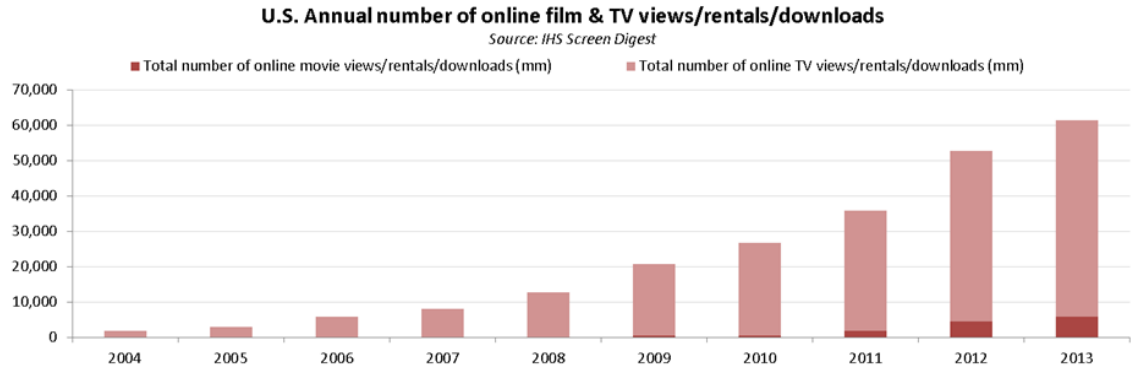
Comments of the Motion Picture Association of America
in Response to the May 19, 2014, #CommActUpdate White Paper
on Competition Policy and the Role of the Federal Communications Commission

June 13, 2014

If there is any communications sector in which policymakers can continue to rely on market forces, it is the video programming sector. Massive investment, rampant innovation, and growing competition demonstrate the merits of avoiding unnecessary government intervention. When First Amendment values are added to the mix, there is no justification for expanding regulation of the television content business—online or off.

As the advocate for the American film, television, and home video industries, the Motion Picture Association of America is pleased to respond to the House Energy and Commerce Committee's May 19, 2014, solicitation for comment in its #CommActUpdate white paper on "Competition Policy and the Role of the Federal Communications Commission." Our six members—Walt Disney Studios Motion Pictures, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox, Universal City Studios, and Warner Bros. Entertainment—are some of the leading providers of television and film content and are committed to providing audiences with as many choices as possible for experiencing great news and entertainment.

And choices they have. Where once Americans' sole source of television programming was three broadcast channels via a television set, today viewers can access hundreds of channels over a variety of distribution sources—and increasingly they may access that content on many devices other than a television. Indeed, online distribution is growing at an accelerating pace. In 2009, more than 50 legitimate online services in the United States were already providing access to movies and television shows. Using those services, U.S. consumers accessed 376 million movies and 20 billion television shows that year. By 2013, the number of legitimate services had jumped to more than a hundred[1] and the numbers of movies and television shows they accessed rose to 5.7 billion and 56 billion. The following chart shows the remarkable pace at which audiences are embracing online video.




[1] See www.WhereToWatch.org.

The quality, quantity, and diversity of video programming available to audiences today is simply staggering. In this new Golden Age of Television, Americans can choose from a dazzling and constantly evolving array of comedy, drama, sports, news, documentaries, films, educational, and informational content. Fans can enjoy the skill and artistry of the best writers, directors, actors and journalists. And as the digital revolution multiplies exponentially the ways in which we can spend our precious free time, the ensuing "competition for eyeballs" has drawn the video marketplace into a virtuous race to the top, yielding increasingly sophisticated and compelling video content—programming with which Americans love to engage and which spurs us to engage with each other.

The white paper asks how Congress should define competition in the modern communications marketplace. When measuring competition in the video marketplace, policymakers should look at the total number of existing choices consumers have, as well as the extent to which technology enables new ones to arise if current options are not meeting consumer expectations. Even the *threat* of competition can be a significant market force. YouTube and Vimeo, for example, are sources of both actual and potential content with low barriers to entry, such that professional and amateur producers have the opportunity to access vast audiences with relative ease. Policymakers must also refrain from defining competition too narrowly. An overly restrictive program market definition, for example, can lead to an unreasonably constrained "market of one" by ignoring other programming that vies for viewers' attention.

The white paper asks what principles should form the basis of competition policy in the oversight of the modern communications ecosystem. We point to the comments we filed in response to the Jan. 8, 2014, white paper on "Modernizing the Communications Act." There we suggested three principles to consider when addressing the video marketplace:

1. Government should not act absent evidence of market failure.

2. Before taking action, government should determine whether the costs will outweigh the benefits.

3. Creators, distributors, and consumers can themselves enter into relationships in the competitive video marketplace that capitalize on technology to make content accessible in innovative ways so long as a framework exists for the effective enforcement of intellectual property rights.

The white paper asks what role, if any, should the Commission have to regulate edge providers. It is unclear whether "edge provider" is meant to include video content creators, but we see no justification for Congress to direct the FCC to expand regulation of programming networks. First, as discussed above, there is no market failure warranting intervention in the video programming marketplace; to the contrary, competition is robust. Expanding involvement by the Commission will more likely reduce choice and hinder innovation than benefit consumers or competition policy. Second, free speech

values further counsel against expanding regulation of video programming providers. Even in the broadcast distribution arena, where the level of First Amendment protection has historically been more modest, the Communications Act explicitly states 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."[2] And in the cable distribution context, where First Amendment protection is stronger, the Act states that federal agencies "may not impose requirements regarding the provision or content of cable services, except as expressly provided in [the cable] title."[3] Supreme Court precedent indicates that content regulation on the Internet would be subject to even more rigorous scrutiny.[4] Therefore, neither Congress nor the FCC should regulate content providers above or beyond where currently provided for in the Act, and there is no basis for amending the Act to expand that authority.

**Conclusion**

Experimentation and disruption are key drivers of innovation; government interference in a programming marketplace characterized by high investment and rapidly evolving technology will only reduce choices for consumers in the long run. Allowing rampant competition and consumers themselves to dictate winners and losers in that marketplace will not only better respect fundamental First Amendment values, but be far more efficient, to the ultimate benefit of both content creators and the audiences that love to watch that content.

Respectfully submitted:

Michael O'Leary
Senior Executive Vice President for Global Policy and External Affairs
Motion Picture Association of America, Inc.
1600 Eye St. NW
Washington, DC 20006
(202) 293-1966

[2] 47 U.S.C. § 326.
[3] 47 U.S.C. § 544.
[4] *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).