

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Video Device Competition)	MB Docket No. 10-91
)	
Implementation of Section 304 of the Telecommunications Act of 1996)	
)	
Commercial Availability of Navigation Devices)	CS Docket No. 97-80
)	
Compatibility Between Cable Systems and Consumer Electronics Equipment)	PP Docket No. 00-67
)	

**REPLY COMMENTS OF TRIBUNE MEDIA SERVICES, INC., DEBTOR-IN-
POSSESSION**

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DEBTOR-IN-POSSESSION

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SUMMARY

Tribune Media Services, Inc., Debtor-In-Possession, and its predecessors-in-interest (collectively, “TMS”) have been syndicating content for more than ninety years and have been creating and publishing television guide content for more than forty years. Today, TMS employs hundreds to create industry-leading electronic program guide (“EPG”) content for use by navigation devices, and TMS licenses its proprietary content to both competitive navigation device providers and MVPDs.

TMS agrees with the many commenting parties that have urged the Commission to avoid unintentionally stifling innovation and competition in an effort to promote the commercial availability of navigation devices. In particular, the Commission should neither impose technical standards on EPG content nor require the unlicensed redistribution of copyrighted EPG content. Such measures are unnecessary to stimulate the market for navigation equipment because no competitive navigation devices have any difficulty acquiring and displaying EPG content from TMS or its competitors. If implemented, moreover, they would impede a complex and efficient publishing industry while providing no benefit to consumers. The proposed EPG content disaggregation mandate would require the unauthorized distribution of copyrighted works and force MVPDs to violate the terms of their EPG content licenses. In addition, the proposed EPG technical standard would impose substantial costs on the EPG content publishing industry while doing nothing to foster competition in the navigation equipment market.

The Commission, therefore, should refrain from unintentionally stifling innovation and competition in the EPG content publication industry in an effort to promote the commercial availability of navigation devices.

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Tribune Media Services, Inc., Debtor-In-Possession (“TMS”),¹ by its attorneys, hereby submits these Reply Comments regarding the Federal Communications Commission’s (the “Commission’s”) *Notice of Inquiry* (the “*NOI*”) in the above-captioned matter.²

TMS is an international leader in entertainment information, marketing, and publishing. TMS’s extensive and proprietary collections of television metadata,³ movie showtimes and metadata, celebrity content, and related content and information power many of the world’s most

¹ As used herein, “TMS” includes both Tribune Media Services, Inc. and its predecessors-in-interest.

² Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment, *Notice of Inquiry*, 25 FCC Rcd 4275 (2010).

³ By “television metadata,” TMS means a broad array of content and other information concerning television programs, such as localized schedule and programming information, localized, MVPD-specific channel lineups, and detailed descriptive content about each television program (*e.g.*, program descriptions, plot summaries, major actors, and guest appearances). While this television metadata is provided by TMS to its customers across a variety of distribution platforms, including print media, online media, and electronic programming guides, TMS has referred to this broad set of content and information herein as “EPG content” because the Commission has focused several of its questions specifically on “electronic programming guides.” The use of the term “EPG content” is not meant to limit the breadth of the type of entertainment content and information that is created by TMS or to limit the multiple distribution platforms through which such content and information is distributed to consumers.

popular print, online, and on-screen entertainment guides and publications produced by or for leading online, cable, direct broadcast satellite, telecommunications, mobile, newspaper, and consumer electronics companies. TMS creates, edits, manages, and licenses proprietary, copyrighted, and copyrightable databases comprised of television, motion picture, and celebrity information, as well as other related content, which it provides to thousands of companies that serve millions of consumers. TMS also creates consumer products and services that feature a wide variety of entertainment information, including Zap2it.com (TMS's direct-to-consumer Internet site), *Channel Guide* and *DISH* magazines, and on-screen program guides for cable television subscribers. TMS's customers include many of the largest, most innovative media, software, and consumer electronics companies in the world, including TiVo, Microsoft, DISH Network, Comcast, and The New York Times Company.

TMS agrees with the many commenting parties that have urged the Commission to avoid unintentionally stifling innovation and competition in an effort to promote the commercial availability of navigation devices.⁴ In particular, TMS urges the Commission to avoid unintended consequences that would result from unnecessary regulation related to the Electronic Program Guide ("EPG") content publishing industry, which is a complex, efficient, and competitive industry that has evolved to meet the EPG content requirements of navigation devices distributed both by multichannel video program distributors ("MVPDs") and non-affiliated manufacturers, as well as the content needs of print and online distributors of entertainment information.⁵

⁴ See, e.g., Comments of AT&T, Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 38-43 (filed July 13, 2010) ("AT&T Comments"); Comments of Charter Communications, Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 5-8 (filed July 13, 2010); Comments of the Motion Picture Association of America, Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 4-6 (filed July 13, 2010); Comments of Motorola, Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 22-30 (filed July 13, 2010); Comments of the National Cable & Telecommunications Association On The Commission's Notice Of Inquiry, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 33-47 (filed July 13, 2010) ("NCTA Comments").

⁵ In these Reply Comments, TMS refers only to the television metadata content publishing industry, not the guide and software industry relating to the EPGs themselves.

Requiring MVPDs to disaggregate proprietary EPG content, as one party has suggested,⁶ would deprive participants in the EPG content publishing industry of their legal and economic rights without advancing the goals of this proceeding (*i.e.*, fostering competition in the market for navigation equipment). The Commission should decline to adopt regulations governing EPG content because no credible evidence exists that the current structure of the market for EPGs has impeded or in the future will impede the competitive availability of navigation devices.⁷ If the Commission nevertheless decides to impose such regulations, any standards it adopts should preserve the intellectual property rights of competitors in the EPG content publishing industry.

I. TMS Creates, Edits, Manages, and Licenses Proprietary EPG Content.

Founded in 1918 as the Chicago Tribune-New York News Syndicate, TMS began operations in the publishing industry by syndicating columns, comic strips, and other content items to newspapers. In addition to its syndication operations, with the birth of television and its wide adoption by consumers in the United States, TMS began creating and aggregating television information to provide to newspapers, for example, publishing weekly television listings guides. In these initial stages of the television industry, TMS provided content and information about television programming for a relatively finite number of programming choices to a relatively discrete number of distribution platforms for television and motion picture content (*e.g.*, newspapers). Since the nascent stages of the television industry, both the creation and aggregation of content and information about television programming has been a function

⁶ Comments of the Consumer Electronics Association and the Consumer Electronics Retailers Coalition on Notice of Inquiry, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 17 (filed July 13, 2010) (“CEA Comments”).

⁷ Indeed, several commenting parties have questioned whether the Commission has authority to impose regulations governing EPG content under Section 629 of the Communications Act (the “Act”). *See, e.g.*, AT&T Comments at 43-66; NCTA Comments at 47-53; Comments of Time Warner Cable, Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 10 (filed July 13, 2010) (“Time Warner Comments”); Comments of Verizon, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 21-24 (filed July 13, 2010) (“Verizon Comments”).

performed by an independent publishing industry rather than by television programmers or distributors themselves.

As television programming grew in popularity and complexity during the 20th century, so did the need for these publishing services and the scope of the creation, editing, management, and licensing of such content. Moreover, consumer demand for dynamic and more robust entertainment content increased. Consumers needed to understand their expanding viewing alternatives in order to make informed decisions about what to watch on television. TMS consequently began meeting this need for broader television metadata about a rapidly growing number of television and video programming choices increasingly available through a broad and expanding array of distribution platforms, including print media, web sites, EPGs, consumer electronics devices, and mobile telephones.

TMS has been creating, editing, managing, and licensing its entertainment content and information for over 40 years. TMS's extensive and proprietary collections include over 3.5 million records covering over four decades of television and motion pictures. TMS employs hundreds for its editorial operations, including more than 150 editors dedicated to sourcing, aggregating, researching, creating, and editing EPG content from over 15,000 sources across the United States and throughout the world. TMS's editors are highly trained and experienced, and TMS employs rigorous standards of editorial quality control to ensure the accurate and timely creation of dynamically available EPG content. TMS licenses and distributes its EPG content to thousands of customers throughout the world.

II. Requiring AllVid Gateways To Pass Through EPG Content To Smart Video Devices Would Have Unintended Consequences For The EPG Content Publishing Industry.

In the *NOI*, the Commission requested comment on the Consumer Electronics Association's ("CEA's") proposal that MVPDs be required to disaggregate proprietary EPG content licensed from EPG content publishers and pass that licensed content to smart video

devices.⁸ The Commission should reject CEA’s proposal both because it misconceives the current structure of the EPG content publishing industry and because it would disrupt the market-based expectations and intellectual property rights of competitors in the EPG content publishing industry.

A. The Established Distribution Model For EPG Content Does Not Inhibit The Availability Of Competitive Navigation Devices.

TMS agrees with the observations of commenting parties that an EPG disaggregation requirement is unnecessary to achieve the purposes of Section 629, which are directed toward fostering the availability of navigation equipment rather than services such as EPG content publishing.⁹ The Commission itself found that the scope of Section 629 does not extend to EPG services, such as EPG content publishing,¹⁰ and the distribution of EPG content in fact has no effect on the competitive availability of navigation devices.

Pursuant to Section 629, the FCC may “adopt regulations to assure the commercial availability . . . of converter boxes, interactive communications equipment, and other equipment” used to access an MVPD’s offerings.¹¹ More than fourteen years of experience since enactment of Section 629 demonstrates that if the availability of competitive navigation devices has been inhibited, it is not due to lack of access to competitively available EPG content. Competitive navigation devices that consumers currently use, such as TiVo set-top boxes and/or home-media

⁸ *NOI*, 25 FCC Rcd at 4290, para. 44.

⁹ *See, e.g.*, AT&T Comments at 46-47; NCTA Comments at 47-53; Time Warner Comments at 10; Verizon Comments at 21-23.

¹⁰ When the Commission considered the issue nearly a decade ago, it concluded that EPG content fell outside the scope of the Commission’s authority under Section 629 of the Act because its provision was intended to assure the competitive availability of equipment, not services. *Gemstar International Group, Ltd. And Gemstar Development Corp.; Time Warner Cable*, 16 FCC Rcd 21531, 21541-42 (2001). The Commission explained that it “has not found that the right to attach consumer electronics equipment to a cable system can be expanded to include the obligation by cable operators to carry any service that is used by such equipment, nor is the legislative history supportive of such a requirement.” *Id.* at 21542. The Commission observed that “the scope of Section 629 apparently was ‘narrowed to include only equipment used to access services provided by multichannel video programming distributors.’” *Id.*, quoting S. CONF. REP. NO. 104-230 at 181 (1996).

¹¹ 47 U.S.C. § 549(a).

computers using Windows Media Center, incorporate EPG content licensed from publishers such as TMS, Rovi Corporation, or FYI Television in their user interfaces. The market has proven that competitive navigation devices do not have any difficulty acquiring and presenting competitively available EPG content; therefore, an EPG disaggregation requirement is wholly unnecessary to further the purposes of Section 629.

B. The Cost Of EPG Information Used In Navigation Devices Is Not Included In MVPD Service Charges.

The Commission's *NOI* sought comment on CEA's repeated assertion that "consumers already pay for programming guide data as part of their subscription fees."¹² CEA is incorrect.¹³ MVPD customers do not pay for disaggregated EPG content when they subscribe to a video programming service. Instead, the cost of EPG information is reflected in the charges for navigation devices that use the EPG service.¹⁴

For example, TMS customers such as TiVo, which offer navigation devices in competition with MVPDs, purchase licenses for TMS's proprietary EPG content, use this information to power and enhance the functionality of their navigation devices, and recover the cost of these licenses through customer charges.¹⁵ Therefore, in the EPG industry, the cost of EPG content traditionally and most appropriately is allocated to and recovered by the navigation device provider as a cost of offering the navigation service.¹⁶ Both MVPDs and competitive

¹² *NOI*, 25 FCC Rcd at 4290, para. 44, *citing* Reply Comments of the Consumer Electronics Association, CS Docket No. 97-80, PP Docket No. 00-67, at 13 (filed Sept. 10, 2007) ("CEA 2007 Reply Comments"); *see also* CEA Comments at 18 ("consumers already pay for [EPG data] in their subscriptions.").

¹³ As noted above, CEA's comments do not recognize the fact that the publishing industry, including newspaper publishing and related services, has created and aggregated television metadata since the early days of the television industry.

¹⁴ To the extent that the cost of licensing EPG information is included in the bills of MVPD customers, it is due to the fact that most lease navigation devices directly from their MVPD.

¹⁵ *See, e.g.*, TiVo Service Agreement at § 3, available at <http://www.tivo.com/abouttivo/policies/tivoserviceagreement.html> (last visited Aug. 8, 2010) ("The TiVo service consists of program guide information and the following features . . .").

¹⁶ CEA has admitted that "CE companies are experienced in licensing and implementing EPGs." CEA 2007 Reply Comments at 13. Of course, CEA has not proposed that its members be forced to unbundle and provide to MVPDs any intellectual property the CE companies have licensed.

navigation device providers acquire a limited license to use proprietary EPG content with their navigation services. MVPDs typically provide an EPG as part of the functionality of navigation devices they lease to their subscribers and incorporate EPG license costs in their equipment lease charge. Indeed, the FCC's Form 1205 allows cable operators to recover the cost of acquiring EPG content by incorporating it into the regulated rate they charge for the lease of navigation devices.¹⁷

C. EPG Content Is Protected By Copyright.

TMS agrees with the other commenting parties that have observed that EPG content is protected by copyright.¹⁸ Any equipment standards or other regulations the Commission may adopt should avoid infringing the valid copyrights of EPG content publishers.

The Supreme Court explained in *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.* that factual compilations merit copyright protection when “the facts [are] selected, coordinated, or arranged ‘in such a way’ as to render the work as a whole original.”¹⁹ Of course, “[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”²⁰ Moreover, that copyright is infringed even when less than an exact replica of the original copyrighted compilation is reproduced; otherwise “subsequent compilers [could] avoid infringement suits simply by adding a single fact to a verbatim copy of the copyrighted compilation, or omitting in the copy a single fact contained in the copyrighted compilation.

¹⁷ See FCC Form 1205, at Schedule B, Worksheet for Calculating Permitted Equipment and Installation Charges, Step A.2, D, and E.

¹⁸ See, e.g., AT&T Comments at 54-55; Comments of Rovi Corporation, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 4 (filed July 13, 2010) (“Rovi Comments”); NCTA Comments at 49-50.

¹⁹ *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991).

²⁰ *Id.* at 345; see also *Kregos v. Associated Press*, 937 F.2d 700, 703-04 (2d Cir. 1991) (requiring minimal level of creativity as well as independent selection and arrangement for compilation to enjoy copyright entitlement).

Such a result would render the copyright of a compilation meaningless.”²¹

TMS’s EPG content is protected by copyright because a substantial amount of original research and content creation (*e.g.*, program descriptions and plot summaries) is involved with the production of the EPG content. Indeed, EPG content that TMS licenses to navigation device providers contains original, non-factual content independently protected by copyright law. In addition, the factual elements contained within EPG content that TMS publishes include a substantial level of creativity in terms of their selection, arrangement, and coordination prior to publication. For example, after sourcing television-programming information from certain content creators and programmers, TMS’s more than 150 editors compile, annotate, and edit any information they receive.

Among other things, however, these editors also then create and edit or enhance program descriptions and plot synopses, determine the appropriate genre and other topic information for a particular program, and correct mistakes included in television scheduling or programming information received. TMS editors update plot summaries continuously and also continually update the EPG content to reflect the latest scheduling and programming information, as well as the latest biographical content for major actors and directors associated with the programming. TMS also cross-references, edits, fact-checks, and matches information sourced from more than 30,000 combined schedule and individual MVPD system lineup sources to create seamless, integrated EPG content collections, accurate to the local level, for its licensees and their consumer across many markets. In addition, TMS offers program-related photographs and celebrity biographies and provides further cross-references between related content contained in its various collections. In this way, unlike the telephone book data compilations involved in the *Feist* case, TMS’s EPG content is a robust, complex, and integrated editorial product that contains original, non-factual content (*e.g.*, narrative program descriptions, narrative episode

²¹ *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509, (2d Cir. 1991) (internal quotations omitted, citing *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 583 n.5 (1985) (Brennan, J., dissenting)).

synopses, photographic works, and celebrity biographical descriptions) protected by copyright. TMS's EPG content accordingly is entitled to a much greater scope of copyright protection than the telephone book data compilations at issue in *Feist*.

Public Knowledge argues that the Commission has the "clear authority" to require that MVPDs permit the unauthorized third-party reproduction of copyrighted EPG content.²² Public Knowledge bases its argument on the Commission's program access rules and the mandatory carriage regime.²³ Its argument fails to withstand scrutiny, however. Cable-affiliated programming acquired pursuant to the program access rules remains subject to copyright licensing by the entities that distribute it. Broadcast programming distributed pursuant to the mandatory carriage rules similarly is subject to a statutory copyright license,²⁴ and broadcasters providing such programming are required to indemnify cable operators if carriage would result in additional copyright liability.²⁵ Contrary to Public Knowledge's argument, neither the program access nor mandatory carriage provisions of the Act authorize the Commission to require the unlicensed distribution of copyrighted works. As the foregoing demonstrates, the Commission should decline to require that MVPDs disaggregate proprietary EPG content they license because doing so would violate the copyrights of EPG content publishers.

D. EPG Content Is Protected By Licensing Agreements.

TMS also agrees with comments from various parties, such as DirecTV and AT&T, that the Commission should not require disaggregation of EPG content because it is licensed only for limited purposes.²⁶ Even if EPG content were not protected by copyright (which it is), it is protected by licensing agreements between MVPDs and EPG content publishers such as TMS,

²² Comments Of Public Knowledge & New America Foundation, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 21-22 (filed July 13, 2010).

²³ See 47 U.S.C. §§ 548 (program access); 534-535 (mandatory carriage).

²⁴ See 17 U.S.C. §§ 111(c), 119.

²⁵ See 47 U.S.C. §§ 534(b)(10); 534(h)(1)(ii); 535(i)(2).

²⁶ See, e.g., AT&T Comments at n.78; Comments of DirecTV, Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, at 20 (filed July 13, 2010) ("DirecTV Comments"); NCTA Comments at 40.

Rovi Corporation, and FYI Television. Licensing terms for EPG information generally allow licensees to use such content only for the provision of their own navigation services but prohibit disaggregated copying and generalized use and distribution. Requiring MVPDs to disaggregate and pass through EPG content — which they have never historically developed themselves but rather have licensed for use in their navigation devices from third-party EPG content publishers — would breach the terms of their license agreements and could expose the MVPDs to liability.²⁷

E. An EPG Disaggregation Requirement Would Upset A Complex, Efficient, And Well-Functioning Content Publishing Industry.

Rovi's comments observed that the EPG content publishing industry has existed for decades and efficiently delivers highly complex products to consumers, media, and navigation device makers.²⁸ TMS agrees and urges the Commission to avoid well-intentioned actions that could have the unintended consequence of disrupting a complex and well-functioning EPG content publishing industry that has existed for decades. Even if EPG content were not protected by copyright and licensing agreements (which it is), mandating the unlicensed distribution of that content would eliminate the incentive of any company to source, aggregate, compile, create, edit, manage, and distribute EPG content. Over the past fifty years, the entertainment information industry, which includes EPG content publishing, has evolved from its origins in providing information for local newspaper publishers to later publishing independent or MVPD-dependent local television guides and finally to today's distribution of the robust television metadata currently produced by TMS through EPGs, websites, or mobile devices.

The structure of the industry and the licensing of EPG content lower the cost to consumers of accessing and using such information. If publishers of EPG content were not compensated fairly for the value of their proprietary, copyrighted, and copyrightable databases, as would be the case if the Commission were to require disaggregation, EPG content publishers

²⁷ See AT&T Comments at n.78; DirecTV Comments at 20.

²⁸ See Rovi Comments at 2.

likely would cease creating and publishing such EPG content. Under such circumstances, each MVPD that desired to provide a navigation device to its customers would be forced to publish such EPG content independently. This duplication and inefficiency would necessarily result in increased costs to MVPD customers without providing any compensating benefits.

III. Restrictive EPG Technical Standards Are Unnecessary.

TMS agrees with those parties that have observed that restrictive technical standards likely will reduce, rather than increase, competition and innovation for navigation devices.²⁹ In particular, the Commission should not impose technology mandates that likely will alter the structure of the existing market for EPG content.

In its Comments, Rovi Corporation makes an inapposite proposal regarding technical standards for EPG content unrelated to the goals of this proceeding.³⁰ The Commission, however, should avoid mandating technical standards for EPG content publishing because such mandates are unnecessary and would do nothing to foster competition in the navigation device equipment market. Rovi's proposal actually contemplates *additional* database administration for EPG content, which necessarily would increase consumer costs to solve a problem that apparently does not exist for consumers in today's marketplace. Navigation devices are already fully capable of receiving and associating EPG content from the various EPG content publishers within the diverse universe of MVPD offerings without Rovi Corporation's proposed standards. For example, TiVo users can browse a unified directory of programming options that include MVPD-provided video as well as programming available from internet-based video providers such as Amazon or YouTube.³¹ The EPG content publishing marketplace has functioned well thus far without any government-mandated technical standards for EPG content. Inasmuch as such restrictive technical standards are unnecessary and unrelated to fostering competition in the

²⁹ See *supra* n.4.

³⁰ See Rovi Comments at 6-10.

³¹ Christopher Mascari, *Tivo Search Is The Future Of Tivo*, GIZMODO (Jan. 9, 2009), available at <http://gizmodo.com/5125062/tivo-search-is-the-future-of-tivo>.

navigation equipment market, the Commission should decline to adopt such proposed standards and should instead allow participants in the EPG content publishing industry to innovate as needed in response to customer demand.

IV. Conclusion

As the foregoing demonstrates, the disaggregation of EPG content and the imposition of restrictive EPG technical standards are unnecessary to promote the competitive availability of navigation devices and would infringe copyrighted EPG content currently provided under license by a long-established EPG content publishing industry. The Commission, therefore, should avoid such requirements that would unintentionally stifle innovation and competition in other related industries in an effort to promote the commercial availability of navigation devices.

Respectfully submitted,
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