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MOTION PICTURE ASSOCIATION
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February 12, 2008

Please find enclosed a copy of the reply comments filed by Motion Picture Association of America concerning competition and diversity in video programming distribution.

2008 FEB 25 P 2:42

February 12, 2008

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 07-29
	)	
Development of Competition and Diversity in video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	
	)	
Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements	)	MB Docket No. 07-198

REPLY COMMENTS OF MOTION PICTURE ASSOCIATION OF AMERICA

Motion Picture Association of America (hereinafter "MPAA") submits this reply in response to comments filed in the above captioned proceedings in response to the Commission's Report and Order and Notice of Proposed Rulemaking (FCC 07-169, adopted September 11, 2007). MPAA is a trade association representing six of the world's largest producers and distributors of theatrical motion pictures, packaged home video material and audiovisual programs for home reception via broadcast, cablecast, satellite distribution and the Internet.[1]

In its Notice of Proposed Rulemaking (hereinafter "NPRM"), the Commission requested comment on whether it should adopt further regulations to facilitate program access, including whether "it may be

[1] MPAA members are Paramount Pictures; Sony Pictures Entertainment Inc.; The Twentieth Century Fox Film Corporation; Universal City Studios LLLP; Walt Disney Studios Motion Pictures; Warner Bros. Entertainment Inc.

appropriate to preclude the practice of programmers to tie desired programming with undesired programming."[2] The Commission referenced characterizations of "the practice of programmers to require carriage of less popular programming in specified (usually basic) tiers in return for the right to carry popular programming as an onerous and unreasonable condition that denies consumers choice and impedes entry to the MVPD market."[3]

In response to the NPRM the American Cable Association and others filed extensive comments calling for adoption of far-reaching new "program access" regulations, including:

- requiring programmers to offer each program channel on a standalone basis at reasonable rates, terms and conditions
- prohibiting programmers from conditioning access to a channel on tiering or distribution obligations
- prohibiting non-cost-based price discrimination
- applying program access obligations to non-vertically integrated program vendors[4]

At the outset, it is important to point out that today's home TV program distribution marketplace is infinitely MORE diverse than it was thirty, ten, even five years ago. Thirty years ago, the three national broadcast networks garnered a 90% primetime share and the highest rated programs received 30+ ratings (down from 50+ ratings 20 years earlier). Ten years ago the four national broadcast networks were receiving primetime audience shares in the 60s and the highest rated shows were getting 20+ ratings. Only five years ago the four major networks were getting primetime audience shares in the high 40s and highest rated shows received over 15 ratings points. The latest information shows big five network shares barely above 40 and the highest rated show, *American Idol,* with a rating of 12.3.[5]

Cable, satellite and the emerging telephone company MVPDs are offering 500+ program channels that are increasingly independently owned. Vertical integration in the cable industry has plummeted from 50% in 1990 to 14.9% today.[6] Meanwhile, the Internet is becoming a major source of video entertainment programming for an increasing number of Americans. User generated content is blossoming, providing a

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[2] NPRM at page 3.
[3] NPRM at page 72, footnote omitted.
[4] See Comments of American Cable Association, January 3, 2008.
[5] Source: Nielsen Media Research
[6] The Progress & Freedom Foundation, "Cable TV 'Gatekeeper' Myths Debunked," November 30, 2007.

ready outlet for millions of independent video voices. Last November, 138 million Americans viewed 9.5 billion online videos.[7]

By any credible measurement, American consumers are receiving increasingly greater access to more entertainment video programming produced by a more diverse group of creative voices. Similarly, competition among program distribution outlets is increasing. Once the exclusive domain of three broadcast networks, home audiovisual entertainment program services are now offered by broadcast stations, cable systems, satellite distributors, telephone companies and an ascending number of Internet sites, including those operated by Google, Fox, Yahoo!, Viacom, Time Warner and Microsoft. Almost every American consumer has access to at least one cable service and two satellite services, which are facing growing competition from cable overbuilders, telephone companies and Internet outlets.

The current expanding program access environment suggests a need for less, rather than more, government intervention and regulation of the program marketplace. Yet the Commission is being importuned to insert itself more deeply into negotiations between the diverse players in the program marketplace, and on the most dubious of public interest grounds.

The Small Cable System Operators for Change assert that they "are increasingly concerned about unreasonable terms and conditions for program carriage.[8] American Cable Association asserts that "Wholesale tying and bundling substantially increase the cost of cable."[9] Although these groups admit that stand alone pricing is available, they contend that "prices are typically set at unreasonably high levels"[10] and "Most standalone channel 'offers' are illusory; they are priced to coerce purchase of the bundle."[11]

These comments reveal what is really being sought in this proceeding. The Commission is being asked to circumvent the operation of the program marketplace, reject the agreements of willing buyers and sellers in a highly competitive program licensing environment and substitute the Commission's judgments as to the terms, conditions and prices that should govern the distribution of entertainment programming

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[7] Liz Gannes, NewTeeVee, "Need-to-Know Web Video Stats: Traffic, Rentals, revenues, UGC," January 17, 2008.
[8] Comments of The Small Cable System Operators for Change, filed in this proceeding January 4, 2008, at page 1.
[9] Comments of American Cable Association, filed in this proceeding January 3, 2008, at page 12.
[10] Comments of The Small Cable System Operators for Change at page 3.
[11] Comments of American Cable Association at page 13.

to American consumers[12]. This radical intrusion into the program marketplace can only be defended on grounds that government is inherently better situated to decide what is best for consumers than the operation of the free market -- a concept that history has amply demonstrated to be fatally flawed.

There is no credible evidence of tying in the record, however to the extent that any of the alleged tying or bundling practices causes harm, the antitrust laws provide more than adequate redress. The purpose of the antitrust laws is to promote consumer welfare.[13] Consistent with this purpose, antitrust law forbids tying when it harms consumer welfare by adversely affecting competition. U.S. courts have nearly a century of experience in handling tying cases and the current approach reflects many decades of critical legal and economic analyses. There are both federal and state antitrust laws that protect consumers in this area.[14] Claims may be pursued by either federal and/or state governmental entities and/or private parties.[15] Antitrust remedies are extremely powerful and include injunctive relief and treble damages plus the recovery of costs and attorney's fees.[16]

Absent grounds for relief under the antitrust laws, those calling for Commission action resort to simple assertions that the public is being "harmed" and that the terms resulting from marketplace transactions are "unreasonable." While reasonable persons can debate whether consumers would be better off if the marketplace operated differently, government should not substitute the subjective values of even its most enlightened and discerning officials for free market determinations, absent compelling evidence of marketplace dysfunction. There is no such evidence in this proceeding. The program marketplace exemplifies

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[12] Additionally, the Commission is being asked to examine various conditions described as onerous or unreasonable with regards to content security technologies. There is no evidence that the commission has the necessary factual or policy basis, technical expertise or legal authority to determine appropriate content security technologies for programmers. The motion picture industry spends significant resources to create high value content and could not possibly justify that investment without assurances their content will be safe from unauthorized copying and redistribution.

[13] Reiter v. Sonotone Corporation, 442 U.S. 330, 342 (1979) ("Congress designed the Sherman Act as a consumer welfare prescription.") (citing 21 Cong. Rec. 2457, 2460 (1890)); Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1446 (9th Cir. 1995), cert. denied, 116 S.Ct. 515 (1995) ("Like the Sherman Act, the original Clayton Act's primary aim was to prevent harm to consumers.")

[14] See e.g. Cal. Bus. & Prof. Code § 16720.

[15] See e.g. U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition at 114 (2007) (The Agencies "will pursue" anticompetitive tying situations.) and 15 U.S.C. 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue.")

[16] See 15 U.S.C. 15(a).

vigorous competition among a rapidly expanding number of diverse players providing consumers abundant choices in what programs they watch and how they are received. Further government intervention is not justified by the record of this proceeding.

Respectfully submitted,

The Motion Picture Association of America

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