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

COMMENTS OF THE
DIRECTORS GUILD OF AMERICA &
THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES

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I. Introduction

The Directors Guild of America (DGA) and the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada (IATSE) respectfully submit these comments on the proposed rule in MB Docket No. 16-42. DGA and IATSE have a record of FCC filings on rulemakings that we believe have the potential to impact our members' livelihoods. In this instance we believe the FCC review of video navigation choices as detailed in MB Docket No. 16-42 has the potential, while not the intent of the FCC, to harm our members' ability to make a living, and to undermine the important security nets that protect them. We are concerned that the proposed rules will put control of what consumers watch on their television sets – the largest screen in 115 million U.S. households – squarely in the hands of companies that have built a business model around "free" content and that, in doing so, profit from both distributing stolen copyrighted works and refusing to compensate the artists who make them.

The Directors Guild of America represents 16,500 directors and members of the directorial team who work in film, television, commercials, documentaries, new media, news and sports. The Guild's mission since its founding 80 years ago is to protect and advance the economic, creative and legal rights of its members.

Founded in 1893, IATSE represents 125,000 members working in all forms of live theater, motion picture and television productions, trade shows and exhibitions, television broadcasting, and concerts as well as the equipment and construction shops that support all these areas of the entertainment industry. IATSE represents virtually all the behind-the-scenes workers in crafts ranging from motion picture animator to theater usher.

We do not seek to comment on the competitive navigation device market or the need for greater consumer choice and access. However, we are concerned that this NPRM, with its focus on set-top boxes and the role of multichannel video programming distributors (MVPDs), has not examined fully the impact of this rulemaking on entertainment industry employees. With respect to our members' interests, we do not see the NPRM taking into consideration the critical interrelationship between the distribution of content and the compensation system that pays filmmakers and craftspeople for actually creating that content.

Paragraph 80 of the NPRM states that "nothing in our proposal will change or affect content creators' rights or remedies under copyright law." We disagree with that contention. As we will detail in this filing, our members' livelihoods will be negatively impacted. We do not believe that the FCC can fully assess the impact of this NPRM without expanding its examination to its impact on those who actually make films and television programming. To open set-top boxes to services that engage in trafficking illegal content, have no respect for copyright, and even less willingness to compensate those who create films and television programs will cause substantial economic harm to our members who count on the revenue received in the form of residuals and re-use payments to sustain a living, fund both retirement benefits for directors and their teams and for craftspeople, and also health benefits for craftspeople who work in the entertainment industry.

We are also concerned about the impact on consumer privacy.[1] The proposed NPRM appears to exempt third-party video services from the federal privacy restraints that currently govern MVPD behavior, and to comfortably rely on state regulations, market forces, and self-assertion to protect the consumer.

DGA and IATSE appreciate the objective of creating a truly competitive marketplace for television set-top boxes. We do not believe the broader examination we advocate hinders the Commission's goal of promoting and providing innovation in the set-top box marketplace. Nor do we think the Commission would want to achieve its goal at the expense of the content creators and craftspeople.

II. Background: The Entertainment Industry Compensation Structure

For most of our members and other creative talent who work in the entertainment industry, employment is intermittent and the job search is continual. During periods in between jobs, our members must sustain themselves and their families. This intermittent work pattern (*i.e.* freelance nature) of the motion picture and television business, and the integral contribution of our members who work in motion pictures[2], have been a way of life in the motion picture business since its inception. As an acknowledgement of these realities, our members share directly and/or share through payments to their health and pension plans (DGA pension plan and IATSE health and pension plans), in the downstream revenue their work generates, in many cases long after its initial release. Those payments are based on specific formula set forth in our collective bargaining agreements based on the distribution platform. Additionally, there are DGA members who own the copyright to their work and are the direct recipient of the revenue the work generates and face the same problems and concerns of any rights holder.

In other words, our members have a vested interest in a distribution and payment structure that is grounded in both protecting content and maximizing the value of that content. Getting full value for the work they create is no less critical to our members than it is to the copyright holders because our members share directly in the downstream revenue their work generates— for DGA, in the form of DGA members' residuals and payments to the DGA pension plans, and for IATSE, in their health and pension plans.

Directors Guild of America

DGA members' residuals, which are collectively bargained, are derived from the reuse of content licensed by content owners to a diverse universe of programmers and distributors. Residual payments come from each and every market where a work is exploited and different types of agreements (exclusive or otherwise) and the release windows of different platforms enables those residual payments to be fully realized and maximized.

Last year, DGA distributed around $360 million in residuals to our members accounting for 23% of their total income. Additionally, residuals constitute the largest source of funds for the DGA's Basic Pension Plan. It is this revenue from the secondary markets that sustains DGA members

[1] NPRM ¶ 77 & 78.

[2] Directors Guild of America, Basic Agreement of 2014, Section 1-201: the term motion picture includes film and television.

between jobs and provides a critical guaranteed safety net for them and their families in a freelance multi-employer business.

IATSE

Similarly, IATSE members also participate in the downstream licensing of copyrighted films and television programs. Under their collective bargaining agreement, IATSE members receive contributions to their health and pension plans from the secondary markets through which motion pictures are licensed. In 2015 alone, licensing through such secondary markets generated $293.5 million in contributions to health care plans and $150.2 million in contributions to pension plans for IATSE members.

III. Copyright, Licensing, & Contractual Arrangements Maximize the Value of Content: Why That Matters to Creators

The films and scripted TV dramas and comedies that the public want to watch, and are willing to pay to watch, require substantial high risk investments. Success is infrequent and never guaranteed, and it generally takes years for a program to break even and become profitable. That is why copyright holders license programming and negotiate distribution deals that will maximize the value of the content in which they invested.

At present, entities who want to include copyrighted films and television programing within their own video service have to license the programming from copyright holders. Those copyright holders participate in the entertainment industry compensation system that, as we have noted, provides vital economic support for our members—and that also incentivizes the creation of programming. Currently, competitors of an existing MVPD or over-the-top (OTT) are not allowed to simply take the programming licensed by that MVPD/OTT but must strike their own licensing deals with the rights holders. So, for example, DBS services like Dish Networks, telecommunications services like Verizon's FIOS service, cable overbuilders like RCN, and internet OTT services like Hulu or Netflix must all separately license the television programs carried by incumbent cable companies for their own video services. Similarly, in the absence of this proposed rule, any entity desiring to include copyrighted films and television programming in a commercial video service, even one provided to consumers through a TV set-top box, would have to license that programming from the rights holder. The protection and monetization of the copyright is agreed to by all parties. And the rights holders, through collective bargaining agreements with DGA and IATSE, have in turn agreed to share the revenue these transactions generate both for our members and the DGA pension and IATSE health and pension plans. In other words, all benefit from those agreements and arrangements.

IV. The FCC's Proposal Will Undermine Longheld Collective Bargaining Gains & Harm the Creators & Craftspeople Who Make Content

As previously stated, DGA and IATSE fully appreciate the objective of creating a truly competitive market for motion picture set-top boxes. However, the proposed rule does not merely allow third parties to sell competitive set-top boxes to MVPD subscribers. The rule, as laid out in the NPRM, also makes it clear that third parties will have access to copyrighted films and television programming, on which our members have worked and for which those third parties have not paid, for their own commercial video services. That would seem to say that the FCC NPRM has less to do with set-top box competition and more to do with providing third parties free access to the content itself; it is this aspect of the proposed rule that gives us serious concern.

DGA and IATSE members are the direct beneficiaries of a distribution structure that protects content and that shares with them the revenue that distribution generates. Today, MVPDs enter into licensing agreements that allow them to distribute through their set top boxes:

- First-run network, syndicated, basic cable, and pay cable programs
- Reruns of network, syndicated, basic cable, and pay cable programs
- Ad-supported video on-demand on network, syndicated, and basic cable programs (usually, the past five episodes of the current season, but in some cases the whole season); and video on-demand of pay cable programs oftentimes for both current and past seasons
- Transactional video on-demand (e.g., movies and television programs available for rent for 24 hours) and electronic-sell-through services (e.g., iTunes, Vudu)
- And, for some MVPDs, subscription video on-demand (e.g., Netflix, Amazon, Vudu) services

Our members share in the revenue with respect to every form of distribution through a combination of initial compensation, residuals, and contributions to our affiliated pension (DGA) and health plans (IATSE pension and health plans). *Their economic stake in both the protection of and revenue-generating ability of content is large.*

We believe that the proposed rulemaking will harm them by: 1) Providing the consumer the choice on their home TV, to video services that knowingly provide access to illegal copyrighted content, and that have built a business model based on “free”; 2) Enabling third parties to distribute copyrighted films and TV programs in secondary markets without any payment to creators and craftspeople; and 3) Reducing the value of ad-supported programming.

The Proposed Rule Will Reduce the Current “Revenue Pie”

According to the NPRM, the FCC will require all MVPDs to offer anyone who has an approved competitive “navigation device” all “video programming itself” as well as “information about what programming is available to the consumer” that owns the device and “information about what that device is allowed to do with the content, such as record it”.[3] This proposal would require distributors who have paid for the rights to disseminate copyrighted content through their platforms to make that content available to third parties to repackage them and provide to viewers with no licensing and contractual obligations. Moreover, the rule proposes to leave issues such as channel placement and treatment of advertising to the marketplace.

The lack of obligation on the part of third party video services, will upend the distribution and compensation ecosystem in which our members are financial participants.

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[3] NPRM ¶ 2.

a. Loss of Compensation As Illegal Content Is Embedded In TV Programming Services

First and foremost is the income lost to our members as consumers are directed away from legal content to illegal content. The proposed rule will enable navigation device makers to offer copyright-protected content in close proximity to content displayed through third party search engines and platforms that do not meaningfully distinguish between lawful and unlawful content or do not have the capacity to identify illegal content before it is streamed. Illegal copyrighted content is no longer confined to the computer screen—now it will be on subscriber's TV screens.

By way of example, when a feature film is available on transactional video on-demand for a limited period of time for a fee, a residual payment is made to the DGA members, the DGA pension plan, and the IATSE health and pension plan. The same is true if the feature film is made available through the set-top box on premium cable (e.g., HBO, Showtime), SVOD provider (such as Netflix or Amazon), or on an ad-supported basis on a television network, in syndication, or on basic cable channel. Under the proposed rulemaking, however, a third party navigation device/video service may provide consumers access (via a program service or a search engine) to illegal copies of the same film on services that traffic in stolen copyrighted content (such as Popcorn Time) and rogue foreign websites as well as services (such as YouTube) that have inadequate procedures for identifying and permanently taking down stolen copyrighted content.

It is highly likely that subscribers who see a plethora of video services pop up on their TV screen will not easily be able to identify the source, be it Time Warner Cable, YouTube, Netflix or Amazon Prime, or a yet unknown third party video service. This will make it even harder for them to determine whether they are looking at lawful or unlawful copyrighted content. This is not just speculation—there are some prominent video services that have amply demonstrated their lack of respect for copyright, their determination not to compensate anyone for use of professionally created content, and half-hearted measures to pull illegal content off their sites.

The current Notice and Takedown procedures are a useless remedy for our members and the problem of takedown/staydown has proven to be one faced even by large copyright holders who have the resources to police the Internet. The U.S. government, while currently reviewing Section 512 has not yet been able to improve or affect this situation.[4] This NPRM, by enabling the breakdown of the wall that separates legal and illegal content, further diminishes the value of the legal content and the importance of copyright protection to creation and compensation to our members for that creation.

These third parties will not want to protect content. Instead they will view their new ability to distribute copyrighted content as a means to generate revenue for themselves and, most importantly, gain valuable customer information that can be monetized in various ways unencumbered by payments for the creation of content, license fees, content protection, advertising restrictions, and placement agreements.

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[4] Directors Guild of America, Comments to the U.S. Copyright Office, Section 512 Study [Docket No. 2015–7], (April 1, 2016).

b. Loss of Secondary Market Re-Use Compensation

Second, is the loss to our members as payments for secondary market use dry up. DGA and IATSE members are the direct beneficiaries of a distribution structure that protects television programming and that shares with them the revenue that distribution generates. Specifically, they participate in revenue generated from different platforms and different types of distribution as detailed above. There is direct compensation from those secondary market uses to the content creators and craftspeople. Under the proposed rulemaking, a third party navigation device/video service has no obligation to provide such compensation for re-use to our members. That third party service will appear on the TV screen as a programming source. So, a subscriber who wants to watch a particular movie or TV program can call it up and find it is offered on multiple sources at different price levels (e.g. Time Warner VOD, Google, Movies on Demand, or Popcorn Time). Some of those program sources compensate our members for secondary re-use, others such as Google or Popcorn Time do not. Moreover, Google can uplink to YouTube and make that movie or TV program even more widely accessible for free. And, as we have noted above, Popcorn Time offers legal and illegal content on its site. How will the viewer know the difference?

The likely outcome of consumers faced with choices from varied program sources, is to choose the least expensive—or free—programming. Free programming and unlicensed programing will not generate any secondary market re-use payments to filmmakers and craftspeople. Based on their actions to-date it is abundantly clear that "free" video services have built a business model on **not** compensating directors or craftspeople for their work. This proposed rulemaking will accelerate and acerbate the situation that already exists.

c. Loss of Value of Ad-Supported Programming

Advertising revenue is the oxygen of the entertainment ecosystem, fueling the industry by providing the funds to both produce original content (e.g., network television series) and finance its licensing in other markets (e.g., basic cable reruns of network programs).

The proposed rule would deprive the entertainment ecosystem of this vital income by enabling third parties to place their own advertising on other's programming, but with no corollary obligation to share the additional revenue it generates with the content owners and licensees, undermining the value of the programming and threatening its production and distribution. If the revenues derived from advertising flow into the pockets of third parties rather than to the content producers, distributors, and exhibitors who have paid for its creation and exhibition, there will be fewer jobs and fewer residuals paid to DGA directors, the DGA pension plan, and the IATSE health and pension plan funds.

The Proposed Rule Will Limit the Expansion of the "Revenue Pie"

Second, the proposed rule could limit the potential to expand the "revenue pie" on which our members depend by stifling the development of new video services willing to pay for licenses to copyrighted films and television programming. The explosion of platforms and services on which consumers can access programming has multiplied the need for content and the ability of producers to pay for the creation of that content. However, the NPRM makes it less profitable for a company to enter the MVPD and OTT markets. Why would a cable company go through the substantial expense of securing a local franchise, building an MVPD infrastructure, attracting subscribers, and licensing copyrighted programming if, simply by offering consumers a set-top box, it could avoid all those costs and provide the same video service? Similarly, why would an OTT service license copyrighted television programming if it could get that programming for free simply by providing television consumers a set-top box?

By reducing incentives to establish new MVPD and OTT services that would compete to license motion picture programming, the proposed rule will undermine the position from which content providers negotiate since they benefit from a larger number of MVPDs and OTTs who are willing to offer compensation to carry their content. Here too with fewer entities buying programming, it will be harder for copyright holders to maximize the price of their making programming, and, as a result, will have less revenue with which to create content. Once again less money to create content means less jobs. Additionally, to the extent the proposed rule stifles the rollout of new services willing to license copyrighted television programming, it will also directly undercut both the initial and secondary markets that pay significant residuals to our members and fund the DGA pension plan and IATSE health and pension plan.

V. The FCC's Proposal Falls Short on Consumer Privacy

Under Sections 631 and 338 of the Communications Act, MVPDs are prohibited from collecting personally identifiable information on consumers without first getting their consent. Cable companies are also prevented from sharing that data with third parties without the written or electronic consent of subscribers (the exception to these requirements is when it is necessary for providing cable service). MVPDs are required to inform consumers of their personally identifiable data collected, the period during which the information will be maintained, when the consumer can have access to that data and various other limitations. These protections are enforceable by the federal government.

In announcing the NPRM, Chairman Wheeler stated that "This proposal will not harm consumer privacy. The proposal tentatively concludes that the privacy protection that exist today will also apply when alternative navigation devices are used."[5] However, an examination of the NPRM would make for a more qualified assessment. "As to ensuring the privacy of subscriber information, given the national market for consumer technology, they (navigation device developers) must already ensure their products and services meet the privacy standards for the strictest state regulatory regime."[6] It would appear that the FCC is comfortable that market forces and state regulations, not federal, will be enough to protect the consumer. Moreover, it would not appear to mandate such compliance, as is required of MVPDs, but leave it up to the navigation devices developers to self-assert.

Given that the business model of some video services is driven by the ability of that service to access and compile huge amounts of consumer data, the absence of strictly laid out and enforced consumer privacy regulations in the proposed ruling can only exacerbate that reality. Under this

[5] NPRM, Statement of Chairman Tom Wheeler.
[6] NPRM ¶ 77.

NPRM not only do third parties gain access to proprietary and copyrighted content, they also gain a huge window into consumers' viewing habits and personal data at home. This real-time, data-driven business model needs such access to grow. The price is the further erosion of consumer privacy. Our members are not just creators of content, they too are consumers: we believe their privacy, like that of the entire public, merit far greater protection that the FCC proposes.

VI. Conclusion

The Directors Guild of America and International Alliance of Theatrical Stage Employees appreciate this opportunity to add the voice and interest of filmmakers and craftspeople to the FCC review of navigation choices and navigation devices.

We welcome the entry of new competitors to incumbent MVPDs that can offer consumers competing video services containing copyrighted motion picture programming. Our concern, as we have stated in this filing, is the other implications of the NPRM for our members. We believe the proposed rulemaking does not take into consideration the complex and critical interrelationship between the distribution of content and the compensation system that pays filmmakers and craftspeople for actually creating that content. If third party video services can access copyrighted content without any regard for, and obligation to, the kind of licensing, advertising, and distribution arrangements that currently guide the showing of films and televison programs in consumers' homes, we believe their livelihoods and earning power will indeed be diminished. They will be faced with the drying up of three different revenue streams that currently support them and provide them and their families a health and pension safety net: 1) diminished payment for legal content as illegal content enters the marketsplace through video services that, knowingly or not, host illegal content; 2) loss of secondary market re-use payments; and 3) diminished value of ad-supported programming.

We firmly believe that there are strong economic and cultural policy reasons to protect filmmakers and craftspeoples' ability to earn a living while creating the high quality American motion pictures that the world has come to know. We are well aware that with the digital age has come a sea change of issues that impact the motion picture business. Our unions and our members have shown themselves willing to face that challenge. We hope that the concerns we have raised are part of future discussions as the FCC undertakes its deliberations. We look forward to working with you to that end.

Respectfully submitted,

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