



**WRITERS
GUILD OF
AMERICA, WEST**

Written Testimony of Shawn Ryan

On Behalf Of

Writers Guild of America, West, Inc.

Before the

United States Senate

Committee on Commerce, Science, & Transportation

At a Hearing Entitled

“At a Tipping Point: Consumer Choice, Consolidation and the Future Video Marketplace”

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Introduction

Chairman Rockefeller, Ranking Member Thune and members of the Committee, thank you for the opportunity to appear before you today. My name is Shawn Ryan; I am a member of the Writers Guild of America, West, Inc. (WGAW) and a working television writer for the past 25 years.

WGAW is a labor organization that represents more than 8,000 professional writers of film, television and online video programming. Guild members write feature films, dramas and comedies for broadcast, cable and pay TV networks, local news, documentary programs and the original series that are now available online through services such as Netflix, Amazon, Hulu and Crackle. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in film are written by WGAW members and the members of our affiliate, Writers Guild of America, East (jointly, “WGA”).

Turn on a television today and the amount of original content offered has never been more plentiful. Broadcast networks, basic cable networks and pay television channels all offer original programming, year round. Dramas and comedies, the primary work of Guild members, can be found on almost three dozen of these networks. Viewers have never had more control over what they watch. Using digital video recorders (DVRs), video on demand (VOD) and online streaming, consumers can watch almost any program at almost any time. Television is not even confined to the TV set anymore. Tablets and smartphones have become portable televisions and online video has expanded the definition of television programming. Consumers can stream thousands of television episodes on Hulu, Netflix and Amazon Prime and now these sites have begun to program their own original comedy and dramas series, adding much needed new competition.

But at odds with this proliferation of outlets is a disturbing truth about American media. It is controlled by only a handful of companies, formed through two decades of vertical and horizontal integration. These companies--CBS, Comcast-NBCU, Disney, Fox, Time Warner and Viacom--own the television networks, the studios and almost all of the scripted content that is available on television and in movie theaters. While the number of outlets has exploded, the number of people deciding what Americans can watch has contracted. The market of multichannel video programming distributors (MVPDs) is even more concentrated, with four companies controlling two-thirds of the market.¹ Through monopoly power, these large corporations profit by underpaying those who are actually responsible for content creation and by overcharging consumers who have few alternative video choices.

TV comedies and dramas, the programs that Guild members create, are an integral part of American culture. Writers are the custodians of this uniquely American art form, and in that capacity I am here today to talk about the choice we face as a society. The addition of Internet distribution has made possible once again a media landscape that more closely reflects our nation's ideals: one of a free market in which the American public, not a few powerful gatekeepers, decides what content it wants to watch. If the open Internet is preserved, if competition is enhanced, and if the media companies are restrained in their efforts to monopolize, then diverse and independent content will flourish. But to fulfill this promise requires action: we must have strong Net Neutrality rules, effective antitrust enforcement, and legislation that both expands competition and reins in discriminatory Internet Service Provider (ISP) practices, such as paid prioritization and data caps that apply only to unaffiliated video content.

¹ SNL Kagan, "U.S. Multichannel Industry Benchmarks," 2013 and "U.S. Cable Subscriber Highlights," 12/13Q, <http://www.snl.com>.

Television

When I began in the television business, there were only four broadcast networks airing original scripted programming. Ironically, in that world of few outlets, the media business was far more competitive than it is today. Because of the Federal Communication Commission's Financial Interest and Syndication Rules (Fin-Syn), the networks were not allowed to own the content they aired in primetime. The rules were designed to serve the public interest by increasing viewpoint diversity and competition in program supply. The result was a thriving independent production sector. In 1989, 76% of the Fall primetime schedule on the broadcast networks was independently produced. This was a heyday for television writers as studios competed for their services. And, because the networks were prohibited from owning this content, writers and independent producers had more control over content.

When Diane English, the creator of *Murphy Brown*, first pitched the show to CBS, the network did not want a main character who was a recovering alcoholic returning from rehab. The network, instead, wanted to soften the storyline by having Brown return from a spa. Because CBS couldn't own the show, English and her producing partners could have taken the project elsewhere rather than compromise its integrity. The result of that power—the product of a competitive market for content—was that CBS acquiesced and English got to make the show she wanted and the one the public loved. The Fin-Syn rules attenuated the power over media granted to the broadcast networks by virtue of their control of the airwaves. Television programming that resulted from the separation between networks and studios promoted a diversity of voices and viewpoints.

But with the advent of cable, the broadcast networks successfully argued for the repeal of the Fin-Syn Rules, claiming the regulations were no longer necessary to ensure competition. The decades that followed saw consolidation on an unprecedented scale. It began with Viacom's 1994 purchase of Paramount and the subsequent merger in 1999 with CBS, and continued with Disney's acquisition of Capital Cities/ABC in 1995, Time Warner's purchase of Turner Broadcasting in 1996, and NBC's combination with Universal in 2003 and acquisition by Comcast in 2010.² At the same time, the broadcast networks used retransmission consent to gain control of the basic cable market, requiring carriage of basic cable networks they owned as a condition for local station retransmission. The product of this consolidation is a basic cable market where five companies account for 74% of basic cable viewers.³

In today's consolidated market, independent programming has been all but eliminated. According to a WGAW analysis of the broadcast network schedules, only 10% of the 2013 Fall primetime schedule was independently produced, almost all of which was reality television.⁴ Basic cable networks air a similarly anemic proportion of independent programming. Only 15% of basic cable comedies and dramas in the 2012-2013 season were independently produced. The decline in independent programming has reduced the number of employers for writers. In 1989, 89% of TV writing jobs came from independent producers. By 2013, the figure had dropped to only 25%.⁵

² CBS and Viacom split in 2005 with Paramount film production and distribution remaining with Viacom and Paramount television production with CBS; both remain controlled by Sumner Redstone through National Amusements.

³ WGAW Analysis of Nielsen data. Average P2+ viewers in primetime, 2013.

⁴ WGAW defines independent producers as studios or production companies that are not owned or affiliated with a major broadcast or cable network or an MVPD provider. Such a definition is essential because it exposes the true amount of programming that reaches the air without the market power or guaranteed distribution provided by vertical integration.

⁵ These figures include all broadcast, cable and pay TV programming written by WGAW members, not just prime time.

This excessive concentration has benefitted the bottom lines of these Fortune 500 companies at the expense of actual content creators. With tight control over both production and distribution, the vertically integrated media companies possess all the power as employers of talent. To be hired on a television writing staff often requires writers to give the employer an exclusive first look on any idea they may have. Writers, who are the R&D of this industry, bear all the risk of developing new creative works while the media companies, through their control of distribution, reap the rewards. If a television series creator and a network experience creative differences, it is the writer who is replaced, not the network. Consumers fare no better in this equation as monopoly power restricts creative expression, limits content choices and drives up prices.

In my career I have had the opportunity to work on a series made by a studio not vertically integrated with the network which it aired on. I served as executive producer on a television series called *The Unit*, a drama about American special forces soldiers and the families back home who supported them. This program was produced by Fox Television Studios and aired on CBS from 2006 to 2009. In 2009, the network cancelled *The Unit* and replaced it with *Medium*, a series produced by a CBS-affiliated studio that had aired on NBC for five seasons. The reasoning behind this decision I believe, was that CBS did not own *The Unit* and would not benefit from secondary market revenue earned by making additional episodes. Because the network had an ownership stake in *Medium*, it chose to air another season of that series because of a syndication deal that would generate additional revenue. This experience highlights the truth about the programming on our airwaves: decisions about what to air are made to advance the economic interests of a few large companies. The programming watched by millions of

Americans every day, therefore, is not the product of a competitive market where the best ideas win out.

Online Video

It is into this world that Internet video distribution has now emerged, with the potential to restore some measure of competition in the marketplace for content. Until recently, much online video content was short-form or reuse of film and television content. While this gave consumers new ways to view content and expanded who could create, it did little to challenge media company hegemony. The game changer was *House of Cards*, a television series from an independent producer that debuted online. This series represented what was previously unimaginable: online content that rivals television in terms of popularity, acclaim and production value. It was followed in short order by the release of three more original Netflix series and two from Amazon. The growth of this market is sudden. Our research indicates that, this year, 20 original television-like dramatic series will be released online.⁶

Consumers have demonstrated a pent up demand for new content offered in new ways. The number of online videos viewed each month by Americans has increased from 7.2 billion in January of 2007 to 52.4 billion in December of 2013.^{7,8} The segment of Americans who watch or download videos has grown from 69% of adult internet users in 2009 to 78% in 2013.⁹ YouTube

⁶ See Comments of WGAW *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, July 15, 2014.

⁷ comScore, “Primetime’ U.S. Video Streaming Activity Occurs on Weekdays Between 5-8 P.M.” March 21, 2007, <http://www.comscore.com/Insights/Press-Releases/2007/03/Primetime-US-Online-Video>.

⁸ comScore, “comScore Releases December 2013 U.S. Online Video Rankings,” January 10, 2014, <http://www.comscore.com/Insights/Press-Releases/2014/1/comScore-Releases-December-2013-US-Online-Video-Rankings>.

⁹ Kristen Purcell, “Online Video 2013,” Pew Research Center, October 10, 2013, <http://www.pewinternet.org/2013/10/10/online-video-2013/>.

and Netflix now make up half of all downstream Internet traffic in North America.¹⁰ The number of people signing up for online video subscriptions is yet another indicator of consumer demand for new, innovative video offerings. Hulu Plus counts more than 6 million paying subscribers and Netflix has nearly 36 million customers in the U.S.^{11,12} The Interactive Advertising Bureau and Price Waterhouse Cooper report that advertisers spent almost \$3 billion on online video advertising.¹³ And consumers spent another \$3 billion on subscriptions to Netflix and Hulu Plus.¹⁴

In response to this growth in demand, online platforms are making significant investments in original programming. Netflix spent \$100 million on the first two seasons of *House of Cards*.¹⁵ It is estimated that Netflix will spend \$400 million on original series in 2014. Amazon reportedly will spend as much as \$500 million.¹⁶ Hulu has committed to increasing the number of original shows on its service with six new series scheduled to debut in 2014. More online platforms are entering the original video market with Yahoo, Xbox and Playstation set to become the next providers to offer TV-length series from professional writers.¹⁷

¹⁰ Sandvine, *Global Internet Phenomena Report: 2H 2013*, <https://www.sandvine.com/downloads/general/global-internet-phenomena/2013/2h-2013-global-internet-phenomena-report.pdf>. Downstream traffic refers to data received by Internet users.

¹¹ Mike Hopkins, "Welcome Jenny Wall, SVP Marketing, Hulu Blog, May 13, 2014, <http://blog.hulu.com/2014/05/13/welcome-jenny-wall-svp-marketing/>.

¹² Rob Golum, "Netflix Rises to Record as Analyst Predicts Viewer Gains," *Bloomberg*, July 1, 2014, <http://www.bloomberg.com/news/2014-07-01/netflix-rises-to-record-as-analyst-predicts-viewer-gains.html>.

¹³ Price Waterhouse Cooper, "IAB Internet Advertising Revenue Report: 2013 Full Year Results," April 2014, http://www.iab.net/media/file/IAB_Internet_Advertising_Revenue_Report_FY_2013.pdf and Marina Lopes, "Videos may make up 84 percent of internet traffic by 2018: Cisco," *Reuters*, June 10, 2014, <http://www.reuters.com/article/2014/06/10/us-internet-consumers-cisco-systems-idUSKBN0EL15E20140610>

¹⁴ Netflix, Inc. Form 10-K (2013) and WGAW estimates of Hulu Plus subscription revenue.

¹⁵ Brad Reed, "Netflix has already recouped its \$100 million House of Cards investment," BGR.com, April 23, 2013, <http://bgr.com/2013/04/23/netflix-subscriber-growth-analysis-459720/>.

¹⁶ Bookman, Samantha. "A closer look at the billions of dollars Netflix, Amazon and Hulu are spending on original content." FierceOnlineVideo, June 4, 2014. Available at <http://www.fierceonlinevideo.com/special-reports/closer-look-billions-dollars-netflix-amazon-and-hulu-are-spending-original>.

¹⁷ Nellie Andreeva, "XBox Develops Pro Skater Comedy Series," *Deadline Hollywood*, December 6, 2013, <http://www.deadline.com/2013/12/xbox-develops-pro-skaters-comedy-series/>, and Marc Graser, "Microsoft to

Much of the original content produced for these new outlets comes from independent producers, including Media Rights Capital, Lionsgate, Sony and Gaumont International Television. Online platforms have created much needed new space for independent producers, which have demonstrated a willingness to explore innovative formats and subjects.

As a result of new online video services, more than two hundred professional writers have worked on original online video programs, generating almost \$10 million in income. Writers have also benefited from services that offer consumers online availability of television series and feature films. Millions of consumers visit Hulu each month to catch up on recent television episodes. Subscription services such as Netflix and Amazon Prime offer hundreds of complete television series and movies for an affordable monthly price. Amazon and iTunes also offer consumers the ability to rent or purchase individual titles. Writers have earned almost \$70 million in residual income from online services licensing or selling the content they wrote.

But the promise of vibrant video competition is threatened by incumbent control of distribution. Our nation's largest ISPs are also MVPDs, offering cable television service. These companies, which include Comcast, Time Warner Cable and AT&T, have both the means and incentive to stifle emerging online video alternatives. Online video services such as Netflix and Amazon do not own distribution facilities and, as such, must rely on ISPs to reach consumers. What's more, competition is extremely limited in the Internet service market: two-thirds of US

Launch First Original Shows on Xbox in Early 2014," *Variety*, December 13, 2013 <http://variety.com/2013/digital/news/microsoft-to-launch-first-original-shows-on-xbox-in-early-2014-1200953110/#>, and Nellie Andreeva, "Xbox Developing 1990s Music Series Based on Rapper Nas' Life," *Deadline Hollywood*, February 11, 2014, <http://www.deadline.com/2014/02/xbox-developing-1990s-comedy-series-based-on-rapper-nas-life/>, and Bryan Bishop, "Sony's first original TV series for Playstation will be 'Powers,'" *The Verge*, March 19, 2014, <http://www.theverge.com/2014/3/19/5527878/sonys-first-original-tv-series-for-the-playstation-will-be-powers>, and Douglas MacMillan, "Yahoo Bets on Two New Web Comedy Series," *Wall Street Journal*, April 28, 2014, <http://blogs.wsj.com/digits/2014/04/28/yahoo-bets-on-two-new-web-comedy-series/>.

households have access to only one or two ISPs with service fast enough to stream video.¹⁸ ISPs, as a result, have tremendous power as content gatekeepers. With this power ISPs intend to erect tollbooths and arbitrarily decide what to charge for access. Comcast, for example, has already demonstrated how it will use such power--by instituting data caps that exempt its own content and allowing interconnection ports to become congested in order to demand compensation from online video competitors, as the company recently did with Netflix.¹⁹ AT&T has come out in favor of paid prioritization. If Comcast is allowed to acquire Time Warner Cable and AT&T is allowed to acquire DirecTV, two companies will control more than half of the MVPD market and half of the wired Internet access market.²⁰ They will undoubtedly use their control to foreclose online competition, harming content creators and viewers alike.

The Future of Video

Without the necessary interventions to ensure that the free market works as intended, the future of video is all too predictable. In this industry, every time a new platform has emerged that promises to enhance competition and choice, the response of incumbents has been to engulf and devour. Comcast, which was allowed to buy NBC Universal, now wants to add Time Warner Cable to its media stable. AT&T has its sights set on DirecTV, and at the same time, they jointly advocate for the weakest possible Net Neutrality rules.

But what is good for these companies is not necessarily good for society. We need a video marketplace that more closely embodies the American values of free speech, fair

¹⁸ FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2012*, December 2013, p 9.

¹⁹ Christopher Libertelli, Vice President, Global Public Policy, Netflix, Inc., "Letter to Senator Al Franken," April 23, 2014.

²⁰ Leichtman Research Group, "2.6 Million Added Broadband from Top Cable and Telephone Companies in 2013," March 17, 2014, <http://www.leichtmanresearch.com/press/031714release.html>. Subscriber information from company filings and SNL Kagan.

competition and the rewarding of creativity and innovation. To protect nascent online video competition and enhance consumer choice, we must enact strong Net Neutrality rules. The Internet is an information highway, and just as Congress does not allow a handful of companies to erect tollbooths on our nation's actual highways, it cannot allow a few ISPs to set arbitrary rates and decide which businesses, video providers or political organizations can have prioritized delivery and which are relegated to a slow lane. Such power would allow ISPs to strangle innovation in the cradle. Can we really expect the next Netflix, Amazon or Crackle to emerge under these circumstances? Net Neutrality rules, therefore, must ban paid prioritization and other discriminatory practices that favor content affiliated with an ISP, as Chairman Rockefeller's Consumer Choice in Online Video Act would do. We should also, as Chairman Rockefeller's bill proposes, expand the definition of an MVPD to include providers that do not own distribution facilities, enabling new online video offerings.

The FCC and the Justice Department should block both the Comcast–Time Warner Cable and the AT&T–DirecTV mergers. There is a fundamental political and economic question raised by mergers, concentration and the resulting monopoly power. Are they good for society or not? The answer in economic theory is a resounding no. Every economic textbook makes clear that the result is a misallocation of resources and an unfair distribution of income. So why do we, as a society, allow corporations to make arguments about merger effects that contradict economic theory?

What will the result be of further mergers and market concentration? Writers will be paid less to create and innovate, even though our national political rhetoric exalts the importance of creators and innovators. And, consumers will pay more, just as economic theory and history have made clear that they will.

This is the quintessential political and economic question for America in the 21st Century:
Will we continue to allow unchecked concentrations of power that result in a widening gulf of
income and wealth? Or, will we seize the opportunity to say no? I hope we will serve the
interests of the many rather than the few, as classic economic theory suggests we should, by
stopping these mergers and by keeping the Internet free and open.