Comments of the Motion Picture Association of America
In Response to the #CommActUpdate White Paper on
Modernizing the Communications Act

January 31, 2014

Overview

Few would disagree that the video marketplace has seen rapid technological change and competition growth in the last twenty years. Tremendous innovation is occurring in the creation, distribution, and consumption of video content, with audiences increasingly able to watch what they want, when they want, where they want, on the device they want. Consumers can now download or stream movies and shows from more than 90 legitimate online services and counting. Last year, the MPAA created wheretowatch.org, offering a one-stop shop to connect consumers to the growing list of legal Internet video services. And of course consumers in almost every market can still gain access to video programming from at least four broadcasters, two satellite providers, one cable provider, and increasingly a phone company. Against this backdrop, there is little basis for expanding government intervention in consumer access to video content.

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 Jan. 8, 2014, solicitation for comment in its first #CommActUpdate White Paper on "Modernizing the Communications Act." Our six members—Walt Disney Studios Motion Pictures, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox, Universal City Studios, and Warner Bros. Entertainment—are committed to providing video fans with as many options as possible for experiencing great entertainment.

Markets are the original distributed computing network. Even with the best of intentions, government is no match for thousands of actors creating and experimenting in the face of competition. In the current climate, regulatory humility will pay dividends; premature action will stunt healthy experimentation, choice, and growth. As many have said, the first goal should be to do no harm. To that end, we propose three guiding principles for Congress to consider in 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.*

Our industry has been the beneficiary of giant leaps in technology, and we are both media and technology companies ourselves. We have produced programming that has inspired, thrilled, and educated audiences around the world for more than a century. And we have been an engine for economic growth in the process. Arts and culture including movie and television production is responsible for more than $500 billion of our nation's gross domestic product—or 3.2 percent—according to a new report by the Bureau of Economic Analysis and the National Endowment for the Arts. And recent changes by the BEA to more accurately reflect the economic contributions generated by movies, television, and other creative works show that GDP had actually been 3 percent higher than previously reported going all the way back to 1929. The movie and television industry supports directly or indirectly nearly 2 million jobs in the United States with backgrounds including trade skills, college educations, and professional degrees. It is responsible for more than 100,000 businesses across all 50 states, 85 percent of which employ fewer than 10 people. The industry accounts for $104 billion in total wages; $16.7 billion in sales tax, state income tax, and federal taxes; and a $12.2 billion trade surplus. Direct industry jobs generate $43 billion in wages. The 284,000 people employed in the core business of producing, marketing, and manufacturing movies and TV shows earn on average $84,000 a year, 75 percent higher than the national average. We drive the newest innovations and work to exceed consumer expectations. As the marketplace continues to evolve in the digital age, we will continue pushing these innovations and the plethora of legitimate services for delivering content to consumers.

The Robust and Innovative Video Marketplace

An explosion of change propelled by Moore's Law has produced better, faster, and cheaper electronics, computing power, storage, and communications. Those developments are revolutionizing everything from "glass to glass," that is, every element between the camera lens and the screen where consumers experience movies and video programming.

When it comes to content creation, our industry is regularly rolling out innovative and often experimental offerings in response to consumer demand for more interactive, more immersive, and more portable entertainment. Whether in state-of-the-art cinemas, on high-definition TVs, or on the latest mobile devices, content creators are working every day on their own and in partnership with other technology companies to create new ways for audiences to easily access content. All MPAA member companies stream their content online through their own sites, as well as through partner services. This includes advertisement-supported applications, such as the NBC app, as well as applications powered by the TV Everywhere authentication model, such as the FOX Now app, TNT app, Watch ABC, Showtime Anytime and others. With licensing agreements under which consumers can rent films through sites such as YouTube, content creators are demonstrating a commitment to offer their high-quality content through the most popular platforms. And others are joining the fray. This is reflected in companies like Netflix and Amazon, whose online streaming services began as distribution outlets for content created by others, but who now also drive development of new original programming.

Transformation is also characterizing video consumption. This is a time of unprecedented change in consumer behavior. Before televisions became commonplace in the 1950s American home, the only way audiences could experience the spectacles and remarkable storytelling of filmmakers was by sitting in a theater. More than half a century later, consumers have more options than ever for viewing their favorite content, and those options continue to grow almost daily.

When watching on the silver screen, moviegoers can experience the latest cutting-edge visual and special effects in high-resolution digital 3-D and IMAX, surrounded by breathtaking digital sound.

When at home, they can watch films and television shows as they air or at the time of their choosing using a DVR, video-on-demand service, Blu-ray disc, or over the Internet. Indeed, nearly 42 million homes in the United States now have any number of Internet-connected media devices, including game consoles, smart-TVs, and online set-top boxes. And because of partnerships with innovative consumer electronics companies, consumers have many new options for enjoying our members' content in their living room, enabled by affordable and easy to use devices like Roku, Chromecast, AppleTV, Xbox, and Playstation. Last year alone, U.S. audiences legally consumed nearly 3.5 billion hours of movies online.

When outside the home, the revolution continues. There are now more mobile devices than people in the United States, and smartphones and tablets have outpaced sales of desktop and laptop computers combined. Audiences are increasingly using those devices to watch video content. They spent many of those hours using a smartphone, tablet, or other mobile device on services like TV Everywhere, Netflix, Hulu, HBO GO, Amazon, Target Ticket, and EpixHD, to name just a few.

Our member companies have embraced this movement of portability, flexibility, and ease of access for viewers. One way they have done so is through cloud-based services such as "UltraViolet," a free digital storage locker that allows a consumer, after purchasing UltraViolet media—such as a Blu-ray, DVD, or electronic purchase over the Internet—to then access that content on any UltraViolet-compatible device registered to them. Consumers have the option to either seamlessly stream the content or download it for later viewing without a broadband connection. Consumers can choose from a number of UltraViolet-enabled services, such as Flixster, Wal-Mart's Vudu, Best Buy's Cinema Now, Technicolor's M-Go and Barnes & Noble. Our member companies—along with others in the Digital Entertainment Content Ecosystem consortium of more than 60 studios, retail stores, and technology firms—created UltraViolet to further enable consumers to watch what they want, when they want, where they want. And because UltraViolet is powered by such a diverse consortium of innovative companies, consumers are not locked in to one portal and can shift from one service to another as each continues to innovate. UltraViolet also enables sharing of content among up to five connected accounts and twelve devices. More than 9,500 titles are available through UltraViolet, with the list growing every day. Consumers have registered more than 15 million accounts for UltraViolet to date.

One thing is certain: today's market is a television fan's market.

Guiding Principles

The Energy and Commerce Committee's Jan. 8, 2014, white paper seeks comment on the appropriate communications regime for the modern era. It asks how to preserve flexibility in the face of rapid change. In that spirit, we offer three principles that we believe should guide policy in the robust and innovative video marketplace:

Government should not act absent evidence of market failure. Policy leaders and economists have oft stated this principle. Some express it as "do no harm." Others as "if it ain't broke, don't break it." A well-functioning market will be more efficient and nimble than government, especially in industries such as ours that are characterized by swift technological change, shifting business models, and increasing competition. Government's ability to prognosticate accurately and act quickly is limited. Good policy and transparency call for market power analyses and showings of market failure before action. How can government know whether action is necessary if it does not first examine the marketplace with rigor? Ours is an evolving marketplace. Content creators, distributors, and audiences are only starting to confront the world of possibilities that the digital, Internet-enabled era brings. Some technological solutions and business models in the video marketplace will strike the right chord from the start. Others will miss the mark. Still others are yet to be conceived, and will evolve in a serendipitous process of trial and error. Policymakers should not short-circuit that process, substituting their judgment for the choices consumers are actively making *for themselves* in the evolving marketplace. The opportunity cost of anticipatory action in this space is large, and government should give the marketplace room to run. Developments in Internet distribution of video, for example, have occurred in fits and starts, marked by events such as the rollout of iTunes. Indeed, it is often the challenge of the moment that motivates the next entrepreneur to invent the better mousetrap. The risk is high that regulatory intervention will inadvertently interrupt healthy experimentation. The government should not act unless it has solid reason to believe that a given issue will persist over the long run, especially when the marketplace offers consumers a variety of options to choose from.

Before taking action, government should determine whether the costs will outweigh the benefits. Cognizant that steps intended to help can themselves harm businesses large and small and serve as a drag on the economy, President Obama issued an order January 2011 requiring executive agencies to ''propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify).''[1] While that order only binds executive agencies, President Obama stated in a subsequent order that the same regulatory principles should apply to independent agencies.[2] His Jobs Council has similarly recommended that Congress require independent agencies "to conduct cost-benefit analysis for economically significant regulations.''[3] This makes good policy sense. Not only will it help ensure that government does not inadvertently do more harm than good,

[1] Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).
[2] Exec. Order No. 13579, 76 Fed. Reg. 41587 (July 11, 2011).
[3] President's Council on Jobs and Competitiveness, Road Map to Renewal: 2011 Year-End Report at 45, available at http://files.jobs-council.com/files/2012/01/ JobsCouncill2011YearEndReport1.pdf.

the added care will help ensure that the government only acts when necessary and appropriately tailors its proposals.

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 video marketplace is enjoying tremendous success in no small part because policymakers have chosen to give clear effect to the rights of creators and disseminators of content. This allows the free market to continue facilitating tremendous innovation in the production, dissemination, and consumption of content, including through the use of Internet-enabled services, applications, and devices. Regulating this market is inherently difficult to get right, and government efforts run the risk of being both under and over-inclusive, hampering innovation. Absent proof of market failure, government should allow evolving business models based on existing intellectual property rights and negotiation through contract to grow and thrive. Because communications policy and copyright policy are intimately intertwined, and because ensuring the right environment for the creation and distribution of content is no small task in the digital environment, we encourage the Energy and Commerce Committee as it continues its examination of the video provisions of the Communications Act to coordinate closely with the Judiciary Committee.

Conclusion

This is a transformative time for content creators and distributors of all types, but especially for those working in the American film and television industry. We have told remarkable stories and been responsible for our share of countless technological innovations thanks to the creative talent and skilled workers who call this industry home. We have made the transition from silent films to talkies; from projector reels to television; from black and white to color; from analog to digital. Today, consumers enjoy our content on every distribution platform, be it broadcast, cable, satellite, or the Internet. Tales once told exclusively on cinema screens are now told on screens of all shapes and sizes. We look forward to working with you to ensure incentives remain in place to encourage creators to continue innovating and exceeding audience expectations.

Respectfully submitted:

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