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

In the Matter of	)	
	)	
Modernization of Media Regulation	)	MB Docket No. 17-105
	)	
Implementation of Section 103	)	MB Docket No. 15-216
of the STELA Reauthorization Act of 2014:	)	
Totality of the Circumstances Test	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	
Petition for Rulemaking to Amend	)	RM 11728
the Commission's Rules Governing	)	
Practices of Video Programming Vendors	)	

MOTION PICTURE ASSOCIATION OF AMERICA

Reply Comments

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Executive Summary

The FCC can and should increase reliance on market forces in content production. Never before have audiences had as many lawful options for accessing compelling, diverse programming—including what, how, where, and when to watch. The American film and television industry now releases more than 700 movies and 400 scripted original shows a year, which it distributes across a broad array of outlets, including in theaters; on hundreds of national, regional, and local broadcast and cable networks; and online. Viewers can receive the networks from broadcasters, cable operators, satellite providers, and phone companies, as well as from "over-the-top" services. Indeed, television and movie studios are now making their content available in the United States through more than 130 lawful online sources, and U.S. audiences used those sources to access 8.4 billion movies and 76.1 billion television episodes in 2015, alone. Viewers can watch these movies and shows "live" at home or at a time and place of their choosing over an ever-growing array of devices. All these options have led many industry observers to say that we are in another Golden Age of television.

The FCC should therefore take this opportunity to revisit its rules in light of today's changing marketplace. One area in particular that the FCC should revisit is the children's television rules. Changes in the broader programming market have also led to changes in the amount, diversity, quality, and sources of children's television programming, as well as the amount of video that children watch that is not specifically designed for them. These developments warrant a fresh look at the particulars of FCC regulation in this area.

The FCC should disregard, however, requests by some commenters to change the retransmission consent regime—including the network non-duplication and syndicated exclusivity rules—under the misleading claim that doing so would increase reliance on market forces. The retransmission consent regime is the only reason that negotiation for carriage of

broadcast programming has any resemblance to a free market, because it returns to content creators at least some of the discretion they lose from the government-imposed local and distant signal compulsory copyright licenses. The FCC must not consider altering the retransmission consent regime unless and until Congress eliminates the compulsory copyright licenses and provides guidance on how these mechanisms will be unwound.

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I. The FCC Should Revisit its Media Rules in Light of the Changing Marketplace

When it comes to rules bearing on the production of television content, changes in the marketplace and in technology support the FCC's instinct that certain media regulations may have become "outdated, unnecessary or unduly burdensome."[1] Never before have audiences had as many lawful options for accessing compelling, diverse programming—including what, how, where, and when to watch.

As the advocate for the American film, television, and home video industries, the Motion Picture Association of America submits these comments on behalf of its 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. They are committed to encouraging the dissemination of a wide variety of programming and movies through a wide variety of platforms and distributors. Indeed, our members are in the business of reaching audiences and have strong incentives to make content that meets viewer demand readily accessible.

The American film and television industry now releases more than 700 movies and 400 scripted original shows a year.[2] Television and movie studios distribute these films and programs across a broad array of outlets, including in theaters; over hundreds of national, regional, and

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[1] *See* Commission Launches Modernization of Media Regulation Initiatives, MB Docket No. 17-105, *Public Notice*, FCC 17-58, at 1 (rel. May 18, 2017), *available at* https://ecfsapi.fcc.gov/file/051878172904/FCC-17-58A1.pdf.

[2] *See* Lesley Goldberg, *Scripted Originals Hit Record 455 in 2016, FX Study Finds*, HOLLYWOOD REPORTER, Dec. 21, 2016, http://www.hollywoodreporter.com/live-feed/scripted-originals-hit-record-455-2016-fx-study-finds-958337; MPAA, THEATRICAL MARKET STATISTICS (2016), http://www.mpaa.org/wp-content/uploads/2017/03/MPAA-Theatrical-Market-Statistics-2016_Final.pdf.

local programming networks; and online. Viewers can receive the networks from broadcasters, cable operators, satellite providers, and phone companies, as well as from "over-the-top" services. Indeed, many content providers offer their own applications to deliver programming directly to viewers, as well as produce programming for, or license programming to, online providers, which can be accessed through wired or wireless broadband subscriptions or wi-fi services. Television and movie studios are now making their content available in the United States through more than 130 lawful online sources,[3] and U.S. audiences used those sources to access 8.4 billion movies and 76.1 billion television episodes in 2015, alone.[4] Twenty percent of the original television series exhibited in 2016 were produced specifically for online services such as Netflix, Hulu, and Amazon,[5] all of which continue to expand the slate of exclusive content they offer, increasingly involving marquee writers, directors, and actors. Viewers can watch the movies and shows "live" at home or at a time and place of their choosing over an ever-growing array of devices, from smartphones to tablets, gaming devices to dedicated online video systems, laptops to computers to smartTVs. All these options have led many industry observers to say that we are in another Golden Age of television.

II. The FCC Should Revisit its Children's Programming Rules in Particular

Changes in the broader programming market have also led to changes in the amount, diversity, quality, and sources of children's television programming, as well as in the amount of programming that children view that is not specifically designed for them. In light of these developments, the FCC should revisit its children's television rules to ensure they are still well

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3 *See* MPAA, *Legal Digital Marketplace,* http://www.mpaa.org/technology-and-innovation/#13.

4 Underlying data available from IHS. *See* https://www.ihs.com/.

5 *See Goldberg*, *supra* note 2.

tailored and serving their intended purposes. The FCC should also consider the role that the FTC plays, as well as the roles played by self-regulatory bodies, such as the Children's Advertising Review Unit.

The advent of cable and satellite services, increases in their capacity over time, and the entry of telephone providers into the video market have greatly multiplied the number of outlets for children's television programming and also led to the rise of specialty kids channels.

Over-the-top services also now enable children's networks to reach audiences directly via their own applications or through third-party download and streaming services like iTunes, Netflix, and Amazon. And over-the-top services are themselves investing heavily in exclusive, original children's programming. Netflix lists 60 original kids' shows on its web site as available to U.S. audiences[6] and Amazon lists 17,[7] with many of the shows from both services already running into multiple seasons. YouTube launched its YouTube Kids children's video application in February 2015,[8] which racked up more than 30 billion views and more than 8 million weekly active users within its first two years, according to Google.[9] YouTube Kids also unveiled four

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6 *See* https://media.netflix.com/en/only-on-netflix (visited July 28, 2017, and sorting all exclusive titles by category).

7 *See* https://www.amazon.com/s/ref=atv_?_encoding=UTF8&bbn=2864549011&field-feature_eighteen_browse-bin=11197230011&field-theme_browse-bin=2650365011&field-ways_to_watch=12007865011&node=2858778011%2C2864549011&pf_rd_i=primevideokids&pf_rd_m=ATVPDKIKX0DER&pf_rd_p=3136503802&pf_rd_r=4ZQCCHQRJW04ZD78BKY0&pf_rd_s=center-4&pf_rd_t=39901&search-alias=instant-video (visited July 28, 2017).

8 *See* Shimrit Ben-Yair, YouTube Kids Group Product Manager, *Introducing the newest member of our family, the YouTube Kids app—available on Google Play and the App Store,* OFFICIAL YOUTUBE BLOG (Feb. 23, 2015), https://youtube.googleblog.com/2015/02/youtube-kids.html.

9 *See* Todd Spangler, *YouTube Orders First Original Kids' Programming for Red Subscription Service*, VARIETY, Feb. 13, 2017, http://variety.com/2017/digital/news/youtube-red-kids-programming-1201986766/.

original kids shows in February of this year, with additional programs in development.[10] None of these sources of content are regulated by the FCC's rules.

The Commission should ensure its rules continue to incentivize producers to design programming specifically for children, as discussed in opening comments filed in this proceeding.[11] To that end, the FCC should revisit the limits it places on advertising and the display of internet addresses[12] to ensure those rules do not hinder the ability of non-internet based providers of children's programming as compared to their online competitors to pour money back into their kids content. Absent additional flexibility, non-internet based providers may be discouraged from providing kids programming, or less able to raise revenue, which could affect both the quality and quantity of the content.

III. The FCC Must Not Alter the Retransmission Consent Regime—Including the Network Non-Duplication and Syndicated Exclusivity Rules—Unless Congress Eliminates the Government-Imposed Compulsory Copyright Licenses, which Limit the Discretion Content Creators Would Otherwise Have in a Free Market

The FCC should disregard requests by some commenters to change the retransmission consent regime—including the network non-duplication and syndicated exclusivity rules—under the misleading claim that doing so would increase reliance on market forces. The MPAA's members, which produce and supply network and syndicated programming, would prefer that distribution of content be governed by contracts negotiated in a completely free and vibrant

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10 *See* Malik Ducard, YouTube Global Head of Family and Learning, *YouTube Kids turns 2 and there's lots to celebrate!*, OFFICIAL YOUTUBE BLOG, https://youtube.googleblog.com/2017/02/youtube-kids-turns-2-and-theres-lots-to.html (Feb. 13, 2017).

11 *See* CBS, Walt Disney, 21st Century Fox, and Univision comments at 5-9; NAB comments at 24-37; NCTA comments at 22-24.

12 *See* 47 C.F.R. §§ 73.670, 76.225.

market. The anachronistic, government-imposed, local and distant signal compulsory copyright licenses, however, prevent that from happening.[13]

The retransmission consent regime is the only reason that negotiation for carriage of broadcast programming has any resemblance to a free market, because it returns to content creators at least some of the discretion they lose from the compulsory licenses. Adding restrictions on the retransmission consent rules would create even less of a free market. This would be exactly the wrong direction to take in light of the overwhelming growth in media outlets and programming channels. With added competition should come less FCC intervention, not more. The FCC therefore should not consider altering the retransmission consent regime unless and until Congress eliminates the government-imposed compulsory copyright licenses.

Many of the proposals—such as limiting discounted wholesale offers for packages of programming, compelling online-access to content, restricting the freedom of programmers to communicate with their audiences, forcing programmers to continue to make their content available to distributors in the absence of a retransmission consent agreement, and prohibiting programmers from keeping sensitive contract information confidential[14]—have been raised before, only to be rejected. Often they are beyond the FCC's jurisdiction, conflict with programmers' rights under the First Amendment and the Copyright Act, or are just poor policies pushed by parties that want a government-created advantage in programming negotiations.

Eliminating the network non-duplication and syndicated exclusivity rules[15] would similarly remove essential counterbalances to the government-created compulsory copyright

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13 *See* 17 U.S.C. §§ 111, 119, 122.

14 *See* Verizon comments at 15-17; NTCA comments at 4-5.

15 *See* R Street comments at 6-8; Verizon comments at 14-15.

licenses, jeopardizing the ability of program suppliers to provide viewers with robust and diverse programming.

Granting local broadcast stations geographic exclusivity generates the advertising revenue that helps fund the production and acquisition of innovative programming. Absent assurances that duplicative programming won't fracture its audience—and thus its advertising revenues—a local broadcast station is far less likely to invest in high-value content or take a risk on anything other than mass appeal programming. And diminishing the purchasing power of buyers in the broadcast programming market would, in turn, harm the ability of content producers to justify the significant upfront investment in the development and production of content, resulting in a reduction in the quality and diversity of broadcast programming. For reasons such as these, the FCC has long held that "the ability to show programs on an exclusive basis is generally recognized as a valuable and legitimate business practice in the television and cable industries."[16]

Ordinarily, program suppliers could efficiently provide assurances about duplicative programming purely through enforcement of contractually negotiated copyright licenses in the marketplace. By granting cable and satellite providers a statutory copyright license, however, the government restricts the ability of content providers to manage distribution through private contract.

The network non-duplication and syndicated exclusivity rules mitigate some of that market impact by returning to broadcast programming suppliers some of the discretion over distribution of their content that the statutory licenses take away. Under the approach reflected

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[16] *In re* Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Gen. Docket No. 87-24, *Report and Order*, 3 FCC Rcd 5299, 5300 ¶ 5 (1988).

by Congress in the 1976 Copyright Act, the government gives cable and satellite operators a statutory copyright license to retransmit the content within broadcast signals, but broadcasters can prevent importation of duplicative content if they have negotiated for exclusive geographic rights from the program supplier. This interrelation has led the FCC to observe that the program exclusivity rules are part of a "mosaic of other regulatory and statutory provisions," including the copyright laws, and that "when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination."[17]

A number of Senators reiterated the same points in letters to the FCC in light of a 2014 proceeding seeking comment on whether to eliminate the rules. Sen. Feinstein—then a member of the Senate Judiciary Committee and now the ranking member—stressed that it "is important to consider the impact of eliminating these rules on the statutory copyright licenses for retransmission of broadcast content."[18] In particular, she cautioned that "how television video content is distributed to the American people is a complex issue governed by several different legal parameters. Eliminating one longstanding element of that system may have unpredictable consequences that could end up harming consumers, particularly those who are low-income and rely on local stations for critical information."[19]

Similarly, Senate Judiciary Committee Chairman Grassley and then-Ranking Member Leahy, along with Senate Commerce Committee Chairman Thune and Ranking Member Nelson, wrote to "express concern about [eliminating] these long-standing rules in the absence of

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[17] FCC, RETRANSMISSION CONSENT AND THE EXCLUSIVITY RULES: REPORT TO CONGRESS PURSUANT TO SECTION 208 OF THE SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT OF 2004, at ¶ 33 (2005).

[18] Letter from Sen. Feinstein to FCC Chairman Wheeler, Oct. 8, 2015, at 1, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-336580A2.pdf.

[19] *Id.*, at 2.

complementary statutory reform of the compulsory copyright laws."[20] The Senators observed that "[t]he cable compulsory copyright license is designed to work in tandem with the FCC's exclusivity rules," cautioning that "[e]liminating these rules without making corresponding changes to the compulsory copyright license system will potentially alter the way in which the cable compulsory license is intended to function and disrupt local television businesses and viewing households."[21] They said that "it would be premature for the FCC to repeal the exclusivity rules while the current compulsory copyright license regime remains unchanged."[22] The FCC ultimately left the rules intact.[23]

Nothing has changed that alters the interrelation between the program exclusivity rules and the compulsory copyright licenses. Nor has anything changed that would mitigate the harm from eliminating the rules. Consequently, there is no factual or legal basis for the FCC to change course now.

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[20] Letter from Sens. Grassley, Leahy, Thune, and Nelson to FCC Chairman Wheeler, Oct. 9, 2015, at 1, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-336580A4.pdf.

[21] *Id.*

[22] *Id*. *See also* Letter from Sen. Schumer to FCC Chairman Wheeler, Oct. 1, 2015 (urging the FCC not to change the program exclusivity rules because they "were passed in the context of a broad, complicated regulatory system that closely ties non-duplication and exclusivity to the compulsory license"), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-336580A6.txt; Letter from Reps. Butterfield, Rush, Meeks, Jeffries, Clarke, and Bass to Chairman Wheeler, Sept. 30, 2015 (expressing concern over the proposal to eliminate the program exclusivity rules because they "have historically existed alongside the compulsory copyright license" and eliminating them could harm the low income and minority communities), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-336575A2.txt.

[23] *See* Doug Halonen, *Wheeler Backs Off On Exclusivity Rules*, TVNewsCheck (Oct. 29, 2015), *available at* http://www.tvnewscheck.com/article/89609/wheeler-backs-off-on-exclusivity-rules.

IV. Conclusion

Changes in technology and the amount of competition warrant an increased reliance on market forces rather than regulation of content production. One area in particular that the FCC should revisit is its rules governing children's programming.

The FCC should not be misled, however, that changes in the retransmission consent regime would lead to an increased reliance on market forces. Retransmission consent returns to the programming ecosystem some of the market forces that are removed by the government-imposed compulsory copyright licenses, as the FCC and Congress have oft recognized. Unless and until Congress eliminates the statutory licenses, the FCC should not make changes to the retransmission consent regime, including the network non-duplication and syndicated exclusivity rules.

Respectfully Submitted,

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