

**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
)	

REPLY COMMENTS OF AMC NETWORKS INC.

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AMC Networks Inc. (“AMCN”) hereby respectfully submits these reply comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“*NPRM*”) in the above-captioned proceeding.^{1/}

INTRODUCTION AND SUMMARY

AMCN urges the Commission not to adopt its proposed rules. The Commission seeks to introduce competition in the market for video navigation devices, but in doing so, proposes rules that go far beyond what is necessary to achieve its stated goal, and threaten to upend the market for programming itself and expose programmers to substantial financial harm.

AMCN agrees with the many commenters that the Commission lacks the authority under Section 629 of the Communications Act to implement the proposed rules, and that the proposed rules are contrary to programmers’ First Amendment rights.^{2/} However, these reply comments

^{1/} *Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 31 FCC Rcd. 1544 (2016) (“*NPRM*”).

^{2/} See Comments of the National Cable & Telecommunications Association, MB Docket No. 16-42, CS Docket No, 97-80, at 161-169 and Appendix A (filed Apr. 22, 2016) (“*NCTA Comments*”); Comments of 21st Century Fox, Inc., A&E Television Networks, LLC, CBS Corporation, Scripps

focus on the practical impact of the Commission’s proposal, and the damage that it will inflict, on programmers and their continued ability to provide consumers with quality programming.

First, the Commission’s proposal could force AMCN to violate contractual obligations to content owners. Much of the content appearing on AMCN’s networks is acquired or licensed from individual content owners and may be subject to specific restrictions on distribution. Under the Commission’s proposed scheme, a third-party device manufacturer could repackage and present this content in a manner that could force AMCN to violate the terms of its licensing agreements.

Second, the proposed rules would harm AMCN’s ability to do business by (i) interfering with AMCN’s ability to fund its programming through advertising; (ii) allowing third-party device manufacturers to profit from programmers’ content without compensation, thereby diminishing programmers’ incentives and ability to fund content creation; (iii) threatening programming network viewership by disassociating programming from the network brand; (iv) undermining channel neighborhooding provisions that allow programmers to focus marketing toward the most appropriate audiences and maximize content distribution; and (v) facilitating the use of pirated content through Internet search terms. For all of these reasons—in addition to the many practical and legal concerns raised by other commenters—AMCN urges the Commission to abandon its proposed rules.

I. THE COMMISSION’S PROPOSED RULES COULD FORCE AMCN TO VIOLATE ITS CONTRACTS WITH CONTENT OWNERS

As many commenters observed, under the Commission’s proposed rules, third-party device makers could disaggregate content from the networks and on-demand portals created by

Networks Interactive, Time Warner, Inc., Viacom Inc., and the Walt Disney Company, MB Docket No. 16-42, CS Docket No, 97-80, at 12-25 & 41-42 (filed Apr. 22, 2016) (“Content Companies Comments”).

programmers and MVPDs, rearranging it into “themed” areas, or other arrangements of their own creation.^{3/} While commenters rightly raise a host of concerns about giving third parties this ability – and AMCN discusses the practical impact of such a scheme on its business below – an additional concern is the potential for programming networks to be distributed in a manner that violates their obligations to the owners of the content they carry.

While programming networks produce some of their own content, other content on the network is acquired or licensed from individual content owners. Those agreements can include various specific restrictions on how that content may be distributed.

AMCN’s licensing agreements with content owners, for example, sometimes require that AMCN include network branding or logos on certain content distributed, or that content be distributed only over an AMCN network-branded platform.^{4/} This is because AMCN’s content licensors derive revenue by licensing the same content in the same geographic area subject to a variety of different limitations and restrictions on each platform (*e.g.*, by giving some parties only video-on demand rights). If a third-party device manufacturer had the ability to select individual programs and repackage and present the programming without this network branding –by distributing it on a platform that is not AMCN-branded, for example – then AMCN would

^{3/} See Content Companies Comments at 12 (the proposal will permit third parties to “change, remove, rearrange, or disaggregate content”); Comments of TV One, LLC, MB Docket No. 16-42, CS Docket No, 97-80, at 8 (filed Apr. 22, 2016) (“TV One Comments”) (expressing concern that programming could appear in categories unrelated to a programmer’s target audience or conversely, “not appear in categories where it should appear”); Comments of the Motion Picture Association of America and SAG-AFTRA, MB Docket No. 16-42, CS Docket No, 97-80, at 7 (filed Apr. 22, 2016) (the proposed rules permit third parties to repackage and manipulate content in ways contrary to or at odds with the programmers’ intent or licensing agreements); 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., MB Docket No. 16-42, CS Docket No, 97-80, at 8 (filed Apr. 22, 2016) (the proposed rules will harm music programming because manufactures could design the competitive device so that the user could create custom music playlists by disaggregating music programming).

^{4/} See Content Companies Comments at 7.

be in violation of its licensing agreements. Content owners would view this as AMCN sublicensing the content in an unauthorized manner, a violation they would consider serious because it affects the content licensor's ability to generate revenue by dividing rights among different distributors.

While AMCN carefully ensures in its MVPD carriage agreements that carriage of AMCN networks occurs only within the boundaries of these rights, the proposed rules would not require third party manufacturers to respect those limits. The Commission cannot force programmers to make content available in a manner that is beyond the scope of the rights they have been granted. Any rules must ensure that third-party device manufacturers adhere to any and all restrictions contained in content agreements.

II. THE PROPOSED RULES WOULD SIGNIFICANTLY HARM AMCN'S ABILITY TO DO BUSINESS

As the initial comments establish, the Commission's proposed rules would harm programmers in a variety of ways: by threatening their advertising revenues, diluting their brand, allowing third parties to cherry pick "hot" content and monetize that content without benefit to the network (and thus diminishing its ability to fund in other creative programming that may not yet have achieved wide-scale popularity), and forcing the network to compete with pirated content. The Commission should not move forward with any rules that do not ensure programmers' continued ability to offer consumers high-quality, innovative content.

A. The Proposed Rules Interfere With AMCN's Ability To Fund Its Programming Through Advertising.

By allowing third parties to alter the amount or type of advertising that AMCN, in its business judgment, has determined reflects the best balance between funding programming and keeping viewers interested by providing the optimal consumer viewing experience, the proposed rules will degrade the value of AMCN's programming, as well as the value of the advertising

slots that AMCN sells to support content creation.

AMCN today selects ads based on relevance to each network's target audience and carefully considers the appropriate amount of advertising per network that balances the need for funds to acquire and create content with the best possible viewing experience for viewers. In its carriage agreements, AMCN works with its distribution partners to negotiate limitations on advertising. These limitations include the timing and duration of ads (including infomercials), ad content (*i.e.*, the type of products and topics that may or may not be advertised), ad placement (to ensure programming is not obscured), and advertising "avails" (blank time slots where ads can be sold by the distribution partner as part of the value AMCN offers in the carriage agreement). While these limitations vary by network, they all reflect AMCN's informed decision about how to fund and create the most attractive network for viewers.

As numerous commenters make clear, under the proposed rules, the advertising programmers or distribution partners have sold could be covered or replaced, or its value – and the subscriber experience – substantially diluted, if the amount of advertising is expanded through a number of tactics, such as wrap-around advertising, pop-up advertising, banner advertising, pre-roll advertising, program shrinking or other techniques.^{5/} This manipulation, as explained by 21st Century Fox and other programmers, "degrade[s] the integrity of the content, risk[s] exposing viewers to excessive and inappropriate advertising, and detract[s] from the

^{5/} See, e.g., Comments of VMe Media Inc. et al., MB Docket No. 16-42, CS Docket No, 97-80, at 2 (filed Apr. 22, 2016) ("VMe Comments") (arguing that third-party device manufacturers and app developers will have the ability under the proposed rules to "to insert new pop-up, banner, wraparound, search, and pre-roll advertising"); Comments of TV One at 12 (arguing that it will lose the ability to offer high quality diverse content in part because its advertisements "could be exchanged for others sold by the third party" or the number of ads "could be expanded substantially through wrap-around advertising, shrinking programming to part-screen, or inserting additional ads during commercial breaks"); Content Companies Comments at 12 (explaining how the proposed rules will "allow third parties to alter, substitute, and otherwise dilute the advertising that helps support investment in high-quality content.").

uniform viewing experience across MVPD platforms that viewers expect.”^{6/} And unlike AMCN, who takes great care to ensure that the amount of advertising included in a program strikes a balance between its revenue needs and its viewers’ programming interest and experience because its business depends on continued viewership, third-party device manufacturers would have no incentive to respect this balance, because the impact of any resulting consumer dissatisfaction or loss of content quality would be borne solely by AMCN.

Public Knowledge’s answer to these arguments – that the consumer *should* have control over advertisements and “decide to buy a device without ads or one with ads, depending on her preference”^{7/} – is wholly untenable. Most programming today is funded in part by advertising, and consumers benefit from that funding. Advertisers have paid for ad placements, and the Commission should not sanction rules depriving advertisers of that value or provide an avenue for manufacturers or consumers to side-step or diminish the value of these placements, simply because a consumer prefers to watch programming without ads. In any event, the far more likely result under the proposed rules is that third party set-top box manufacturers offer more or different advertising, not no advertising – and the rules would not offer consumers any avenue of control in that circumstance.^{8/}

^{6/} Content Companies Comments at 38.

^{7/} Comments of Public Knowledge, MB Docket No. 16-42, CS Docket No, 97-80, at 37-38 (filed Apr. 22, 2016) (“Public Knowledge Comments”).

^{8/} TiVo’s agreement with Public Knowledge that consumers should have the ability to limit exposure to ads, TiVo Comments at 9, is particularly ironic, given that as established in the initial comments, TiVo has been saddling consumers with voluminous *extra* advertising and otherwise altering paid content. Comments of TiVo, Inc., MB Docket No. 16-42, CS Docket No, 97-80, at 9 (filed Apr. 22, 2016) (“TiVo Comments”); *see also* Content Companies Comments at 28, n.58 (noting that “various navigation device makers have already been placing ads over linear programming) (citing Deborah Yao, *More Ads Coming to TV Even to One-Time Havens*, ABCNEWS.COM, <http://abcnews.go.com/Technology/story?id=8237990&page=1> (last visited Apr. 20, 2016) (“TiVo, the creator of the digital video recorder that panicked the TV business by making it simple to skip ads, now flashes banners on TV screens when users pause, fast-forward or delete shows,” including “layering an ad on top of” programming)); Michael Hiltzik, *TiVo Finally Tells TV Broadcasters to Stuff It*, L.A. TIMES

The uncertainty over whether a particular ad will remain in a programming stream, or be overwritten or overwhelmed by other advertising will reduce advertisers' incentives to enter into agreements with programmers, as programmers will not be able to guarantee that any advertising they include will be seen by a particular demographic – or at all. Without advertising, programmers will have only one stream of revenue – carriage fees. Prices charged to MVPDs will rise exponentially, and as the costs of programming inputs rise, so will the prices charged to consumers. The result would be a decrease in varied, high quality programming, and so harm to both consumers and programming diversity.^{9/} The Commission should take care to avoid this result.

(Oct 5, 2015), <http://www.latimes.com/business/hiltzik/la-fi-mh-tivo-finally-tells-tv-broadcasters-20151005-column.html> (noting that one service offered on TiVo's new Bolt unit is its Quick Mode service, "which allows playback of recorded shows 30% faster, with the audio electronically tweaked"); TV One Comments at 16-17 (stating that TiVo has been "flooding cable viewers with additional advertising," and noting that TiVo's DVR equipment "can insert commercials into a program (in the form of pop-up advertisements) while a consumer pauses or fast-forwards the program"); Comments of the U.S. Chamber of Commerce, MB Docket No. 16-42, CS Docket No. 97-80, at 4 (filed Apr. 22, 2016) ("U.S. Chamber of Commerce Comments") ("[A]s early as 2005, TiVo began tests on inserting its own pop-up advertising when viewers fast-forwarded through recorded content.").

^{9/} See, e.g., U.S. Chamber of Commerce Comments at 4 (asserting that there will be a snowball effect if competitive device manufacturer is able to manipulate advertising because "advertisers [will] lose the incentive to enter into agreements with content providers . . . [programmers] will suffer a reduction in advertising revenue, [and] therefore, video production and content companies will be discouraged from producing innovative content which may be seen as financially riskier."); Comments of Mnet America, MB Docket No. 16-42, CS Docket No. 97-80, at 1 (filed Apr. 22, 2016) ("Mnet Comments") ("[T]he new proposed rule would allow the device makers to add additional advertising around our content and their menus that access our content. This will cause advertisers shift their marketing spend away from cable television networks to set top boxes[.]"); AT&T Comments at 42 (stating that for "smaller, niche programmers, for which advertising is often the primary source of revenue . . . the loss of advertising revenue could spell doom"); VMe Comments at 2 ("[T]his mandate gives tech companies the right to siphon away our advertising revenue."); Comments of the Association of National Advertisers, MB Docket No. 16-42, CS Docket No. 97-80, at 3-4 (filed Apr. 22, 2016) ("ANA Comments") (noting that "[i]ndustry 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.").

B. Allowing Third Parties To Profit From Content Without Compensating Programmers Hinders Programmers' Ability To Fund Content Creation.

AMCN shares the concerns of numerous commenters who note that the Commission's proposed rules could undermine programmers' ability to monetize their own property and so obstruct the creation of innovative and diverse video programming. As the Communications Workers of America comments observe, "allowing tech giants such as Google to free-load off the value and audiences that video distributors, networks, and programmers have jointly created . . . means fewer resources to invest in quality programming."^{10/}

The initial comments set forth a host of ways in which the proposed rules open the doors for third party set-top box manufacturers to profit from programmers' content, all of which would be detrimental to AMCN's business. And more importantly, with no limits on these manufacturers' ability to manipulate content for their own advantage, new harms could arise continuously.

First, a third-party device manufacturer could, for example, cherry-pick and repackage high-value content from a variety of programmers and create its own "channel." For example, a box manufacturer could group AMCN's *The Walking Dead* with HBO's *Game of Thrones*, ESPN's *SportsCenter*, Showtime's *Homeland*, and Comedy Central's *South Park*. Viewers and advertising revenues would shift to the "channel,"^{11/} but neither AMCN nor the other

^{10/} Comments of the Communications Workers of America, MB Docket No. 16-42, CS Docket No. 97-80, at 5 (filed Apr. 22, 2016) ("CWA Comments") (noting that "[t]he Commission's proposal appears to upend the video market economic system" and that "[t]he loss to video distributors' and networks' ad revenue streams . . . 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.").

^{11/} As some commenters point out, similar actions have occurred in the journalism and news media market. Tech Knowledge notes that "the shift to Internet consumption of printed content, in combination with other factors, has already resulted in a corresponding shift in advertising revenues from traditional (vertically integrated) newspaper and magazine publishers to (horizontal) search engines and digital content aggregators," to which newspapers have responded by reducing costs through layoffs, cutting

programming networks – who are solely responsible for driving viewers to that “channel” – would share in that success.^{12/}

AMCN invests in the production and acquisition of high-quality content in order to create the best possible networks for its viewers. Like any other creative enterprise, the commercial success of an individual program depends on many factors and is often unpredictable. AMCN relies on its most popular programs – which have included such programs as *The Walking Dead*, *Fear the Walking Dead*, *Breaking Bad* and *Mad Men* – to generate advertising and licensing revenues needed to fund the creation of new content that consumers will enjoy and appreciate. AMCN also relies on these programs to bring viewers to the network, where they can be introduced to new programming and series.

Allowing third parties to freely use and profit off of these most successful programs, without any compensation to AMCN and without bearing any of the losses that accompany less successful programming, would interfere with this cycle of production, and hamper the ability of AMCN and other networks to continue to invest in the creation of innovative and diverse programming. As the Content Companies note, “allow[ing] third parties to appropriate, monetize, and distribute content without undertaking any of the risks or expenses associated with the creation of that content . . . would negatively impact the economic underpinnings of the

back coverage, and investing less in investigative journalism. Comments of Tech Knowledge, MB Docket No. 16-42, CS Docket No, 97-80, at 27-28 (filed Apr. 22, 2016); *see also* CWA Comments at 5-6.

^{12/} See NCTA Comments at 37 (“Instead of assuring the availability of retail devices that display services “*offered*” and “*provided*” by MVPDs, the proposed rules would harm those services, eviscerating the foundational licensing agreements on which they rely, by enabling retail devices to rearrange, alter, delete and repackage an MVPD’s service into an entirely new service, without regard to the MVPD’s service or to intellectual property.”).

creation and distribution of content as well as the rich and diverse viewing choices available to consumers.”^{13/}

Second, a third party manufacturer might seek to redirect viewers to the viewing platform where they profit the most. If a MVPD subscriber searches for *The Walking Dead*, the third party device might redirect that subscriber to the Netflix platform, if it is more advantageous for the manufacturer to bring the viewer there. This would interfere with AMC’s MVPD ratings, which drive the carriage and advertising revenues necessary to fund the creation of rich and diverse programming. Moreover, AMCN’s agreements with distributors include terms requiring pass through of the Nielsen watermark, to ensure that AMCN’s networks receive credit when viewers watch network programming, but third-party device manufacturers would have no obligation to adhere to these terms, further undercutting AMCN’s ability to fund high-cost programming.

Third, a competitive set-top box manufacturer might seek to profit from AMCN’s content by selling information about its viewers and their viewing habits to advertisers or to AMCN competitors – or use that information to create its own competing network.^{14/} TiVo argues that this does not introduce any novel concerns, because if MVPDs already sell set-top box data to advertisers, it should be able to do the same.^{15/} But this argument totally overlooks the fact that how and when a distributor may use network viewing data is the subject of negotiation and is reflected in the price that the distributor pays – and unlike MVPDs, TiVo would be profiting from this data without any compensation to the network.

^{13/} Content Companies Comments at 2; *see also* Comments of the Creators of Color, MB Docket No. 16-42, CS Docket No. 97-80, at 1 (filed Apr. 22, 2016) (“Creators of Color Comments”) (calling the proposed rules “a license for Silicon Valley tech giants to exploit our work for their own profit, without paying us for rights and diverting revenue away from the production of quality shows.”).

^{14/} Content Companies Comments at 9; NCTA Comments at 6, 49-50.

^{15/} TiVo Comments at 29.

Fourth, as many commenters note, a third party manufacturer might also seek to charge programmers who want to appear in user interface search results – or might skew competition by prioritizing search results for preferred or affiliated content, or for those willing to pay for higher priority.^{16/} IFTA voices the concern that “legitimate distributors would be forced to pay the unaffiliated manufacturers of devices or applications for any or preferential placement in the search results, linking or on the coveted ‘home screen’,” and that allowing set-top box manufacturers to make programmers pay for priority would “drive the price for viewing films and programs down to the lowest level offered by anyone (possibly to zero), siphoning off revenues that could be used to fund creation or promote consumer awareness of content.”^{17/} TV One suggests that “given Google’s well-known history of prioritizing search results based on who pays for them, a programmer could be required to pay for additional search terms to ‘hit’.”^{18/}

Third-party device manufacturers would likewise be able to deprioritize search results or discriminate against disfavored networks and content. The Cuban American National Council, Inc. worries that “[m]inority networks will face grave uncertainty as negotiated guarantees around channel placement give way to new program guides and Google-style search menus, where niche programming will be disadvantaged against larger and better known shows. . . . the result could be ‘digital redlining’, with shows aimed at minority audiences buried at the bottom of the pile and cut off from their audiences.”^{19/}

^{16/} Comments of the Independent Film & Television Alliance, MB Docket No. 16-42, CS Docket No. 97-80, at 6 (filed Apr. 22, 2016) (“IFTA Comments”).

^{17/} IFTA Comments at 7-8.

^{18/} TV One Comments at 15-16.

^{19/} Comments of the Cuban American National Council, Inc., MB Docket No. 16-42, CS Docket No. 97-80, at 1 (filed Apr. 22, 2016).

Public Knowledge’s solution to all programmer concerns – the absurd proposition that programmers should avoid these consequences by entering into separate contracts with device manufacturers or vendors to negotiate various rights^{20/} – makes clear that all these programmer concerns are valid, and that supporters of the proposed rules *intend* for additional payments to be made by programmers to the third-party manufacturers. With no obligation to do anything for programmers, third party manufacturers would have absolutely no incentive to enter into agreements with programmers unless it involved additional compensation for them.

There is no reason that a desire to promote a competitive market for set-top boxes needs to reduce incentives to produce programming and divert needed funds away from content creators. As CWA observes, the Commission “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.”^{21/} Any rules must ensure that any use of programmer content results in corresponding value for the programmer.^{22/}

^{20/} Public Knowledge Comments at 45.

^{21/} CWA Comments at 5-6; *see also* Mnet Comments at 1 (by altering, replacing, or adding ads, third-party device manufacturers will be able to “generate advertising revenues from [programmers’] content without sharing a portion of such advertising revenues or otherwise providing fair value” to programmers for access to their content); Comments of the Directors Guild of America & the International Alliance of Theatrical Stage Employees, MB Docket No. 16-42, CS Docket No. 97-80, at 7-8 (filed Apr. 22, 2016) (explaining that the proposed rule would diminish the value of ad-supported programming “by enabling third parties to place their own advertising on other’s programming, but with no corollary obligation to share the additional revenue it generates with the content owners and licensees”).

^{22/} IFTA Comments at 3-4, 8-9 (expressing concern that the proposed rules would allow unaffiliated third parties to generate revenue for themselves without compensating the content owner, and emphasizing “the need for this proceeding to protect the incentives that make investment and production desirable.”).

C. The Proposed Rules Threaten Programming Network Viewership By Disassociating Programming From The Network Brand.

As some initial commenters explained, some programming networks drive viewers not by attracting them to individual star programs, but rather by forming programming schedules and on-demand user interfaces around a network theme. In such case, it is the theme itself that viewers are tuning in for, rather than only for individual programs. TV One, for example, noted that a themed network's success results from "calculated efforts to build viewer affinity with the *network* . . . [b]y including highly targeted themes, actors, topics and advertising in its programming."^{23/}

AMCN's WE tv network is another example of such a network. WE tv focuses on attracting female viewers through targeted programming about relationships and families, including a focus on relatable stories centered on the African-American community. This focus is articulated through programming subject matter; the age, look, and gender of the shows' casts; music choices; taglines; and the products and services advertised, among other things. WE tv viewers know that they can turn to the network and regardless of the particular program airing, it will be of relevance to them and their interests.

Commenters supporting the proposed rules argue suggest that disaggregation of programming would benefit consumers. For example, UNIFYme.tv claims that the proposed rules will "clearly organize[] programming around themes that give viewers a simple list of programming options – whether it's on a mainstream channel like CBS or Fox, or a new independent channel . . . [s]ports themes, nature, romance, culture, etc."^{24/} This argument ignores the financial loss that programmers would suffer as a result of repackaging. If content is

^{23/} TV One Comments at 6.

^{24/} Comments of UNIFYme.tv, MB Docket No. 16-42, CS Docket No. 97-80, at 4 (filed Apr. 22, 2016).

disassociated from the network, then the value of that branding is lost. For networks that depend on network-wide branding to attract viewers, rather than on individually marketed programs, brand dilution could cause a significant loss in viewership.

Moreover, the Commission's proposed rules do not grant networks harmed in this way any avenue for recourse. Unlike programmers' distribution partners, third party device manufacturers would have no contractual relationship with programmers and no incentive to work with them to resolve branding and message issues.^{25/} The Commission should not move forward with its proposal without first protecting programmers' ability to control their brand and how their networks are presented and categorized.

D. The Proposed Rules Would Eviscerate Channel Neighborhooding and On-Demand Interface Agreements That Allow Programmers To Focus Marketing Toward Appropriate Audiences And Maximize Distribution.

The proposed rules' failure to require third-party manufacturers to abide by the contractual terms that programmers have negotiated in their carriage agreements with distributors to control how, when, and where their content is distributed and displayed is a serious failure.^{26/}

Carriage agreements often include presentation and branding elements such as channel neighborhood restrictions, discoverability of content, prioritization or non-discrimination of content within on-demand user interfaces, cross marketing obligations, and other provisions governing content delivery and form.^{27/} AMCN shares the Content Companies' concerns that

^{25/} See TV One Comments at 9 (“[W]hile TV One, given its contractual relationships, could address any concerns with its MVPD partners directly, it would have absolutely no recourse under the Commission’s proposal, since the third party box manufacturer would have no relationship with TV One or any incentive to resolve TV One’s concerns.”).

^{26/} See, e.g., Comments on Behalf of Intellectual Property Law Scholars, MB Docket No. 16-42, CS Docket No, 97-80, at 6 (filed Apr. 22, 2016); Content Companies Comments at 6-11.

^{27/} See Content Companies Comments at 37.

“[n]othing in the proposed rules would stop a third party from repackaging content, stripping it of its branding, placing it in a different channel neighborhood, replacing or supplementing its advertising, or otherwise prioritizing some programming at the expense of other content.”^{28/}

Channel neighborhood provisions, protection around the manner in which a distributor can and must display network content within on-demand interfaces, and joint marketing obligations between networks and distributors allow programmers to focus marketing toward the most appropriate audiences and maximize subscriber viewing. Viewers interested in a particular type of programming will frequently turn from one channel to the channels with the same theme in the “neighborhood,” allowing networks to attract new viewers. Similarly, as video on-demand platforms become more prevalent in the marketplace and viewers increasingly turn to on-demand environments to consume network programming, programmers work with distributors to best position and market to viewers to both consume sought after content and discover new content. As such, in negotiating certain carriage agreements, AMCN takes care to ensure some of its networks are included in channel neighborhoods with other networks targeted towards a similar audience and that network content is positioned within distributors’ on-demand interfaces in a manner that most encourages viewers to discover network content.

By allowing third parties to break up channel neighborhoods and group channels in the manner they deem appropriate (or not group them at all), the proposed rules destroy programmers’ ability to attract likely viewers in this manner, and so would diminish network revenues. Grouping channels in a neighborhood where they are unlikely to attract viewers – a

^{28/} Content Companies Comments at 37; Creators of Color Comments at 1 (“For independent and diverse networks, these agreements on issues like channel placement, advertising, and promotion are critical to reaching and growing an audience.”).

news network in the middle of premium movie offerings – or simply in a group that does not reflect the manner in which the network views itself could cause the network further harm.

Programming networks can devote significant time and resources to identifying their genre and target audience and the channel neighborhood that best reflects those decisions and is most likely to attract viewers. Third party manufacturers, with absolutely no expertise or experience in this area, no motivation to drive viewers to a programming network, and no accountability when they fail are the wrong parties to hold control over how networks are presented. The Commission should not grant them this ability in the misguided attempt to facilitate a more competitive market for set-top boxes.

E. The Proposed Rules Would Devalue Licensed Programming By Facilitating Consumers' Use Of Pirated Content.

Finally, AMCN shares other commenters' concerns that the proposed rules present of the risk of pirated content appearing in search results alongside legitimate content, which would facilitate the use of stolen content and reduce the value of licensed programming.^{29/} IFTA warns that the Commission's proposal "dangerously encourages set-top box manufacturers to include functionality in their devices that will allow consumers to directly access the Internet and search for and surface links to unauthorized sites and illegally offered programs side-by-side with legitimate broadcast, cable and online platform programming."^{30/} It further explains that including (and possibly prioritizing) this illegal content in navigation system search listings will give the results "a veneer of legitimacy and ease of access that will expand the audience for

^{29/} See, e.g., NCTA Comments at 100-104; U.S. Chamber of Commerce Comments at 4 (noting that "the proposed rule fails to place restrictions on search results to prevent third-party device makers from showing pirated content alongside licensed content."); Comments of the Small Business and Entrepreneurship Council, MB Docket No. 16-42, CS Docket No, 97-80, at 3 (filed Apr. 22, 2016).

^{30/} IFTA Comments at 9.

illegal content.”^{31/} Similarly, CreativeFuture expresses concern that “there would be no prohibition – even by the passing through of contractual provisions – on mixing and matching pay-TV and infringing web content in the same guide, allowing presentation of both legitimate and pirated material on equal footing.”^{32/} Consumer confusion over the legitimacy of programming could result in widespread consumption of pirated material, jeopardize the financial stability of programming networks, and discourage innovation and investment in high-quality programming that consumers enjoy.

Public Knowledge dismisses these concerns by saying that the fear of viewers watching pirated content is “exaggerated.”^{33/} But Public Knowledge’s dismissal of these fears as “pessimistic”^{34/} is willful ignorance and simply ignores the facts. In the first 24 hours of the season five premiere of AMC’s show, *The Walking Dead*, it was illegally downloaded by roughly 1.27 million unique IP addresses worldwide.^{35/} And as Gale Ann Hurd, producer of *The Walking Dead*, recently explained:

This is a real threat. Google's search engine does this today. Here's what happens when I search “watch *Fear the Walking Dead*.”

After the paid results, the first option is AMCN and the second is a pirate site — literally, side by side.^{36/}

^{31/} *Id.*

^{32/} Comments of CreativeFuture, MB Docket No. 16-42, CS Docket No, 97-80, at 8-9 (filed Apr. 22, 2016) (also noting that “[e]xperience with search today suggests that stolen content would be featured alongside with, and sometimes more prominently than, licensed content.”).

^{33/} Public Knowledge Comments at 47 n.66.

^{34/} Public Knowledge Comments at 47 n.66.

^{35/} Gale Anne Hurd, *FCC Proposal Would Make Zombies of Your Favorite TV Shows*, USA TODAY (Apr. 12, 2016, 4:59 PM), available at <http://www.usatoday.com/story/opinion/2016/04/12/fcc-set-top-box-proposal-cable-internet-piracy-walking-dead-zombies-gale-hurd-column/82919704/> (also noting that “a recent experiment showed that users are more likely to purchase legally when legal sites are prioritized over pirate sites — and they’re more likely to pirate when pirate links are promoted.”).

^{36/} *Id.*

The Commission should not be putting rules in place without requirements that third party manufacturers ensure that their search results exclude or deprioritize pirated content.

CONCLUSION

For all the reasons discussed above, the Commission should not adopt the rules as proposed.

Respectfully submitted,

/s/

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