

Independent Film & Television Alliance® (IFTA®) submission dated August 20, 2018 in response to Topic 1 with respect to Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201.¹

Historically, the U.S. Government has prevented media ownership monopolies.

Independent film and television are an integral part of American culture. Recognizing that a thriving independent industry fosters competition and enriches America's marketplace of ideas, the federal government has in the past taken decisive steps to prevent major motion picture studios from dominating the broadcast industry. In addition to FCC ownership rules, there were the 1970 Financial Interest and Syndication Rules (Fin-Syn) and the Consent Decree of 1977, which prevented the networks from establishing massive media conglomerates, along with the Paramount Decrees of the 1940's stemming from FTC action with respect to theater ownership and block booking.

In 1995, the Commission's "Global Competition and Innovation Hearings" under the leadership of then-Chairman Robert Pitofsky established a comprehensive process for information gathering in support of the FTC's dual mission to promote competition and to protect consumers from unfair and deceptive practices. These hearings are widely regarded as "the first major step in establishing the FTC as a key modern center for ... 'competition policy research and development'" and "sought to 'articulate recommendations that would effectively ensure the competitiveness of U.S. markets without imposing unnecessary costs on private parties or governmental processes.'"²

Roll-back of media ownership rules has stifled competition.

At the time Chairman Pitofsky sought to examine a path for an even playing field in the emerging internet marketplace, the Fin-Syn rules were still in effect – if in their dying days -- to prevent the monopolization of broadcast television by establishing ownership parameters for programming aired in prime time; the home video market was developing; cable television channels were multiplying; and foreign markets were emerging rapidly.

However, since the mid-nineties, the safeguards against media monopolies have been stripped away. The result has been the emergence of a handful of giant media conglomerates that now dominate the film, television, cable, and broadband industries. These conglomerates produce their own programming, show it on their own networks, and rerun it on their secondary networks or affiliated cable stations or move it to affiliated video on demand services. This has made it nearly impossible for independents to enter the market. For example, the major television networks have stopped acquiring independent feature films or movies of the week for broadcast. Independent production has fallen from 50% in 1995 to only 5% of network prime time programming.³ It was once hoped that the cable networks would be the antidote to this

¹ See [83 Fed. Reg. 38307 \(August 6, 2018\)](#).

² Timothy J. Muris, More Than Law Enforcement: The FTC's Many Tools – A Conversation with Tim Muris and Bob Pitofsky, 72 ANTITRUST L.J. 772, 773 (2005).

³ Figure current as of 2008.

trend, but they are now commonly owned with the networks and, in significant part, have also closed their doors to the independents. Few cable networks will acquire from independents on equitable terms if at all.

Harmful pattern replicated in the online environment.

In the nearly quarter-century since the Pitofsky Hearings and staff reports⁴, the marketplace for audiovisual content in the U.S. has dramatically evolved. Technology and internet bandwidth have increased exponentially with the ability for internet users to stream or download full-length films and television programs on demand to a wide range of devices.

The marketplace has shifted to the internet -- once considered a viable path for creators to reach their audience. However, the internet and the platforms that sit on top to provide streaming services have either become “must get” portals for films but wield enormous market leverage like Google and Amazon so they can unilaterally dictate the terms of license agreements including the licensee fee; or have become consolidated with traditional distribution platforms and media companies like NBCU Comcast, soon to be Fox and Disney (which will substantially control Hulu), and AT&T-DirecTV and now Time-Warner.

Moreover, following the recent news that the U.S. is considering a rollback of the Paramount Decrees⁵, there are now reports that Amazon and Netflix are seeking to acquire brick-and-mortar theaters, such as the Landmark theater chain and its more than 50 theaters in over 27 key markets across the U.S.⁶

When independents can't compete, it is the viewer who loses out.

In this consolidated marketplace, cord-cutting (*i.e.*, the cancellation of cable and other traditional pay-TV subscription services by television viewers in favor of internet-only access), is occurring at an increasingly rapid pace⁷ but independents are still disadvantaged as content suppliers because the internet and platforms themselves still exercise inordinate buying power. In a prime illustration of such market power, a consumer who cuts the cord with their cable company in most cases will continue to acquire internet service from the same company that supplies both internet and television service.

The independents are also challenged with relying on the internet platforms to effectively deal with piracy. While the internet creates opportunities for expanded distribution, new audiences, and new revenue streams for independents, it also has fostered the biggest threat to our industry: online infringement is allowed to flourish without any effective way under current law to prevent or stop the introduction and rapid proliferation of infringing copies across the internet. It is a painful irony that the platforms are able to turn down legitimate independent

⁴ [FED. TRADE COMM'N STAFF, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE](#) (1996); [FED. TRADE COMM'N STAFF, ANTICIPATING THE 21ST CENTURY: CONSUMER PROTECTION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE](#) (1996).

⁵ <https://www.bloomberg.com/news/articles/2018-08-02/u-s-eyes-end-of-film-distribution-system-that-rules-hollywood>

⁶ <https://www.bloomberg.com/news/articles/2018-08-16/amazon-is-said-to-be-in-running-to-acquire-landmark-movie-chain>.

⁷ <https://variety.com/2018/digital/news/cord-cutting-2018-estimates-33-million-us-study-1202881488/>

content offers while also refusing to proactively prevent that same content from being uploaded illegally via their broadband services.

In the U.S., it is also the pattern that the major internet platforms and service providers already deploy enhanced anti-piracy protections with respect to their own content and in the context of agreements on a “voluntary” basis negotiated with large suppliers while refusing to extend those enhanced services to smaller content suppliers. In the case of Google/YouTube, these enhanced protections include proactive “take down stay down” options for large companies, but smaller companies are only offered the option of monetizing the illegal copies – allowing Google/YouTube to place advertising on the illegal copies and sharing a fraction of the ad revenue derived from the illegal use, rather than preventing the further upload and illegal distribution of the infringing material. This discriminatory treatment creates a marketplace distortion of revenue and a substantial barrier for smaller content suppliers seeking to use the internet as a major pathway to audiences.

We urge the FTC to take notice that while it may appear that the internet offers endless opportunities for independents to reach audiences, those opportunities are constrained by the decisions and actions of a few major market players. It is incumbent upon Government to ensure that notwithstanding the multiple layers of consolidation and sheer market power of the internet giants, they are forced to act in a transparent and fair manner and not exercise unfair market leverage against independent producers of films and television programming, whether through specific commercial practices or by continuing to foster-by-inaction a marketplace plagued with illegal content.

In that regard, we urge the Commission to use its authority to investigate fully the extent to which the large internet platforms, including Google and Facebook, and service providers today are allowed, and arguably incentivized, to avoid taking action to halt the spread of illegal content and services across their systems. This investigation should encompass those devices, services and streaming apps that are marketed on the basis of access to illegal or pirated content (so-called “preloaded boxes”). We further recommend that the Commission evaluate actions by these platforms and services that have the effect of foreclosing market access for smaller content providers.

The hearings and report that the Commission contemplates have the potential to set forth ground-breaking conclusions about how today’s legal and enforcement framework must be adapted to encourage the steady supply of legal content and the establishment of a marketplace online that consumers and users can trust. We encourage the Commission to move forward aggressively and to follow the record to a body of solid recommendations and regulatory actions.