Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

April 22, 2016

In the Matter of	)	
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Expanding Consumers' Video Navigation Choices	)	MB Docket 16-42
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	)	
Commercial Availability of Navigation Devices	)	CS Docket 97-80
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COMMENTS OF THE
ASSOCIATION OF NATIONAL ADVERTISERS

The Association of National Advertisers (ANA), on behalf of its members, hereby files comments in response 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. In particular, ANA comments on the very serious and negative impacts of the proposed rules on advertising practices and on consumers, including expectations regarding marketing, availability and diversity of content, and cost of services. ANA does not believe that the Commission has analyzed sufficiently the NPRM's potential impacts on consumers and advertising interests. ANA therefore urges that the NPRM not be adopted in its current form.

It is clear that the proposed rules have *great* potential to impact the advertising segment of our economy in very significant and undesirable ways. A fair and robust advertising marketplace in the broadcast and cable arena must continue to exist and be fostered, since advertising has such an important role in content creation, programming availability, and cost to consumers for such content. However, ANA believes that the NPRM will jeopardize advertising's many contributions to the economic and other interests of the public. It is not consistent with existing rights and obligations regarding protected material. It interferes with the free expression of views that is a hallmark of our society. In short, the NPRM in its current form will not advance the public interest.

I. Introduction and Summary

Founded in 1910, ANA's membership includes nearly 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.

ANA firmly believes that the Commission should not adopt the NPRM in its present form, as it does not advance the public interest. The NPRM as presently structured would substantially undermine responsible and relevant advertising, injuring Multichannel Video Program Distributors (MVPDs), content creation, and the consuming public.

II. Advertising's Many Benefits

Advertising provides enormous beneficial content and information to consumers in the broadcasting and advertising-supported cable marketplace. Therefore, any action taken by the Commission in this proceeding must be taken extremely carefully.

Advertising is a powerful engine for economic growth and development, providing employment opportunities and job diversity, improving consumers' standard of living through informed decision-making, ensuring the survival of media useful for communications, creating healthy competition among products, and otherwise benefiting the economic development of the nation. An important recent study by the highly regarded IHS Economics and Country Risk group analyzed advertising's economic contributions in the United States on a national, state and regional basis. The study found that in 2014, an estimated $297 billion was spent on advertising; 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. Advertising contributed $3.4 trillion (19%) to the U.S. GDP, supported 20 million U.S. workers, and overall supported $1.9 trillion in salaries and wages in 2014.[1]

Some at the Commission recognize the importance of advertising to the economy. As Commissioner O'Rielly stated at a conference held by ANA last year, "(W)ithout advertising and the benefits it brings, the cost of every product and service in America would be increased

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

substantially. A threat to your industry also means risking significant job loss, innovation and competition in the many business sectors that are only able to survive and/or grow because of advertising revenues."[2]

Advertising has helped to support the development of the broadcasting and cable infrastructures that deliver diverse content, including entertainment, religious, local community news and other information. Since 1996, the cable industry has invested nearly $342 billion in content.[3] Today, more than 660 cable operators in the United States use in excess of 5,200 cable systems[4] to provide the average American consumer with 189 channels.[5] Eighty-three percent of U.S. households subscribe to paid television systems[6] and 93 percent of U.S. households have access to high-speed cable Internet service.[7] Obviously, consumers are enjoying – and demanding – diverse programming and technological innovation from cable and broadcasting systems. All of this is occurring while operating expenses for the cable industry have grown from $9.8 billion in 1990 to $68.3 billion in 2014.[8]

The report of the Commission's own Downloadable Security Technical Advisory Committee (DSTAC) found that advertising produces $25 billion annually for MVPDs and that, without such support, advertising revenues and financial support will migrate to other platforms, causing harm to MVPDs and their subscribers.[9] Industry experts, MVPDs and content providers agree that the Commission's proposal would undermine the advertising-based economics that currently support the creation of high-quality commercial video content, including diverse and independent content providers.[10] Clearly, these contributions are in the public interest. Yet the

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[2] Remarks of Commissioner Michael O'Rielly, Federal Communications Commission, Before the Association of National Advertisers, April 1, 2015, 1, https://www.fcc.gov/document/commissioner-oriellys-remarks-ana.

[3] *Investment in Programming*, National Cable & Telecommunications Association, https://www.ncta.com/industry-data/item/3195

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

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

[6] 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-american-households-still-pay-tv-2081570

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

[8] *America's Cable Industry: Working for Our Future, A Review of Industry Data from the 2015 Bortz Media Report*, National Cable & Telecommunications Association, 2014, 11, https://www.ncta.com/sites/prod/files/Impact-of-Cable-2014-NCTA.pdf ("NCTA Report")

[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] 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.

NPRM demonstrates scant awareness of advertising's many benefits or the need to protect and foster this critical economic foundation of the broadcast and advertising-supported cable infrastructure in its single-focused drive toward making the market for navigation devices competitive. This objective alone assuredly is far too narrow a definition of the appropriate scope of "the public interest" in regard to the MVPD and advertising marketplace.

ANA is perplexed by the NPRM's statement (paragraph 80) 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." Perhaps that is because the Commission makes this assertion based on the CableCARD regime. What the Commission proposes in this NPRM, however, is vastly different from current requirements. It is clear that the proposed rules, if further protective measures are not mandated, will have *great* potential to impact severely and adversely the advertising segment of our economy, e.g., by allowing for the potential use of ad overlays, insertion of additional material, degradation of existing content, and other unacceptable practices.

ANA is not participating in this rulemaking in order to argue for or against the desirability of navigation device proposals. Rather, we are concerned about ensuring that, whatever the technologies utilized, a fair marketplace exists in which advertising interests are protected and where the financial underpinnings for content creation, and competition among content creators, are not undermined. Adoption of the NPRM could lead to draconian effects, with the availability of less content, fewer distributors of programming, higher costs to consumers, and less innovation. These results certainly would not help consumers or be in the public interest.

III. The Commission Must Assess the Effects of Any New Rules on the Advertising Market and Ensure No Disruption to Advertising Agreements and Content

While ANA is just beginning to assess the full extent of the proposed rules' potential impacts, we respectfully caution the Commission against acting peremptorily and prematurely, lest this NPRM lead to significant and hobbling effects on marketing activities. Among the advertising-related issues that ANA has identified thus far meriting special and more careful consideration by the Commission are the following:

- The proposed rules will significantly affect the contractual and other obligations of advertisers and those distributing their advertisements. Today, the privity which exists between these parties ensures both rights and obligations. If content is accessed by a third party with which there is no privity, those rights and obligations would be undermined. In fact, it may well be that any surviving rights and obligations would be unenforceable or, if they were capable of being enforced at all, they might only be enforceable after substantial and unreasonable cost and delay.

Advertisers would be in the position of not knowing who is responsible for the integrity of their ads, since the contractual relationships become substantially more uncertain under the NPRM's proposed regime in regard to MVPD content. It appears that advertisers would have to absorb significantly increased costs just in attempting to monitor where their ads appear, and whether they were the same messaging as they had originally put forth or not. Further, the NPRM would call into question the existing contractual terms that specify, e.g., methods of enforcement, dispute resolution processes, venue and other similar issues. It is small comfort that advertisers might potentially be able to enforce their rights in court, presuming they could track their ads, identify whom they could sue, and the like, as this litigation would be very expensive, highly uncertain, and enormously time-consuming.

The NPRM requires programmers to extract the programming, with its attendant advertising, and then allows third parties to treat it as if it were their own programming. This will occur apparently without any of the protections that are associated with the original programming, and without any express requirements placed on the acquiring entity. The NPRM does not manifest any ability for parties to oversee or control ad placement or monitoring of ad delivery.

Absent the original privity of contract that exists between the programmer and the advertiser, there appears to be no reasonable way to ensure the integrity of the advertising associated with the programming. The ability to enforce the original contract – because the involved parties would be different – would be lost or substantially eroded. The NPRM, in short, threatens to undermine the underpinning of the vastly successful existing advertising MVPD marketplace.

In addressing the Commission's NPRM, Chairman Wheeler asserted at a press conference that there would be a specific prohibition on the insertion of extra advertising; that existing content distribution deals, licensing terms and conditions would remain unchanged; and that the proposed rules would not interfere with the business relationships or content agreements between MVPDs and their content providers or between MVPDs and their customers. He said that, "(Y)ou need to have sanctity of the contract."[11]

That is clearly not the case under the NPRM as it is presently constituted. Because the NPRM permits access to content by a party that is not bound by the original advertising agreement, it appears that an accessing party will be able to alter or manipulate the original advertisement through such actions as inserting additional advertising, using unrestricted overlays, banners or other features. Likewise, the accessing party could block a competing party's ads or otherwise disturb the integrity of the material. Also, the technologies used by the accessing party might make ad blocking or other intrusion into the ad's integrity easier.

The Commission, in the NPRM, however, ignores or dismisses these concerns stating:

> We do not currently have evidence that regulations are needed to address concerns raised by MVPDs and content providers that competitive navigation solutions will disrupt elements of service presentation (such as agreed upon channel lineups and neighborhoods), replace or alter advertising, or improperly manipulate content. We have not seen evidence of any such problems in the CableCARD regime, and based on the current record, do not believe it is necessary for us to propose any rules to address these issues.[12]

These concerns, however, are not merely conjecture or supposition. The dangers are already evident. ANA is aware of instances where promotion and marketing of original programming has been overtaken by the marketing of the acquiring entity. TiVo, for example, has overlaid its own messaging or placed competing advertising messages over the promotional messaging of cable operators. TiVo has made clear that in its view, "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."[13] This view by a recognized device manufacturer and video service provider

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[11] Comments by Chairman Tom Wheeler, Open Meeting Press Conference, February 18, 2016, https://www.fcc.gov/news-events/events/2016/02/february-2016-open-commission-meeting.
[12] In the Matter of Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, MB Docket No. 16-42, CS Docket No. 97-80, at 39-40.
[13] *Letter from Devendra T. Kumar, Counsel for TiVO*, MB Docket No. 15-64, CS Docket No. 97-80 at 1 (filed January 13, 2016).

is merely a harbinger of how numerous third party manufacturers across the globe will handle programming content and advertising under the Commission's proposals.

Under the rules proposed in the NPRM the device marketplace could and likely would be flooded with third party devices manufactured by entities over which the Commission and other U.S. regulatory bodies would have little or no jurisdiction. Those entities would have every incentive to ignore the contractual obligations between content providers and MVPDs and pursue every avenue to monetize their control over the content they would be provided for free pursuant to law. Obviously, content must be passed through without disruption or degradation or the advertising marketplace is likely to be seriously disrupted. It does not appear that the Commission has fulfilled its intentions as expressed by Chairman Wheeler to protect content interests of advertisers or others, and the Commission has not adequately utilized its existing authority – as well as the applicability of other authority – to ensure content integrity.

ANA believes that, in order to protect the public interest and fulfill the requirements of Section 629 of the Communications Act of 1934, the Commission at the least must ensure existing copyright protections and contractual rights and obligations remain in place. The Commission should not take any action that would result in such protections, rights, and obligations being unenforceable or substantially more difficult and unreasonably expensive to enforce.

- In today's advertising marketplace, the entity carrying an advertisement and the advertiser reach compensation agreements based on a variety of factors, including the scope of the audience and specifics related to placement of the advertisement (e.g., channel location, time and place of the ad's appearance, brand protection, and the acceptability of advertising relative to both national and local markets), and security and distribution elements. If third parties can access content via navigation devices as the NPRM proposes, there will be potentially extremely negative effects on these agreements and other advertising-related elements such as valuation, compensation estimates, adjustments for failure to reach the promised audience level, and other contractual terms. Also, because advertisements are extremely time-sensitive, legal remedies that can only be resolved after protracted, time-consuming legal skirmishes may not be adequate.

- In addition, the NPRM undermines the significant investments connected with advertising. For example, NBC reports that it paid $1.18 billion for the U.S. broadcast rights to the 2012 London Games, and $4.38 billion for the 2014-2020 Olympics.[14] CBS and Turner Broadcasting expended $10 billion to broadcast the NCAA Men's Basketball tournament games from 2011 to 2024.[15] NBC's current *Sunday Night Football* package costs the network $950 million each year.[16] Undoubtedly, these kinds of investments will be jeopardized if third parties are able to take content and manipulate it, as the value of programming will diminish dramatically where parties may acquire something of such value at no cost and without having to comply with representations regarding the integrity of the programming and advertising content or its security.

- It also appears that there would be serious effects on remedies available to parties involved in such agreements, as the NPRM's resultant undermining or cancellation of the privity in the original advertising contract renders the current regimen for enforcement far less likely to succeed in a timely and effective manner. The Commission must take steps to help avoid any such highly detrimental effects.

- ANA has concerns about the NPRM's effects on the adequacy of security features included with advertising to preclude its theft. Those distributing programming today use complex systems to ensure content integrity. ANA agrees with the Commission that any regulations must "ensure that Navigation Devices (1) have content protection that protects content from theft, piracy and hacking" (paragraph 71).

  Yet it is far from clear that the NPRM as it stands now succeeds in doing so. Gale Ann Hurd, producer of AMC's "The Walking Dead," for example, has commented that, "if the Federal Communications Commission (FCC) approves Chairman Tom

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[14] Scott Allen, "NBC Paid $1.2 Billion to Broadcast the London Olympics. Where Does that Money Go?," *Mental Floss*, July 30, 2012, http://mentalfloss.com/article/31347/nbc-paid-12-billion-broadcast-london-olympics-where-does-money-go.
[15] "CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement," NCAA Press Release, January 12, 2011, http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement.
[16] Joe Flint, "NFL Signs TV Rights Deals with Fox, NBC and CBS," *Los Angeles Times*, December 15, 2011, http://articles.latimes.com/2011/dec/15/business/la-fi-ct-nfl-deals-20111215.

Wheeler's regulatory proposal to 'open' set-top boxes, it will make piracy as easy and dangerous in the living room as it is on laptop and mobile devices."[17] The Commission must mandate that any accessing party equal or exceed existing security features, or the door could be opened to programming piracy where content becomes available to parties that have not paid for it, and advertising interests will be forced to forego just compensation for their efforts. This detrimental result would undermine both the compensation for content as well as the desirability of producing such content, because of the significant risk that those doing so will not be compensated appropriately.

- Advertising today supports access by consumers to incredibly diverse and reasonably-priced content. In 2014, the gross payments made by advertisers to cable programming networks totaled $30.1 billion; this amount does not include local advertising gross revenues generated by cable system operators, which are estimated to be $5.4 billion in 2014.[18]

The Commission proposes to inject competition into the navigation device marketplace, which is arguably a desirable outcome and could benefit consumers. The Commission, however, appears to ignore the other costs and disadvantages of its proposal. For example, the Commission dismisses possible effects on consumers' demand for diverse programming and other services. Because the NPRM would undermine the value and income of advertising, which is a large component of the subsidy for content, the proposed rules would also raise consumers' costs and reduce their ability to access information. The Commission must not, while purporting to advance consumer rights and benefits by requiring competition among navigation devices, simultaneously impose higher burdens that diminish consumers' choices or have other effects that are not in consumers' interests. [19]

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[17] Gale Ann Hurd, "Stop Piracy Apocalypse: 'Walking Dead' Producer," *USA Today*, April 12, 2016, http://www.usatoday.com/story/opinion/2016/04/12/fcc-set-top-box-proposal-cable-internet-piracy-walking-dead-zombies-gale-hurd-column/82919704/.

[18] NCTA Report at 12.

[19] "Opposition to FCC Chairman Wheeler's Set-Top Box Plan Grows: 14 Latino Organizations Join the Future of TV Coalition," Future of TV Coalition Press Release, February 4, 2016, http://futureoftv.com/news-item/opposition-to-fcc-chairman-wheelers-set-top-box-plan-grows-14-latino-organizations-join-the-future-of-tv-coalition/

- Advertising plays an important role in informing and educating consumers, in providing information to the body politic, and many other worthwhile endeavors. These activities further the public interest. The Commission must carefully consider any impacts of the proposed rules on the public's right to obtain information. Similarly, consumers have expectations, ensured by statutory and regulatory requirements, as to the standards for content, including the appropriateness of material and their ability to avoid confusion through deceptive and unfair marketing. The Commission must not disturb expectations or laws and regulations that ensure consumers are not misled, that they are not confused, and that they do not have other negative experiences with advertising.

In short, the NPRM raises these and many other significant issues that affect advertising interests, the rights and opportunities of both consumers and marketers involved in programming, and existing law and marketing practices. It is clear that the Commission must dedicate additional time and effort to analyze the NPRM's effects on advertising and aggressively solicit information as to such effects. ANA does not suggest that all current technologies, methods of marketing and marketing arrangements must remain static. To the contrary, the public interest is served by evolving technologies, innovation, and creativity in marketing and promotion. But the Commission should take no action until it fully has investigated and understands the NPRM's likely effects – both intended and unintended. As noted above, all actions of the Commission must advance the public interest. Merely establishing a competitive marketplace for navigation devices without avoiding or by causing the NPRM's other negative consequences is clearly too narrow a definition to meet the FCC's public interest obligation.

IV. Conclusion

For the foregoing reasons, ANA respectfully requests that the Commission refrain from approving the NPRM in its current form. It will not advance the public interest. It will, however, jeopardize the significant contributions made by advertising to the economic and other interests of the public. It is not consistent with existing rights and obligations regarding protected material. It interferes with the free expression of views that is a hallmark of our society. We urge the Commission not to take any action that could have the unintended effect of chilling television and ad-supported cable, jeopardizing contractual rights and obligations that thereby are highly likely to undermine the content marketplace. The Commission must engage in a thoughtful, deliberate and thorough evaluation of the potential impacts of the proposed rules, something that the limited time provided for the initial comment period does not permit either for the Commission or interested parties.

These rules should not be adopted as proposed.

Respectfully Submitted,

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