

**MPAA Response  
to Communications Act Update White Paper 6:  
Regulation of the Market for Video Content and Distribution**

Jan. 23, 2015

**I. The Modern Video Marketplace is Thriving**

Never before have audiences had as many video options—including what, how, where, and when to watch—as we have pointed out in previous whitepaper responses.<sup>1</sup> Viewers can choose from among hundreds of national, regional, and local programming networks that appeal to almost every conceivable interest. They can access programming from a variety of distribution platforms, and in most markets can choose from among at least four broadcasters, two satellite providers, one cable provider, a variety of over-the-top providers, and increasingly a phone company. They can view content on a television, cellphone, computer, or tablet. And they can watch content as it airs or at the time of their choosing. Under the existing statutory and regulatory framework, studios are licensing television and film content to all different types of providers, including many online distributors. The existing framework also encourages online distributors to expand audiences' viewing choices further by investing in original programming. Netflix, Amazon, and Hulu, for example, are all expanding the slate of exclusive content they offer, increasingly involving marquee writers, directors, and actors. By one estimate, more than 300 original, scripted, prime-time shows aired on broadcast, cable, or online networks in 2014.<sup>2</sup>

As the advocate for the American film, television, and home video industries, the Motion Picture Association of America is pleased to submit these comments on behalf of our six members: Walt Disney Studios Motion Pictures, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox, Universal City Studios, and Warner Bros. Entertainment. Our members are some of the leading providers of television and film content and play a large role in making all these choices available.

And in the process of entertaining and informing audiences, fostering discussion and debate, and contributing to America's cultural history, the movie and television industry is a significant driver of the local and national economies. The movie and television industry directly and indirectly supports 1.9 million jobs in the United States, involving backgrounds including trade skills, college educations, and professional degrees. Direct industry jobs generate \$46 billion in wages and the industry is responsible for more than 99,000 businesses across all 50 states. Most of those businesses are small businesses, with 85 percent employing fewer than 10 people. The industry accounts for \$111 billion in total wages and \$15.9 billion in sales tax, state income tax, and federal taxes. It produces \$16.2 billion in exports with a 6-to-1 export-to-import ratio and a \$13.6

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<sup>1</sup> See Comments of the Motion Picture Association of America In Response to the #CommActUpdate White Paper on Modernizing the Communications Act (Jan. 31, 2014); 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).

<sup>2</sup> See Why You Feel Like There's Too Much TV to Watch, available at [http://www.vulture.com/2015/01/why-you-feel-like-theres-too-much-tv-to-watch.html?mid=twitter\\_nymag](http://www.vulture.com/2015/01/why-you-feel-like-theres-too-much-tv-to-watch.html?mid=twitter_nymag).

billion trade surplus. That's 6 percent of the total U.S. private-sector trade surplus in services and more than the telecommunications, advertising, mining, management and consulting, legal, medical, computer, and insurance service sectors.

If this picture of massive investment, rampant innovation, and growing competition demonstrates anything, it is that government need not increase intervention in the production or distribution of video programming.

## **II. How Content Owners Produce and Distribute Video Programming Should Continue to Be Left to the Free Market, the First Amendment, and Copyright Law**

The white paper asks what Communications Act changes Congress should consider regarding the relationship between video content and distributors.<sup>3</sup> We begin by pointing to the three principles we articulated in response to the first Communications Act Update white paper, on "Modernizing the Communications Act":

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.*<sup>4</sup>

We do not believe government should intervene in the video marketplace absent evidence of a market failure. Government is unlikely to be as efficient or to produce better outcomes than the thousands of actors creating and experimenting each day to attract eyeballs. As the white paper observes, "[w]ith the advent of mainstream, over-the-top video services, the development of time-shifted viewing, and the proliferation of over 800 programming networks, video audiences have become increasingly fractured."<sup>5</sup> Said another way, viewers are benefitting from a vibrantly competitive marketplace. Absent a failure in that marketplace, there is no economic or other justification for Congress to expand the regulation currently embodied in the Communications Act.

And even if there were a market failure, Congress must be careful to ensure that the benefits of any action it may take outweighs the costs. In addition to purely economic costs, Congress must consider the impact on existing marketplace dynamics, which are characterized by rapid innovation and intense competition as content owners and distributors seek to accommodate ever-changing consumer expectations. The current

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<sup>3</sup> See White Paper at 6, question 4(a).

<sup>4</sup> Comments of the Motion Picture Association of America In Response to the #CommActUpdate White Paper on Modernizing the Communications Act (Jan. 31, 2014), at 1.

<sup>5</sup> White Paper at 5.

environment has fostered significant investment and allowed market participants to experiment both with new technologies and new business models.

The production and distribution of video content is already fraught with significant risk in this competitive environment, as the white paper acknowledges.<sup>6</sup> The continually evolving business models that have arisen help companies bear that risk and support the investments necessary to produce today's wide diversity of content. Indeed, a major motion picture costs, on average, about \$100 million to make, but only four out of ten will recoup the initial investment. In today's competitive environment, major television productions are beginning to rival feature films not only in quality and cost, but also risk. Indeed, an oft-quoted rule of thumb is that 80 percent of scripts submitted will never become a pilot episode, 80 percent of those scripts that make it to the pilot stage will never become a series, and 80 percent of series never see a second season. Even with this risk, the industry continues to invest, largely because audiences continue to clamor for more original programming from both established and new sources. The millions of jobs and tens of thousands of businesses mentioned at the outset of these comments are built, in part, on the current regulatory environment. Altering the existing regime could lead to considerable uncertainty about the future of the content marketplace, potentially hindering investment and experimentation.

Among the most important ingredients in the success of the video marketplace is respect for two fundamentally American values: free speech and intellectual property. The ability to determine the substance of their content and the mechanisms by which it is distributed, as well as effective tools for copyright enforcement, are essential to enabling producers to develop relationships with distributors and audiences as technology and consumer expectations evolve. We thus ask that the Committee remain mindful of the distinction between regulation of signals and regulation of content.

The Communications Act governs the transmission of signals,<sup>7</sup> as the white paper acknowledges.<sup>8</sup> Indeed, the retransmission consent, must-carry, and program access rules all pertain to the availability of network signals, not the underlying content. By contrast, production and distribution of, and access to, the underlying content is left to the free market, the First Amendment, and copyright law. Regulating what content a programmer

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<sup>6</sup> *Id.*

<sup>7</sup> See 47 U.S.C. §§ 151, 152(a), 153(33), 153(52) (creating the FCC “[f]or the purpose of regulating interstate and foreign commerce in *communication by wire and radio*,” stating that “[t]he provisions of [the Communications Act] shall apply to all interstate and foreign *communication by wire or radio*,” and defining communication by wire and radio as “the *transmission* ... of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission”) (emphasis added).

<sup>8</sup> See, e.g., White Paper at 3 (recognizing that “[t]he law makes a distinction between the right to carry the content of a broadcaster (a matter of copyright law) and the right to retransmit the signal carrying the content (a matter of communications law).”).

must provide or the way it must do so would raise significant constitutional concerns.<sup>9</sup> 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.”<sup>10</sup> This is why Congress has been loath to authorize content regulation by agencies.<sup>11</sup> Similarly, the Copyright Act reserves to content owners discretion over the distribution and public performance of their works.<sup>12</sup> Accordingly, government should let the market do its work: bringing audiences, programmers, and distributors together to determine which business models best result in the production and dissemination of compelling content that audiences demand.

The white paper also asks about the right balance between consumer welfare and the rights of content creators.<sup>13</sup> There, again, constitutional notions of free expression and copyright point the way. Under the First Amendment, it is the speaker and the audience acting in the marketplace of ideas—not the government—that determines what is said and heard. And the 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.<sup>14</sup>

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<sup>9</sup> 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).

<sup>10</sup> *Id.*, at 254.

<sup>11</sup> See, e.g., 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”); 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”).

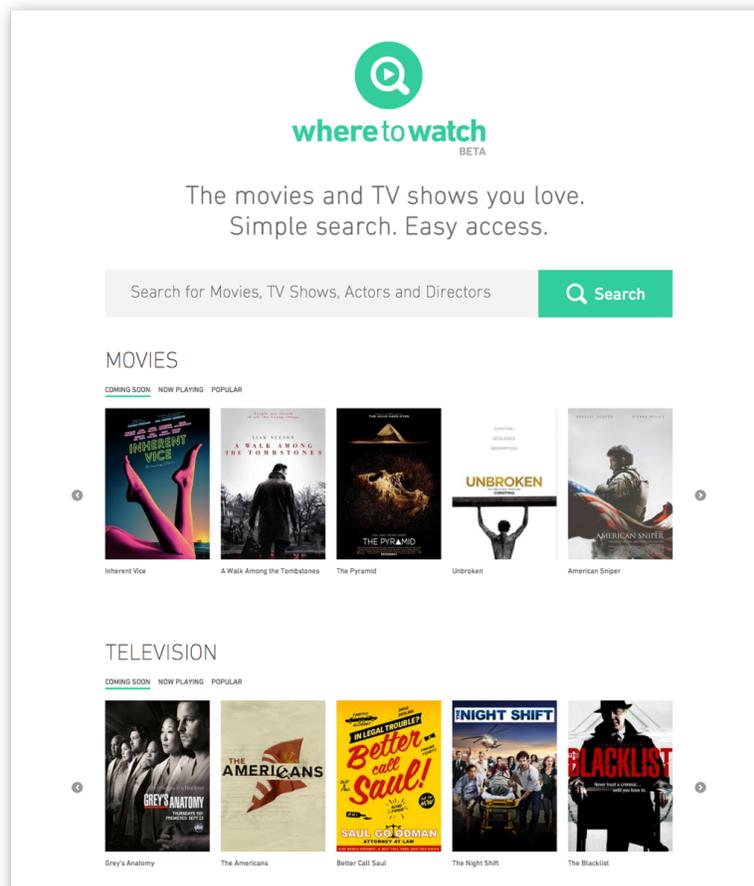
<sup>12</sup> See 17 U.S.C. § 106 (3), (4). See also *Orson Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3rd Cir. 1999) (partially pre-empting a Pennsylvania statute restricting a motion picture distributor from entering into an exclusive first-run exhibition agreement with an exhibitor because it violate the distributor’s rights under the Copyright Act); *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); *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); *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).

<sup>13</sup> See White Paper at 6, question 4(b).

<sup>14</sup> See U.S. Const., Art. I, § 8, cl. 8 (conferring upon the legislative branch the power “[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”).

### III. There Is Currently No Need to Amend the Communications Act with Regard to Internet Distribution of Video

The white paper asks how over-the-top video services should be treated under the Communications Act.<sup>15</sup> We do not believe any changes to the Act with regard to Internet-distributed video programming are currently warranted. Although still nascent, Internet-based video distribution models are flourishing, just like the broader video marketplace. By 2009, there were already more than 50 lawful online services in the United States providing access to film and television content, and U.S. consumers used those services to access 376 million movies and 20 billion television shows that year. By 2013, the number of legitimate services had jumped to more than one hundred, and the numbers of movies and television episodes viewers accessed rose to 5.7 billion and 56 billion, respectively.<sup>16</sup> To help audiences navigate among all those choices, the MPAA has launched WhereToWatch.com, which enables viewers to search for video content by title, actor, or director, and then click through to a variety of legal online sources to access the film or television show.



<sup>15</sup> See White Paper at 6, question 5.

<sup>16</sup> 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), at 1.

The white paper suggests that “[a]ccess to programming has stymied a number of would-be OTT providers, including Aereo, ivi.tv, SkyAngel, and FilmOn.”<sup>17</sup> To the extent anything stymied these providers, it was their attempts to build businesses that retransmitted content without permission from copyright owners, in violation of the law, or the inability to develop business models that offered sufficient incentives to draw content partners and viewers. Indeed, the Supreme Court and the Second Circuit, respectively, held that Aereo and ivi.tv violated copyright owners’ exclusive right to publicly perform their works, and a federal district court held FilmOn in contempt for violating an injunction to cease retransmitting content in violation of the Copyright Act.<sup>18</sup> Plenty of other OTT businesses are developing under current law, such as ABC.com, Amazon, Blockbuster on Demand, Crackle, Flixster, Fox.com, Google Play, Hulu, iTunes, NBC.com, Netflix, Target Ticket, Vudu, and YouTube.

A quick scan of announcements over just the last four months shows how vibrant the over-the-top television marketplace is already becoming:

- On Oct. 15, 2014, TimeWarner announced the launch of a stand-alone, over-the-top, HBO service in the United States.<sup>19</sup>
- On Oct. 16, 2014, CBS announced the launch of *CBS All Access*, a subscription video-on-demand and live-streaming service that makes available both archived and current CBS television network programming.<sup>20</sup>
- Between Oct. 27, 2014, and Jan. 14, 2015, Amazon introduced the Google Chromecast competitor Fire TV Stick; announced the debut of three original television series and 12 original television pilots; and signed Woody Allen to create his first television series.<sup>21</sup>

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<sup>17</sup> White Paper at 1.

<sup>18</sup> See, e.g., *ABC v. Aereo*, 134 S.Ct. 2498 (2014); *WPIX v. ivi*, 691 F.3d 275 (2d Cir. 2012) ); *CBS v. FilmOn.com*, No. 10 CIV. 7532 NRB, 2014 WL 3702568 (S.D.N.Y. July 24, 2014). See also *Fox, NBC, FilmOn Drop 9th Circ. Appeals After Aereo Ruling*, Law 360 (July 24, 2014), available at <http://www.law360.com/articles/560983/fox-nbc-film-on-drop-9th-circ-appeals-after-aereo-ruling>.

<sup>19</sup> HBO Chairman and CEO Richard Plepler Announces HBO to Offer a Stand-Alone HBO Streaming Service in 2015, available at <http://www.timewarner.com/newsroom/press-releases/2014/10/15/hbo-chairman-and-ceo-richard-plepler-announces-hbo-to-offer-a>.

<sup>20</sup> CBS Brings Programming Direct to Consumers with New Multi-Platform Digital Subscription Service, available at <http://www.cbcorporation.com/news-article.php?id=1096>.

<sup>21</sup> Introducing Fire TV Stick, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1981713>; Amazon Debuts First Original Live-Action Kids Series Gortimer Gibbon’s Life on Normal Street, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1982430>; Amazon’s First Pilot Season of 2015, Featuring Slate of 13 Original Comedy, Drama, Docuseries and Kids Offerings, will Debut January 15, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=2003577>; Amazon Announces Lineup for its First Pilot Season of 2015, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1988353>; Amazon to Debut the Highly-Anticipated Dramatic Comedy Mozart in the Jungle, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1991658>; Amazon to Debut its First Original Hour-Long Drama Series Bosch, available

- Between Oct. 29, 2014, and Jan. 7, 2015, Netflix made announcements regarding 10 original television series.<sup>22</sup> On Jan. 20, 2015, the company announced it had added a record 13 million new subscribers during the fourth quarter of 2014, bringing its total subscriber base to 57.4 million.<sup>23</sup>
- Between Oct. 30 and Nov. 18, 2014, Hulu announced two original television series.<sup>24</sup>
- On Nov. 13, 2014, Sony announced the launch of PlayStation™ Vue, a cloud-based TV service that makes available 75 channels of live and archived programming, including from CBS, FOX, FX, FOX Sports, YES Network, National Geographic, NBC, NBCSN, CNBC, Telemundo, Bravo, E!, Oxygen, Sprout, Syfy, USA Network, BET, CMT, Comedy Central, MTV, Nickelodeon, VH1, Discovery, TLC, Animal Planet, Oprah Winfrey Network, HGTV, Food Network, and the Travel Channel.<sup>25</sup>
- On Jan. 5, 2015, DISH announced the launch of Sling TV, a live, over-the-top television service, including content from ESPN, Disney, TNT, TBS, Food Network, HGTV, and the Cartoon Network.<sup>26</sup>

All of these over-the-top services and Internet-original television programs are arising under current law. One industry analyst wrote recently that “[m]omentum is in OTT video’s corner, and viewing on mobile devices, streaming media players and game consoles will continue to rise. These consumption trends and the use of Internet-

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at <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=2007574>; Amazon Studios Signs Woody Allen to Create His First Television Series Ever, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=2007234>.

<sup>22</sup> AwesomenessTV’s All New Richie Rich Series to Air Only on Netflix, available at <https://pr.netflix.com/WebClient/getNewsSummary.do?newsId=1701>; The Wildest Party Ever Hits the Jungle When the Netflix Original Series All Hail King Julien Debuts Dec. 19, available at <https://pr.netflix.com/WebClient/getNewsSummary.do?newsId=1715>; From Academy Award® nominees Peter Morgan and Stephen Daldry: The Masterful New Netflix Original Series, The Crown, available at <https://pr.netflix.com/WebClient/getNewsSummary.do?newsId=1741>; Netflix to Adapt Lemony Snicket’s A Series of Unfortunate Events into Original Series, available at <https://pr.netflix.com/WebClient/getNewsSummary.do?newsId=1742> Netflix TCA Winter 2015 Release, available at <https://pr.netflix.com/WebClient/getNewsSummary.do?newsId=1831>.

<sup>23</sup> Netflix Adds Record 13 Million New Members in 2014; Q4 Revenue and EPS Rise, available at <http://www.thewrap.com/netflix-adds-record-13-million-new-members-in-2014-q4-revenue-and-eps-rise/>.

<sup>24</sup> Oscar®-Nominated Director Jason Reitman Comes to Hulu in Straight-to-Series Order for Casual, available at <http://blog.hulu.com/2014/10/30/jason-reitmans-casual-comes-to-hulu/>; Hulu Orders Amy Poehler’s Difficult People Starring Julie Klausner and Billy Eichner, available at <http://blog.hulu.com/2014/11/18/hulu-orders-amy-poehlers-difficult-people-starring-julie-klausner-and-billy-eichner/>.

<sup>25</sup> Sony Network Entertainment International And Sony Computer Entertainment Unveil PlayStation™Vue, available at <http://www.sony.com/SCA/company-news/press-releases/sony-corporation-of-america/2014/sony-network-entertainment-international-and-sony-.shtml?icid=pr-newswire-feed>.

<sup>26</sup> Sling TV to Launch Live, Over-the-Top Service, available at <http://about.dish.com/press-release/products-and-services/sling-tv-launch-live-over-top-service-20-month-watch-tvs-tablets>.

connected devices and the OTT apps on them may have the ability to change the way TV is conceptualized.”<sup>27</sup> Taken together, these observations indicate that although still in its infancy, the online video marketplace is alive and well, and that there is no current need to amend the Communications Act with respect to online video programming.

Respectfully submitted:



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<sup>27</sup> SNL Kagan, Frictionless content, millennials and the ‘appification’ of TV at CES ’15, *available at*, <https://www.snk.com/InteractiveX/article.aspx?id=30546111>.