

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 TIVO INC.**

**TIVO INC.**

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## SUMMARY

Consumer groups, public interest organizations, industry trade associations, content creators, and companies not affiliated with large MVPDs filed comments in response to the *Notice of Proposed Rulemaking* supporting the Commission's proposal. In doing so, they joined editorial boards of national publications, technology writers, the Obama administration's leading economic advisors, and well over 100,000 consumers, all of whom also support the Commission proposal. All of these parties support giving consumers choices in how they access pay-TV programming, leading to lower costs for consumers and greater innovation in the marketplace.

The National Telecommunications and Information Administration also expressed support for the Commission's proposal, "applaud[ing] the Commission's decision, pursuant to Section 629 of the Communications Act, to move forward with a proposal to increase competition and expand consumer choice in the market for multichannel video navigation devices." NTIA made clear that its aim was to "urge all stakeholders to focus their analysis on how to implement" the Commission's proposal.

Unfortunately, the incumbent companies opposed to the Commission's proposal provided no such constructive feedback, choosing instead to raise a number of objections that are either incorrect, vastly overstated, or simply orthogonal to the Commission's proposal to enable competition in the navigation devices market. As TiVo and others have noted before, the main objections and parade of horrors raised by opponents of the Commission's proposal could also be leveled against the current CableCARD regime – "horrors" that never happened. Whether it is the possibility of

reordering channel line-ups or replacing ads, or third-party devices violating customer privacy or not passing through EAS simply because they are not bound by Title VI regulation, or Internet-connected devices enabling piracy – all of these supposed dire outcomes of the Commission’s proposal have not occurred even though they are *possible* under the CableCARD regime that exists today.

Remarkably, opponents of the Commission’s proposal *agree*, admitting that the parade of horrors that they caution against is possible when MVPD subscribers use third-party CableCARD devices today. In other words, the objections raised by opponents of the Commission’s proposal are not about the Commission’s proposal at all – they are simply objections to consumers being given choices in how they access MVPD programming as required by Section 629. Or, put more simply, objections to the very idea of competition in order to preserve incumbent revenue streams and control over consumers’ program choices.

The Commission should recognize such attempts to deny consumers the benefits of competition for what they are, and should proceed with its proposal to increase competition and expand consumer choice in the navigation devices market. As discussed in greater detail in these Reply Comments, the concerns raised by opponents of the Commission’s proposal are either unfounded or can be addressed by the Commission through appropriate requirements on those providing third-party navigation devices.

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TiVo Inc. (“TiVo”) hereby files these reply comments in the above-captioned proceeding in support of the Commission’s efforts to establish a long-awaited successor to CableCARD to assure the competitive availability of retail navigation devices in compliance with Section 629. Certain incumbent parties with vested interests have filed comments indicating they are opposed to the very premise of competition from providers of unaffiliated, retail navigation devices, as envisioned by Section 629, rather than anything specific to the Commission’s proposal. Such parties desire that the Commission ignore its statutory obligations and deprive the American public of competition and choice. TiVo urges the Commission to recognize the motivation behind such commenters and proceed with adopting rules that give consumers the choices envisioned by Section 629, leading to lower costs, greater innovation, and other consumer benefits.

## I. INTRODUCTION.

Numerous parties including consumer groups,<sup>1</sup> public interest organizations,<sup>2</sup> industry trade associations,<sup>3</sup> content creators,<sup>4</sup> and companies<sup>5</sup> not affiliated with large MVPDs filed comments in response to the *Notice of Proposed Rulemaking*<sup>6</sup> supporting the Commission's proposal. Editorial boards of national publications<sup>7</sup> and technology writers<sup>8</sup> are also near unanimous support for the Commission's proposal. The Obama

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<sup>1</sup> Comments of Public Knowledge, MB Docket No. 16-42 (filed Apr. 22, 2016) ("PK Comments"); Comments of Consumer Action, MB Docket No. 16-42 (filed Apr. 20, 2016) ("Consumer Action Comments"); Comments of the Consumer Federation of America, MB Docket No. 16-42 (filed Apr. 22, 2016) ("CFA Comments").

<sup>2</sup> Comments of Electronic Frontier Foundation, MB Docket No. 16-42 (filed Apr. 22, 2016) ("EFF Comments"); Comments of the Greenlining Institute, MB Docket No. 16-42 (filed Apr. 22, 2016).

<sup>3</sup> Comments of INCOMPAS, MB Docket No. 16-42 (filed Apr. 22, 2016) ("INCOMPAS Comments"); Comments of Computer & Communications Industry Association, MB Docket No. 16-42 (filed Apr. 22, 2016) ("CCIA Comments"); Comments of Information Technology Industry Council, MB Docket No. 16-42 (filed Apr. 22, 2016); Comments of Digital Media Association, MB Docket No. 16-42 (filed Apr. 22, 2016).

<sup>4</sup> Comments of Writers Guild of America West, MB Docket No. 16-42 (filed Apr. 22, 2016).

<sup>5</sup> Comments of Google Inc., MB Docket No. 16-42 (filed Apr. 22, 2016); Comments of Amazon, MB Docket No. 16-42 (filed Apr. 22, 2016).

<sup>6</sup> *Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, MB Docket No. 16-42, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 16-18 (rel. Feb. 18, 2016) ("NPRM").

<sup>7</sup> TiVo Comments at 8-9, n. (citing editorials from the *New York Times*, *Los Angeles Times*, *Chicago Tribune*, *Boston Globe*, and *USA Today*); see also The Editorial Board, *Cheaper Cable TV Starts With A Better Box*, BLOOMBERG VIEW (Apr. 20, 2016), <https://www.bloomberg.com/view/articles/2016-04-20/cheaper-cable-tv-starts-with-a-better-box>.

<sup>8</sup> *Id.* at 8 n.15 (citing columns in *Ars Technica* and *Mashable*); see also Hayley Tsukayama, *I Don't Care How You Do It. Someone Has To Fix the Cable Box.*, The Washington Post (Feb. 5, 2016), at <https://www.washingtonpost.com/news/the-switch/wp/2016/02/05/i-dont-care-how-you-do-it-someone-has-to-fix-the-cable-box/>; Brian Barrett, *Cable Boxes Suck. One Day They'll Die. Until Then We Have To Fix Them* (Apr. 22, 2016), at

administration's leading economic advisors also support the Commission proposal as a common sense way to promote competition and save consumers money.<sup>9</sup> The Commission has also heard directly from consumers themselves, with well over 100,000 consumers writing to the Commission asking it to "unlock the box."<sup>10</sup> All of these parties support giving consumers choices in how they access pay-TV programming, leading to lower costs for consumers and greater innovation in the marketplace.

The National Telecommunications and Information Administration ("NTIA") also weighed in, "applaud[ing] the Commission's decision, pursuant to Section 629 of the Communications Act, to move forward with a proposal to increase competition and expand consumer choice in the market for multichannel video navigation devices."<sup>11</sup>

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<http://www.wired.com/2016/04/cable-box-dying-still-needs-fixed/>; Troy Wolverton, *Don't Be Fooled; FCC's Set-Top Box Rules Good for Consumers, Industry*, Mercury News (May 6, 2016), at [http://www.mercurynews.com/tv/ci\\_29860859/wolverton-dont-be-fooled-fccs-set-top-box](http://www.mercurynews.com/tv/ci_29860859/wolverton-dont-be-fooled-fccs-set-top-box); Joe Brown, *Thinking Outside the Cable Box*, The Tampa Tribune (Apr. 24, 2016), at <http://www.tbo.com/list/columns-jbrown/thinking-outside-the-cable-box-20160424/>.

<sup>9</sup> Jason Furman & Jeffrey Zients, *Thinking Outside the Cable Box: How More Competition Gets You a Better Deal* (Apr. 15, 2016), <https://www.whitehouse.gov/blog/2016/04/15/ending-rotary-rental-phones-thinking-outside-cable-box>. Jason Furman is Chairman of the Council of Economic Advisers, while Jeffrey Zients is Director of the National Economic Council and Assistant to the President for Economic Policy.

<sup>10</sup> John Eggerton, *Consumer Voices Speak Up for FCC's Set-Top Proposal*, Broadcasting & Cable (Apr. 29, 2016), <http://www.broadcastingcable.com/news/washington/consumer-voices-speak-fccs-set-top-proposal/156069>.

<sup>11</sup> Letter from Lawrence E. Strickling, Assistant Secretary for Communications and Information, United States Department of Commerce, to Chairman Tom Wheeler, Federal Communications Commission, MB Docket No. 16-42, Apr. 14, 2016, at 1 ("NTIA Letter").

NTIA noted that it is “committed to preserving and expanding competition in all markets, because competition enhances consumer welfare and drives innovation, ultimately benefitting the American economy and its workers via higher productivity growth.”<sup>12</sup> NTIA noted the many positive aspects of the Commission’s proposal, while also urging the Commission to ensure that certain concerns regarding the proposal are addressed.<sup>13</sup> NTIA made clear, however, that its aim was to “urge all stakeholders to focus their analysis on how to implement the [Commission’s proposed ‘Competitive Navigation’] model in a way that promotes competition for multichannel video navigation devices, yet ensures the security of multichannel video programming and permits continued innovation in the development and distribution of that programming.”<sup>14</sup>

Unfortunately, the incumbent companies opposed to the Commission’s proposal provided no such constructive feedback, choosing instead to raise a number of objections that are either incorrect, vastly overstated, or simply orthogonal to the Commission’s proposal to enable competition in the navigation devices market. As TiVo and others have noted before, the main objections and parade of horrors raised by opponents of the Commission’s proposal could also be leveled against the current CableCARD regime – in short, the “horrors” never happened. Whether it is the possibility of reordering channel line-ups or replacing ads, or third-party devices

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<sup>12</sup> *Id.* (citations omitted).

<sup>13</sup> *Id.* at 4-5.

<sup>14</sup> *Id.* at 2.

violating customer privacy or not passing through EAS simply because they are not bound by Title VI regulation, or Internet-connected devices enabling piracy – all of these supposed dire outcomes of the Commission’s proposal are in fact *possible* under the CableCARD regime that exists today. In some cases, the objections are to features – such as the use of an independent user interface by a third-party navigation device – that already exist in retail CableCARD devices today.

Remarkably, opponents of the Commission’s proposal *agree*, admitting that the parade of horrors that they caution against is possible when MVPD subscribers use third-party CableCARD devices today.<sup>15</sup> Indeed, several large studios, filing together as the “Content Companies,” admit that the “fundamental[]” difference between the existing CableCARD regime and the Commission’s proposal is that “very few devices today use CableCARD technologies, whereas the [NPRM] is premised on the assumption that its approach will be widely adopted.”<sup>16</sup> In other words, the objections raised by opponents of the Commission’s proposal are not about the Commission’s proposal at all – they are simply objections to consumers being given choices in how

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<sup>15</sup> See, e.g., Comments of 21st Century Fox, Inc. et al., MB Docket No. 16-42, at 28 (filed Apr. 22, 2016) (“Content Companies Comments”) (“[T]he existing CableCARD regime – which for more than a decade has allowed consumers to access MVPD content with third-party equipment – has already been the source of the very concerns that Content Companies have raised.”); Comments of Comcast Corp. and NBCUniversal Media, LLC, MB Docket No. 16-42, at 81-82 (filed Apr. 22, 2016) (“Comcast Comments”) (raising concerns about existing TiVo practices); Comments of AT&T, MB Docket No. 16-42, at 47 n.168 (filed Apr. 22, 2016) (“AT&T Comments”) (same); Comments of the National Cable & Telecommunications Association, MB Docket No. 16-42, App. A at 58 (filed Apr. 22, 2016) (same) (“NCTA Comments”).

<sup>16</sup> Content Companies Comments at 29 n.62.

they access MVPD programming as required by Section 629. Or, put more simply, objections to the very idea of competition in order to preserve incumbent revenue streams and control over consumers' program choices.

The Commission should recognize such attempts to deny consumers the benefits of competition for what they are, and should proceed with its proposal to increase competition and expand consumer choice in the navigation devices market. As discussed in greater detail below, the concerns raised by opponents of the Commission's proposal are either unfounded or can be addressed by the Commission through appropriate requirements on those providing third-party navigation devices.

## **II. THE COMMISSION SHOULD NOT EXPAND THE SCOPE OF COPYRIGHT LAW.**

Opponents of the Commission's proposal raise a number of objections regarding the Commission proposal supposedly encroaching on copyright holders' rights. However, upon closer inspection, these opponents either misunderstand the Commission's proposal and/or copyright law, or more likely are redefining copyright law to include "rights" that simply do not exist in order to protect incumbent revenue streams. The law gives copyright holders specific exclusive rights, such as the right to reproduce, distribute, and publicly perform their works. But such rights are not absolute. In particular, those rights are limited by the public's right to fair use of copyrighted works. Moreover, copyright doesn't give copyright holders an all-encompassing right to demand fees for and control the functionality of every third-party device that interacts with content. The Commission must reject these misleading

arguments and proceed with rules that protect content owners' intellectual property while preserving competition and consumer choice.

**A. The Commission's Proposal Will Not Result in the "Disaggregation" of MVPD Service**

Several opponents of the Commission's proposal claim that it would result in the unauthorized "disaggregation" of MVPD services. MPAA claims that the proposal would "permit[] third-parties to use copyrighted content to enhance their commercial services",<sup>17</sup> while the Content Companies claim that the proposal "would allow third parties to appropriate, monetize, and distribute content ...."<sup>18</sup> Other opponents raise similar objections.<sup>19</sup> These arguments ignore the fundamentals of the Commission's proposal and/or copyright law.

The Commission's proposal does not allow third parties to "appropriate" MVPD content; it allows *consumers* to use third party navigation devices to access the MVPD programming they have paid for. MVPDs purchase and package content from programmers and sell that package to subscribers, who pay MVPDs for delivery of the copyrighted content – package fees that are typically well over \$1,000 per year per subscriber. This proceeding is simply about how such MVPD programming packages purchased by an end user are received, accessed, and displayed on such end user's device(s). TiVo and other third parties are not "appropriating" anything; under the

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<sup>17</sup> Comments of the Motion Picture Association of America and SAG-AFTRA, MB Docket No. 16-42, at 4 (filed Apr. 22, 2016) ("MPAA Comments").

<sup>18</sup> Content Companies Comments at 2.

<sup>19</sup> NCTA Comments at 18; Comcast Comments at 75-76; AT&T Comments at viii-ix.

Commission's proposal, the three information flows are not being passed on to TiVo for it to appropriate, they are being passed on to a consumer who chooses to use a third-party navigation device.

MPAA also argues that the Commission's proposal "is tantamount to giving those third parties a zero-rate compulsory copyright license,"<sup>20</sup> but this too widely misses the mark. Third-party navigation device makers are not being granted a license; the consumer who has paid for a subscription to an MVPD program package is being given choices in how to access and view the copyrighted content she has paid to receive. The content creator chooses to distribute its content and licenses the public performance right to the MVPD. If TiVo or any other third-party navigation device maker were to distribute or publicly perform the copyrighted work in an unlawful fashion, it would be found liable under copyright law. But that is not what this proceeding is about.

The fact that TiVo or other third parties may generate some revenue from selling devices or charging other fees does nothing to change this analysis. As EFF correctly notes, "[c]opyright law grants no right to control 'profiting from content' or 'creating a new service' when the rights of reproduction, distribution, etc. are not implicated, or when fair use applies."<sup>21</sup> As explained above, it is the consumer who subscribes to

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<sup>20</sup> MPAA Comments at 8.

<sup>21</sup> EFF Comments at 4 (citations omitted). As EFF went on to note, "[n]umerous industries, from TV and DVR manufacturers to home and vehicle audio installers to popcorn growers 'profit' from the demand for creative work without permission or payment to copyright holders." *Id.*

MVPD content and pays for such a subscription, whether he chooses to lease a navigation device from the MVPD or use a third-party navigation device. Copyright law is not implicated and the public interest is not harmed if the consumer chooses to pay a few dollars more to TiVo or another third-party navigation device provider for additional features, *in addition* to the subscription fees paid to receive MVPD content.

**B. Licensing Terms are Not “Copyright,” But the Commission Can Enable Business Models That Go Beyond Copyright Law By Reinstating Encoding Rules**

Opponents of the Commission’s proposal argue that it encroaches on copyright holders’ rights by failing to preserve the contractual arrangements between copyright holders and MVPDs. As an initial matter, any such failures to preserve specific contractual provisions are not violations of copyright law or infringements on rights granted to copyright holders – if they were, they could certainly be subject to vindication of such rights under copyright law.

In addition, the complaint that third party navigation devices would not be required to preserve contractual arrangements is true of CableCARD devices today – meaning that this objection *is not about the Commission’s proposal in this proceeding*. MVPD’s arguments about the sanctity of contracts carry little weight when they have been entering into such contracts even though they cannot guarantee compliance with all aspects of programming contracts they have been entering into over the last several years with respect to any retail CableCARD devices used by their subscribers.

Opponents attempt to draw distinctions between the CableCARD regime and the Commission’s proposal, but these distinctions are either imagined or irrelevant to the

specific concerns raised by opponents of the Commission’s proposal. MPAA states that “CableCARDS enable unidirectional services, not two-way, Internet-based services,”<sup>22</sup> but that is both irrelevant – the only difference between one-way and two-way services is that the latter enable VOD (and upstream signaling functionality) in addition to linear programming – and incorrect – the Commission’s proposal enables users to access MVPD programming, not “Internet-based services.” MPAA also claims that CableCARD devices are “contractually bound to comply with terms on service presentation,”<sup>23</sup> but consumers using CableCARDS today are able to, and indeed do, access content using an independent user interface. Other purported harms, such as providers of third-party devices not being bound by agreements regarding channel line-ups and neighborhoods, are true of CableCARD devices today – though TiVo has always preserved the MVPD-supplied channel line-up and would have no objection to a requirement that the MVPD-supplied channel line-up be preserved as the default line-up presented to users.<sup>24</sup>

Nevertheless, TiVo and other CE manufacturers have long recognized the need for arrangements and business models that may go beyond the contours of copyright law. Historically, restrictions on subscriber use have been embodied in license terms for devices to receive content, which are then ameliorated by encoding rules that limit the

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<sup>22</sup> MPAA Comments at 14.

<sup>23</sup> *Id.* at 15.

<sup>24</sup> Any such requirement should not, however, prevent alternate line-ups (for example, genre-focused programming) or user customization, similar to what MVPD-supplied set-top boxes allow users to do today in selecting “favorites.”

impositions that may be placed on users. The combination of license and encoding rule balances the desire for programmers to control and “window” the distribution of content with consumers’ fair use rights, and sets a ceiling on restrictions that MVPDs can impose on content. For example, VOD content has been marked “copy never” and could not be copied, irrespective of consumers’ fair use rights. TiVo supports reinstating encoding rules that, along with the security technology licenses, give content owners, navigation device manufacturers, and consumers a predictable and consistent set of rules on how content can be treated.

However, providers of third-party navigation devices cannot be bound to follow every provision of programming agreements entered into by MVPDs, both because they have no way of knowing the terms of every confidential agreement entered into by every MVPD across the country, and also because some of these provisions may be anti-consumer and too restrictive of consumers’ fair use rights. As NTIA noted, while some aspects of MVPD programming contracts are important to preserving industry business models and revenue streams, “there may be elements of MVPD-programmer agreements that could hinder development of competitive navigation devices.”<sup>25</sup> For example, one could imagine commercial reasons a programming contract might limit an end user’s ability to fast forward through parts of a recorded program, watch recorded programming 30% faster with pitch corrected audio, or even to not allow a user to mute a music competition reality show, but users must have the option to make the viewing

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<sup>25</sup> NTIA Letter at 5.

decisions to which copyright law does not apply, and to exercise their fair use rights when it does.

### **III. THE PURPORTED CONCERNS ABOUT IMPROPER AND INTRUSIVE ADVERTISING ARE UNFOUNDED.**

Opponents of the Commission’s proposal to enable consumer choice in the navigation devices market raise a number of concerns related to providers of third party navigation devices being likely to engage in supposedly improper practices with respect to advertising. NCTA, for example, claims that “[t]he proposed rules would also allow third parties to remove advertisements that MVPDs and content providers place into programming and replace them with the third party’s own ads.”<sup>26</sup> TiVo once again notes that, in theory, providers of navigation devices using CableCARDs *could* remove and replace ads today – meaning that this objection is not to the Commission’s proposal but to the entire notion of competition from providers of unaffiliated retail devices. Nevertheless, no CableCARD device manufacturers have done so. TiVo, for example, has offered and sold retail set-top boxes for over a decade and has never removed ads from an MVPD linear programming stream and replaced them with its own. This history is far more instructive and predictive than theoretical concerns expressed by those who oppose the very concept of competition and consumer choice. Regardless, TiVo would not have concerns about a provision in the Commission’s rules

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<sup>26</sup> NCTA Comments, App. A at 32. NCTA purports to support its claim by pointing to “pause” ads employed by TiVo, discussed further later in Section III, but such ads do not remove and replace ads with third party ads.

preventing such interference with the “three flows” before consumers have an opportunity to decide how to render or store them.

NCTA and others also object to Pause Ads from TiVo.<sup>27</sup> For the past seven years, TiVo has offered advertising inventory *when a user chooses* to hit the pause button while watching a program. TiVo has never interfered with the program or the viewing experience; the ad only appears after the user chooses to pause (i.e. temporarily stop watching) the program. Until this proceeding, no MVPD or programmer had raised any objections about this because such displaying of ads is not a violation of copyright or any other law.

Moreover, in practice, approximately 80 percent of Pause Ads sold by TiVo have been furnished by television networks. In general, television networks refuse to air advertising for programs on competing networks. However, given the opportunity, the same programmers who are complaining about TiVo’s Pause Ads through their trade associations and industry groups are the enterprises that are buying those Pause Ads in order to reach new viewers through ads that can target similar genre shows. In other words, despite their inside-the-beltway objections to such ads, television networks and programmers approve of and engage in them in the real world marketplace.<sup>28</sup>

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<sup>27</sup> See, e.g., NCTA Comments at 44-47; Comcast Comments at 81-82; AT&T Comments at 44 & n.157.

<sup>28</sup> Despite the predominant use by programmers, MPAA refers to this pause advertising inventory as “tampering,” MPAA Comments at 15, and Comcast even calls them “pop-up ads.” Comcast Comments at 81. As these parties are well aware, pop-up ads are a form of online advertising in which a new web browser window opens to display advertisements. Pop-up ads interrupt the user’s experience, cannot be avoided, and are generally seen as a nuisance. Pause advertising has *none* of these attributes. By

Finally, TiVo notes that other “parade of horrible” scenarios such as third party navigation devices displaying pop-up ads, or ads framing television content, etc., are not risks in a competitive retail market. Again, these practices are theoretically possible under the existing CableCARD regime, which allows for independent user interfaces – indeed, any manufacturer of a “smart TV” *could* display ads that frame television content. The reason such practices are not found in the marketplace today and will not be a problem under the Commission’s proposal is that consumers will reject intrusive and annoying ads and, given social media opprobrium, will not buy and will ask for refunds for retail navigation devices that display pop-up ads or shrink the viewing area to frame ads. All of this is recognized by device makers who function in the real world, making such criticisms seemingly uniquely tailored for an inside the beltway audience.

#### **IV. CUSTOMER PRIVACY WILL BE SAFEGUARDED AND ENFORCED UNDER THE COMMISSION’S PROPOSAL.**

As TiVo explained in its comments, in the decade-plus it has offered retail navigation devices, it has never used customer information in any manner that MVPDs are prohibited from doing under Sections 631 and 338(i) of the Communications Act.<sup>29</sup> TiVo also explained that its privacy practices are subject to the jurisdiction and enforcement of the primary privacy enforcement agency, the Federal Trade Commission (“FTC”), as well as state governments.<sup>30</sup> Several other commenting parties

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definition, they *never* interrupt a program, are displayed only by user choice, and are unobtrusive.

<sup>29</sup> Comments of TiVo Inc., MB Docket No. 16-42, at 25 (filed Apr. 22, 2016).

<sup>30</sup> *Id.* at 25-28.

agreed that under the Commission's proposal, privacy practices of third party navigation devices would be subject to the jurisdiction and enforcement of the FTC.<sup>31</sup>

Most importantly, the FTC itself filed a letter making it clear that it has the jurisdiction and enforcement power to protect consumer privacy practices and providing a clear roadmap for ensuring that it retains such jurisdiction under its Section 5 authority to prohibit deceptive practices.<sup>32</sup> TiVo endorses the FTC's approach of ensuring that consumer privacy is protected under the Commission's proposal. As a responsible actor that has always protected consumer privacy, TiVo welcomes strong consumer protections that ensure that consumers will have the confidence to use innovative and improved competitive navigation device options without fear that their privacy will be harmed or usage data disclosed.

On this note, TiVo must respond to NCTA's baseless claim that it sells customer viewing records to advertisers.<sup>33</sup> This is simply untrue – TiVo has never sold or disclosed individualized customer viewing records to a third party as would be prohibited under Section 631. In an arrangement with Viacom, TiVo Research (a wholly-owned subsidiary of TiVo) utilized its advanced analytics to enable Viacom to provide advertisers with more valuable consumer engagement data, all while using

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<sup>31</sup> PK Comments at 30-36; EFF Comments at 5-6; CFA Comments at 12-13; Google Comments at 5-8; Amazon Comments at 7-8; INCOMPAS Comments at 22-23; CCIA Comments at 25-28.

<sup>32</sup> Letter from Jessica L. Rich, Director, Bureau of Consumer Protection, Federal Trade Commission, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42 (Apr. 22, 2016) ("FTC Comment").

<sup>33</sup> NCTA Comments at 83 & n.181.

anonymous or aggregated viewing information.<sup>34</sup> Given that its members are the largest collectors and sellers of set-top box data, the motives behind NCTA's erroneous criticism of TiVo's data privacy practices is suspect at best.

**V. RETAIL NAVIGATION DEVICES WILL THRIVE UNDER THE COMMISSION'S PROPOSAL AND WILL ULTIMATELY BENEFIT THE MVPD ECOSYSTEM.**

Opponents of the Commission's proposal argue that the lack of widespread adoption of retail CableCARD devices illustrates that consumers do not want greater choice in retail navigation devices and a successor to CableCARD is not needed. NCTA and Comcast, for example, cite to the large number of downloaded MVPD apps vis-à-vis retail CableCARD devices as evidence that consumers prefer MVPD proprietary apps to the unaffiliated retail navigation devices that the Commission's proposal would allow.<sup>35</sup>

This argument overlooks the real reasons CableCARD devices were not widely deployed – the lack of support by cable operators, as well-documented by the Commission and others.<sup>36</sup> From the outset, the CableCARD regime has been beset with

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<sup>34</sup> Press Release, Viacom and TiVo Research Announce Strategic Partnership, Nov. 2, 2015, *available at* <http://pr.tivo.com/press-releases/viacom-and-tivo-research-announce-strategic-partnership-nasdaq-tivo-1225857> ("The combination of Viacom's advanced predictive engine and TiVo's anonymized, granular set-top box data, matched directly to purchase and consumer engagement data in a privacy protected manner, allows advertisers to see much more than if their campaign was viewed." (quoting Frank Foster, Senior Vice President and General Manager of TiVo Research)).

<sup>35</sup> NCTA Comments at 25; Comcast Comments at 33-34.

<sup>36</sup> See National Broadband Plan at 52, Section 4.2 (discussing four major problems with CableCARD support); Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment, CS Docket No. 97-80, PP Docket No. 00-

problems including the inability to access two-way signals such as VOD, poor field and customer service support, and a variety of discriminatory practices including operators actively marketing against using retail devices. Indeed, in response to customer reports and complaints, the Commission actually adopted a rule requiring that for a professional CableCARD installation, an MVPD “technician arrive[] with no fewer than the number of CableCARDS requested by the customer and ensure that all CableCARDS delivered to customers are in good working condition and compatible with the customer's device.”<sup>37</sup> Needless to say, this is not a rule that needs to be adopted in a market with adequate customer service and support.

The notion that 99 percent of consumers would willingly pay an average of \$231 per year to lease MVPD set-top boxes runs counter to the experience of every other market for consumer electronics devices that is characterized by robust retail competition. NCTA and others do not offer any compelling explanation for why the market for set-top boxes would be different from every other consumer electronics market. Instead, the Commission’s proposal will give consumers choice and all the

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67, Fourth Further Notice of Proposed Rulemaking, FCC 10-61, at 5-8, ¶¶ 11-18 (rel. Apr. 21, 2010) (proposing rules to attempt to address problems with support for CableCARD-enabled retail devices); Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment, CS Docket No. 97-80, PP Docket No. 00-67, Third Report and Order, FCC 10-181, at 6-20, ¶¶ 8-38 (rel. Oct. 14, 2010) (adopting measures to attempt to address problems with support for CableCARD-enabled retail devices); Comments of TiVo Inc., MB Docket No. 14-16, at 15-17 (filed Mar. 21, 2014) (describing how support for CableCARD devices had gotten worse); Reply Comments of TiVo Inc., MB Docket No. 14-16, at 4-6 (filed Apr. 21, 2014) (same).

<sup>37</sup> 47 C.F.R. § 76.1205(b)(3).

advantages that competitive markets provide such as lower costs, innovative products, and better service – including for those consumers who choose to continue leasing navigation devices from MVPDs. It is no wonder that all major consumer groups with relevant subject matter expertise and so many major national editorial boards and technology writers believe that the Commission’s proposal will bring significant consumer benefits.<sup>38</sup>

AT&T argues that the prices of TiVo’s devices and service today prove that consumers will not save money under the Commission’s proposal. Depending on the configuration, consumers may actually save significantly by using a TiVo box,<sup>39</sup> but regardless, AT&T’s argument displays a lack of understanding of how competitive markets work. In a market with such limited competition, it is no surprise that TiVo competes for high-end customers seeking a premium product. Moreover, TiVo’s experience is that the most informed and tech-savvy consumers are more likely to successfully navigate the complicated CableCARD installation process and poor operator support.<sup>40</sup> However, once competition takes hold under the Commission’s proposal, economies of scale and market segmentation will allow navigation device

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<sup>38</sup> See Section I, *supra*.

<sup>39</sup> Jefferson Graham, *Review: TiVo Bolt stream, DVR + cord shaver*, USA Today (Nov. 4, 2015), at <http://www.usatoday.com/story/tech/2015/11/04/review---tivo-bolt-stream-dvr-cord-shaver/75109560/> (explaining that the author saved \$150 annually after installing a TiVo Bolt set-top box).

<sup>40</sup> See, e.g., *id.* (“Spoiler alert: Cable companies are notorious for being tough to deal with when the “CableCard” is requested, and my experience was no different. It took many calls, tweets and eventually two visits to make it work for simply inserting a card in a TiVo box.”).

makers to serve consumers at lower and varying price points. This is how all new consumer products work – from televisions to smart phones to tablets to Tesla electric vehicles.

Some commenters have argued that the use of competitive navigation devices will hinder technological advances.<sup>41</sup> However, today’s video devices can handle technology conversions (such as operators upgrading from MPEG2 to MPEG4) and these conversions can go smoothly, particularly when operators provide device makers with advance notice of such conversions. For example, Comcast has been converting service tiers from MPEG2 to MPEG4 in certain markets and TiVo’s Series 4 and Series 5 devices have been able to make the transition without requiring any replacement or additional equipment.<sup>42</sup> Regardless, technological compatibility issues arise in every consumer electronics market such as with televisions, smart phones, and tablets, and have never been a reason for content distributors to control the entire market for such products.<sup>43</sup>

Allowing consumers to have a choice of third-party navigation devices with improved, innovative user interfaces in which to view their pay-TV content is in fact **beneficial** to MVPDs and programmers because it gives consumers more options and

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<sup>41</sup> See, e.g., AT&T Comments at 26; Comments of EchoStar Technologies L.L.C. and DISH Network L.L.C., MB Docket No. 16-42, at 25 (filed Apr. 22, 2016).

<sup>42</sup> TiVo Support, *Comcast Transitioning to MPEG4 in Select Markets*, at [https://support.tivo.com/articles/Features\\_Use/Comcast-Transitioning-to-MPEG4-in-Select-Markets](https://support.tivo.com/articles/Features_Use/Comcast-Transitioning-to-MPEG4-in-Select-Markets).

<sup>43</sup> Of course, consumers would still have the option to lease boxes from their service provider if they are concerned about technology obsolescence.

reasons to continue to subscribe to pay-TV bundles, thereby largely preserving the current economics of the MVPD industry. As a recent review concluded, with a third party device like the TiVo Bolt “running the show, TV is more enjoyable.”<sup>44</sup> On the other hand, when consumers lack choice and options, they seek other alternatives, leading to cord cutting.<sup>45</sup>

## VI. GRACENOTE’S ARGUMENTS REGARDING COPYRIGHT OF GUIDE DATE ARE INCORRECT.

Gracenote filed comments expressing concern with the proposed requirement that MVPDs pass through programming metadata ID numbers. Gracenote asserted that such a requirement would violate Gracenote’s contractual and intellectual property rights and is unnecessary because “*Gracenote licenses this metadata to anyone who wishes to purchase it at reasonable and nondiscriminatory prices...* [and it] would be *delighted* to provide its services on a nondiscriminatory basis to any third-party manufacturer that wants them.”<sup>46</sup> TiVo applauds Gracenote for making this commitment to the FCC and third party manufacturers and urges the Commission to

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<sup>44</sup> Id.

<sup>45</sup> A recent survey of cord cutters and cord shavers indicated that a majority of them would be less likely to reduce their spending on pay-TV if they were offered a single device to search, discover, and watch all of their content, including OTT content. See Comments of the Consumer Video Choice Coalition, MB Docket No. 15-64, at 7-8 n.12, citing *The Digital Consumer: Global Views on the Pay TV Experience, Cable Analytics and Cable Wi-Fi* at 7, available at <http://www.amdocs.com/Solutions/cable-satellite/Documents/Amdocs-IEMR-Consumer-Pay-TV-Survey-2015-Highlights.pdf> (citing a survey by Linx-IE Market Research Corp.).

<sup>46</sup> Comments of Gracenote, MB Docket No. 16-42, at 4, 6 (emphasis in original) (“Gracenote Comments”).

hold Gracenote to this commitment. However, where basic factual program metadata and IDs are not available for license (such as for MVPD VOD assets), the MVPD must be required to make this information available so that competitive navigation devices can inform subscribers of their VOD choices.

While Gracenote's program descriptions are likely entitled to copyright protection as they contain originality and creativity, its IDs are not. The IDs are alphanumeric identifiers which identify a specific program, actor, episode, format and/or other factual information. Copyright does not protect facts. "That there can be no valid copyright in facts is universally understood."<sup>47</sup> One of the main cases cited by Gracenote proves TiVo's point. *Feist* involved a claim of protection to a white pages telephone directory organized by geographic region and name, and including the address and telephone number of each resident. Despite the publisher's substantial investment in compiling tens of thousands of listings, the Court held the directory could not be protected by copyright because the compilation of that basic factual information lacked the constitutionally-required element of originality.<sup>48</sup> Similarly,

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<sup>47</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991); 17 U.S.C. § 102(b). See Copyright Office FAQ, *What Does Copyright Protect*, <http://www.copyright.gov/help/faq/faq-general.html#protect> Program metadata IDs and the underlying facts also can be viewed as essential to the function and operation of the method of selecting television channels, and such functions and methods of operation also are excluded from copyright protection. 17 U.S.C. 102(b); see *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807 (1<sup>st</sup> Cir. 1995) (determining that commands and hierarchical menu command structure for selection of spreadsheet operations is not protectable by copyright). "If specific words are essential to operating something, then they are part of a 'method of operation' and, as such, are unprotectable." *Id.*, 49 F.3d at 816.

<sup>48</sup> *Feist*, 499 U.S. at 345.

Gracenote cannot protect the underlying facts in its IDs, regardless of whether it assigns different IDs for different versions of the same show. Like the data in a white pages phone book, the IDs contain basic facts as to time, channel, program name, version, format, etc. These facts themselves are not protectable by copyright, regardless of whether these facts could be ordered or arranged in an original way.

Gracenote's contractual breach and trade secret theories fare no better. If access to IDs were required by a Commission regulation, it could not be considered a contractual breach. Gracenote also fails to demonstrate how IDs by themselves would be considered trade secrets subject to misappropriation.<sup>49</sup>

All the Commission is seeking in this proceeding is for the MVPD to provide certain factual information, such as channel, program, start/stop time, and an ID so that competitive navigation devices can accurately convey to consumers the programming that is available. For most programs, this information should be available for license by metadata providers such as Gracenote. Where it is not available for license (such as for VOD assets for example), however, the MVPD must be required to make this information available so that competitive navigation devices can inform MVPD subscribers of their VOD choices.<sup>50</sup> This is in the best interest of the MVPD as well as

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<sup>49</sup> Gracenote's Constitutional claims also lack merit. *See generally Ex Parte* Comments of TiVo Inc., NBP Public Notice #27, GN Docket Nos. 09-47, 09-51, 09-137, CS Docket No. 97-80, at 12-13 (filed Feb. 17, 2010).

<sup>50</sup> Once a device maker knows what program and episode is on VOD, the device maker can license or create its own detailed program guide information. Hence, TiVo agrees with the Commission's tentative conclusion that Service Discovery Data should not include the detailed program guide information.

the device maker as both parties have a vested interest in keeping the subscriber satisfied and paying fees (and buying VOD titles) to the MVPD.

**VII. SMALL CABLE OPERATORS CAN BE EXEMPTED FROM BEING REQUIRED TO COMPLY WITH A SUCCESSOR STANDARD WITHOUT COMPROMISING THE GOALS OF THIS PROCEEDING.**

In its comments, TiVo supported an exemption for small cable operators from the standards-focused rules proposed in this proceeding.<sup>51</sup> TiVo noted that smaller MVPDs are disadvantaged in the set-top box marketplace because they lack the economies of scale to participate meaningfully in standards-setting and implement any technology changes required by a new standard in a cost-efficient manner.<sup>52</sup> Public Knowledge also supported giving smaller operators flexibility in complying with the proposed rules.<sup>53</sup>

TiVo supports the proposal of the American Cable Association (“ACA”) that “the Commission refrain from imposing its proposed regulations small multichannel video programming systems, those with fewer than 600,000 subscribers and not affiliated with either (i) an MVPD either serving more than one percent of all MVPD subscribers; or (ii) an MVPD or any entity with an attributable interest in an MVPD of 50 percent or more that has a market capitalization of greater than \$100 billion.”<sup>54</sup> ACA proposed that the Commission apply its rules only to MVPDs larger than those set forth above because:

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<sup>51</sup> TiVo Comments at 32-34.

<sup>52</sup> *Id.* at 32.

<sup>53</sup> PK Comments at 54-55.

<sup>54</sup> Comments of the American Cable Association, MB Docket No. 16-42, at iv (filed Apr. 22, 2016).

- These larger MVPDs (a) serve over 93 percent of pay-TV subscribers – far higher than the amount needed for a technology to become self-sustaining and create further growth, and (b) have traditionally been the first providers to deploy new equipment; and
- Smaller MVPDs, many of whom are already integrating third party devices into their systems, will often adopt the same technologies as larger MVPDs after larger MVPDs prove them out and the technologies become generally available at lower costs.<sup>55</sup>

TiVo agrees. Smaller MVPDs have a completely different economics than large MVPDs. They pay significantly more for programming, equipment and other operating elements, all resulting in little if any profit margin. Indeed, for certain smaller MVPDs, video is a loss leader for their broadband product.<sup>56</sup> Smaller MVPDs need not be included for the FCC's proposed regulations to be successfully implemented.

#### **VIII. THE CABLECARD SUPPORT RULES SHOULD BE RETAINED.**

In its comments, TiVo explained that the CableCARD supply and support rules are critical to support a competitive market for retail navigation devices while the Commission's new rules are implemented.<sup>57</sup> CCIA,<sup>58</sup> Public Knowledge,<sup>59</sup> and the Consumer Video Choice Coalition<sup>60</sup> agreed. NCTA was the only other party that weighed in on the issue of the continued applicability of CableCARD rules, and

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<sup>55</sup> *Id.* at iii.

<sup>56</sup> See, Oriana Schwindt, *Why Some Cable Companies Want To Become Chord-Cutters Themselves*, International Business Times (March 3, 2016), at <http://www.ibtimes.com/why-some-cable-companies-want-become-cord-cutters-themselves-2329724>.

<sup>57</sup> TiVo Comments at 34-38.

<sup>58</sup> CCIA Comments at 33-34.

<sup>59</sup> PK Comments at 53-54.

<sup>60</sup> CVCC Comments at 48-49.

repeated its past assertion that none of the CableCARD-related rules remain in effect.<sup>61</sup> TiVo has in the past explained why this understanding of the status of the CableCARD rules is incorrect.<sup>62</sup>

Nevertheless, NCTA says that cable operators will continue to supply CableCARDS and that “[t]here is no evidence of any regression in CableCARD support ....”<sup>63</sup> In light of NCTA’s representations, the Commission should make clear that all cable operators must support and supply CableCARDS to retail device users until a successor solution pursuant to the new rules is implemented and firmly established in the marketplace.

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<sup>61</sup> NCTA Comments at 173.

<sup>62</sup> TiVo Inc. Reply to Opposition, CSR-8740-Z, MB Docket No. 12-328, CS Docket No. 97-80, at 2-7 (June 10, 2013); *see also* Consumer Electronics Association Reply, CSR-8740-Z, MB Docket No. 12-328, CS Docket No. 97-80 (June 13, 2013); Reply Comments of the AllVid Tech Company Alliance, CS Docket No. 97-80 (Feb. 28, 2014).

<sup>63</sup> NCTA Comments at 173.

Respectfully submitted,

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