

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

May 23, 2016

In the Matter of)	
)	
Expanding Consumers' Video Navigation Choices)	MB Docket 16-42
)	
Commercial Availability of Navigation Devices)	CS Docket 97-80
)	
)	
)	

**REPLY COMMENTS OF THE
ASSOCIATION OF NATIONAL ADVERTISERS**

The Association of National Advertisers (ANA), on behalf of its members, hereby files reply comments (with an attachment on key constitutional issues) in regard to the Commission's Notice of Proposed Rulemaking (NPRM) raising questions related to allowing competitive consumer electronics manufacturers and other developers to make set-top box devices and software (navigation devices) that can provide access to multichannel video programming. ANA responds in particular to comments made concerning copyright and First Amendment issues that are highly inaccurate. They do not reflect the current legal status of copyrights, and otherwise do not reflect an understanding of the NPRM's potential to severely and inappropriately undermine cable and broadcast advertising that plays a critical role in fostering content creation, making programming available, and helping to lower cost to consumers for such content. Consequently, ANA believes that the NPRM, rather than advancing the public interest, will severely undermine it. The Commission, therefore, should not adopt the NPRM in its current form.

I. Introduction and Summary

Founded in 1910, ANA's membership includes more than 700 companies with 10,000 brands that collectively spend over \$250 billion in marketing and advertising. ANA provides leadership that advances marketing excellence and shapes the future of the industry. ANA also includes the Business Marketing Association (BMA) and the Brand Activation Association (BAA), which operate as divisions of the ANA, and the Advertising Educational Foundation,

which is an ANA subsidiary. ANA advances the interests of marketers and promotes and protects the well-being of the marketing community.

Advertising provides enormous beneficial content and information to consumers in the broadcasting and advertising-supported cable marketplace, and is a powerful engine for economic growth and development. In 2014, an estimated \$297 billion was spent on advertising in the U.S.; advertising accounted for 16 percent of the \$36.7 trillion in total U.S. sales; every dollar of advertising contributed \$19 in sales; and advertising spending created \$2.4 trillion in direct consumer sales.¹

Advertising has played a major role in the development of the broadcasting and cable infrastructures that presently deliver an unprecedented level of diverse content, including entertainment, religious, local community news, and myriad other information. As of March 2016, there were almost 16,000 broadcast television stations in the United States.² Local television stations reached almost \$20 billion in revenue from on-air advertising in 2014.³ Since 1996, the cable industry has invested nearly \$342 billion in content.⁴ Today, more than 660 cable operators in the United States use in excess of 5,200 cable systems⁵ to provide the average American consumer with 189 channels.⁶ Eighty-three percent of U.S. households subscribe to paid television systems⁷ and 93 percent of U.S. households have access to high-speed cable Internet service.⁸ Just last year, the report of the Commission's own Downloadable Security Technical Advisory Committee (DSTAC) found that advertising produces \$25 billion annually for Multichannel Video Program Distributors (MVPDs) and that, without such support, advertising revenues and financial support will migrate to other platforms, causing harm to

¹ *Economic Impact of Advertising in the United States*, IHS Economics and Country Risk, 2015, <http://www.ana.net/getfile/23045>

² Broadcast Station Totals As Of March 31, 2016, FCC (issued April 6, 2016).

³ *Investing In Television@ Market Report*, BIA/Kelsey, April 24, 2014, [http://www2.biakelsey.com/Company/Press-Releases/140424-Local-Television-Revenue-Expected-to-Reach-Over-\\$20-Billion-in-2014.asp](http://www2.biakelsey.com/Company/Press-Releases/140424-Local-Television-Revenue-Expected-to-Reach-Over-$20-Billion-in-2014.asp)

⁴ *Investment in Programming*, National Cable & Telecommunications Association, <https://www.ncta.com/industrydata/item/3195>

⁵ *Number of Cable Operators and Systems*, National Cable & Telecommunications Association, <https://www.ncta.com/industry-data/item/3296>

⁶ *Advertising & Audiences: State of the Media*, Nielsen, May 2014, 14, www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2014%20Reports/advertising-and-audiences-report-may%202014.pdf

⁷ Brendan James, "Forget Cable Cord-Cutting: 83 Percent of American Households Still Pay For TV," *International Business Times*, September 3, 2015, <http://www.ibtimes.com/forget-cable-cord-cutting-83-percent-americanhouseholds-still-pay-tv-2081570>

⁸ *Cable High-Speed Internet Availability to U.S. Households*, National Cable & Telecommunications Association, <https://www.ncta.com/industry-data/item/3197>

MVPDs and their subscribers.⁹

The NPRM as presently structured would substantially undermine responsible and relevant advertising on broadcast and cable media. These adverse impacts would result from, e.g., (1) advertisers being unable to ensure the integrity of their ads, (2) hurting advertisers' ability to limit distribution of their ads to the consumers the ads are directed to and intended to reach, (3) causing confusion regarding offers or promotions contained in the ads by extending their distribution to geographic regions where such offers and promotions may not be available, (4) infringing the advertisers' copyrights in such ads, (5) eliminating advertisers' ability to maintain ad placement, and (6) rupturing the privity of contract that provides essential legal protections between advertisers and program distributors. Such drastic marketplace changes will injure broadcasting interests, MVPDs, content creation, and the media viewing audience.

Numerous entities agree that the Commission's proposal would seriously impair the advertising-based economics that currently support the creation of high-quality commercial video content, including diverse and independent content providers.¹⁰ Advertising plays a major role in fostering robust economic growth, provides consumers with highly valuable information, and helps to support a wide range of diverse programming and technological innovation. The controls maintained by advertisers provide the foundation for the significant investments in content that can be delivered free to consumers. Conversely, undermining that balance will harm the very consumers the Commission claims to be protecting through this NPRM. Clearly, maintaining and fostering advertising as a key economic foundation of the broadcast and cable media is in the public interest.

II. The NPRM Threatens Copyright Interests Which Support Content

In its initial filing, ANA stated that it was perplexed by the NPRM's statement that the Commission does "not currently have evidence that regulations are needed to address concerns...that competitive navigation solutions will disrupt elements of service presentation...replace or alter advertising, or improperly manipulate content."¹¹

ANA also expressed the view that the NPRM has *great* potential to impact severely and adversely the advertising segment of our economy by disrupting copyright rights at the heart of

⁹ Report of Working Group 4 (WG4) to Downloadable Security Technical Advisory Committee (DSTAC), Federal Communications Commission, August 4, 2015, 152-153, <https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf>

¹⁰ See, e.g., Paul Glist et al., "Cable Set Top Boxes – Key Regulatory and Marketplace Developments," 2 *Practicing Law Institute, Broadband and Cable Industry Law 2016*, (PLI Intellectual Property, Course Handbook Series No.G-1270, 2016), 13.

¹¹NPRM, at paragraph 80.

the content creation and distribution system. This disruption would allow for the potential use of ad overlays, insertion of additional material, degradation of existing content, and numerous other unacceptable practices. Nothing in the initial comments filed in this proceeding provides any reasonable basis for changing ANA's view of the NPRM's potentially disastrous effects on program content. In fact, some of the comments serve only to reinforce ANA's concerns about these harms. Nor is there any practical procedure that advertisers can adopt to protect the interests the Commission so cavalierly eliminates in the NPRM.

a. The NPRM's destruction of advertisers' copyright protections is unconstitutional

The fundamental principle of the nation's copyright protection provided by law is that the owner of a copyright has the right to choose how and where its copyrighted work will be published or displayed. This right is enshrined in Article I, Section 8 of the Constitution: "The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Exercising its constitutionally-granted authority, Congress enacted the Copyright Act to provide protection for copyrighted material and to specify the ways a copyright owner can control and monetize its works. Section 106 of that law provides exclusive rights to copyright owners:

Section 106. ... the owner of copyright ... has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies ...;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies ... of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.¹²

¹² 17 U.S.C. 106

The Copyright Act specifies some exceptions to these protections, but none of them (including section 107's "fair use" exemption) applies to the issues raised in the NPRM. Clearly, the Copyright Act affords the copyright owner the exclusive right to license its work, to modify that work, and to monetize and control distribution of that work. The NPRM intervenes in that process, attempting to supplant Congress' role in securing the rights of advertisers, MVPDs, and others in the creative community. These infringements are patently inconsistent with the Constitution.

Ignoring carefully constructed and legally negotiated contracts between MVPDs and content providers, as well as those entered into directly between advertisers and MVPDs, will have numerous adverse impacts on commercial advertisers. Advertisers have interests in their messages that exhibit original intellectual effort in conception, composition, and arrangement. As discussed further below, the NPRM will interfere with advertisers' ability to monetize and control the distribution of ads, because third parties will be capable of taking ads and either supplanting them, altering them or otherwise manipulating them.

b. The NPRM proposals are outside the Commission's legal authority and expertise

The Copyright Act vests the Copyright Office with the authority to adopt rules and regulations to assist in the protection of copyrights and the enforcement of copyright owners' rights. On those occasions when Congress has authorized exceptions to copyright protections, the exceptions have been very specific.¹³ Congress did not include any such exception in its instruction (contained in section 629 of the Communications Act of 1934) to the Commission regarding the navigation device marketplace, and the Congress did not express any intent – either expressly or impliedly – that existing copyright protections be superseded by the Commission's actions in carrying out that section. Consequently, there is no explicit authority provided to the Commission to take the copyright-related actions it proposes in this NPRM. The Commission must exercise its authority under section 629 in full compliance with other statutory provisions, including those such as copyright law outside of the Commission's direct authority.

Because the Copyright Office has been charged with overseeing copyright law, appropriately the Commission typically has not chosen to involve itself in copyright issues, and so it has not developed extensive expertise in this area. Yet here, in clear contravention of

¹³ For example, the license permitting the retransmission of broadcast programming set forth in section 111 (17 U.S.C. 111).

existing copyright law and absent any explicit Congressional action or authorization, the Commission attempts to become *the* copyright regulator under the guise of creating choice and competition for consumers. Once the Commission arrogates this type of authority to itself, it is unclear where that might end. The NPRM proposes action vastly outside the Commission's authority and expertise, and will create very dangerous precedents.

Further, purportedly in attempting to open the video content marketplace to greater competition, the Commission imposes significantly and detrimentally on the interests of involved parties. Some comments, while stressing the need for navigation innovation, appear to ignore distributors' navigation innovation efforts, such as guide functionality, voice capable remote control, and various apps. The NPRM's proposed actions would at best offer minimal benefits to consumers and, when balanced against the harm to copyright owners and distributors, the proposal does not use the least restrictive methods to achieve the Commission's stated purpose.

Finally, some have sought to justify the NPRM on the grounds that it will help to reduce piracy.¹⁴ This assertion misses the point; copyright law is not primarily about the reduction of piracy, but rather the owner's right to control the distribution of its protected material. The Commission's interest in protecting against theft of material may be laudable, but that justification for this involvement by the Commission in copyright law is yet another example of the Commission acting outside of its authority. In addition, comments were filed that stated that the proposed NPRM changes could lead to more piracy,¹⁵ a clearly undesirable result.

c. The NPRM proposals violate the copyright protections afforded to advertisers, owners and distributors of content

The NPRM destroys the protections afforded by specific contractual agreements setting forth the detailed rights and obligations of advertisers, as well as program owners and distributors.

i. Advertising interests

Advertising interests are directly affected by the copyright violations proposed in the NPRM. For example, the manner in which programming location is identified, channel organization, channel order, and other elements are important factors in advertisers' decisions

¹⁴ For example, Public Knowledge's filing claims that a competitive device market will provide better piracy protections. (Public Knowledge filing, at page 47).

¹⁵ See, e.g., comments of the Motion Picture Association of America and SAG-AFTRA, at pages 20-28.

about ad placement and compensation. The current market structure for television advertising supports advertisers' ability to place their ads based on national, regional or local distribution; the type of programming or specific content; the audience composition; and the time of day or night that the ads appear. All of these options fall within a framework where advertisers ensure through their agreements with programmers or MVPDs that, for example, their ads will not be overwritten, placed in slots adjacent to competitive advertising, aired during inappropriate programming, or aired at inappropriate times. Currently, advertisers' agreements with content providers and MVPDs set standards that ensure the transmission of ads which accommodate local laws, community standards, and particular audience demographics, as well as other conditions specific to individual agreements. They also often spell out how contractual disputes should be resolved.

Astute media planning is a crucial and integral part of the advertising ecosystem. Clearly, advertisers do not indiscriminately place advertising with the hope that it will reach intended consumers. In fact, media planning is both a science and an art practiced by expert professionals. The return on investment of every dollar spent is carefully considered. The NPRM severely upsets that balance and will cause irreparable damage to advertisers' interests in optimizing the return on investment of the billions of dollars they collectively spend to reach consumers.

The NPRM has both short- and long-term negative implications for advertising. In the short term, an advertiser that has purchased commercial advertising time during a scheduled program will run the risk – and in fact the likelihood – that the advertiser's ad will be replaced by advertising content not its own, thereby robbing that advertiser of some (if not all) of the value of the purchased advertising time. In the long term, the devaluation of commercial advertising opportunities will force advertisers to invest less in television advertising. In turn, the decreased revenue will cause content providers and MVPDs to attempt to reduce costs, resulting in fewer programming choices and lower quality choices. These reductions in the variety and quality of programs will then provide advertisers with even fewer viable options to promote their products. The NPRM has provided no proposals for addressing and resolving these serious issues.

Under the NPRM, third parties would be permitted to ignore contractual rights and benefits through a guaranteed right of access to content, by which they will be able to alter existing advertising or add advertising not included with the original content. Third parties will have economic motivations for replacing existing ads with their own advertisements; indeed, the

NPRM itself recognizes this fact, stating that navigation devices are a vehicle for differentiation.¹⁶ What further proof of copyright threats need there be than the NPRM itself, which recognizes the marketplace necessity of uniqueness, leading to the alteration and modification of advertising and content? Despite these obvious threats to existing agreements, in its filing Public Knowledge erroneously stated that the NPRM does not change contract law, only marketplace facts, and then went on to claim that contracts are not an impediment to the Commission's actions in this NPRM.¹⁷

Yet, as ANA pointed out in its initial filing – and as others stated in their filings¹⁸ -- the NPRM fleetingly and cavalierly dismisses these very real concerns, citing a “lack of evidence.”¹⁹ This approach ignores the reality that advertising is a major part of the financial lifeblood fueling the development and distribution of a large proportion of the content itself.

ii. Proposed technology “fixes” do not appear to be adequate solutions

Some assert that the proposed rules would not undermine these copyright protections since programmers and providers can use technical solutions (such as RVU or Vidipath link protection technologies) to protect against any infringement, and that most pay-TV operators distribute content online and offer apps by which subscribers can access content through their subscriptions.²⁰ But these technologies today leave intact the MVPD's services, thereby ensuring the integrity of copyright protections and other agreements, while the NPRM appears to permit third parties to have access to disaggregated content within the material the MVPD provides.

Indeed, third parties have insisted that they are permitted to ignore copyright protections or others' agreements when they reassemble an MVPD's content. On its website, TiVo, for example, offers the following reason for having TiVo services in the home: “A better way to avoid commercials. The only thing more annoying than watching commercials is having to fast-forward through them every 10 minutes. With SkipMode, you can skip over an entire commercial break at the press of a button, and resume your show without interruption. What

¹⁶ NPRM, at paragraph 27.

¹⁷ Public Knowledge filing, at page 12.

¹⁸ See, e.g., EchoStar and DISH filing, at page 20; AT&T Services, Inc., filing at page 79

¹⁹ NPRM, at paragraph 80.

²⁰ See, e.g., Google filing, at pages 4-5.

you do with all that time you save is your own damn business.”²¹ Some parties also have said that they are not bound by any existing contracts between advertisers and MVPD providers.”²²

Further, such suggested technology “fixes,” and the NPRM itself, fail to address the fact that content protection schemes do not – and cannot – ensure that devices (including devices using such technologies) permit content to be shown without such modifications as overlays, delayed starts, interruptions, or replacement with such indistinguishable content as competing advertisements. EchoStar, for example, correctly notes that TiVo’s “pause menu” enables commercials to be inserted into live and time-shifted programming.²³ A device manufacturer could also detect an ad portrayal and then overlay or display video content that is outside the MVPD’s control. A device manufacturer could destroy the value of advertising adjacency -- i.e., the time preceding, during or following a program set aside for commercial breaks which is offered for sale generally on the basis of ratings calculated by audience size and which has value because viewers often tune to a particular program early or desire to continue watching the remainder of a show and are exposed to commercials in the adjacent break position.

Advertisers, likewise, frequently secure exclusive sponsorship, often at significant cost, to ensure that a commercial by a marketplace competitor does not “ambush” the advertiser by appearing during a particular program. Quite often, contractual exclusivity is the only practical way to prevent ambush marketing, making such contractual restrictions a critical investment. There does not appear to be anything in the technology “fixes” proposed so far that would prevent a third party from switching from the MVPD’s video source to another source that is completely outside the MVPD’s control. If this were to occur, the value paid by advertisers for such arrangements would be undercut seriously. It is obviously not the case, as Public Knowledge asserted in its comments, that the NPRM leaves the MVPD bundle of programming intact.²⁴

iii. The NPRM proposals would disrupt the content ecosystem

In short, the NPRM upsets the entire content production and distribution ecosystem. As the Copyright Alliance rightly pointed out in its comments:

²¹ <https://www.tivo.com>.

²² See, e.g., letter from Devendra T. Kumar, Counsel for TiVo, to Marlene H. Dortch, MB Docket No. 15-64, at 1 (Jan. 13, 2016) (“The TiVo Representatives made clear that competitive device providers are not and should not have to be bound to programming contracts entered into by MVPDs to which they were not party.”); and comments of the Electronic Frontier Foundation, MB Docket No. 15-64, at 2 (Oct. 9, 2015) (“the Commission should avoid making mandatory any post-receipt usage controls on audiovisual content” imposed by “rights holders or intermediaries”).

²³ EchoStar and DISH filing, at page 20.

²⁴ Public Knowledge filing, at page 45.

“[t]he complex compensation system on which creative professionals rely for remuneration for their contributions to copyright protected works ...turns in large part on exclusive distribution deals that produce residuals and royalties on which creative professionals rely to fund not only their labor but also their health care, insurance, retirement, and other benefits. These and other forms of compensation are determined via complex licensing agreements between MVPDs, studios, production companies, networks, performing rights organizations, unions, guilds, and ultimately, the countless individual writers, directors, actors, songwriters and composers, designers, musicians, and technical artists who create the various elements of video programming. The FCC’s proposal reflects a deep misunderstanding of how this entire system operates.”²⁵

This long list of serious negative results will be greatly ramified if advertisers’ protection of their advertising rights is severely undermined. Today, advertising terms are carefully negotiated and specified in programming agreements, so that parties know exactly what is permitted and what is precluded. Yet the NPRM does not take into account these fundamental elements of today’s negotiated agreements. It is clear that, if compensation for advertising is harmed, the kinds of problems described by the Copyright Alliance will increase dramatically and will severely drain the content production and distribution stream. Also, members of Congress have expressed concerns about the NPRM’s negative effects on programming diversity.²⁶ Without advertising support, those who conceive of entertainment ideas, those who take a chance and construct a pilot or a documentary, those who move forward without a guarantee that a program will succeed – and many others – would face almost insurmountable odds and, in many cases, simply not be able even to initiate their efforts.

Other agreements are jeopardized by the NPRM. For example, Cox Communications stated in its comments that the NPRM’s “open-source pay-TV content” proposal completely upends established approaches to copyright, content security, and quality of service assurances.²⁷ AT&T Services, Inc., pointed out that the Copyright Act grants exclusive rights to content creators so as to promote creative efforts, and that these creators are entitled to protection so that no one makes a service substantially similar to that creation.²⁸ The NPRM would lead to multiple violations of those rights.

Due to the fact that the NPRM, as presently constructed, destroys the privity of contract involved in the agreements supporting those who produce, support and distribute content, it is

²⁵ Copyright Alliance filing, at p. 4.

²⁶ See, e.g., letter from Representatives Walden and Clarke (April 1, 2016, page 1) expressing concerns that the NPRM does not include “a meaningful assessment of the effects on independent and diverse networks....The FCC must proceed with a better understanding of how their proposed rules could limit diversity and inclusion on our nation’s shared media platforms.”

²⁷ Cox Communications filing, at page 19.

²⁸ AT&T Services, Inc., filing, at page 77.

highly likely that consumers will have access to less content, fewer entities producing content, content that is of poorer quality, and content that costs consumers more. ANA concurs with the statement by the Recording Industry Association of America that replacing a “distribution chain that today is manageable through a combination of contractual and statutory terms and conditions with a large, dispersed group of third parties lacking similar incentives to abide by terms and conditions would threaten a market that otherwise functions well.”²⁹ That result clearly is not in the public interest.

iv. Other negatively-affected interests

The NPRM infringes not only on the fundamental rights of copyright owners including advertisers, but also on the legal rights of content distributors set forth in their agreements with those owners. While some suggest that the NPRM might broaden distribution to wider audiences,³⁰ the manner in which the NPRM would eviscerate the rights created under these agreements will do exactly the opposite. It will chill a distributor’s incentive to purchase the rights in the first instance, since the value of that purchase would be destroyed if the distributor must share those rights with no compensation.

All these negative effects will significantly impair advertisers, as there will be less content, fewer programs on which to place advertising, and lower advertising value because the underlying content it supports has been devalued.

v. Content integrity and agreements must be preserved

If the Commission issues final rules in this area, they should only be promulgated if they mandate security for all relevant content. The Commission must require that content, and advertisements that support and accompany that content, are not changed or otherwise impacted without the explicit agreement of the original contracting parties. Any requirements should, at the very least, prohibit content substitution; overlays; delayed programming; alteration or other manipulation of advertisements; and content interruption.

III. The NPRM Proposed Rule Violates the First Amendment

The NPRM violates First Amendment rights of advertisers, content owners and distributors. The ANA concurs in various comments criticizing the NPRM’s attempted constitutional justification of the proposed rules, as the Commission’s analysis sails far wide of

²⁹ Recording Industry Association of America, et al., filing, at page 8.

³⁰ See, e.g., Google filing, at page 5.

the mark.³¹ Further, ANA attaches to these reply comments a letter that sets out in great detail some of the NPRM's major legal and constitutional infirmities, including invalid alleged justification for of compelled speech, misapplication of traditional commercial and non-commercial speech legal precedents, and an attempt to justify the creation of a competitive navigation device marketplace based on inapplicable legal opinions.³²

a. Advertisers' First Amendment rights violated

As noted earlier, the NPRM permits the alteration of both advertising and programming. Advertisers have a right to truthfully and non-deceptively say (consistent with other obligations) what they wish, when they wish, and in the manner they wish. Yet the NPRM appears to turn over that right to third parties who can manipulate advertising, transforming it virtually any way they wish – or overriding it altogether.

Similarly, when programming is altered, the value of advertising underlying that programming is reduced. Advertisers will offer less compensation if they are not confident that their messages will either be seen or be seen when and in the format they intend and to which the involved parties have agreed. As noted earlier, numerous third parties have stated that they do not feel bound by existing ad agreements. Furthermore, it is either impracticable or unduly costly to ensure ad integrity when third parties are involved. The NPRM takes no note of who would be responsible – when third parties are involved -- for guaranteeing protection of an advertiser's First Amendment rights to speak when and as the advertiser wishes or be silent in media venues not of their choosing. The burdens (including tracking of ads, cost, etc.) to protect an ad would fall on advertisers and likely not on the original distributor with which the advertising agreement is reached, since a third party is now involved and the original distributor will surely refer to the mandated content access provided by the NPRM as reason for its lack of responsibility. This approach is absolutely unreasonable and impractical. In short, when the advertiser's First Amendment rights have been violated, there will often be no reasonable remedy for the violation because there is no underlying agreement between the advertiser and the violator. Further, advertisers often are attempting to convey their messages during very specific short time periods to highly targeted audiences, and so remedies through the courts,

³¹ See, e.g., comments of the National Cable Telecommunications Association (NCTA) at pages 165-66 and App. A 69-74; comments of Tech Knowledge, at pages 11-31; comments of AT&T Services, Inc., at pages 87-95; comments of Comcast Corp. and NBCUniversal Media, LLC ("Comcast/NBC"), at pages 54-56; comments of 21st Century Fox, Inc., *et al.* ("Fox, *et al.*"), at pages 41-42; comments of the Motion Picture Association of America and SAG-AFTRA at pages 18-19; and comments of The Free State Foundation at pages 15-16.

³² See attached letter from Robert Corn-Revere of Davis Wright Tremaine LLP discussing each of these and other legal issues.

even if obtainable, often will come far too late to compensate for the major immediate losses due to third-party interference with ads.

b. Content owners' and distributors' First Amendment rights violated

The NPRM proposals allow for the content of programming to be severely affected, which in turn prevents programmers from speaking and may compel them to endorse messages contrary to their own views. It does not – as Public Knowledge, e.g., asserted in its comments³³ – advance programmers' speech interests. What the NPRM does is, indeed, quite the opposite. It prevents programming interests from having their content displayed consistently and without alteration, and by doing so, the NPRM encroaches on their First Amendment right to say what they want, in the manner in which they desire to do so. Programmers have the right to control their message and not have it distorted or disturbed by third parties. They have the right to market their own unique services and capabilities, and to advance their brand in which they have typically invested significant advertising resources. Because programmers will not be able to structure their programming as they wish, their ability to “speak” is diminished.

With regard to MVPDs, as AT&T Services, Inc., stated, the First Amendment “protects not only an MVPD's choice of the particular video channels to offer its customers, but also how the MVPD presents its entire service to subscribers, including branding, look and feel, the interface used to present the content, the arrangement of the channels, the search functionality, the decision as to which ads to include with which content, and other features that the Commission's decision takes away from MVPD's editorial control and places in the hands of third parties.”³⁴ Unfortunately, the NPRM proposals therefore severely undercuts the First Amendment rights of MVPDs and their advertisers as well.

Despite Public Knowledge's assertion to the contrary,³⁵ MVPDs will not be able to exploit speech interests in their programming arrangements, because others may well rearrange the MVPD's programming. Their First Amendment rights are threatened not just because the NPRM precludes MVPDs from controlling the manner in which viewers watch programming; rather, the NPRM violates the Constitution because it denies MVPDs the ability to speak and convey content as *they* (rather than third parties) wish. And the mere potential increase in the manner in which MVPDs' programming bundles might be accessed does not further their First Amendment interests by somehow making speech more available. To the contrary, it severely

³³ Public Knowledge filing, at page 13.

³⁴ AT&T Services, Inc., filing, at page 90.

³⁵ Public Knowledge filing, at page 14.

limits the speech interests of both programmers and advertisers because the speech is subject to the control and manipulation of third parties rather than the material's original distributor.

As noted earlier, when programming rights are violated, the value of advertising supporting that programming similarly is seriously harmed.

c. The NPRM proposals do not meet legal requirements for speech restraints

All of this occurs without the Commission's compliance with legal standards for imposing such burdens. The Constitution requires that any restriction on First Amendment rights must be no greater than is essential to further an important or substantial governmental interest.³⁶ The NPRM purports to achieve the directive in section 629 of the Communications Act of 1934 to create a competitive navigation device marketplace, presumably the important or substantial governmental interest, by mandating third-party access to content. The NPRM would do this in ways that burden speech far more than is essential to further that presumed governmental interest. Section 629 does not permit the Commission to achieve this interest by, for example, allowing third parties to change or eliminate advertising, thereby undermining a major foundation of the content creation and distribution system that provides numerous benefits to consumers.

Also, in furtherance of that presumed governmental interest, the Commission is not permitted to force advertisers or content distributors to be associated with speech not their own. By permitting third parties to alter programming content, the NPRM raises the likelihood that an advertisement may not appear in the manner, time or place that the advertiser intended, and a programmer or MVPD may find itself endorsing (or appearing to endorse) material for which it is not responsible and with which it may not agree.

All these requirements harm First Amendment rights, and do so without showing that the governmental interest would be achieved less effectively if the NPRM were not adopted. It is likely that there are other means, as some have noted, through an apps approach that would allow devices to receive services without disrupting the programmer's control of content.³⁷ This approach appears to be capable of achieving this presumed governmental interest in a far less draconian manner. Regrettably, the NPRM proposals in their current form are replete with First Amendment violations.

³⁶ See *Turner Broadcasting System, Inc. v. FCC* (1997), 512 U.S. at 662 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

³⁷ See, e.g., AT&T Services, Inc., filing at page 92.

IV. Conclusion

The NPRM is seriously flawed:

- It would severely harm advertising interests, thereby jeopardizing advertising's significant support for the content creation and distribution system.
- It violates the Constitution by sweeping aside copyright protections for advertising and programming.
- It violates pre-existing contractual relationships and the market structure under which they are based.
- It reduces or eliminates the value of television advertising.
- It will reduce the variety and quality of television programming available to advertisers and consumers.
- It threatens investments made in advertising, programming and distribution systems.
- It violates First Amendment rights of advertisers, programmers and distributors.
- It attempts to exercise authority in violation of the Constitution and beyond authority granted to the Commission in regard to copyright, exceeding both what the Constitution permits as well as requirements that the Commission act to further an important or substantial governmental interest in a manner no greater than is essential to the furtherance of that interest.

ANA strongly believes there is nothing in the initial filings made in this proceeding which demonstrates that the NPRM proposals would advance the public interest. In fact, the comments overwhelmingly demonstrate that the NPRM would severely harm that interest.

The proposed rules therefore must not be adopted.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Dan Jaffe", written in a cursive style.

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Mr. Daniel Jaffe
Vice President – Government Relations
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Re: **Reply Comments of the Association of National Advertisers, Inc.**
Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42;
Commercial Availability of Navigation Devices, CS Docket No. 97-80

Dear Mr. Jaffe,

You have asked for analysis of the Federal Communications Commission's conclusions regarding whether requiring Multichannel Video Programming Distributors ("MVPDs") to provide Content Delivery Data to unaffiliated navigation device developers violates First Amendment prohibitions against compelled speech. In its Notice of Proposed Rulemaking and Memorandum and Order, the Commission concludes that the proposed rules do not infringe MVPDs' First Amendment rights. *Expanding Consumers' Video Navigation Choices*, 31 FCC Rcd. 1544, ¶ 45 (2016). It reaches this conclusion through an expansive reading of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), in which the Supreme Court interpreted the commercial speech doctrine to permit government mandated disclosures to remedy potentially deceptive or misleading commercial speech. However, the compelled commercial disclosure standard derived from cases such as *Zauderer* and *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), is not applicable in the context of this rulemaking.

The NPRM seeks to implement the mandate in Section 629 of the Communications Act to create a market for devices that can access video programming and other services offered by multichannel video programming distributors ("MVPDs"). 47 U.S.C. § 549. The Commission is proposing rules to allow third parties to design and offer devices or software able to navigate programming through competitive user interfaces. NPRM ¶ 1. The NPRM proposes to require MVPDs to provide Content Delivery Data, Service Discovery Data, and Entitlement Data, *id.*, *passim*; *see also id.* ¶ 45, and to require a disaggregation of MVPD service into individual elements to be communicated to any retail device manufacturer or app developer to selectively merge into derivative services. The proposed rules would require MVPDs to relay their programming and data to device manufacturers and app developers.

The Commission addresses the First Amendment implications of its proposal in a single paragraph in the NPRM and relies solely on commercial speech precedent. NPRM ¶ 45. The FCC says it "does not believe" the proposed rules infringe First Amendment rights, because they "simply require MVPDs to provide content of their own choosing to subscribers to whom they

have voluntarily agreed to provide” it, because they ostensibly “would not interfere with” MVPDs’ “choice of content,” and because they would only “require MVPDs to disclose accurate factual information” about their service and the subscriber’s right to access it. *Id.*

The Commission recites – but does not apply – the standard for regulation of commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980), and invokes the “more relaxed standard to evaluate compelled disclosure of ‘purely factual and uncontroversial’ information” for “preventing deception of consumers” under *Zauderer*. *Id.* And, in reliance on the D.C. Circuit’s recent decision in *American Meat Institute v. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), it asserts that government interests other than correcting deception can support disclosure requirements. *Id.*

Commenters addressing this attempted constitutional justification of the proposed rules are all but unanimous in pointing out that the Commission’s analysis misses the point because the proposal is not a commercial speech regulation.¹ As NCTA explains, the NPRM’s constitutional justification is deficient because, among other reasons, the proposed rules interfere with First Amendment rights by compelling MVPDs and programmers to endorse and associate with messages that are not their own, and by restricting their own editorial discretion. NCTA Comments, App. A at 69. *Accord*, Comments of Fox *et al.* at 41 (“the proposed rules would compel the Content Companies to speak with navigation companies and through navigation devices that may distort their message”). Because the proposed rules do not implicate the commercial speech doctrine, they are subject to at least intermediate scrutiny, and arguably face strict scrutiny given the breadth of their impact on the presentation of programming and the accompanying advertising that supports it. *See, e.g.*, NCTA at 71-73; Tech Knowledge at 19-31. *See also* AT&T at 88; Free State at 16.

The NPRM’s reliance solely on the commercial speech precedents *Central Hudson* and *Zauderer*, and a couple of cases applying them, is misplaced. As the Commission recognizes, *Central Hudson* and *Zauderer* apply only in the context of commercial speech, NPRM ¶ 45, which is defined as that which does no more than propose a commercial transaction. *E.g.*, *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014). *See also Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 583-84 (2011). Here, while the proposed set-top box rules undoubtedly will affect advertising that appears in the program offerings and streams that the Commission intends to regulate, the vast majority of MVPD programming and the associated exercise of editorial control in how it is presented are far removed from speech that proposes a commercial transaction. In addition, in invoking commercial speech principles in pursuit of “more relaxed standards” – for which the rules proposed do not qualify – the Commission ignores how the commercial speech doctrine has steadily evolved and, since the forerunner cases of *Bigelow v. Virginia*, 421 U.S. 809, 818-20

¹ *See* Comments of the National Cable & Telecommunications Association (“NCTA”) at 165-66 & App. A 69-74; Comments of Tech Knowledge, 11-31; Comments of AT&T at 87-95; Comments of Comcast Corp. and NBCUniversal Media, LLC (“Comcast/NBC”), at 54-56; Comments of 21st Century Fox, Inc., *et al.* (“Fox, *et al.*”), at 41-42; Comments of the Motion Picture Association of America and SAG-AFTRA at 18-19; Comments of The Free State Foundation at 15-16. The lone comment to the contrary provides only a brief constitutional discussion and contains only minimal citation to legal authority. *See* Comments of Public Knowledge at 13-14.

(1975), and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), how the Supreme Court has significantly increased the protection it affords such speech.²

The Commission attempts to also inappropriately expand settled doctrine in the narrower context of “compelled disclosure.” As the NPRM recognizes, *Zauderer* authorizes compelled disclosures only for commercial speech, and not only solely of purely factual and uncontroversial information, but also only if it is necessary to prevent deception of consumers. NPRM ¶ 45. But upon doing so, the Commission does not suggest there being any “deception” here. *Cf.* Comcast Comments of Comcast Corp. at 56 (“this standard is inapplicable because the Commission’s proposal does not involve ‘purely factual and uncontroversial information’ nor is it related to preventing consumer deception”). Instead, it relies on *American Meat Institute* to argue for **extending** the *Zauderer* compelled speech exception to “government interests *other than* correcting deception.” NPRM ¶ 45 (citing *American Meat Inst.*, 760 F.3d 18) (emphasis added). But this is improper, for several reasons.

First, the Supreme Court has never applied *Zauderer*’s compelled disclosure exception outside the context of misleading or deceptive commercial speech, or even suggested that such application is appropriate. And even *American Meat Institute*, in holding that “*Zauderer* in fact does reach beyond problems of deception,” still restricted it to commercial speech, 760 F.3d at 20, 22-23, whereas the set-top box rules propose to regulate much more than that, as shown. The compelled disclosure in *American Meat* also was part of the communication between sellers and consumers, *id.*, whereas here the disclosure has nothing whatsoever to do with the commercial transaction with viewers, but rather is made to third parties to the MVPD-viewer interaction (specifically, competitors to the MVPDs). *See Nat’l Ass’n of Manufacturers v. SEC*, 800 F.3d 518, 523 (D.C. Cir. 2015) (*Zauderer* applies only to “voluntary commercial advertising” and not “outside that context”). The Commission’s embrace of *American Meat* also ignores that other courts have expressly confined *Zauderer* to its original, more limited rationale. *See Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2009) (compelled disclosures are permissible if “reasonably related to the State’s interest in preventing deception of customers”) (quoting *Zauderer*, 471 U.S. at 651), *aff’d*, *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729 (2011).³

² Over the ensuing decades the Court invalidated: (1) prohibitions on the use of illustrations in attorney ads, *Zauderer*, 471 U.S. at 647-49; (2) an ordinance regulating placement of commercial newsracks, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993); (3) a state ban on in-person solicitation by CPAs, *Edenfield v. Fane*, 507 U.S. 761, 777 (1993); (4) a state ban on using “CPA” and “CFP” on law firm stationery, *Ibanez v. Florida Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136 (1994); (5) a restriction on listing alcohol content on beer labels, *Rubin v. Coors*, 514 U.S. 476, 491 (1995); (6) a state ban on advertising alcohol prices, *44 Liquormart*, 517 U.S. at 165; (7) a federal ban on broadcasting casino advertising, *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999); and (8) federal limits on advertising drug compounding practices. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 377 (2000). *See also generally Sorrell*, 564 U.S. 552.

³ The Commission also relies on cases in other circuits in line with *American Meat*, NPRM ¶ 45 (citing *N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294 (1st Cir. 2005)), but even there, (a) each of those cases, like *American Meat*, analyzed the rules at issue as regulations of commercial speech, which the speech regulated here is not, and (b) even cases subsequently decided

Even where the NPRM arguably implicates commercial speech, the legal authority that it relies upon to constitutionally justify the rules is misplaced. For example, the rules as proposed would enable third parties to insert different advertising into or on top of programs, per the DSTAC Report. See AT&T Comments at 89 n.323 (citing DSTAC WG4 Report at 155). See also Comments of Comcast Corp. at 55 n.140 (“the Commission’s proposal would invite device manufacturers to insert their own ads ... over disaggregated content obtained from MVPDs”). Facilitating such modification or deletion of ads denies advertisers the benefits of the bargains they strike with MVPDs and with the programmers they carry, and cannot be justified by offhand reference to *Zauderer*’s allowance of purely factual and uncontroversial disclosures for potentially misleading advertising. See NPRM ¶ 45. In fact, *Zauderer* has no application to such regulation. And while the NPRM also recites the elements of the *Central Hudson* standard, *id.*, the Commission does not undertake the necessary analysis under *Central Hudson*, nor does it demonstrate that it satisfies the requirement that “if [it] could achieve its interests in a manner that does not restrict speech, or that restricts less speech,” it “must do so.” *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2000).

Ultimately, the government is not permitted to invoke the commercial speech doctrine whenever it feels it needs a “more relaxed standard” to justify regulations that affect speech. Nor does *Zauderer* provide carte blanche to allow the government to compel whatever speech it deems necessary to advance any regulatory goal. These principles, rather, have specific applications, and are not relevant to the speech regulation that the proposed set-top box rules represent. The commenters who have addressed this point are correct in insisting that First Amendment standards applicable to non-commercial speech apply, and that the Commission has not attempted to show that the relevant standards have been met.

Sincerely,



Robert Corn-Revere
Counsel for the Association of National Advertisers

in those circuits recognize *Zauderer* does not apply where speech is compelled outside of a commercial transaction. See, e.g., *PSEG v. Town of N. Hempstead*, ___ F.Supp.3d ___, 2016 WL 423635 at *12-*13 (E.D.N.Y. Feb. 3, 2016).