

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, THE
NATIONAL MUSIC PUBLISHERS ASSOCIATION, AMERICAN ASSOCIATION OF
INDEPENDENT MUSIC, AMERICAN FEDERATION OF MUSICIANS, SCREEN
ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO
ARTISTS, AND SOUNDEXCHANGE, INC.**

The Recording Industry Association of America, Inc. (“RIAA”), the National Music Publishers Association (“NMPA”), the American Association of Independent Music (“A2IM”), American Federation of Musicians (“AFM”), the Screen Actors Guild – American Federation of Television and Radio Artists (“SAG-AFTRA”), and SoundExchange, Inc. (“SoundExchange”) (collectively “the Music Community Parties”) hereby respectfully submit these comments in response to the Commission’s February 18, 2016 Notice of Proposed Rulemaking in the above-captioned proceeding (“*Navigation Device NPRM*”).¹

RIAA is a trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members invest in great artists to help them reach their potential and connect to their fans. They are some of the most vibrant and innovative music labels in the world and create, manufacture, and/or distribute nearly 85% of the legitimate recorded music produced and sold in the United States.

¹ Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices, Proposed Rule, 81 Fed. Reg. 14,033 (Mar. 16, 2016).

Founded in 1917, NMPA is the largest music publishing trade association in the United States and the voice of music publishers and their songwriter partners. Its mission is to protect, promote, and advance the interests of music's creators on the legislative, judicial, and regulatory fronts.

A2IM is a 501(c)(6) not-for-profit trade organization headquartered in New York City representing a broad coalition of 391 independently owned American music labels. The organization represents these independently owned small and medium-sized enterprises' interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community. In doing so it supports a key segment of America's creative class that represents America's diverse musical cultural heritage. Billboard Magazine, using Nielsen SoundScan data, identified the Independent music label sector as 34.4 percent of the music industry's U.S. recorded music sales market in 2015 based on copyright ownership, making Independent labels collectively the largest music industry segment.

AFM is the largest organization in the world representing the interests of professional musicians. Whether negotiating fair agreements, protecting ownership of recorded music, securing benefits such as health care and pension, or lobbying our legislators, the AFM is committed to raising industry standards and placing the professional musician in the foreground of the cultural landscape.

SAG-AFTRA represents more than 160,000 actors, announcers, broadcast journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists, and other media professionals. SAG-AFTRA members are the faces and voices that entertain and inform America and the world. With national offices in

Los Angeles and New York, and local offices nationwide, SAG-AFTRA members work together to secure the strongest protections for media artists into the 21st century and beyond.

SoundExchange is the independent non-profit collective management organization representing the entire recorded music industry. The organization collects statutory royalties on behalf of over 110,000 recording artists and master rights owners accounts for the use of their content on satellite radio, Internet radio, cable TV music channels and other services that perform sound recordings over non-interactive digital music services. The Copyright Royalty Board, created by Congress, has entrusted SoundExchange as the sole entity in the United States to collect and distribute statutory digital performance royalties from more than 2,500 services. Since 2003, SoundExchange has paid out over \$3 billion in royalties.

INTRODUCTION AND SUMMARY

The Music Community Parties support generally the Commission's goal of achieving greater innovation through increased competition. The music community has itself worked hard to license and enable a broad array of innovative music services for consumers. Today, our members' music is licensed to thousands of services worldwide, including countless online and satellite radio stations.² The music community's recent efforts to respond to consumer demand

² Today, consumers have access to music not only via multichannel video programming distributors, but also via satellite and online radio; on-demand subscription and advertising based audio streaming services; on-demand subscription and advertising based video services; physical purchases and digital downloads; higher resolution music downloads for greater fidelity; lyric sites that enable music lovers to access lyrics easily; and apps like Flipagram that enable consumers to create photo and video stories set to music. Consumers can interact with licensed music on their TVs (MVPD or apps) or tablets, smart phones and other internet enabled devices (downloads, streams, and other apps), as well via their cars. See www.whymusicmatters.com/find-music for a variety of other licensed music services available in the United States, and www.pro-music.org/legal-music-services.php for a worldwide listing.

have resulted in streaming representing the largest and fastest-growing source of revenue for the music industry, constituting 34.3% of the U.S. market at \$2.4 billion.³

The delivery of music and music videos via multichannel video programming distributors (“MVPDs”) is an important part of the music market today. Licensed streaming over MVPD services reaches tens of millions of American homes, and has, at least thus far, remained a relatively secure space largely free from the content theft that has plagued the distribution and exploitation of music online. The music community has an interest in preserving protections for copyrighted content (such as sound recordings and music videos) transmitted over MVPD services, and in ensuring the continued viability of authorized, licensed services in this space.

The Music Community Parties are concerned that the Commission’s proposal could undermine the stable music MVPD market by permitting third-party set top box providers to monetize and control the way consumers access music without any say, let alone permission, from those who create that music. The Commission’s proposal could create an unfair competitive landscape by permitting some device and software developers to use music without abiding by the licensing conditions surrounding it, providing a windfall for third parties and undermining the protections for music owners that exist in the MVPD space today. The result would be to frustrate the incentives to create and disseminate copyrighted content via MVPD services and stifle innovation in business models that allow consumers access to music.

The Commission’s proposal to require MVPDs to communicate an “entitlements” information flow to third-party navigation devices appears inadequate to ensure that those who develop those devices and related applications honor relevant licensing terms and conditions, and

³ Joshua P. Friedlander, RIAA, *News and Notes on 2015 RIAA Shipment and Revenue Statistics* (Mar. 22, 2016), <https://www.riaa.com/wp-content/uploads/2016/03/RIAA-2015-Year-End-shipments-memo.pdf>.

leaves the underlying content owners without the protections that statutory licenses, privity relationships, and contractual and statutory enforcement mechanisms provide today. None of this can be in the public interest. For these reasons, the Music Community Parties urge the Commission to reconsider its proposed approach in the *Navigation Device NPRM*.

I. THE MUSIC INDUSTRY HAS A VITAL INTEREST IN THE VIDEO NAVIGATION DEVICE PROCEEDING

Licensed music services delivered over MVPD providers, such as Music Choice and Muzak, have been a stable and important part of the music market. Virtually all cable providers, as well as Dish Network and DIRECTV, offer streaming music channels to their customers, with newer streaming options expanding into the MVPD market alongside more established services. MVPDs also carry numerous channels, including MTV, Fuse, Revolt, BET, Bounce TV, and Great American Country, that utilize music video content licensed directly from record companies. Other services deliver on-demand music videos over MVPD services as well,⁴ and MVPD distribution offers a convenient channel by which new services can bring licensed, legitimate recorded music and music videos directly to consumers' television screens and home entertainment systems in the future.

For this reason, the Music Community Parties have an important stake in ensuring that the Commission's navigation device rules preserve a marketplace that allows such services to flourish in a manner that protects the rights of content owners and provides a fair, level playing field for all.

⁴ In addition to MVPD-delivered music services, "smart" TVs also often allow consumers to access Internet-delivered music services, such as Vevo, Spotify, Pandora and YouTube.

II. TODAY’S MVPD MARKETPLACE PROVIDES IMPORTANT PROTECTIONS FOR COPYRIGHT OWNERS

Today, a visible and manageable chain of privity governing relationships among music content owners and service providers⁵ has helped advance delivery of music in the MVPD space. Music and music videos made available through MVPD-delivered music services today are frequently accompanied by usage terms and conditions—arising both out of copyright law and out of the business models of services authorized to transmit music and music videos to customers—which are, in turn, safeguarded by contractual and statutory relationships between music services and MVPDs. For example, Congress has created a statutory licensing scheme, through Sections 112(e) and 114 of the Copyright Act, by which music services can obtain licenses to recorded music in order to offer audio-only programming to residential televisions through cable or satellite providers.⁶ Music Choice and Sirius XM, for instance, which each offer dozens of streaming music channels via MVPD services, do so primarily through this statutory licensing scheme. However, this congressional grant of a statutory license to MVPD-based music streaming providers comes with statutory conditions on how the music can be delivered and used. These conditions include requiring that the service be non-interactive, that receiving devices not switch channels automatically, that the service not be offered with an advance program guide or schedule listing the sound recordings that will be streamed, and (for some services) that the transmitting entity work to prevent users from scanning channels to select

⁵ The participants in the this market are also known and identifiable, consisting of MVPDs themselves, as well as any third-party navigation device and application developers with whom MVPDs enter into licensing/authorization agreements, making it feasible for music service providers (and the content owners from whom they receive licenses) to review their operations and confirm that relevant licensing requirements are being honored.

⁶ 17 U.S.C. §§ 112(e), 114(d)(2), and 114(f).

particular recordings and to limit users' ability to make copies of sound recordings.⁷ Likewise, MVPD-delivered music services that operate pursuant to direct licensing relationships with the copyright owners, such as those offering on-demand access to recorded music or music videos, can offer functionalities permitted by the terms and conditions of the applicable contracts. Business and licensing rules governing the manner in which music services make use of copyrighted music help preserve distinctions among market segments, allowing for more diverse options for consumers.

Today, MVPD-delivered music services obtain the rights to use music and then in turn authorize MVPD service providers to deliver it to their customers. MVPDs, who ultimately deliver content to users, either through their own navigation devices or licensed third party navigation devices, are connected through a chain of privity to the music services, who are in turn subject to licensing commitments, either by operation of law or through contractual arrangements, with the copyright owners. This chain of privity ensures that each party in the chain has both the incentive and the means to honor licensing terms: were an MVPD ever to make unauthorized use of music delivered over its service (such as by providing or licensing navigation devices with the ability to offer an interactive service experience by converting music streams into an "on-demand" offering without securing the appropriate licenses), the music owner could resort to contractual remedies until the MVPD respects the licensing terms or the parties reach an alternate arrangement.

⁷ See *id.* at § 114(d)(2)(A), (B)(ii) & (C)(ii), (v), (vi).

III. THE COMMISSION’S PROPOSAL WOULD FRUSTRATE THE ABILITY OF CONTENT OWNERS TO ENSURE COMPLIANCE WITH LICENSES FOR MUSIC

The Commission’s proposal could extend some of the worst aspects of the online environment⁸—which have done and continue to cause incalculable damage to the music community—to the relatively secure environment of MVPD programming in the home. 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. As the proliferation of software and services facilitating the infringement of copyrighted music on the Internet demonstrates, there are any number of ways in which navigation devices and applications could be designed to make use of copyrighted music or music videos in an infringing manner inconsistent with either the rights of the content owner and/or the licensing terms and conditions by which the service provider must abide. For example, third-party navigation device and application developers could design their devices or applications to:

- include functionality that enables the creation of manual or automated permanent copies of recordings authorized only for streaming;
- disaggregate music programming into individual tracks to allow users to create custom playlists;
- turn non-interactive programming into interactive programming;
- comingle recordings from authorized, licensed channels with recordings from unauthorized sources;

⁸ These include the rampant content theft—and lack of meaningful, effective remedies to address that theft—that occur in the online environment. For more information, see the October 16, 2015 submission by members of the music community regarding the Development of the Joint Strategic Plan on Intellectual Property Enforcement, in response to Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments, 80 Fed. Reg. 52,800 (Sept. 1, 2015).

- search for unauthorized content online alongside licensed programming; and
- monetize music without paying those who invested thousands of hours and millions of dollars to create.

As stated above, these types of features and results, designed to circumvent contractual and statutory terms and conditions, have not proliferated in the current MVPD environment. The *Navigation Device NPRM*, however, could upend this balance. In particular, the mechanisms the *NPRM* proposes for ensuring that third-party navigation devices comply with content usage terms and conditions—a requirement that MVPDs communicate an “Entitlements Data” information flow to navigation devices,⁹ paired with a limitation that MVPDs need only “validate only Navigation Devices that are sufficiently robust to protect content and honor the Entitlement Data that the MVPD sends to the Navigation Device”¹⁰—are weak, susceptible to abuse, and thus insufficiently robust. Specifically:

- Content owners and licensed music services will be significantly handicapped in their ability to ensure compliance with licensing terms because, under the proposal in the *NPRM*, they would not be involved in, and have at best limited visibility into, the “Entitlements Data” information flow;
- The proposal does not provide content owners, music service providers, or MVPDs any effective means for ensuring that a navigation device operator or developer (much less software developers whose applications run on third-party navigation devices) actually honors the licensing terms, nor does it provide any realistic penalties in the event of non-compliance;¹¹ and

⁹ *Navigation Device NPRM*, ¶ 39.

¹⁰ *Navigation Device NPRM*, ¶ 71.

¹¹ Indeed, it appears from the *Navigation Device NPRM* that the only instance in which the operator of a noncompliant device or application would face an adverse consequence would be if an MVPD decided to rescind its validation and discontinue providing it with information flows—something MVPDs would have little incentive to do given the risk of customer dissatisfaction. This creates further disincentives for navigation device operators to remain faithful to the applicable terms.

- The proposal that licensing terms be limited to a standardized “Entitlements Data” information flow may prove insufficient to describe the full range of licensing terms presently used in the marketplace, and would constrain future innovation.¹²

In sum, this proposal is likely to result in significantly reduced protections for music delivered via MVPD services, and hinder, rather than promote, a healthy, innovative MVPD-based music ecosystem. Legitimate music-focused services that deliver content over MVPDs, and the copyright owners who license them, would confront a proliferation of navigation devices and applications over which services can be accessed, with few meaningful mechanisms for monitoring whether those devices or applications respect contractual or statutory terms and conditions on content use, and no ability to resort to contractual or statutory remedies, or to withdraw their content streams, when developers fail to respect those limitations. This creates an environment ripe for abuse by operators who take an unduly aggressive view of the law while still seeking to operate within it and by those who willfully infringe for pecuniary benefit.

CONCLUSION

Competition and innovation are the cornerstones of a successful marketplace. In attempting to advance those goals, the Commission could create an unfair competitive landscape that grants third parties free use of music without permission. These third parties could monetize music without paying creators, provide access to music inconsistent with contractual or statutory terms and conditions, and introduce content theft into the MVPD market. The Music

¹² For instance, although it may be possible to encode a simple “no copying” rule into an “Entitlements Data” information flow, other requirements that limit the use of copyrighted music today—such as the statutory prohibition against the use of sound recordings licensed under Section 114 of the Copyright Act as part of an “interactive service” (*e.g.*, preventing third-party devices or applications from presenting them to users via an on-demand format)—are much more complex. Moreover, even beyond the types of usage terms that exist with respect to today’s music services, confining the business rules that can be effectively communicated to third-party navigation devices and applications to a set of predetermined, standardized requirements would tie the hands of future innovators and prevent the development of future business models.

Community Parties therefore urge the Commission to reconsider its proposal so as to address these unintended consequences.

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Respectfully submitted,

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