



*Before the*  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC, 20554

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

**REPLY COMMENTS OF CONSUMER WATCHDOG**

**MAY 23, 2016**

The Commission's bid to open the set-top box market so that consumers can decide what navigational devices they use to access television programming from their satellite or cable television provider will result in competition that undoubtedly will cut consumers' costs. At the same time the move opens a Pandora's box of privacy concerns that must be addressed. Consumer Watchdog<sup>1</sup> supports unlocking the set-top box market to increase competition, but only if the Commission enacts robust regulations to ensure that consumers' privacy is protected.

Last year Consumer Watchdog petitioned the Commission<sup>2</sup> seeking a rule that would require Internet edge providers like Google and Facebook to honor do-not-track requests sent by a consumer. While we believe the threats to privacy raised by such Internet giants are substantial and must still be addressed, perhaps through legislation, these comments are focused on the privacy concerns raised by navigational devices. Many of the expected new entrants in the set-top box market are likely to be edge providers, like Google, underscoring that ultimately a unified approach to consumer privacy cross the Internet ecosystem will be necessary.

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<sup>1</sup> Consumer Watchdog is a nonprofit organization dedicated to educating and advocating on behalf of consumers for over 25 years. Its mission is to provide an effective voice for the public interest. Consumer Watchdog's programs include health care reform, oversight of insurance

<sup>2</sup> <http://www.consumerwatchdog.org/resources/fccdntpetiton061515.pdf>

Acknowledging that reality, however, does not preclude taking action in various sectors as the opportunity arises. In addition to this set-top box rulemaking the Commission's NPRM on privacy regulations for broadband Internet access service providers is another example of a sector where important privacy protections can be put in place immediately. In these comments we turn first to the potential consumer benefits of unlocking the set-top box market and then to the Pandora's box of privacy concerns that must be addressed by the Commission if the market will be opened in a way that truly benefits consumers. Consumer Watchdog only supports the proposed unlocking of the set-top market if robust privacy regulations are enacted and enforced.

### **Competition Will Cut Costs, Prompt Innovation**

For too long pay-TV services, also known as multichannel video programming distributors (MVPDs) such as Comcast and DirectTV, have largely required that set-top box navigational devices subscribers use to access their programming must be rented from them. Because MVPDs generally exercise near monopoly power in their respective markets, this requirement has kept set-top box prices artificially high and hurt consumers. It has been particularly burdensome for those with low or limited incomes.

Unlocking the set-top box market and opening it to two third-party providers will substantially lower prices. Just as the Commission's 1968 Carterfone decision<sup>3</sup> broke AT&T's stranglehold on telephone equipment and spurred innovation, competition and lower prices, all to the benefit of consumers, Consumer Watchdog expects the Commission's new set-top box rules will spark innovation and lower prices. Consumers will reap the benefits.

### **Strong Action Needed To Protect Privacy**

In terms of the impact on innovation, competition and price that the new set-top box rules will have, the benefits are clear. Consumer privacy protection, however, will require strong action. Current law prohibits cable and satellite TV providers (MVPDs) from using information about the viewing habits of a subscriber without the subscriber's permission. Current advertising practices by MVPDs, however, indicate that cable and satellite TV providers may be actively

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<sup>3</sup> *In the Matter of Carterfone Device in Message Toll Tel. Serv.*, 13 F.C.C. 2d 420, 421 (1968)

circumventing these rules.<sup>4</sup> Consumer Watchdog calls on the Commission to immediately investigate the MVPDs' practices and take necessary enforcement actions where warranted.

The strictly enforced rules applying to satellite and cable TV providers must also be applied to third-party set-top box manufacturers. In some cases the privacy invasive possibilities of third-party navigational devices will be even greater than those posed by MVPDs. One can readily see how a navigational device offered, for instance by Google, could track viewing habits and combine that data with information from other sources to offer a detailed profile of a consumer. It should be up to the consumer whether set-top box data such as viewing history is gathered and shared. It should only be allowed when explicit, informed opt-in written consent is given. Third-party set-top box providers must explain clearly how they will use the data, with whom it will be shared and for what purposes. Moreover, set-top box use must not be contingent upon acceptance of sharing of viewing data.

The Commission has suggested that MVPDs provide technical data necessary for a navigational device (set-top box) to function only to those third parties who certify to the MVPD that they will honor the privacy practices required of cable and satellite TV providers. This is a step in the right direction, but is not enough.

Rather than merely certifying they will honor privacy rules that apply to cable and satellite providers, the third-party navigational device makers, must make that pledge, as the Federal Trade Commission has suggested in its comments to the Commission,<sup>5</sup> to consumers as well. Presumably this would come in a privacy policy. Such a statement, the FTC says, would be analogous to a company committing to a privacy code of conduct. Once such a commitment is made, the FTC has the ability to enforce such a code under its Section 5 authority to prohibit

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<sup>4</sup> Center for Digital Democracy, "Big Data is Watching: Growing Digital Data Surveillance of Consumers by ISPs and Other Leading Video Providers," 23 Mar. 2016, <https://www.democraticmedia.org/article/big-data-watching-growing-digital-data-surveillance-consumers-isps-and-other-leading-video>

<sup>5</sup> FTC comments from Jessica Rich, [https://www.ftc.gov/system/files/documents/advocacy\\_documents/comment-filed-jessica-rich-privacy-enforcement-implications-fccs-proposed-set-top-box-rulemaking/160422fccsettopltr.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/comment-filed-jessica-rich-privacy-enforcement-implications-fccs-proposed-set-top-box-rulemaking/160422fccsettopltr.pdf)

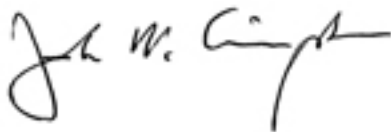
deceptive practices. A set-top box provider could not promise to honor consumer privacy and then fail to do so without committing a deceptive practice. The FCC would also have jurisdiction and presumably the Video Privacy Protection act would protect the privacy of a consumer's viewing history. When it comes to protecting consumers, the more cops on the beat, the better.

Increasingly if consumers' rights are to be protected the Federal Communications Commission and the Federal Trade Commission will need to work closely together. Consumer Watchdog was heartened by your recent Memorandum of Understanding<sup>6</sup> spelling out how you intend to do so. Set-top box rules offer a concrete example of where this cooperation can pay off in meaningful ways.

### **Conclusion**

Consumer Watchdog believes the proposed set-top box rules will enhance competition, reduce prices, and promote innovation, all to the great benefit of consumers. However, robust privacy protections must be put in place that would hold third-party set-top box manufacturers to the same privacy rules covering satellite and cable TV. In addition third-party set-top manufacturers should be required to make public commitments to privacy that could be enforced under the Federal Trade Commission's Section 5 authority.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John M. Simpson". The signature is fluid and cursive, with a long horizontal stroke at the end.

John M. Simpson  
Privacy Project Director

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<sup>6</sup> FTC-FCC Memorandum of Understanding,  
[https://www.ftc.gov/system/files/documents/cooperation\\_agreements/151116ftcfcc-mou.pdf](https://www.ftc.gov/system/files/documents/cooperation_agreements/151116ftcfcc-mou.pdf)