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

In the Matter of	)	
	)	
Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services	)))	MB Docket No. 14-261

To: The Commission

COMMENTS OF THE DIGITAL MEDIA ASSOCIATION

Introduction and Summary

The Digital Media Association ("DiMA") files these comments to urge the Commission, as it considers how to respond to the continuing development of the media market, to proceed with care and caution. The current over the top ("OTT") market is vibrant and growing, and the Commission should move carefully to avoid unintended consequences that could stunt the growth of this developing field. Accordingly, any changes to the definition of multi-video programming distributor ("MVPD") should be mindful of the potential for unintended consequences and thus be narrowly tailored to a well-defined class of online video programming distributors ("OVDs"). In short, the Commission should follow a "light touch" regulatory approach to ensure that OTT providers can continue to offer the same innovative and high-quality services they have produced thus far.

DiMA comes to this debate as the representative of the digital media industry: webcasters, online media, digital services, and technology innovators. DiMA's member companies offer products and services that have revolutionized consumer media and democratized access to media and information by attracting millions of viewing hours online to the new and repurposed content that is now available when consumers want to watch it. The innovative products and services that DiMA member companies bring to market have changed—and will continue to change—commerce and daily life, as well as how Americans obtain and enjoy news, entertainment, and sports.[1] As a result of the tremendous innovation of DiMA members, consumers are able to enjoy a wide variety of content on a growing number of devices, both at home, and on the go. DiMA believes this vital perspective should inform the Commission's next steps in the rapidly changing and still evolving online video space.

I. The OTT Market Is Vibrant and Growing

The marketplace for online video content has undergone a revolution over the last several years. Services such as Amazon Instant Video, Apple TV, Sony, and Xbox Video, have transformed the way the public consumes video content, enabling consumers to watch video almost anywhere, at any time, on a variety of devices. To respond to the changing tastes of consumers who increasingly are opting to consume video content online in addition to through traditional broadcast, cable, or satellite platforms, OTT providers have developed, and now offer to consumers, both new platforms and new content.[2] Leading OTT providers today offer

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[1] The Digital Media Association represents some of the world's leading Internet companies including: Amazon.com, Apple, Live365, Microsoft, Pandora, RealNetworks/Rhapsody, Slacker, and Google's YouTube.

[2] *See TV Makers Design for Streaming Video to Stay Relevant*, ASSOCIATED PRESS, Jan. 6, 2015, *available at* http://www.nytimes.com/aponline/2015/01/06/technology/ap-us-tec-gadget-show-future-of-tv.html (referencing a report from The Diffusion Group, a research firm that specializes in Internet video, that predicts online video will account for a third of all video viewing in 2020, up from about 10 percent in 2013). *See also* Timothy Stenovec, *Netflix Actually Won Big At Last Night's Emmys*, HUFFINGTON POST (Aug. 26, 2014, 5:07 PM), http://www.huffingtonpost.com/2014/08/26/netflix-emmys_n_5717765.html (noting that consumer time spent watching video on the Internet, on platforms such as Amazon Instant Video, Netflix, and YouTube increased 54 percent in 2014, according to Nielsen).

millions of movies and television shows to be streamed or downloaded instantly, and have attracted millions of subscribers. For instance, Amazon.com offers over 40,000 titles on its Amazon Instant Video service, and Apple TV users can access the 85,000 movies and 300,000 TV shows available on iTunes.[3]

Not only has the OTT market generated an offering of remarkable quantity to millions of consumers, the limited content it has produced, has included programming of exceptional quality. OTT programming was recognized with television's highest awards at the recent Golden Globe® ceremony. Specifically, Amazon's original series *Transparent* won awards for Best TV Series, Musical or Comedy and Best Actor in a TV Series, Musical or Comedy, for star Jeffrey Tambor.[4] Kevin Spacey won Best Actor in a TV Series, Drama for the Netflix original series *House of Cards*,[5] while Robin Wright won last year's award for Best Actress in a TV Series, Drama for the same show[6]. Last year, Netflix original productions also won seven Creative Arts Emmys.[7]

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[3] *Amazon Instant Video*, AMAZON (2015), http://www.amazon.com/Instant-Video/b?node=2858778011; *iTunes Overview*, APPLE (2015), https://www.apple.com/itunes/video/.

[4] *2015 Golden Globe Award Winners*, GOLDEN GLOBE® AWARDS, http://www.goldenglobes.com/golden_globe_winners (last visited Feb. 23, 2015).

[5] *Id.*

[6] *2014 Golden Globe Award Winners*, GOLDEN GLOBE® AWARDS, http://www.goldenglobes.com/golden_globe_winners/2014 (last visited Feb. 24, 2015).

[7] *See* Press Release, Academy of Television Arts & Sciences, 66th Emmy Awards (Aug. 16, 2014) (*available at* http://www.emmys.com/sites/default/files/Downloads/2014-creative-arts-winners-v1.pdf).

Throughout this success, the OTT market has continued to grow and diversify. Early this year, DISH announced the launch of its Sling TV Service.[8] Sling TV will offer live and on-demand Internet-based access to a variety of cable television channels at approximately a fifth of the cost of an average cable or satellite subscription.[9] Recent announcements by HBO and CBS further illustrate the innovation and profound changes taking place online. Last October, HBO announced that it plans to begin offering a stand-alone, over-the-top service for its programming that would be accessible without a cable or satellite subscription.[10] The next day, CBS announced the launch of its "All Access" service, which offers users access to thousands of episodes of classic television programs from the CBS library as well as new and past episodes from the network's current shows.[11] And more innovation is underway as Sony is preparing its own online content package of traditional cable channels.[12] It bears emphasis that these new services, which are radically transforming online viewing habits, all have grown in response to evolving consumer demands and without government intervention or assistance.

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[8] *See* Emily Steel, *Dish Network Unveils Sling TV, a Streaming Service to Rival Cable (and It Has ESPN)*, N.Y. TIMES, Jan. 5, 2015, at B3.

[9] *See id.*

[10] *See* Emily Steel, *HBO Plans New Streaming Service, With Eye on Cord Cutters*, N.Y. TIMES, Oct. 15, 2014, at B1.

[11] *See* Emily Steel, *Cord-Cutters Rejoice: CBS Joins Web Stream*, N.Y. TIMES, Oct. 16, 2014, at A1.

[12] *See id* ("Sony is preparing an Internet product expected to include programming from Viacom, the parent of networks like Comedy Central, MTV and Nickelodeon. DirecTV also said that it would start an online video service. A similar service from Showtime, the premium cable network owned by CBS, is likely in the not too distant future,' [CBS Chief Executive Leslie] Moonves said.").

II. In Light of These Trends, DiMA's Leading OTT Content Providers Urge the FCC to Move with Caution to Avoid Any Unintended Consequences

This tremendous investment by online companies to acquire distribution rights to current content and to produce original content all has taken place in the present regulatory landscape, which has entailed virtually no government involvement. The flourishing field of online video delivery demonstrates that companies are experimenting with various business models and already making available to consumers a variety of offerings: recent TV shows, older TV shows, recent movies, older movies, foreign movies and foreign TV shows, and original content. The OTT space has attracted investment and innovation from every leading content provider in the country; these companies are investing millions of dollars in content and technology to develop new online video content offerings. For instance, in the third quarter of 2014 alone, Amazon invested $100 million into developing original content.[13]

DiMA's concern is that the rules proposed by the Commission possibly could stifle ongoing experimentation. Excessive or ill-advised regulation at this point could deter continued investment. The tremendous developments in OTT services have emerged in an environment that permits innovators to be flexible and unencumbered. Changing this environment with the addition of regulation could alter the foundation that has supported these developments and that has encouraged investment for continued growth. The Commission's good intentions could thus end up back-firing, reducing resources and opportunities for these innovators rather than expanding them. To avoid these unintended consequences, the Commission should proceed with caution when deciding whether and how to impose regulatory obligations on OTT providers.

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[13] *See* Emily Steel, *Amazon Tries Adding Art to Its Data*, N.Y. TIMES, Aug. 15, 2014, at B1.

III. At a Minimum, Changes to the MVPD Definition Should be Modest and Narrowly Tailored to a Well-Defined Class of OVDs

If the Commission does ultimately decide to act in this area, the resulting changes to the MVPD definition should be limited and narrowly tailored to a well-defined class of OVDs. To this end, DiMA appreciates the fact that the current proposed rulemaking rejects a "one size fits all" approach and instead draws important distinctions between Internet-based distributors that make available for purchase, by subscribers or customers, multiple continuous linear streams of video programming ("Internet-based MVPDs") on the one hand, and other Internet-based providers of video content (*e.g.*, subscription on-demand, transactional on-demand, ad-based linear and on-demand, or transactional linear content) on the other.[14] Even if the Commission decides to subject the former group to some type of regulation, DiMA members strongly believe the latter group should not be subjected to regulation.

Moreover, to the extent the Commission seeks to offer more types of OVDs the opportunity to receive the benefits of MVPD status, it is important that the Commission uses a flexible approach that leaves the decision of whether to receive those benefits—and be subject to the attendant responsibilities—to the OVDs themselves. As the Commission noted in the NPRM, MVPD status comes with both regulatory privileges and obligations: MVPDs may take advantage of program access rules, but also have obligations relating to program carriage and good faith negotiation with broadcasters for retransmission consent.[15] However, it is doubtful

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[14] *See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, MB Docket No. 14-261, FCC 14-210, at ¶ 13 (rel. Dec. 19, 2014).

[15] *See id.* at ¶ 36 (enumerating several regulatory privileges and obligations of MVPD status, including: "the right to seek relief under the program access rules and the retransmission consent rules" and requirements regarding competitive availability of navigation devices, good faith (continued…)

that all OTT providers wish to distribute television broadcast stations or avail themselves of program access or program carriage rules. If that is the case, any actions the Commission takes in this proceeding should leave those OTT providers unaffected. In that way, the Commission would "do no harm."

The Commission tentatively concludes in the NPRM that "the statutory definition of MVPD includes certain Internet-based distributors of video programming," specifically identifying "all entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time." The Commission should add a criterion to this proposed definition: an OVD should qualify as an MVPD only if it also seeks to take advantage of the FCC's program access or retransmission consent rules. That is, the statutory definition of MVPD should include those entities that make available for purchase, by subscribers or customers, multiple continuous streams of video programming distributed at a prescheduled time and which utilize the FCC's regulatory framework to obtain linear cable programming from a vertically-integrated cable or satellite programming vendor or linear broadcast video programming from a television broadcaster.

This approach leaves the choice of how best to offer consumers innovative, high-quality services where it belongs: with the OVDs and not with the FCC. Some OVDs may decide to continue with the approach that has thus far served them well, while others may determine that they can best serve consumers by benefiting from the Commission's program access and retransmission consent rules and fulfilling related responsibilities. The market will guide those

negotiation with broadcasters for retransmission consent, equal employment opportunity hiring, closed captioning, video description, access to emergency information, signal leakage, inside wiring, and the loudness of commercials).

decisions, and for entities that want to avail themselves of the Commission's rules, the door will be open.

IV. If the FCC Decides to Regulate Internet-based MVPDs Going Forward, It Should Apply a "Light Touch"

As noted above, online video distribution is experiencing a period of tremendous growth and innovation. The combination of rapidly evolving technology, high consumer demand for online video, and low barriers to entry has created an environment in which many entrants, large and small, have been able to thrive, bringing new viewing options to consumers as well as new avenues for distribution to content producers.

While DiMA members appreciate the Commission's intent to assist the development of the growing OTT field, the value of MVPD status for a modern digital media platform has yet to be determined. Subjecting newly covered Internet-based MVPDs to regulations adopted for traditional, facilities-based MVPDs could adversely affect the growth of the entire industry. The Commission should therefore proceed cautiously and refrain from imposing the many regulatory MVPD obligations on OTT providers as they continue to experiment to meet the demands of a quickly-evolving market. At most, the Commission should apply a "light touch" and only the most relevant MVPD requirements to ensure that OVDs continue to have the flexibility and resources necessary to offer novel and nimble approaches to the distribution of online content.

V. Conclusion

Our present time has been heralded as the new "golden age of television." As demonstrated by recent Golden Globe® awards, however, all of the best "television" is no longer only on traditional television at all, or distributed by any MVPD. In reality, the concept of "television" is evolving to adapt to consumers' changing tastes and needs. The Commission should be slow to interfere with this process, which has worked fairly well so far. Accordingly, its actions in this space, if any, should be modest and should reflect considerable caution.

Respectfully submitted,

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