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Copyright Office Letter Raises New Questions About FCC Set-Top Box Proceeding

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A **recent letter** by the US Copyright Office has raised questions about the **FCC's proposal** to adopt new rules intended to open up the market for cable television set-top boxes and what actions the FCC ultimately will take. The Copyright Office's letter, which was provided in response to a request from Congresswoman Blackburn (R-TN) and other Congressional opponents of the FCC initiative, creates further uncertainty about whether the FCC can craft a rule that will achieve its goal of increasing competition in the set-top box market while also satisfying the needs of content providers. The Copyright Office expressed concern that the FCC's proposal could interfere with copyright owners' statutory rights to license their works and restrict their ability to impose reasonable restrictions on use of those copyrighted works.

Chairman Wheeler's limited remaining time for action

Adopting new rules for set top boxes is an important element of FCC Chairman Tom Wheeler's agenda, and he has indicated that he is determined to make it easier for competitive providers of set top boxes and other video hardware to sell their products to cable and satellite TV customers before he leaves office, likely in January or soon thereafter. Given the other items on his agenda – including broadband privacy and reforming regulation of high-speed services used by businesses – he will need to act quickly in this proceeding to meet that deadline. Moreover, the timing is further constrained because Democratic Commissioner Jessica Rosenworcel's term ends when Congress adjourns, which will leave the FCC split evenly between Democrats and Republicans unless she is confirmed for a new term this fall or in a lame duck session after the election. The key question is whether there are any rules that can gain a majority of the FCC commissioners, particularly because Commissioner Rosenworcel has expressed doubt about the original proposal and both Republican commissioners have opposed adopting new rules.

Objections to the FCC proposal

The Copyright Office's letter reinforced claims by cable operators and programmers that the initial proposal would interfere with the rights of content providers, and warned that regulatory actions that interfere with the rights of copyright owners to manage the exploitation of their copyrighted works though private licensing arrangements would be inconsistent with the Copyright Act. In addition to the copyright concerns echoed by the Copyright Office, the cable industry also has claimed that the FCC's proposal would threaten the security protections on cable programming and would be too complicated and technically infeasible to implement.

The cable industry's alternative

The Copyright Office addressed only the FCC's initial proposal, and did not comment on **a compromise** suggested by the cable industry in June. Under the cable industry proposal, cable and satellite operators would develop HTML5-compliant apps that could be used on any third party device and that would be licensed to manufacturers at no charge. The apps would include access to all regular and on-demand programming and a user interface, and would allow devices to search cable and satellite content together with other content available on the devices. Although manufacturer and consumer groups have not endorsed the cable industry proposal, Google has described it as a "constructive effort" and consumer advocacy group Public Knowledge said it was "encouraged" by the proposal.

Opportunities emerging from possible outcomes of the proceeding

If the FCC adopts rules that are close to those it proposed initially, the most likely beneficiaries will be companies like Google, Apple, Amazon, and TiVo that would be able to integrate cable and satellite programming into their devices on terms they prefer (including being able to control navigation between channels). If the cable industry proposal, or something similar, were to be adopted, the benefits to device manufacturers would be more limited, particularly because the cable and satellite operators would continue to control the format of the program guide. However, manufacturers and app developers would still benefit in some ways, and there could be opportunities for alternatives to traditional set top boxes. If, however, Chairman Wheeler is unable to forge a majority of the FCC for a proposal before he runs out of time, cable and satellite operators will benefit because it is unlikely that the FCC under a new Administration will act quickly on this issue, leaving the status quo in place. Today, the most likely outcomes of this proceeding appear to be either adoption of a compromise or no action at all before the end of the Obama Administration.

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