nations contain carefully crafted, highly specific rules covering the exclusive rights of copyright holders. The Chairman's proposal threatens to violate language, contained in several of these agreements, that specifically restrict signatories from allowing the retransmission of content over the Internet.

The Commission also lacks the authority to abrogate these free trade agreements. By adopting rules that force MVPDs into a position where they *must* act in violation of treaty terms, the United States may be subjected to protracted litigation-style disputes before the World Trade Organization, and, potentially, to punitive retaliatory tariffs and trade barriers.

At the same time, the rules also threaten to violate U.S. domestic law covering retransmission in both the Copyright Act and the Cable Act. In short, by failing to qualify for statutory licenses as "cable systems" under the Copyright Act, and by failing to qualify as either "cable systems" or "MVPDs" under the Cable Act, third-party set-top box providers are not legally permitted to retransmit content without explicit license from rightsholders.

Therefore, the Commission should proceed carefully, and with humility. And if the Commission decides to implement the rules despite the overwhelming problems contained within them, it should do so with a highly constrained version of the set-top box standard that completely avoids any sort of Internet-based transmission.

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[1] Notice of Proposed Rulemaking, *In the Matter of Expanding Consumers' Video Navigation Choices & Commercial Availability of Navigation Devices*, FCC 16-18, at ¶ 12 (Feb. 18, 2016), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1.pdf [hereinafter "NPRM"].

[2] These problems are detailed at length in our initial filing as part of this NPRM. See Comments of the International Center for Law & Economics, *In the Matter of Expanding Consumers' Video Navigation Choices & Commercial Availability of Navigation Devices*, FCC 16-18 (April 25, 2016), *available at* http://apps.fcc.gov/ecfs/comment/view?id=60001657468.

The proposed rules will violate free trade agreements and generate a flood of lawsuits and sanctions against the United States

The Commission, as a body subordinate to Congress, is not free to violate treaties that bind the U.S. government.[3] Yet that is exactly the course that the Commission would take if it were to implement the proposed set-top box rules. The rules clearly violate the obligations regarding performance rights and retransmission limitations contained in a number of free trade agreements, and this opens up the possibility of a torrent of lawsuits and other disputes directed at the U.S. Government by our trading partners, as well as consequent retaliatory tariffs aimed at U.S. industry.

In the course of negotiating free trade agreements, the U.S. and its trading partners craft highly targeted provisions relating to the recognition of certain intellectual property rights, including the basis upon which copyright holders' exclusive rights must be protected in each country. Such terms will typically include, among other things, the conditions under which a work may be publicly performed, or a broadcast retransmitted. Article 17.4(10)(b) of the U.S.-Australia Free Trade Agreement, for instance, requires that

> neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) **on the Internet without the authorisation of the right holder or right holders**, if any, of the **content of the signal and of the signal[.]** (emphasis added).[4]

Nearly identical provisions can be found in at least nine other U.S. free trade agreements, each of which has been duly approved by Congress and entered into force, and each of which specifically forbids the retransmission of copyrighted material online without the express authorization of the rightsholders.[5]

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[3] Head Money Cases, 112 U.S. 580, 598 (1884).

[4] Australia-United States Free Trade Agreement, Art. 17.4(10)(b), U.S.-Austl., May 18, 2004, 118 Stat. 919 *available at* http://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Pages/chapter-seventeen-intellectual-property-rights.aspx

[5] These include

- United States-Colombia Trade Promotion Agreement, U.S.-Colom., Art. 16.7(9), May. 15, 2012, *available at* https://ustr.gov/sites/default/files/col-ipr.pdf;
- United States-Bahrain Free Trade Agreement, Article 14.4(10)(b), U.S.-Bahrain, Sept. 14, 2004, 44 I.L.M. 544, *available at* https://ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file211_6293.pdf;
- Dominican Republic–Central America–United States Free Trade Agreement, Article 15.5(10)(b), Aug. 2, 2005, 19 U.S.C. § 4001 *available at* https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file934_3935.pdf;
- U.S. Korea Free Trade Agreement, Art. 18.4(10)(b), June 30, 2007, 46 I.L.M. 642 *available at* https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file273_12717.pdf;
- Morocco Free Trade Agreement, Art. 15.5(11)(b), June 15, 2004, 44 I.L.M. 544 *available at* https://ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file797_3849.pdf;
- U.S.-Oman Free Trade Agreement, Art. 15.4(10)(b), Jan. 1, 2009 *available at* https://ustr.gov/sites/default/files/col-ipr.pdf;

None of these trade agreements leaves room for national communications authorities to abrogate rightsholders' control over their works. Similarly, none of the agreements allows for retransmission to occur either over the Internet or to a third-party once an MVPD has performed its own retransmission.

The Commission has no authority to abrogate international treaties enacted by Congress

Treaties, which are "primarily… compact[s] between independent nations,"[6] constitute the supreme law of the land, alongside the federal constitution and properly enacted statutes.[7] Violations of treaties are "the subject of international reclamation and negotiation, which may lead to war to enforce them," and, consequently, it is not for domestic regulatory agencies to abrogate them.[8]

In fact, quite the opposite is true. Notice how the language quoted above reads: "neither Party may permit…." The "Party" in this case is the government, and this provision places an *obligation* on the government — of which the FCC is a part, of course — not to look away when unauthorized retransmissions take place. To do so would violate the provision.

And if *permitting* unauthorized retransmission violates the treaty, surely actually *mandating* unauthorized retransmission does.

Although it is doubtful, of course, that intellectual property rights violations will lead to the sort of outright war that the Supreme Court feared in the *Head Money Cases*, it *is* possible that such treaty violations will lead to *trade* wars.

Even in the absence of punitive tariffs, free trade agreements are subject to a litigation-style dispute process, and countries found to have violated their obligations are subject to trade sanctions.[9] Moreover, Congress has instructed the U.S. Trade Representative ("USTR") to seek the same level of protection in our trade agreements as the U.S. provides to its own citizens.[10] If the U.S. is found to have adopted rules that violate its own treaty obligations with respect to IP, it seriously undermines the USTR's ability to carry out that Congressional mandate.

- U.S.-Panama Trade Promotion Agreement, Art. 15.6(10)(b), June 28, 2007, *available at* https://ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file131_10350.pdf;
- U.S.-Peru Trade Promotion Agreement, Art. 16.7(9), Apr. 12, 2006 *available at* https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/FTAs/peru/16%20IPR%20Legal.June%2007.pdf; and
- U.S.-Singapore Free Trade Agreement, Section 16.4(2)(b), May 6, 2003, 42 I.L.M. 1026 *available at* https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf.

[6] Head Money Cases, *supra,* note 3 at 598.

[7] U.S. Const. Art. VI, cl. 2.

[8] Head Money Cases, *supra,* note 3 at 598.

[9] The World Trade Organization, *Chapter Three: Settling Disputes*, in UNDERSTANDING THE WTO, 58 *available at* https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf.

[10] Trade Act of 1974, Section 2, 19 U.S.C. §§ 2101 (1976) *available at* http://legcounsel.house.gov/Comps/93-618.pdf

In order to avoid violating U.S. treaties, therefore, the Commission should either forego implementing the rules or else tailor them in such a way that competitive set-top boxes are neither obligated nor permitted, to retransmit broadcast content without authorization.[11]

Both the DSTAC's "Virtual Headend System" Proposal and its "Application-Based Service with Operator Provided User-Interface" Proposal are based upon IP retransmission of MVPD signals,[12] which gives rise to the retransmission and public performance concerns raised in this reply comment. The proposal that would be most amenable to current copyright law is the "Competitive Navigation" System Proposal — at least to the extent that it does not require MVPDs to stream content over the Internet. However, even that proposal suffers from its own deficiencies, in particular its requirement that MVPDs forego providing their own security layer.[13]

In short, without careful consideration of the full legal effect of these rules — including the effect on foreign trading partners and our treaty obligations to them — the Commission runs the risk of undermining U.S. trade policy, and dragging the United States into protracted trade battles.

The proposed rules violate public performance rights and retransmission requirements of domestic U.S. law

The proposed rules also pose a serious problem for the comprehensive statutory regime that Congress has enacted around copyright owners' public performance rights[14] on the one hand, and the retransmission rights associated with broadcast television, on the other.

The Copyright Act gives authors the

> "exclusive righ[t]" to "perform the copyrighted work publicly." The Act's Transmit Clause defines that exclusive right as including the right to "transmit or otherwise communicate a performance… of the [copyrighted] work… to the public, by means of any device or process, whether the members of the public capable of receiving the performance… receive it in the same place or in separate places and at the same time or at different times."[15]

In its *Aereo* decision, the Supreme Court noted that entities that transmit broadcast television over the Internet are "publicly performing" copyrighted works.[16] The Court went on to observe that

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[11] Unfortunately, the DSTAC Report, on which the Commission relies as part of this proceeding, does not, however, provide much guidance on how this tailoring would be accomplished. *See generally* Final Report of the Downloadable Security Technology Advisory Committee, MB Docket 15-64 [hereinafter "DSTAC Report"].

[12] DSTAC Report at 4-6.

[13] DSTAC Report at 6.

[14] The transmission and retransmission of audiovisual works may implicate the reproduction right, distribution right, and public performance right. 17 U.S.C. §106. For purposes of this submission, the discussion is focused on the public performance right, but that should not be taken to mean the rights of reproduction and distribution are not implicated.

[15] Am. Broad. Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (citing 17 U.S.C.§§ 101 and 106(4)).

[16] *Id.* at 2508.

technological features that might differentiate transmission systems from each other do not affect the calculus when determining whether a work has been publicly performed.[17] Further, a copyright owner's right to authorize or prohibit the public performance of a work does not terminate once an initial transmission has been made by a broadcaster — thus additional retransmissions will still implicate the public performance right of Section 101.[18]

In 1976 Congress codified an important limitation to this exclusive right in the form of Section 111 of the Copyright Act, which provides a statutory license for retransmissions performed by "cable systems" — a definition that is both narrowly circumscribed, and also carries with it a host of statutory requirements.[19]

Thus, any entity retransmitting broadcast television — irrespective of the technical means used to accomplish the retransmission — has two options. First, it can obtain a license from copyright owners for the rights needed to retransmit such a broadcast. This is an option that many online platforms exercise today. For instance, Twitter recently negotiated with the NFL for the exclusive right to deliver OTT broadcasts of ten Thursday Night Football games.[20]

Alternatively, if a firm wishes to retransmit copyrighted broadcast content but prefers not to engage in open market negotiations, it can conduct itself in a manner that qualifies it for a statutory license as a "cable system" under Section 111 of the Copyright Act.

Set-top box providers are not "cable systems" under the Copyright Act

To qualify for a Section 111 license, a firm must be a "cable system," which is defined as

> a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.[21]

Section 111, enacted in 1976 as part of a general revision of U.S. copyright law,[22] was part of Congress' direct response to two Supreme Court cases that held that early forerunners of modern cable systems did not infringe rightsholders' public performance rights by retransmitting broadcast televi-

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[17] *Id.* at 2508-09

[18] *Id.* at 2508.

[19] *Id.* at 2505; 17 U.S.C. § 111; U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act Section 109 Report 1 (2008) ("SHVERA Report"). Identical licenses under identical terms were applied to DBS providers in the Satellite Home Viewer Improvement Act of 1999.

[20] NFL Communications, *National Football League and Twitter Announce Streaming Partnership for Thursday Night Football* (Apr. 5, 2016) *available at* https://nflcommunications.com/Pages/National-Football-League-and-Twitter-Announce-Streaming-Partnership-for-Thursday-Night-Football.aspx

[21] 17 U.S.C. § 111(f)(3).

[22] Pub. L. No. 94–553, 90 Stat. 2541, codified at Title 17 of the United States Code

sion signals.[23] These decisions enabled cable systems to retransmit broadcast television signals without paying any royalties to rightsholders — a situation that Congress found unacceptable. Thus, the 1976 Act added the transmit clause to the statutory definition of "public performance," making clear that such retransmissions are public performances. Having done so, however, Congress also enacted the section 111 statutory license in order to facilitate cable retransmission of broadcast television, while still ensuring that rightsholders received some compensation.[24]

In order for cable systems to qualify for the statutory license, however, they are required to comply with a number of provisions. Chief among these is an obligation to remit a royalty fee semi-annually to the Register of Copyrights.[25] This fee is based upon a complex formula that turns on, among other things, the gross receipts of the cable system and the number of signals it retransmits outside the originating station's service area.[26] In turn, the Copyright Royalty Board determines the appropriate portion of these royalties for distribution among each of the copyright owners whose works have been retransmitted under the statutory license.[27]

The contemplated third-party providers of "competing navigation systems" do not meet these requirements.

Internet transmissions do not qualify for compulsory licenses as retransmissions under Section 111

But even if they did *agree* to pay the requisite royalties (or if an amended version of the rules required them to comply with the requirements of Section 111), most of the intended beneficiaries of the Chairman's proposed rules would still not qualify as cable systems under Section 111.

Consistent with the view of the Copyright Office, courts have overwhelming held that Internet-based retransmission services are outside the scope of the definition of cable system in section 111, and are therefore ineligible for a statutory license.

The Copyright Office has examined whether Internet transmissions qualify for compulsory licenses on multiple occasions, and on each occasion has rejected such a classification. The Copyright Office has said that Internet retransmission is "vastly different" than other methods of acceptable retrans-

[23] Fortnightly Corp. v. United Artists Television, 392 U.S. 390, 393 (1968); Teleprompter Corp. v. CBS, 415 U.S. 394, 396 (1974).

[24] H.R. Rep. No. 94-1476, at 88–89 (1976).

[25] 17 U.S.C. § 111(d)(1)(A)–(F).

[26] See *Id.*

[27] 17 U.S.C. § 111(d)(4).

mission,[28] and that a "section 111 license does not and should not apply to Internet retransmissions."[29] Moreover,

> The Office continues to oppose an Internet statutory license that would permit any website on the Internet to retransmit television programming without the consent of the copyright owner. Such a measure, if enacted, would effectively wrest control away from program producers who make significant investments in content and who power the creative engine in the U.S. economy. In addition, a government-mandated Internet license would likely undercut private negotiations leaving content owners with relatively little bargaining power in the distribution of broadcast programming.[30]

More recently, the General Counsel of the Copyright Office wrote in response to Aereo's attempt to qualify for the Section 111 license that, "internet retransmissions of broadcast television fall outside the scope of the Section 111 license."[31]

The Copyright Office's Aereo letter expressly relied upon the Second Circuit decision in *WPIX v. ivi*, where the court held that "it is certainly unclear whether the Internet itself is a facility, as it is neither a physical nor a tangible entity" rather, it is "a global network of millions of interconnected computers" for the purposes of Section 111 compulsory licenses.[32]

And Congress itself has noted how extremely narrow the exception of Section 111 is, because, in "creating compulsory licenses, [Congress] is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders, and [] it therefore needs to act as narrowly as possible to minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate."[33] For instance, it was not until Congress expressly included "microwave" as a channel of communications in Section 111 that such broadcasts became eligible for compulsory licenses.[34]

Congress has not defined Internet services as eligible for the statutory license under Section 111, and the Copyright Office and courts have similarly refused to do so. It would almost certainly be an *ultra vires* act for the Commission to now do so on its own.

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[28] U.S. Copyright Office, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals 97 (1997).

[29] Copyright Broadcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 106th Cong. 25–26 (2000) (statement of Marybeth Peters, The Register of Copyrights) (quoting Letter of Marybeth Peters, Register of Copyrights, to the Honorable Howard Coble (Nov. 10, 1999))

[30] U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act Section 109 Report 1, 188 (2008).

[31] Letter of Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights to Aereo, Inc., United States Copyright Office (July 16, 2014) *available at* http://www.nab.org/documents/newsRoom/pdfs/071614_Aereo_Copyright_Office_letter.pdf.

[32] WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 280 (2d Cir. 2012) citing 1–800 Contacts, Inc. v. WhenU.Com, Inc., 414 F.3d 400, 403 (2d Cir.2005) cert. denied ivi, Inc. v. WPIX, Inc., 133 S. Ct. 1585 (2013).

[33] S.Rep. No. 106–42, at 10 (1999).

[34] See 17 U.S.C. § 111(f)(3).

Set-top Box Providers Are Neither Cable Systems Nor MVPDs Under the Cable Act

Even though a cable system does not need to seek negotiated licenses from copyright owners in order to retransmit live broadcasts under the Copyright Act, the *Cable* Act imposes an obligation that "cable systems" — defined separately from the Copyright Act — obtain retransmission consent from local broadcasters that opt-in to the Act's retransmission consent regime. To obtain this consent, cable companies must generally pay an agreed upon amount to broadcasters on top of statutory copyright royalties. Aside from satellite services that operate under a different, parallel statutory license, entities that wish to retransmit broadcast television stations that have opted in to retransmission consent must bargain with the broadcaster for the right to do so; no statutory license is available.

In addition to the requirements of the Copyright Act, the Cable Act of 1992 imposes obligations upon firms that would retransmit broadcast content. The retransmission consent provision that Congress added in 1992 applies to any "cable system or other multichannel video programming distributor."[35] The Cable Act defines a "multichannel video programming distributor" as:

> a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming[.][36]

And the Cable Act defines a "cable system" as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; [or] (B) a facility that serves subscribers without using any public right-of-way[.][37]

Entities that do not qualify as "cable systems" under the Cable Act could still validly retransmit broadcast signals without permission if they qualify as MVPDs. But the FCC's Media Bureau concluded in 2010 that an Internet-based programming distributor is not an MVPD under the Communications Act.[38] After soliciting public comment on whether the agency should amend its interpreta-

[35] 47 U.S.C. § 325(b)(1).

[36] 47 U.S.C. § 522(13).

[37] 47 U.S.C. § 522(7).

[38] Sky Angel U.S.,LLC, Order, 25 FCC Rcd 3879, 3882–83,para.7 (MB 2010).

tion of this statutory term, in late 2014 the FCC proposed a rule that would have expanded the regulatory definition of an MVPD to encompass certain Internet- based distributors.[39]

This NPRM met significant opposition, however, leading the Chairman to state at a House Committee on Energy and Commerce hearing in November 2015 that the agency did not intend to move forward with the rulemaking, given the resistance the agency had encountered since issuing the proposal.[40]

The significant legal concerns raised by commenters in that proceeding make it doubtful that the Commission will be able to construe the Communications Act's MVPD definition as encompassing Internet-based video distributors.[41] First, in order to make such a change the Commission would need to amend its rules — which it has so far failed to do. Second, and most important from a pragmatic perspective, there does not appear to be sufficient political support for changing the rules. Nevertheless, and regardless of the reasons why, the current MVPD rules do not apply to the entities that would otherwise be illegally retransmitting under the proposed set-top box rules.

Thus, entities that are not MVPDs or cable systems under the Communications Act — such as online video distributors (OVDs) like Apple TV — are not subject to the Cable Act's retransmission consent provision. And neither are they eligible for the Copyright Act's statutory license. As a result, under any scenario, third-party providers of retransmitted broadcasts would need to seek an explicit license from rightsholders in order to display the cable streams within their own applications (to the extent that they are creating app or virtual headend set-top box replacements). But the Commission's proposed set-top box rules would apply *regardless* of whether those third party providers had, in fact, obtained such licenses. Consequently, the rules "authorize" illegal retransmissions, and will likely be dead on arrival because precious few third-party providers would take on the massive liability risk of implementing it in the hopes that the Commission's "authorization" were sufficient.

But they would almost assuredly lose. For the FCC to attempt to reinterpret the statutory definition of an MVPD to encompass Internet-based retransmission services in contravention of both the Copyright Act and the Cable Act is the very sort of "voyage of discovery" by a federal agency that the Supreme Court recently condemned in *Utility Air Regulatory Group v. EPA*.[42]

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[39] Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, Notice of Proposed Rulemaking, 29 FCC Rcd 15995 (2014), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-210A1_Rcd.pdf.

[40] Mario Trujillo & David McCabe, FCC Puts Online Video Regs on Hold, THE HILL (Nov. 17, 2015, 5:32 PM), http://goo.gl/fGr6OM.

[41] See, e.g., Comments of CEI, ICLE, and TechFreedom, Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, Notice of Proposed Rulemaking, 29 FCC Rcd 15995 (2015), available at http://apps.fcc.gov/ecfs/document/view?id=60001039178.

[42] 134 S. Ct. 2427, 2446 (2014) (emphasizing that "an agency may not rewrite clear statutory terms" to suit its policy preferences).

Conclusion

The Commission should not (and may not) implement its rules without respect for the limitations on its ability to achieve its stated objectives arising from international law and other (non-Communications Act) domestic law.

The Commission has no authority to violate U.S. free trade agreements, and implementing the rules as proposed would plainly do so — callously calling into doubt a significant number of international agreements that place carefully balanced and negotiated restrictions on the retransmission of content over the Internet.

Further, the rules run afoul of the retransmission provisions of both the Copyright Act and the Cable Act. Virtually all (if not all) of the third-party set-top box providers that the NPRM is meant to galvanize simply do not qualify as "cable systems" under either law, and do not qualify as an MVPD under the Cable Act. Thus, these providers have no entitlement to retransmit programming over the Internet unless they independently negotiate with rightsholders.

There is simply no way around these problems. Unless the Commission substantially tailors the rules in such a way that it avoids any sort of Internet-based transmission, or else (and against its claimed intentions) makes provision for independent negotiations between third-parties and content owners, the rules will be *ultra vires*, and the entities acting under them will be subject to copyright liability.

Of course, as we noted in our initial comments, there is no need for the rules in the first place. The market for consumer video is thriving and growing — television is enjoying a new "Golden Age." The best course for the Commission to follow is to opt not to enact the rules and instead to allow the vibrant market for video content to continue to meet consumer demand.