

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

In the Matter of

Expanding Consumers' Video Navigation
Choices

Commercial Availability of Navigation
Devices

MB Docket No. 16-42

CS Docket No. 97-80

COMMENTS OF GRACENOTE

Eddie Lazarus
Lisa Washburn
Sal Karottki
TRIBUNE MEDIA SERVICES, LLC
d/b/a GRACENOTE
435 N. Michigan Ave. Suite 915
Chicago, IL 60611
518-792-9914

Scott Blake Harris
Michael Nilsson
Adrienne E. Fowler
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W.
The Eighth Floor
Washington, DC 20036
(202) 730-1300
Counsel for Gracernote

April 22, 2016

SUMMARY

Gracenote takes no position on the overall advisability or legality of the Commission's set-top box proposal. It writes to express its concerns with respect to a single aspect of the proposal—the requirement that multichannel video programming distributors (“MVPDs”) pass through a proprietary ID number offered by one of Gracenote's competitors. Any such requirement would be both unnecessary and unwise.

Gracenote is a leading entertainment data and technology company. Among other products and services, Gracenote creates, publishes, and licenses programming “metadata”—including detailed content and information about television shows, movies, programming schedules, and related subjects. Gracenote licenses its services to video providers of all kinds, including MVPDs, online video providers, digital media outlets, and device manufacturers. Gracenote's customers, in turn, use this metadata to create electronic programming guides. Gracenote competes with Rovi, Ericsson, and others in a market that is robust both in the United States and globally. In order to do so, Gracenote offers its services at reasonable and nondiscriminatory prices to anyone who wishes to purchase them.

Since programming metadata, including the proprietary ID number at issue here, is readily available for purchase by anyone, Commission action in this area is unnecessary. The Commission seeks to promote competition for set-top boxes. And it is concerned that MVPDs have an incentive to hinder such competition by withholding their programming from third parties. Such concerns, however, simply do not apply to metadata. Gracenote and its competitors already sell metadata to third parties, and would be delighted to continue doing so. Indeed, MVPDs and third parties alike have built an astounding variety of innovative user

interfaces and electronic programming guides using the services offered by Gracenote and its competitors, and there is absolutely no reason to think this will not continue.

The Commission's specific proposal—to require MVPDs to provide third parties with a proprietary and non-universal program ID number belonging to one of Gracenote's competitors—simply will not work. MVPDs other than the clients of that competitor would have nothing to pass through. And it should be unthinkable (and would surely be unlawful) for the Commission to *require* MVPDs to subscribe to one competitor in the market in order to “universalize” metadata ID numbers.

More broadly, the Commission need not—and should not—require MVPDs to pass through *any* of the ID numbers that they receive from the competing providers of programming metadata. In addition to being unneeded, such a requirement would violate Gracenote's (and probably its competitors') contractual and intellectual property rights—even though the Commission has repeatedly said that this proceeding would protect IP rights. Finally, any requirement to pass through ID numbers would hinder the functionality of the very devices the Commission seeks to protect.

TABLE OF CONTENTS

I. Gracenote Provides a Service Essential to MVPDs, Competitive Device Manufacturers, and Online Providers Alike.....	2
II. No Problem Exists for which Intervention in the Metadata Market Would Be Appropriate..	5
III. The Commission’s ID Pass-Through Proposal Will Not Work.....	6
IV. The Commission Should Not Require Pass-Through of Any ID.....	9
A. Requiring Pass-Through of ID Numbers Would Mandate the Violation of Gracenote’s Intellectual Property, Contractual, Trade Secret, and Constitutional Rights.....	10
B. Requiring Pass-Through of ID Numbers Would Harm Consumers.....	15
Conclusion	16

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 GRACENOTE

Tribune Media Services, LLC, doing business as Gracenote (“Gracenote”)¹ writes to express its concerns with respect to one aspect of the Commission’s set-top box proposal—the requirement for multichannel video programming distributors (“MVPDs”) to provide third parties with a proprietary ID number offered by one of Gracenote’s competitors.²

- Because the market for “metadata”—including detailed content and information about television shows, movies, programming schedules, and related subjects—is highly competitive, the Commission need not act at all in this area to achieve its stated aims.
- The Commission’s proposal to pass through the EIDR ID will not work and has the potential to wreck the robustly competitive metadata market.
- Any broader proposal to require pass-through of *all* ID numbers (irrespective of source) would violate the contractual and intellectual property rights of Gracenote and its competitors. It would also risk harming the very devices the Commission seeks to protect, because any use of Gracenote’s *numbers* divorced from the rest of its *service* will likely cause devices to not function properly.

¹ Tribune Media Services, LLC was formerly known as Tribune Media Services, Inc.

² *Expanding Consumers' Video Navigation Choices*, FCC 16-18, MB Docket No. 16-42, CS Docket No. 97-80 (rel. Feb. 18, 2016) (“Notice”).

I. GRACENOTE PROVIDES A SERVICE ESSENTIAL TO MVPDS, COMPETITIVE DEVICE MANUFACTURERS, AND ONLINE PROVIDERS ALIKE.

The Commission’s proposal may reflect an incomplete understanding of the complicated ecosystem of programming metadata, and of what providers like Gracenote do. As discussed below, the marketplace for programming metadata is robust and competitive. Gracenote provides metadata in competition with multiple providers (including Rovi and Ericsson). Each of these providers offers its own, proprietary metadata service, none of which interoperate with one another. Gracenote, Rovi, Ericsson, and other providers, however, offer their services to all comers—including third-party set-top box manufacturers—at reasonable and nondiscriminatory prices.

Gracenote creates, edits, manages, publishes, and licenses proprietary—and copyright protected—databases composed of television, motion picture, and celebrity information, as well as other related content. Gracenote invests heavily in, and provides its services to thousands of companies that serve millions of consumers. As described to the Commission in an earlier iteration of this proceeding,³ Gracenote has been creating, editing, managing, and licensing its entertainment content and information for over 40 years. Gracenote’s proprietary, copyrighted, and trade-secret protected database contains many millions of records, covering more than four decades of television and movies—and, of course, this database expands daily. Gracenote employs more than 300 editors dedicated to sourcing, aggregating, researching, creating, and editing content from over 20,000 sources. Its editors are highly trained and experienced. Gracenote also employs rigorous standards to ensure the accurate and timely creation of its metadata—which, in turn, it provides to distributors serving 250 million households worldwide.

³ Reply Comments of Tribune Media Services, Inc., Debtor-in-Possession, MB Docket No. 10-91 *et al.* (filed Aug. 12, 2010) (“TMS AllVid Reply Comments”).

Gracenote's service is incredibly useful to MVPDs, online distributors, and third-party set-top box manufacturers alike. To take one example, an MVPD owning multiple cable systems acquires the rights to transmit hundreds of channels from dozens of programmers. These channels, in turn, have tens of thousands of individual shows—each of which, in turn, has a producer, a director, numerous actors, and so on. If the MVPD wants to offer its subscribers basic service—much less the kind of advanced user interface it increasingly needs to compete—it must do a variety of things:

- First, it must know what program every channel it carries is showing, and when it is showing it.
- Second, in addition to identifying each such program, it must create descriptions of every program (and every *version* of these programs) on every channel. It must update these descriptions and create new ones every day as new programming is created.
- Third, it must link information from the various shows to each other. To take the most basic example, it has to link the various episodes of *Scandal* to one another to enable search and DVR recording functionality. An MVPD almost certainly, however, would want to do more than that. For example, since *Scandal* stars Kerry Washington, the MVPD will want to figure out how to link this actress to other programs and movies she is featured in, such as *Django Unchained*, *Ray*, and *Mr. & Mrs. Smith*.
- Fourth, it must figure out how to track all this information to the different channel lineups it has for each cable system it owns. Thus, it needs to “know,” for example, that its system in Long Island may have *Scandal* on WABC (channel 7), while the same show and all its attendant information can be found on WNEP (broadcasting off-air on channel 50, but carried “virtually” on channel 16) on a system close to Scranton.

With all of this information, the MVPD can build its own unique program guide and incorporate it into its user interface, with which it can compete with other providers in the marketplace.

Without it, it cannot.

The MVPD in this example *could* gather, compile, check, analyze, and organize all this information itself. Doing so, however, would be both expensive and distracting to a company that, all things being equal, would likely prefer to focus on acquiring programming and

delivering video and broadband to subscribers. Therefore, MVPDs, just like competitive device manufacturers and online providers, seek help from companies like Gracenote, which specialize in this sort of work, and which possess the experience and scale to research, develop, compile, publish, and license metadata far more efficiently and accurately than any individual provider could on its own.

Of most relevance here, *Gracenote licenses this metadata to anyone who wishes to purchase it at reasonable and nondiscriminatory prices.* Indeed, it must do so in order to be able to compete with Rovi, Ericsson, and others. Its clients include cable MVPDs, satellite MVPDs, telco MVPDs, online video providers, digital media outlets, and competitive set-top box manufacturers, many of whom are active participants in this proceeding.

The key to making all of this work is Gracenote's proprietary identification system. Each program (for instance, the movie *Avatar* that recently appeared on USA Network) has its own, unique proprietary ID number. That, however, doesn't begin to tell the whole story.

- Television *series* have their own ID numbers.
- Television *seasons* have their own ID numbers.
- Individual television *episodes* have their own ID numbers.
- Each *version* of a show (language, format, resolution, *etc.*) has its own ID number.

Thus, for example, *Scandal* has one number, *Scandal* Season 5 has another number, "Dog-Whistle Politics" (the episode that first aired on October 15, 2015) has another number, and a Spanish Version of "Dog-Whistle Politics" has another number. The *most specific* number (the one that applies to individual versions of episodes) for each "item" of content is called the "TMS

number.”⁴ Other, more general ID numbers have different names, but are collectively called “connector numbers” because they connect individual items of content with each other.

Gracenote’s ID numbers—including the TMS numbers and the suite of connector numbers—are the key to unlocking the metadata that populate electronic program guides. They also enable subscribers to access other information related to the programs. Gracenote’s service, when integrated with a particular client’s technology, will allow a subscriber to click on *Scandal*, see that Ms. Washington is the star, click on her entry, see that she has also starred in *Django Unchained*, and watch (or record) *Django Unchained*. Without the ID numbers, however, Gracenote’s metadata is just a bunch of disconnected information.

This is why Gracenote’s editors spend the same effort in creating, updating, and triple-checking ID numbers as they do the metadata itself. Indeed, the *numbers themselves* contain a great deal of editorial information. For example, the first two digits of a TMS number indicate whether the content is a movie or a TV show. If it is a TV show, the last four digits contain information about the series and episode of that show.

II. NO PROBLEM EXISTS FOR WHICH INTERVENTION IN THE METADATA MARKET WOULD BE APPROPRIATE.

The Commission has proposed rules because it wants to promote competition in the market for set-top boxes. It believes that MVPDs have an incentive to hinder such competition by refusing to provide their programming and associated information to third-party device manufacturers.⁵ This, the Commission suggests, is because MVPDs have incentives to “maintain control over the user interface.”⁶ In order to combat the “incentives” it has identified,

⁴ “TMS numbers” derive their names from Gracenote’s former name, Tribune Media Services, Inc.

⁵ *Notice* ¶ 15.

⁶ *Id.*

the Commission proposes requiring MVPDs to pass through programming and other “information flows” that, in its view, are necessary to allow third parties to integrate MVPD programming into their own user interface.

Whatever the merits of this argument generally, it plainly does not apply to metadata. Gracenote and its competitors provide metadata services to MVPDs, online providers, and equipment manufacturers alike. Today, by way of example, TiVo, Roku, and Google all license metadata in order to offer an enhanced consumer experience. As far as Gracenote is concerned, the more buyers the better. It would be *delighted* to provide its services on a nondiscriminatory basis to any third-party manufacturer that wants them. We suspect Gracenote’s competitors would feel the same way.

Finally, no third party prevents or will prevent Gracenote from providing its services to competitive set-top box providers. No Gracenote contract with any MVPD restricts Gracenote from providing such service, Gracenote has never been asked to sign any such provision, and Gracenote would never agree to do so—otherwise its business would crater. There is, in other words, no reason whatsoever for the Commission to intervene here.

III. THE COMMISSION’S ID PASS-THROUGH PROPOSAL WILL NOT WORK.

While we believe the Commission’s desire to act in this area may rest on an incomplete understanding of the metadata market, we are quite sure that its specific proposal fails to take into account that market as it exists today. The Commission proposes to require cable operators, satellite carriers, and other MVPDs to provide to third parties three “information flows” to set-top boxes offered by manufacturers unaffiliated with any MVPD.⁷ The Commission describes the information flows subject to this “pass-through” requirement as follows:

⁷ *Id.* ¶¶ 2 (information flows), 25 (unaffiliated with any MVPD).

- **Service discovery** (information about what programming is available to the consumer, such as the channel listing and video-on-demand lineup, and what is on those channels).
- **Entitlements** (information about what a device is allowed to do with content, such as record it).
- **Content delivery** (the video programming itself, along with information necessary to make the programming accessible to persons with disabilities).⁸

The Commission proposes to define “service discovery” to include, “at a minimum, channel information (if any), program title, rating/parental control information, program start and stop times (or program length, for on-demand programming), and an ‘Entertainment Identifier Register ID’” (also known as an “EIDR”).⁹ Citing EIDR’s website, the Commission describes EIDR as “a universal unique identifier system for movie and television assets.”¹⁰

Despite claims made on its website, the EIDR is not a “universal unique identifier” or industry standard in any sense. First, the EIDR is proprietary. EIDR was founded by Rovi and its commercial partners, including Comcast and Cable Labs.¹¹ Second, the EIDR encompasses only a small subset of the universe of available programming.¹² Third, the EIDR is not a standard. It is only one of multiple competing ID systems, and it has a smaller market share than Gracenote’s IDs. While EIDR happens to make its ID numbers available without charge, it does

⁸ *Id.* ¶ 2.

⁹ *Id.* ¶ 38.

¹⁰ *Id.* ¶ 38 n. 105 (citing EIDR Home Page, <http://eidr.org/>).

¹¹ About EIDR, Entertainment Identifier Registry, <http://eidr.org/about-us/> (describing EIDR as being “founded by Movielabs, Cablelabs, Comcast and Rovi to meet a crucial need across the entertainment supply chain”).

¹² As far as Gracenote is aware, the EIDR registry covers only the most popular movies and television programming. Local programming, paid programming, news, sports, and other broadcasts often lack EIDR numbers altogether. Thus, even if the Commission requires EIDR clients to pass through the EIDR to third-party set-top boxes, those boxes would have large gaps in coverage. Gracenote’s metadata, by contract, covers all programming, including local programming.

so simply because it has a different business model than its competitors: EIDR’s founding member, Rovi, makes its money by selling the proprietary electronic programming guide technology that works with the IDs. Yet many MVPDs nonetheless have chosen not to become EIDR members. They choose instead to purchase metadata services, including the critical ID numbers, offered by Gracenote, Ericsson, or another competitor. What this means is that the Commission’s proposed requirement that MVPDs pass through the EIDR would not, by its terms, seem to apply to many MVPDs—since they do not use the EIDR and would therefore have nothing to pass through.¹³

It should, of course, be unthinkable for the Commission to *require* MVPDs to join EIDR and do business with Rovi and its partners rather than with their competitors, just to have an EIDR ID to pass through. The proposal does not say MVPDs are required to join EIDR, and we cannot imagine the Commission intended it to do so. There is no conceivable reason or justification for the Commission to force companies happy with Gracenote, Ericsson, or another competitor to use EIDR instead or in addition to the one they have chosen. Nor can we see any reason or possible justification to elevate one competitor’s service into a “universal metadata” standard to the detriment of those offered by other competitors—and certainly not in a proceeding seeking to increase competition in the video space. In any event, the Commission has provided no legal basis for such an action, and we are aware of none.

¹³ This problem was anticipated in the DSTAC process itself. See Report of Working Group 4 to DSTAC at 160 (*available at* <https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf>) (“The same problem arises with the Device Proposal’s requirement that program guide data be disassembled and delivered. . . . Other vendors who license guide data to MVPDs do not even include the information sought in the Device Proposal.”).

Without belaboring the point, moreover, EIDR would be a curious candidate to be granted any such monopoly. EIDR requires its members to pay substantial membership fees¹⁴ and relies on third parties (content owners, aggregators, post-production shops, and others) to populate its data instead of doing so itself.¹⁵ EIDR also requires members to relinquish rights in their own intellectual property, and restricts their use of Rovi's intellectual property—which is of even greater concern since Rovi has often been involved in litigation over asserted intellectual property rights.¹⁶ The bottom line is that mandating the use of EIDR would destroy the competitive metadata market. This cannot possibly be the Commission's desired outcome.

IV. THE COMMISSION SHOULD NOT REQUIRE PASS-THROUGH OF ANY ID.

The Commission's reference to a single competitor's ID system may have been an oversight. It raises a broader point, however: The Commission should not require pass-through of *any* ID numbers—whether it be only the TMS number (the closest equivalent to the EIDR) or

¹⁴ Entertainment Identifier Registry, Entertainment Identifier Registry Overview at 34 (Jan. 2016) (*available at* http://eidr.org/documents/2016-01-15_EIDR_Overview_FINAL.pdf) (“EIDR Overview”) (setting forth fees).

¹⁵ About EIDR, Entertainment Identifier Registry, <http://eidr.org/about-us/> (“A registrant submits objects for registration along with core metadata and information such as the type of object and relationship to other objects. The registrant could be a content owner, an aggregator, post-production house or any other entity authorized to register objects. The Registry requires minimal metadata required to guarantee uniqueness for the full range of asset types.”).

¹⁶ EIDR Overview at 32 (describing reciprocal patent non-assert); Certain Products Containing Interactive Program Guide And Parental Control Technology, Respondent Netflix's Public Interest Statement at 4, Inv. No. 337-TA-845, USITC (July 7, 2013) (*available at* <http://cdn.arstechnica.net/wp-content/uploads/2013/11/Rov.NFLX-pubint.pdf>) (describing Rovi's litigation strategy).

the connector numbers or both. Doing so would raise insurmountable contractual, intellectual property, and related issues and would cause customer harm.

A. Requiring Pass-Through of ID Numbers Would Mandate the Violation of Gracenote’s Intellectual Property, Contractual, Trade Secret, and Constitutional Rights.

Any pass-through requirement extending to Gracenote would mandate the violation of a variety of rights held by Gracenote, including intellectual property rights, contractual rights, trade secret rights, and even constitutional rights.

Intellectual property rights. An ID pass-through requirement would violate Gracenote’s intellectual property rights—and the Commission has repeatedly stated that it intends to respect such rights in this proceeding.¹⁷ The Copyright Act protects both Gracenote’s entire metadata service and its constituent parts—including ID numbers. As the Supreme Court has explained, factual compilations merit copyright protection when “the facts [are] selected, coordinated, or arranged ‘in such a way’ as to render the work as a whole original.”¹⁸ Originality, in turn, means that “the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”¹⁹

Courts have, therefore, extended copyright protection to taxonomies and their component parts. In one case brought by the American Dental Association, the Seventh Circuit held that a

¹⁷ See, e.g., Notice ¶ 29 (listing as one of the “paramount objectives” of this proceeding that “unaffiliated vendors must implement content protection to ensure that the security of MVPD services is not jeopardized, and must respect licensing terms regarding copyright, entitlement, and robustness”).

¹⁸ *Feist Publ’ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991).

¹⁹ *Id.* at 345; see also *id.* (“[T]he requisite level of creativity is extremely low,” and “even a slight amount will suffice.”); *Kregos v. Associated Press*, 937 F.2d 700, 703-04 (2d Cir. 1991) (requiring minimal level of creativity as well as independent selection and arrangement for compilation to enjoy copyright entitlement). Moreover, that copyright is infringed even when less than an exact replica of the original copyrighted compilation is reproduced; otherwise “subsequent compilers [could] avoid

taxonomy of dental procedures—*specifically including the ID numbers that were part of that taxonomy*—met the standard for originality and copyright protection.²⁰ At issue in that case was the Associations’ Code on Dental Procedure and Nomenclature, which classified dental procedures into ordered groups and assigned each a long description, a short description, and a unique ID number.²¹ The court held that the broader dental procedures and their classification by the Association enjoyed copyright protection,²² and that the Code’s individual ID numbers also were original works of authorship. The court found that the creation of these numbers involved the requisite creativity described in *Feist*, through a series of structural choices made by the Code’s editors.²³ These included:

- The choice to use five digits in each number.
- The choice to assign a group of procedures one particular numerical range instead of another.

infringement suits simply by adding a single fact to a verbatim copy of the copyrighted compilation, or omitting in the copy a single fact contained in the copyrighted compilation. *Key Publ’ns, Inc. v. Chinatown Today Publ’g Enters., Inc.*, 945 F.2d 509, 514 (2d Cir. 1991) (citing *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 583 n.5 (1985) (Brennan, J., dissenting)). Copyright protection has been found to subsist, for example, in a directory of Chinese-American businesses (*Key Publ’ns*, 945 F.2d 509), an unadorned snapshot of a vodka bottle (*Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068 (9th Cir. 2000)), and a question on a standardized test (*Educ. Testing Servs. v. Katzman*, 793 F.2d 533 (3d Cir. 1986)).

²⁰ *American Dental Ass’n v. Delta Dental Plans Ass’n*, 126 F.3d 977 (7th Cir. 1997).

²¹ *Id.* at 977.

²² The court recognized that “[f]acts do not supply their own principles of organization,” and that “[c]lassification is a creative endeavor.” *Id.* at 979. Because the dental procedures listed in the Code could have been grouped “in any of a dozen different ways”—by their complexity, by the tools necessary to perform them, and so on—the Code as a whole constituted original, and thus protectable, expression. *Id.*

²³ By contrast, courts have declined to grant copyright protection to ID numbers derived from a “mechanical application of the [numbering system’s] rules,” without “even a spark of creativity.” *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 283 (3d Cir. 2004).

- The choice to place zeroes at the beginning of each number rather than at the end, “assuring a large supply of unused numbers” for future procedures.²⁴

Each of these choices reflected one among “multiple, [] equally original” ways to number a given procedure and, as a result, the unique numbers were entitled to copyright protection.²⁵

Gracernote easily meets this “originality” standard. Indeed, Gracernote uses exponentially more creativity in its ID numbers than did the American Dental Association. For example, Gracernote has chosen to treat *The Real Housewives of Atlanta* and *The Real Housewives of New Jersey* not as two “seasons” of the same “TV show,” but instead as two separate “TV shows” linked by a connector ID. Gracernote has chosen to classify language variations in a similar way: the Portuguese version of *House* (titled *Dr. House*) is considered to be a different “TV show” from its English counterpart and therefore has a different TMS number, but the two share several connector numbers. So, too, with “versions.” Each of the many varieties of the movie *Avatar*—standard definition, high definition, 3D, Special Edition 3D, IMAX 3D, IMAX Special Edition 3D—has its own TMS number, but shares with other versions certain (but not all) other

²⁴ *American Dental Ass’n*, 126 F.3d at 979.

²⁵ *Id.*; see also *Toro Co. v. R & R Products Co.*, 787 F.2d 1208 (8th Cir. 1986) (“A [numbering] system that uses symbols in some sort of meaningful pattern, something by which one could distinguish effort or content, would be an original work.”). Copyright protection also has been extended to analogous types of data. For example, the Second Circuit held that a book of used car valuations—including the valuations themselves—were “original creations of [the author].” See *CCC Information Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 67 (2d Cir. 1994). The court emphasized that the valuations were “predictions by the [plaintiff’s] editors of future prices,” which were “based not only on a multitude of data sources, but also on professional judgment and expertise.” *Id.* at 63–64. Similarly, in *CDN Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999), the Ninth Circuit held that individual coin price estimates were sufficiently original to enjoy copyright protection, as “the plaintiff use[d] its considerable expertise and judgment to determine how a multitude of variable factors impact upon available bid and ask price data.” *Id.* at 1260; see also *Nat’l Football Scouting, Inc. v. Rang*, 912 F. Supp. 2d 985 (W.D. Wash. 2012) (individual “player grades” in scouting reports copyrightable); *Health Grades, Inc. v. Robert Wood Johnson Univ. Hosp., Inc.*, 634 F. Supp. 2d 1226 (D. Colo. 2009) (individual healthcare ratings for hospitals copyrightable).

connector numbers. The creation of the ID numbers, in other words, involves creativity; it is not a mechanical process.²⁶ This, then, is an easy case—and is even easier given the inextricable links between the ID numbers themselves and Gracenote’s broader service, which indisputably enjoys copyright protection.²⁷

Contractual rights. In addition to causing the infringement of Gracenote’s intellectual property rights, an ID pass-through requirement would eviscerate Gracenote’s contractual rights. Gracenote licenses its metadata service to MVPDs, online video providers, digital media outlets, and third-party device manufacturers directly. Each of Gracenote’s clients, in turn, recoup the cost of Gracenote’s service from those who buy their services or devices.²⁸ Thus, for obvious reasons, Gracenote does not allow MVPDs to “pass through” its services to third parties. Indeed, every one of Gracenote’s contracts explicitly forbids MVPDs from providing metadata—or any component thereof, including ID numbers—to third parties. To require MVPDs to pass through Gracenote’s ID numbers would, thereby, require every Gracenote MVPD client to breach its contracts with Gracenote.

Trade secret rights. Gracenote’s TMS numbers also are entitled to protection as trade secrets because of the steps Gracenote takes to allow only authorized users to access and use its

²⁶ The IDs’ two-letter prefixes could have consisted of one letter or three; their ten-digit cores could have been nine or fifteen digits long; and their four-digit suffixes could have been three or five digits. The numbers in the core could have been randomly generated, rather than sequentially generated. Gracenote could have arranged the suffixes before the cores, rather than after, and non-TV episode suffixes could have had a wide range number of values other than “0000.” Each decision in the creation of these numbers reflects, to use the courts’ phraseology, significant “professional judgment and expertise.”

²⁷ See TMS AllVid Reply Comments at 7-9 (citing cases).

²⁸ See *id.* at 6 (providing additional detail).

ID numbers.²⁹ Gracenote’s ID numbers are neither generally known to, nor reasonably ascertainable by, anyone except Gracenote’s customers who have entered into a license agreement authorizing them to access and use the IDs as part of Gracenote’s overall system.³⁰ Gracenote derives a significant competitive advantage from maintaining the secrecy of its IDs.³¹ Gracenote takes many steps to maintain the secrecy of its ID numbers, even with respect to its own employees. As discussed above, Gracenote prohibits licensees from passing metadata—or any component thereof, including ID numbers—to third parties. Accordingly, Gracenote’s ID numbers are protectable trade secrets, the mandatory disclosure of which would deprive Gracenote of its rights.

Constitutional rights. Precisely because Gracenote carefully protects its ID system, an ID pass-through requirement would also constitute an unconstitutional uncompensated taking. The Supreme Court has recognized that, to the extent an individual has a cognizable trade-secret right, “that property right is protected by the Taking Clause of the Fifth Amendment.”³² Each of

²⁹ In order to constitute a “trade secret” under the Uniform Trade Secrets Act, information: (i) must not be “generally known” or “readily ascertainable by proper means” by others who may gain advantage from its use, (ii) must provide “independent economic value” to its owner as a result of its secrecy, and (iii) must be the subject of “reasonable” efforts “to maintain its secrecy.” See Uniform Trade Secrets Act § 1(4) (*available at* http://www.uniformlaws.org/shared/docs/trade%20secrets/utsa_final_85.pdf).

³⁰ Moreover, given the complexity of the numbering system and the contingencies built into it (*e.g.*, the core ten digits of a new TMS ID is determined by the order in which it is processed), the TMS IDs “[cannot] be readily duplicated without involving considerable time, effort or expense.” *Computer Care v. Serv. Systems Enters., Inc.*, 982 F.2d 1063, 1072 (7th Cir. 1992) (discussing “readily ascertainable” requirement).

³¹ See *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 900 (Min. 1983) (“[The] statutory element [of ‘independent economic value’] carries forward the common law requirement of competitive advantage.”).

³² *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04.

the factors used by courts to analyze regulatory takings of trade-secret material suggests a potential taking exists here, which would require just compensation.³³

B. Requiring Pass-Through of ID Numbers Would Harm Consumers.

The Commission has no particular reason to require MVPDs to pass through ID numbers to third parties and, as noted, doing so would raise serious legal and even constitutional issues. In addition, Gracenote believes that a pass-through obligation would inhibit innovation and harm consumers. The problem is that grafting Gracenote’s (or any providers’) ID numbers onto another providers’ metadata—creating a Frankenstein’s Monster of a service—will not work.

Gracenote does not sell its ID numbers separately. Rather, Gracenote offers its ID numbers only as an integral, and integrated, part of Gracenote’s metadata service. If the Commission required MVPDs to give Gracenote’s ID numbers away, however, it might be possible for set-top box manufacturers to “map” their own or third-party databases onto Gracenote’s ID numbers. In theory, this would allow those boxes to use Gracenote IDs to apply third-party databases to Gracenote’s clients’ programming. Giving a third-party set-top box the ability to use alternative databases for an MVPD’s programming might sound like an acceptable outcome—if the Commission had authority to ignore contractual, intellectual property, trade secret, and constitutional rights.

But even were it within the Commission’s authority, such an ID pass-through mandate would almost certainly not lead to an outcome acceptable to the Commission or consumers.

³³ To determine whether the compelled disclosure of a private party’s trade secrets constitutes a taking, courts consider: (1) the “economic impact of the regulation,” (2) whether the government action “interferes with reasonable investment-backed expectations,” and (3) “the character of the government action.” *Id.* at 1005 (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)). Here, Gracenote has invested tens of millions of dollars in developing and using its proprietary numbering system to classify the universe of programming, with the expectation that the government would not require disclosure of its trade secrets.

Gracenote takes exceptional care (taking much time at significant cost) to ensure that its ID numbers “map” correctly to its metadata. It cannot believe that others, seeking to graft Gracenote’s ID numbers onto otherwise incompatible third-party databases, will be able to take similar care, even if they exerted similar effort. The result, Gracenote is confident in predicting, would be millions of set-top boxes throughout the United States that record the wrong show, don’t record at all, or just won’t work.

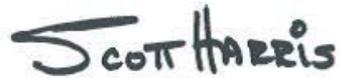
Take, for example, search functionality. Gracenote’s editors take great care to assign its various numbers to shows accurately, so that its clients can design search functionality that actually works. Thus, for example, Gracenote ensures that a children’s show cannot be confused with a similarly named horror movie, or even adult content. This attention to detail will become even more important as MVPDs and third-party providers seek to offer combined searches of web and linear programming. The creator of an Internet cat video, or a pornographic video for that matter, may wish to confuse search engines by calling the clip *Friends*. Gracenote’s editors carefully link the television show *Friends* with their appropriate ID numbers, avoiding search-confusion with the cat video or worse. Third parties are unlikely to take the same care in matching Gracenote’s ID numbers with other metadata. Even if they do, they may not “catch” all of the nuances Gracenote catches. The result is that searches will give the wrong results, or won’t work at all.

CONCLUSION

There is no basis whatsoever for the Commission to intervene in the competitive and functioning metadata market. Simply put, *any* party can purchase the metadata services and IDs necessary to offer consumers rich, differentiated, and functional electronic program guides. Moreover, as written, the Commission’s proposal cannot possibly work because many MVPDs

do not use the EIDR ID system. Finally, expanding the proposal to include Gracenote's IDs would require MVPDs to violate Gracenote's IP and trade secret rights, cause Gracenote's clients to breach their contracts, raise serious constitutional questions, and likely cause millions of set-top boxes to function badly—if they functioned at all. The bottom line is that the *Notice's* ID proposal is unnecessary, unwieldy, and unwise. We respectfully urge the Commission to abandon it.

Respectfully Submitted,

A handwritten signature in black ink that reads "SCOTT HARRIS". The signature is written in a cursive, slightly stylized font.

Eddie Lazarus
Lisa Washburn
Sal Karottki
TRIBUNE MEDIA SERVICES, LLC
d/b/a GRACENOTE
435 N. Michigan Ave. Suite 915
Chicago, IL 60611
518-792-9914

Scott Blake Harris
Michael Nilsson
Adrienne E. Fowler
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W.
The Eighth Floor
Washington, DC 20036
(202) 730-1300
Counsel for Gracenote

April 22, 2016