

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**Comments of
Communications Workers of America**

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The Communications Workers of America (“CWA”) respectfully submits these comments in response to the Commission’s *Video Navigation Devices* Notice of Proposed Rulemaking (“NPRM”).¹ CWA represents 700,000 workers in private and public sector employment. CWA members work in telecommunications and information technology, news media, broadcast and cable television, the airline industry, education, health care and public service, law enforcement, manufacturing and other fields. CWA members as consumers and as workers have a deep interest in this proceeding.

In this proceeding, the Commission proposes rules to implement the mandate of Section 629 of the Communications Act “to assure the commercial availability” of competitive navigation devices for multi-channel video programming and services.² These navigation devices, sometimes referred to as “set-top boxes,” are the electronic devices or software applications that connect the signals from a cable, satellite, or IPTV multi-channel video program distributor (“MVPD” or “pay-TV provider”) to one’s television set.

CWA certainly supports policies that promote consumer choice and competition in the market for video programming by facilitating consumer access to web-based video streaming. CWA has long recognized the multiple consumer and worker benefits that accrue from web-based video streaming: consumers are able to access and pay for the programming they want, unmediated by pay-TV companies’ bundles; creative artists and program producers are able to reach audiences directly with diverse and quality TV shows; and communications workers

¹ *In the Matter of Expanding Consumers’ Video Navigation Choices et al*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, MB Docket No. 16-41, CS Docket, Feb. 18, 2016 (“NPRM”).

² 47 U.S Code §549.

benefit as network companies' video revenue streams strengthen the business case for job-creating investment in higher-speed broadband networks. Certainly, the development of navigation devices and software applications that integrate pay-TV and web-based video streaming will foster the growth of a healthy, competitive video marketplace that benefits consumers and workers in the media and communications sectors.

The Commission undertakes this rulemaking at a time of explosive growth in web-based video streaming. As Chairman Wheeler recently pointed out, "American consumers enjoy unprecedented choice in how they view entertainment, news and sports programming."³ People can subscribe to a multitude of web-based streaming services like Netflix, Hulu, Amazon Video, Sling TV and Sony Vue, as well as new streaming apps from individual programmers such as HBO Now, CBS All Access, and MLB Gameday. People can also purchase a wide variety of connected devices including retail boxes like Roku, Apple TV, and Google Chromecast. Pay-TV providers have negotiated agreements with electronic device manufacturers to provide access to their programming over a single, integrated device.⁴ These are all positive developments that indicate that the market is already providing alternatives to cable companies' set-top boxes.

Despite these market-based developments, the Commission now proposes a complex set of rules that would require MVPDs to make their programs and video guides available for free to some of the wealthiest companies on the planet, such as Google. On its face, this appears to go well beyond Section 629's mandate to "to assure commercial availability" of non-affiliated

³ Tom Wheeler, "It's Time to Unlock the Set-Top Box Market," Re/code, Jan. 27, 2016. (available at <http://recode.net/2016/01/27/its-time-to-unlock-the-set-top-box-market/>).

⁴ See "Comcast Launches Xfinity TV Partner Program; Samsung First TV partner to Join," April 20, 2016.

navigation devices. The Commission’s proposal would allow third parties to repackage and rebrand video content that they have not paid for to sell advertising and to monetize consumer viewing data. Moreover, the Commission’s proposed rules would open the door to violations of consumers’ privacy rights, abuse of programmers’ copyright protections, and infringement of carefully negotiated licensing agreements between programming networks and multi-channel video programming distributors. “It’s not hard to understand why tech giants like Google are lobbying for this rule,” a consortium of 18 independent programmers explained. “Right now, if they want to incorporate our programming into YouTube or other video products, they must negotiate the rights and pay fair market licensing fees. If this rule passes, Google will instead be able to strip-mine our creative work for free, while collecting valuable data on users’ viewing history and monetizing it through ads.”⁵

The Commission’s proposed rules threaten the core protections for content creators that are at the heart of the video ecosystem. The NPRM’s scheme has no protections that prevent navigation suppliers from violating the statutory copyrights of programmers. For instance, those third parties could move the content out of the channel “neighborhood” for which the programmer has negotiated or could remove the advertising that defrays programmers’ and MVPD’s costs.⁶ Additionally, the NPRM’s lax approach to piracy protections undermines the value of these

⁵ See Letter from Roger M. Bobb et al. (“18 Independent Programmers Letter”) to Sen. John Thune, Chairman and Sen. Bill Nelson, Ranking Member, Senate Committee on Commerce, Science, & Transportation and Rep. Fred Upton, Chairman and Rep. Frank Pallone, Ranking Member, House Energy & Commerce Committee, Feb. 17, 2016 at 2. (“The set-top box proposal...would fundamentally undermine this level playing field, stacking the deck against creators by giving tech companies a license to repackage and profit from our work without any need to negotiate, much less pay for the rights...[D]evice manufacturers will be free to ignore the hard-fought terms of licensing contracts we have negotiated with TV distributors to govern channel placement, advertising restrictions, digital rights and much else.”)

⁶ See Steven S. Wildman, “The Scary Economics of the NPRM’s Navigation Device Rules,” pp. 24-25.

parties' copyrights. All of these factors dilute the value of existing copyrights, which means that programmers would either have to seek higher payments from MVPDs to show their content or have fewer resources to devote to the development of quality programming, and in particular independent and minority programming, and to support the writers, producers, and others who create and support the service.⁷

Equally troubling, navigation device suppliers are not subject to the statutory privacy obligations that Congress has appropriately mandated on cable and satellite companies. Sections 551 (cable) and 338 (satellite) of the Communications Act prohibit cable and satellite video providers from collecting and disclosing "personally identifiable information" regarding "the extent of any viewing or other use by the subscriber" and other transaction information without prior consent from the subscriber. The Commission has authority to enforce these statutory provisions; in addition, Congress provides individuals the right to bring a civil action in federal court for any violation of these privacy protections.⁸ But these provisions do not apply to tech companies or navigation devices suppliers, allowing these third parties to data-mine consumer viewing habits and other personal information without getting permission from the consumer and without paying for the video content that gives them access to this consumer data.

While the Commission attempts to plug this serious hole in its proposal with a complicated licensing scheme numerous parties, have sounded the alarm.⁹ In a letter to Chairman Wheeler,

⁷ See, for example, Multicultural Media, Telecom, and Internet Council Letter to FCC Chairman Tom Wheeler, Feb. 11, 2016 at 3. ("In our view, diverse and independent programmers and content creators would experience negative impacts on channel placement, advertising scheduling and other critical elements that have increased the visibility and profiles of these networks in a crowded video marketplace.")

⁸ 47 U.S Code § 338(i) (satellite) and 47 U.S Code §551 (cable).

⁹ NPRM at ¶¶ 70-78.

Larry Strickling, the Administration’s principal telecom advisor, expressed his concerns: “This approach leaves important questions to be addressed – most importantly, who will ensure compliance with certification and through what legal authority.”¹⁰ Indeed: who will certify compliance with licensing provisions? Who will enforce the provisions? Will consumers have a private right of action in the case of violations?¹¹

Finally, the Commission’s proposal appears to upend the video market economic system, allowing tech giants such as Google to free-load off the value and audiences that video distributors, networks, and programmers have jointly created. The loss to video distributors’ and networks’ ad revenue streams will be twofold and significant. First, there is nothing to stop Google or others from swapping their own advertising (either commercials or wrap-around ads) for the ads sold by networks and video distributors. Second, by combining consumers’ viewing data with its own analytics and powerful algorithms, Google will be able to increase the value it can deliver to advertisers. Reduced ad revenue means fewer resources to invest in quality programming, the network, and the workers who create and produce content and who build, maintain, and service the network.¹²

¹⁰ Letter from Larry E. Strickling, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to FCC Chairman Tom Wheeler, RE: Expanding Consumers’ Video navigation Choices, MB Docket No. 16-42, April 14, 2006, at 5.

¹¹ Brian Fung, “Washington wants your cable company to become a whole new privacy cop,” *Washington Post*, Feb. 19, 2016 (available at <https://www.washingtonpost.com/news/the-switch/wp/2016/02/19/washington-wants-your-cable-company-to-become-a-whole-new-privacy-cop/>)

¹² See Letter from Larry Strickling to Chairman Tom Wheeler, April 14, 2016 at 4-5 (“[I]f competing navigation device providers were permitted to disregard the programming choices made by MVPDs or the agreements between MVPDs and programmers – such as by removing or replacing advertising – the ability of programmers to recover their costs might be weakened, which could ultimately have a deleterious effect on the programming supply market, including that for specialized and minority programming.”)

We have seen the results of this kind of disruption in the news media markets, where the old economic model that supported quality newsgathering has been destroyed, with no mechanism to replace it. The result is a decline in the quality and coverage of local news and investigative journalism, while the search, reuse, and repackaging companies have soared in financial value. As independent programmers explained to the Commission, web-based video streaming does not generate the ad revenue necessary to support quality video production.¹³ We should not replicate this dynamic in the video marketplace by permitting competition to destroy an existing economic model without creating incentives for producers to create more content and expand networks and network speeds. The results of this kind of one-sided focus on the consumer market without equal concern for the production side of the economic equation has led to a crisis of news production that undermines the quality and diversity of a free press that is essential to our democracy. The Commission would be well served to consider this history in this proceeding and must ensure that rules designed to promote competition in video navigation devices do not simply result in a shift of revenue and value from those who produce content and build the physical distribution network to innovators in re-packaging that content for targeted online advertising purposes.

In summary, the Commission's "Competitive Video Navigation Device" proposal raises many troubling issues and concerns, which left unaddressed, would result in considerable harm to consumers and workers in the media and communications sectors. As the Commission moves forward in this proceeding, it must ensure that final rules establish a level playing field with

¹³ See 18 Independent Programmers Letter, Feb. 17, 2016 at 2 ("The challenge facing web-only content producers today isn't accessibility – the challenge is revenue. Without the stable revenue stream afforded by negotiated carriage deals with TV distributors, web-only channels will struggle to ever afford the production budgets necessary to create

strong consumer and copyright protections; strong and clear Commission enforcement authority applicable to all providers of navigation devices; and a video ecosystem that blocks free riders and supports quality, independent, and minority programming. CWA articulates the following seven principles as the foundation for this rulemaking:

1. Require all providers of navigation devices to abide by the licensing and carriage agreements negotiated between content owners and multi-channel video distributors.
2. Prohibit all providers of navigation devices from altering, adding to, or interfering with the programming provided by content providers.
3. Require strong copyright protection of all video programming, proprietary information, and terms negotiated in licensing and carriage agreements.
4. Strengthen opportunity for the production of quality, independent, and minority programming.
5. Protect the privacy of consumer information by ensuring that strong privacy protections and enforcement mechanisms are applicable to all providers of navigation devices.
6. Ensure that all providers of navigation devices provide fair compensation to content creators so that fees and advertising revenue flow back to rights holders and into the royalty- pension- and benefit plans of the film and television workforce.
7. Ensure that the rules will lead to the expansion of high-speed broadband networks to all consumers.

Respectfully Submitted,



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the quality programs our audiences expect and deserve.”)