

May 31, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Notice of Ex Parte – MB Docket No. 16-42, CS Docket No. 97-80
Writers Guild of America, West, Inc.**

Dear Ms. Dortch:

On May 26, 2016, Monica Desai and Ben Tarbell of Squire Patton Boggs (US) LLP, on behalf of the Writers Guild of America, West, Inc. (“WGAW”)¹ met with Scott Jordan, Chief Technology Officer of the Federal Communications Commission (FCC or Commission), and the following staff of the Media Bureau: Mary Beth Murphy (Deputy Bureau Chief), Michelle Carey (Deputy Bureau Chief), and Brendan Murray (Assistant Chief, Policy Division).

As discussed in the meeting, WGAW supports the Commission’s proposal to expand consumer access to competitive navigation devices.² WGAW recommends measures to prevent competitive navigation devices from interfering with embedded advertising content, in order to protect this important funding source.

In the meetings, WGAW discussed options regarding actions that the Commission could take to prevent interference with embedded advertising content, including to:

¹ WGAW is a labor organization representing more than 8,000 professional writers working in film, TV, and digital media. Members of WGAW and its affiliate, Writers Guild of America, East, write virtually all of the entertainment programming and much of the news programming seen on TV and in film, and also are the creators of original programming for online services.

² See *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 (“NPRM”).

- a. Find, as the Commission has proposed to do, that the “Service Discovery Data” stream “need not include descriptive information about the advertising embedded within the program, to ensure that competitive Navigation Devices do not use that data to replace or alter advertising.”³
- b. Require that the “Compliant Security System” license for competitive navigation devices must specify that such devices may not alter, replace, overlay, or remove protected content, which would include embedded advertising content.⁴
- c. Require that use of the Multichannel Video Programming Distributor (MVPD) “Information Flows” by competitive navigation devices is subject to terms and conditions of advertising agreements between MVPDs and content providers, and this information regarding the terms of advertising content be passed through as data in the information stream.⁵
- d. Require that in order for competitive navigation devices to be “certified” in accordance with the proposed rules, that the competitive navigation device must not alter, replace, overlay, or remove embedded advertising content.⁶

Below, WGAW discusses its support for the Commission’s proposed rules, the need for those rules to include robust protections for embedded advertising content, and WGAW’s proposals listed above to prevent interference with advertising content.

I. Benefits of the Commission’s Proposed Rules

WGAW agrees that the current market for video navigation devices lacks robust competition, inconsistent with the intent of Congress as reflected in Section 629 of the Communications Act.⁷ Increased competition in this market will be beneficial both to consumers and to content creators. As traditional and online content are integrated in competitive navigation devices, consumers will have convenient and easy access to an expanded choice of programming. Content creators, particularly independent content creators, will benefit from these new outlets.⁸ To ensure that these potential benefits are

³ *NPRM* ¶ 80 n. 232.

⁴ *See NPRM* Appendix A (proposing that a “Compliant Security System” would be “licensable on terms that require licensees to comply with robustness and compliance rules”). Those “robustness and compliance rules” could include compliance with embedded advertising contracts.

⁵ *See NPRM* ¶ 35 (proposing to require MVPDs to provide three “Information Flows” to competitive navigation devices – “Service Discovery, Entitlement, and Content Delivery”).

⁶ *See NPRM* ¶¶ 72-78.

⁷ 47 U.S.C. § 549.

realized, competitive navigation devices should not be allowed to alter, replace, overlay, or remove advertising.

II. Integrity of Advertising Content Must Be Protected

WGAW focused this ex parte meeting on options for protecting the integrity of encrypted video programming streams – including embedded advertising content. The record in this proceeding reflects that interference with advertising content embedded in the Information Flows appears to be technically feasible. The Downloadable Security Technology Advisory Committee (DSTAC) Report acknowledged that “third party devices could ... insert different advertising into or on top of programs.”⁹ Additionally, competitive navigation device manufacturers may have a financial incentive to substitute or overlay advertising embedded in the stream, and the record indicates that ad overlay or insertion business models already exist in the video marketplace.¹⁰

Congress has recognized the need to protect embedded advertising content in the context of compulsory licensing, providing that a cable system infringes copyright if it “willfully alter[s]” the “content of the particular program” or “any commercial advertising ... transmitted.”¹¹ The Commission should therefore take specific measures to prevent interference with embedded advertising content by third party competitive navigation device providers.

⁸ WGAW discusses the potential benefits of the Commission’s proposed rules more fully in its Comments and Reply Comments in this proceeding. *See* Comments of the Writers Guild of America, West, Inc., MB Docket No. 16-42, CS Docket No. 97-80 (Apr. 22, 2016); Reply Comments of the Writers Guild of America, West, Inc., MB Docket No. 16-42, CS Docket No. 97-80 (May 23, 2016).

⁹ Report of the Downloadable Security Technology Advisory Committee, at 290, 301 (Aug. 28, 2015) (“DSTAC Report”).

¹⁰ For example, TiVo inserts advertising through the use of “[f]ast-forward billboards” and “[i]n program placements – before, during, and after,” and TiVo offers a “Pause Menu” advertising option such that “[w]hen viewers hit pause, additional ad messaging appears in a screen overlay.” *See* TiVo advertising sales, *available at* <https://www.tivo.com/ad-sales>; TiVo Advertising, *Pause Menu*, *available at* <https://www.tivo.com/tivoadvertising/pausemenu.html>; Comments of EchoStar Technologies LLC and DISH Network LLC, MB Docket No. 16-42 *et al.*, at 20 (Apr. 22, 2016). Additionally, YouTube offers “In-Video Overlay Ads” that “appear overlaid on the bottom of the YouTube video player on the YouTube watch pages.” *See* Google, *In-video Overlay Ads*, *available at* https://support.google.com/displayspecs/answer/187095?hl=en&ref_topic=4588474.

¹¹ 17 U.S.C. § 111(c)(3).

III. Proposals to Prevent Interference with Advertising Content

In the meetings, WGAW advanced several proposals intended to protect advertising content embedded in the MVPD Information Flows. Specifically, WGAW recommended that the Commission:

- a. Find, as it has proposed to do, that the “Service Discovery Data” stream “need not include descriptive information about the advertising embedded within the program, to ensure that competitive Navigation Devices do not use that data to replace or alter advertising.”¹²

WGAW agrees that including descriptive information about embedded advertising could facilitate the alteration of embedded advertising content, and that this information should therefore be excluded from the Service Discovery Data stream. However, the WGAW asked the Commission to consider additional measures to protect advertising.

- b. Require that the Compliant Security System license for competitive navigation devices must specify that such devices may not alter, replace, overlay, or remove protected content, which would include embedded advertising content.

The Commission’s proposed rules provide that the Compliant Security System that will “validate” competitive navigation devices must be “licensable on terms that require licensees to comply with robustness and compliance rules.”¹³ The Commission has stated that “robustness and compliance” refers to measures to “ensure that content is protected as intended.”¹⁴ WGAW proposes that such “protected content” include embedded advertising content specifically. It is logical to do so, as embedded advertising is a part of the programming stream and is encrypted along with the rest of the transmitted programming content.

Protection for embedded advertising content is consistent with the aims of Section 629(b) of the Act.¹⁵ Section 629(b) provides that the Commission may not prescribe regulations that would impede the rights of MVPDs to prevent “theft of service.”¹⁶ Theft of service includes the unauthorized interception of audio or visual data streams, which would encompass interference with advertisements embedded in the content stream. For example, Congress recognized that “cable service” is more expansive than only the video programming when it defined “cable service” as including the “video programming” as well

¹² NPRM ¶ 80 n. 232.

¹³ See NPRM ¶ 71, Appendix A (proposed 47 C.F.R. § 76.1200(k)).

¹⁴ NPRM ¶ 70.

¹⁵ See 47 U.S.C. § 549(b); NPRM ¶ 71.

¹⁶ 47 U.S.C. § 549(b).

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as all “information that a cable operator makes available to all subscribers generally.”¹⁷ This is also reflected in the Commission’s rules.¹⁸

- c. Require that use of the MVPD Information Flows by competitive navigation devices is subject to terms and conditions of advertising agreements between MVPDs and content providers, and this information regarding the terms of advertising content be passed through as data in the information stream.

As detailed in the record, licensing agreements between MVPDs and content providers include “clear, enforceable terms for ... acceptable advertising [and] restrictions against overlays.”¹⁹ The Commission should require that use of the MVPD Information Flows is subject to the terms and conditions of agreements between MVPDs and content providers related to advertising. In this way, both embedded advertising and out-of-stream advertising subject to specific, negotiated agreements would be protected. Such terms and conditions would be conveyed to third party device manufacturers through the Information Flows as metadata, not by disclosing the terms of licensing agreements.²⁰

- d. Require that in order for competitive navigation devices to be “certified” in accordance with the proposed rules, that the competitive navigation device must not alter, replace, overlay, or remove embedded advertising content.

The Commission has proposed to require that MVPDs only provide the Information Flows to competitive navigation devices that hold a “Certificate” that certifies that such devices will “honor” various “important public policy goals underlying the Communications Act.”²¹ The certification should include a specific confirmation that the competitive navigation device will not alter, replace, overlay, or remove embedded advertising content.

¹⁷ See 47 U.S.C. §§ 522(6), (14).

¹⁸ 47 C.F.R. § 76.5(ff).

¹⁹ See Comments of National Cable & Telecommunications Association, MB Docket No. 16-42 *et al.*, at 33 (Apr. 22, 2016); see also Comments of AMC Networks, Inc., MB Docket No. 16-42 *et al.*, at 5 (May 23, 2016) (explaining that “AMCN works with 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).”).

²⁰ See Comments of the National Association of Broadcasters, MB Docket No. 16-42 *et al.*, at 8 (Apr. 22, 2016).

²¹ See NPRM ¶¶ 72-74, Appendix A (proposed 47 C.F.R. §§ 76.1200(l); 76.1211(a)).

The Commission has used its enforcement authority to take action against companies violating the terms of FCC-ordered certification requirements.²² Under Section 503 of the Act, the FCC has general authority to enforce both Section 629 and the implementing rules it adopts:

Any person who is determined by the Commission ... to have--

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter ... shall be liable to the United States for a forfeiture penalty.²³

Also, violations of this certification could trigger Federal Trade Commission (FTC) enforcement as an “unfair” or “deceptive” act or practice, particularly if the certifications are

²² See *Elimination of Interferences to Terminal Doppler Weather Radar (TDWR)*, Memorandum, from Julius Knapp, FCC Office of Engineering and Technology; P. Michele Ellison, FCC Enforcement Bureau (July 27, 2010); see also *Revision of Part 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) Devices in the 5 GHz Band*, First Report and Order, 29 FCC Rcd 4127 (2014) (modifying FCC rules to “require manufacturers to secure the software in all U-NII devices to prevent modifications that would allow the device to operate in a manner inconsistent with the equipment certification,” citing Enforcement Bureau Takes Action to Prevent Interference to FAA-Operated Terminal Doppler Weather Radars Critical to Flight Safety, FCC Enforcement Advisory, DA 12-459 (Sept. 27, 2012); *VPNet, Inc.*, Order & Consent Decree, 28 FCC Rcd 15429 (Enf. Bur. 2013); *Ayustar Corporation*, Order & Consent Decree, 28 FCC Rcd 15420 (Enf. Bur. 2013); *Towerstream Corporation*, Notice of Apparent Liability for Forfeiture and Order, 28 FCC Rcd 11604 (Enf. Bur. 2013); *Argos Net, Inc.*, Forfeiture Order, 28 FCC Rcd 1126 (Enf. Bur. 2013); *Directlink, LLC*, Notice of Apparent Liability for Forfeiture and Order, 28 FCC Rcd 37 (Enf. Bur. 2013); *Skybeam Acquisition Corporation*, Notice of Apparent Liability for Forfeiture and Order, 27 FCC Rcd 11337 (Enf. Bur. 2012); *AT&T, Inc.* Forfeiture Order, 27 FCC Rcd 10803 (Enf. Bur. 2012); *VPNet, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 27 FCC Rcd 2879 (Enf. Bur. 2012); *Argos Net, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 27 FCC Rcd 2786 (Enf. Bur. 2012); *Insight Consulting Group of Kansas City, LLC*, Notice of Apparent Liability of Forfeiture and Order, 26 FCC Rcd 10699 (Enf. Bur. 2011); *Ayustar Corp.*, Notice of Apparent Liability for Forfeiture and Order, 26 FCC Rcd 10693 (Enf. Bur. 2011); *Rapidwave, LLC*, Notice of Apparent Liability for Forfeiture and Order, 26 FCC Rcd 10678 (Enf. Bur. 2011); *AT&T, Inc.*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 1894 (Enf. Bur. 2011)).

²³ 47 U.S.C. § 503(b).

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made to the public. Jessica Rich, Director of the FTC's Bureau of Consumer Protection, explained in the record that the FTC has the authority to enforce against "unfair and deceptive acts or practices" in commerce including deceptive representations to consumers, and that the FTC has taken enforcement action against companies that the FTC alleged "falsely" made certain "certifications" regarding privacy practices.²⁴ Ms. Rich recommended that the FCC "facilitate FTC enforcement against third-party set-top box manufacturers" by requiring that the certification for competitive navigation devices "be conveyed to consumers," and WGAW supports this recommendation.²⁵

IV. Conclusion

WGAW supports and applauds the Commission's proposal to empower consumers in how they access video programming, and to promote innovation and access to diverse and independent sources of video content. As advertising is a key revenue source for television programmers, competitive navigation devices should not be permitted to alter, replace, overlay, or remove embedded advertising content. WGAW encourages the Commission to adopt a combination of these proposals.

Respectfully submitted,



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²⁴ See Letter from Jessica L. Rich, Director, Bureau of Consumer Protection, Federal Trade Commission, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 16-42, CS Docket No. 97-80, at 1-4 (Apr. 22, 2016).

²⁵ *Id.* at 1, 6-7.