Before the
**Federal Communications Commission**
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Implementation of Section 103 | ) | MB Docket No. 15-216 |
| of the STELA Reauthorization Act of 2014 | ) | |
| | ) | |
| Totality of the Circumstances Test | ) | |

**Reply Comments of the Motion Picture Association of America**

*I. Overview*

The First Amendment, copyright law, and the FCC's commitments not to regulate edge providers require the agency to respect programmers' discretion over the availability of content online. Letting free speech and intellectual property rights drive video production and dissemination has provided audiences with access to a robust and diverse universe of programming online and off, and will continue to do so.

The MPAA therefore opposes requests by the National Cable and Telecommunications Association and others that the FCC consider online availability of programming when applying the "good faith" negotiation provisions governing retransmission of broadcast signals.[1] Our members—Walt Disney Studios Motion Pictures, Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, and Warner Bros. Entertainment Inc.—take this position even though they also belong to the NCTA.

Arguments that the FCC should examine online availability of programming in considering what constitutes "good faith" for purposes of retransmission consent negotiations

[1] *See* NCTA comments at 3.

amount to calls for direct regulation of content providers in contravention of both the First Amendment and copyright law. Under the First Amendment, it is the speaker and the audience acting in the free market—not the government—that determines what is said and heard, as well as how it is communicated.[2] And the Constitution's Copyright Clause recognizes that respecting the right of creators to determine how to disseminate their works increases both the production and distribution of content, to the ultimate public benefit.[3]

## *II. The Programming Marketplace is Robust and Diverse, Both Online and Off*

The MPAA's members are committed to offering content to audiences through a wide variety of platforms and distributors. The ability of content producers to decide what programming to create and how to disseminate it is what makes the availability of content today so dynamic. It also enables programmers to manage the economic risks they face in the competitive and unpredictable video marketplace, thereby allowing them to continue investing and innovating to offer high-quality content to viewers.

Audiences have access to hundreds of channels of mass appeal and niche programming from broadcasters, cable operators, satellite providers, and phone companies. In addition, many content providers offer their own applications to deliver programming directly to viewers, as well as license programming to "over the top" services, such as those from Amazon, Hulu, Netflix, Sling TV, and Sony.

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[2] *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988) (stating that "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it").

[3] *See* U.S. CONST., art. I, § 8, cl. 8 (conferring upon the legislative branch the role "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

Viewers can access this content on devices such as tablets and smartphones, gaming and dedicated online video systems, PCs and Macs, and smart TVs. With such equipment, American audiences can already choose from more than 115 online services to legally access television and film content over the Internet, up from essentially zero in 1997.[4] Viewers used these services to access 66.3 billion television episodes and 7.1 billion movies in 2014, up 229 percent and 1,132 percent, respectively, from just the prior five years.[5] The figures are expected to grow to 101.6 billion and 11.7 billion by 2019.[6]

## *III. Considering Online Availability in a "Good Faith" Analysis Would Conflict with the First Amendment*

The Notice of Proposed Rulemaking seeks comment on whether the FCC should consider conditions on online access to programming in applying the totality of the circumstances test.[7] The NPRM also asks whether constitutional or statutory limitations prevent the FCC from doing so.[8] We note that some commenters also ask the FCC to consider conditions on online availability to be a *per se* violation of the good faith provisions.[9]

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[4] *See* MPAA, *The Number of Legal Online Services for Movies and TV Shows Around the Globe Keeps Climbing* (July 30, 2015), *at* http://www.mpaa.org/the-number-of-legal-online-services-for-movies-and-tv-shows-around-the-globe-keeps-climbing/#.VpfIqU1IiUl. *See also In re* Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261, MPAA Comments, at 2-3 (March 3, 2015) (MPAA OTT comments).

[5] Underlying data available from IHS. *See* https://www.ihs.com/. *See also MPAA OTT comments*, *supra* note 4, at 2-3.

[6] Underlying data available from IHS. *See* https://www.ihs.com/. *See also MPAA OTT comments*, *supra* note 4, at 2-3.

[7] *In re* Implementation of Section 103 of the STELA Reauthorization Act of 2014, MB Docket No. 15-216, *NPRM*, FCC 15-109, at ¶ 13 (rel. Sept. 2, 2015). *See* 47 U.S.C. § 325(b)(3)(c) (requiring retransmission consent to be negotiated in good faith); 47 C.F.R. § 76.65(b)(2) (setting out the totality of the circumstances test for determining whether a negotiation has occurred in good faith).

[8] *See NPRM* at ¶ 13.

[9] *See, e.g.*, American Cable Association comments at iv-v. *See also* 47 C.F.R. § 76.65(b)(1) (setting out *per se* violations of the good faith requirement).

Considering online availability in a "good faith" analysis, under either the *per se* prong or the totality of the circumstances test, would run afoul of the First Amendment by encroaching upon the discretion of content producers to determine what content to make available—as well as when and how.[10] Engaging in such an analysis would suggest that conditions on online availability could lead to an adverse FCC finding, imply that programmers have a legal obligation to make particular content available online, and ascribe to the FCC the power to compel programmers to do so. As the Supreme Court has made clear, government forced access to media "brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment."[11] And when it comes to regulation of speech on the Internet, that gloss has a high sheen, as the Supreme Court's "cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[12]

Congress has been careful to minimize the Communication Act's impact on speech,[13] and is explicit when it wants the FCC to regulate in ways that bear upon the First Amendment.[14] Thus, to avoid potential First Amendment issues, the FCC must not interpret provisions of the Act as authorizing regulation of speech absent express language. The D.C. Circuit held in 2002, for example, that the First Amendment precluded the FCC from imposing video description rules

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[10] *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (finding government compulsion of a newspaper to publish content it otherwise would not have published violated the First Amendment).

[11] *Id.* at 254.

[12] *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 866-70 (1997).

[13] *See, e.g.*, 47 U.S.C. § 326 (providing that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication"); 47 U.S.C. § 544(f) (providing that "[a]ny Federal agency ... may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title").

[14] *See, e.g.*, 18 U.S.C. § 1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."); 47 U.S.C. § 315 (governing provision of broadcast time to candidates for public office); 47 U.S.C. § 399 ("No noncommercial educational broadcasting station may support or oppose any candidate for political office.").

absent a direct Congressional authorization to do so.[15] Because the FCC was trying "[t]o regulate in the area of programming," it could not rely on the general provisions of section 1 of the Communications Act.[16] Similarly, because nothing in Titles II, III, or VI of the Communications Act, nor in Section 706 of the 1996 Telecommunications Act, explicitly authorizes the FCC to regulate the video content that producers make available on the Internet, the FCC cannot do so within the confines of the First Amendment.

## *IV. Considering Online Availability in a "Good Faith" Analysis Would Conflict with Copyright Law*

Encroaching on programmers' discretion regarding online availability of content would also amount to a limitation on copyright owners' rights under the Copyright Act. Section 106 of the Copyright Act gives copyright holders the exclusive rights to distribute and publicly perform their works.[17] While the Copyright Act does provide limited compulsory copyright licenses covering the retransmission of content on certain platforms,[18] those compulsory licenses do not extend to retransmission on the Internet, as the Copyright Office and the courts have confirmed.[19]

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15 *See MPAA v. FCC*, 309 F. 3d 796 (D.C. Cir. 2002).

16 *Id.* at 804.

17 17 U.S.C. § 106 (3), (4).

18 *See, e.g.*, 17 U.S.C. §§ 111, 119, 122 (creating compulsory copyright licenses for retransmission of broadcast signals over cable and satellite services in certain circumstances).

19 *See WPIX v. ivi*, 691 F.3d 275, 282-83 (2d. Cir. 2012) (stating that Congress did not intend for section 111 to extend to Internet transmissions, that Internet retransmissions services are not cable systems, and that such services are not entitled to the section 111 license); *ABC v. Aereo*, Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867 (S.D.N.Y Oct. 23, 2014) (stating that the Supreme Court's *Aereo* decision did not alter the conclusion that Aereo is not a cable system entitled to the section 111 compulsory license and that section 111 does not apply to Internet transmissions); *CBS Broadcasting, Inc. v. FilmOn.com, Inc.*, No. 10 Civ. 7532(NRB), 2014 WL 3702568 (S.D.N.Y. July 24, 2014) (stating that FilmOn is not a cable system entitled to the section 111 compulsory license and that section 111 does not apply to Internet transmissions); *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 1:13-cv-00758-RMC, 2015 WL 7761052, at *24 (D.D.C. Dec. 1, 2015) (same). *See also* Letter from Jacqueline Charlesworth, General Counsel and Associate Register of Copyrights, to Matthew Calabro, Aereo, Inc., July 16,

Cajoling programmers to make content available online, and restricting the terms and conditions they could otherwise negotiate in the free market, is tantamount to creating a compulsory copyright license for Internet access to content. That is something outside the authority of the FCC to create, conflicts with the policy choices Congress has made in the Copyright Act in decidedly not creating such a compulsory license, and encroaches on the discretion the Copyright Act gives to copyright holders over the distribution and public performance of their works, including to choose among a variety of distributors and to negotiate a variety of terms.[20]

## *V. Considering Online Availability in a "Good Faith" Analysis Would Conflict with the FCC's Commitments Not to Regulate Edge Providers*

Considering online availability in a "good faith" analysis, under either the *per se* prong or the totality of the circumstances test, would also contradict the FCC's own pronouncements regarding regulation of the Internet. As the Wireline Bureau recently explained, "[t]he Commission has been unequivocal in declaring that it has no intent to regulate edge providers,"[21]

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2014, at 1 (stating that "[i]n the view of the Copyright Office, internet retransmissions of broadcast television fall outside the scope of the Section 111 license.") (citing U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* 91-99 (1997); Copyright Broadcast Programming on the Internet: Hearing before the Subcomm. on Courts and Intellectual Property of the Comm. On the Judiciary, 106th Cong. 25-26 (2000) (statement of Marybeth Peters, Register of Copyrights)).

[20] *Cf. Orson Inc. v. Miramax Film Corp*., 189 F.3d 377 (3rd Cir. 1999) (partially pre-empting a Pennsylvania statute restricting a motion picture distributor from entering into an exclusive first-run exhibition agreement with an exhibitor because it violated the distributor's rights under the Copyright Act); *Syufy Enterprises v. National General Theatres*, 575 F.2d 233, 236 (9th Cir. 1978) (supporting proposition that a movie distributor may license a movie exclusively); *Naumkeag Theatres Co. v. New England Theatres, Inc*., 345 F.2d 910, 912 (1st Cir. 1965) (supporting proposition that a movie distributor is under no obligation to make its motion picture available in all markets at the same time); *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101, 124 (5th Cir. 1954) (stating that "a distributor has the right to license or refuse to license his film to any exhibitor, pursuant to his own reasoning, so long as he acts independently"); *Westway Theatre Inc. v. Twentieth Century Fox Film Corp.*, 30 F. Supp. 830, 836-37 (D. Md.) (stating "it is clearly the established law that the distributors have the right to select their customers, and therefore the plaintiff has no absolute right to demand exhibition rights for the pictures of any of the distributors") (citations omitted), *aff'd*, 113 F.2d 932 (4th Cir. 1940).

[21] *In re* Consumer Watchdog Petition for Rulemaking to Require Edge Providers to Honor 'Do Not Track' Requests, RM-11757, *Order*, DA 15-1266, at ¶ 1 (WCB rel. Nov. 16, 2015).

which includes "[a]ny individual or entity that provides any content, application, or service over the Internet."[22] Chairman Wheeler reiterated that point this month at the Consumer Electronics Show, stating: "We do not extend our authority to edge providers."[23]

In the *Network Neutrality Order*, for example, the FCC was clear that it was not "regulating the Internet, *per se*, or any Internet applications or content."[24] The FCC said that its regulations "only apply to last-mile providers of broadband services—services that are not only within [its] subject matter jurisdiction, but also expressly within the terms of section 706."[25] The Commission was thus careful to distinguish the transmission services of broadband information access providers, which it subjects to regulation, and the "various 'add-on' applications, content, and services," which it continues to classify as unregulated information services.[26] Significantly, the FCC rejected calls to regulate the online offerings of edge providers, including the suggestions of the American Cable Association and others to regulate programmers' provision of content over the Internet.[27] The FCC also distinguished common carriers from "entities with robust First Amendment rights," such as broadcasters, those exercising editorial discretion, and others that are "speaking" rather than providing transmission capacity as "conduits."[28] For the

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22 47 C.F.R. § 8.2(b) (emphasis added).

23 *See* John Eggerton, *CES 2016: Some Title II Foes Attack Wheeler in Vegas*, MULTICHANNEL NEWS, Jan. 7, 2016, *at* http://www.multichannel.com/news/fcc/some-title-ii-foes-attack-wheeler-vegas/396336.

24 *In re* Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Report and Order on Remand*, FCC 15-24, at ¶ 382 (rel. Mar. 12, 2015).

25 *Id.*, at ¶ 282.

26 *Id.*, at ¶ 47.

27 *Id.*, at ¶ 282 n.725 (citing American Cable Association Network Neutrality comments at 47-48, Cox Network Neutrality comments at 13).

28 *Id.*, at ¶¶ 546-551 & n.1707 (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984) ("Unlike common carriers, broadcasters are 'entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties].'"); *Denver Area Educ. Telecoms. Consortium v. FCC*, 518 U.S. 727, 739 (1996) (plurality opinion) (distinguishing between common carriers' and editors' rights under the First Amendment); *Midwest Video II*, 440 at 709 n.19 (1979) (ruling on other grounds, but acknowledging that First Amendment issues

same reasons, the Wireline Bureau denied requests to apply do-not-track regulation to edge providers.[29]

Although the Communications Act grants the FCC some authority over transmission of broadcast and pay-TV signals, the FCC does not have authority to regulate the availability of specific video content housed on the Internet. Whether to make their content available online, and under what terms and conditions, is a matter for the programmers' case-by-case discretion, just as it is for newspaper publishers in the example cited by the FCC.[30] Honoring this discretion has resulted in the availability of a wide array of programming, both online and off. In fact, the same viewer often has multiple sources for the same content, including from cable, satellite, and wireline phone companies and for free over the air, as the FCC also acknowledges.[31] Viewers often also have access over the Internet directly from programmers or from OTT providers, including via cell phones and other mobile devices with wireless plans or WiFi service. As a result, the fact that one distributor has failed to secure access to content (and often only temporarily) does not mean that the viewer does not still have access. That some of the same content may also be available over broadcast signals does not subject the online programming or programmer to broadcast signal regulation, since what the programmer is providing online is not a broadcast signal. This is really no different than the NCTA's point and the FCC's tentative

implicated in compelling cable operators to provide common carriage of public-originated transmissions are "not frivolous")).

[29] *In re* Consumer Watchdog Petition for Rulemaking to Require Edge Providers to Honor 'Do Not Track' Requests, RM-11757, *Order*, DA 15-1266, at ¶¶ 1, 3-4 (WCB rel. Nov. 16, 2015).

[30] *See NPRM* at ¶ 10 (noting that "in an analogous context, some news organizations that distribute content via newspapers and the Internet limit access to their online content to paid subscribers.").

[31] *See id.* at ¶¶ 3, 13.

conclusion in the "over-the-top" proceeding that a cable operators' provision of content over the Internet is not subject to cable regulation.[32]

House Energy and Commerce Committee Ranking Member Frank Pallone urged the FCC to "hit the pause button on regulating streaming video" in the FCC's OTT proceeding.[33] He said the FCC's proposed intervention there would merely "prop up some video business models" rather than "actually make people better off," and cautioned that "regulating certain business models does risk stifling innovation."[34] The same sentiments apply here to the FCC intervention sought by some pay-TV providers.

## *VI. Conclusion*

All of the tremendous growth in online programming is occurring pursuant to contract and copyright licensing agreements, as broadcast and MVPD regulation and compulsory copyright licenses do not apply. Considering online availability in a "good faith" analysis, under either the *per se* prong or the totality of the circumstances test, would run afoul of the First Amendment, conflict with copyright law, exceed the bounds of the Communications Act, and contradict the FCC's own commitments not to regulate edge providers. It would also hinder audiences' access to robust and diverse programming by encroaching on the discretion of content owners to determine how to disseminate their works. The MPAA therefore opposes proposals to

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[32] *See In re* Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261, *NPRM*, FCC 14-210, at ¶ 78 (rel. Dec. 19. 2014) (tentatively concluding "that video programming services that a cable operator may offer over the Internet should not be regulated as cable services"); NCTA OTT comments at 35-36 (agreeing with the Commission that a cable operator is not acting as a cable operator or providing a cable service when offering programming over the Internet).

[33] Ranking Member Frank Pallone, Jr., Remarks at the Duke Law Forum, Future of Video Competition and Regulation (Oct. 9, 2015).

[34] *Id.*

consider online availability of programming when applying the good faith negotiation provisions governing retransmission of broadcast signals.

Respectfully submitted,

Neil Fried
Senior Vice President, Government and Regulatory Affairs
Motion Picture Association of America
1600 Eye Street N.W.
Washington, D.C., 20006
(202) 293-1966

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