

**December 20, 2018**

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex C)  
Washington, DC 20580

*Electronically submitted via [www.regulations.gov](http://www.regulations.gov)*

**Re: 21<sup>st</sup> Century Hearings: Constitution Center October 23-24, 2018 (Docket ID: FTC-2018-0090)**

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The Independent Film & Television Alliance® (IFTA®)<sup>1</sup> respectfully submits these comments in response to the Federal Trade Commission’s request for input following the fourth session of its Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century.<sup>2</sup> We are pleased to continue our participation in the FTC’s first wide-scale exploration of copyright issues and these comments expand on those previously submitted by IFTA<sup>3</sup> in advance of the October 23<sup>rd</sup> session on *Competition Policy and Copyright Law* at which Eric Cady, IFTA Senior Counsel participated.

While copyright is the heart of American innovation and creation, fair access to legitimate distribution to reach a wide audience of consumers is the life blood of the independent sector. In the U.S., the distribution of film and television programming has never been more concentrated in a handful of large media conglomerates, which control much of the television networks, cable channels and broadband pipes through which on demand content flows to consumers.

IFTA’s emphasis remains that the U.S. government should ensure that online platforms take responsibility for illegal actions occurring on their systems and within their control. Such ‘platform responsibility’ requires updating government policies and laws (including legal immunities and safe harbors) that treat these online gatekeepers differently than other industries and actually absolve them of responsibility for the widespread societal harms allowed to proliferate on their systems. In the context of these hearings, IFTA specifically urges that the U.S. government and the Commission take action to ensure that media giants and online

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<sup>1</sup> Based in Los Angeles, IFTA is the trade association for the independent motion picture and television industry worldwide, representing more than 145 companies in 20 countries, the majority of which are small to medium-sized U.S.-based businesses which have financed, produced and distributed many of the world’s most prominent films, including 80% of the Academy Award® winners for “Best Picture” since 1980. Independent films and television programs are made in every genre and budget level by those companies (that take on the majority of the financial risk for the production and control the licensing of its distribution to third parties around the world). A complete list of IFTA Members is available online at: <http://www.ifta-online.org>.

<sup>2</sup> <https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-4-competition-consumer-protection-21st-century>

<sup>3</sup> <http://www.ifta-online.org/sites/default/files/IFTA%20FTC%20Filing%20August%2020%202018.pdf>

platforms engaged in content distribution are not permitted to engage in anti-competitive behaviors that cause harm to consumers, and unaffiliated independent producers, who invest in production and seek legitimate distribution through those same distribution channels and platforms.

Once considered “new players” and “start-ups”, online platforms such as Google, Netflix, and Amazon are increasingly producing content and now enjoy unprecedented leverage as the importance of their platforms to reach consumers has never been higher. The result is an overwhelming power of these platforms to define the online market itself, potentially to the exclusion of other platforms, and certainly allowing them to restrict access by third party producers and to unilaterally control wholesale prices and terms. For example, Amazon recently discouraged smaller content producers by unilaterally dropping its pricing on self-uploaded content by more than a third<sup>4</sup> and, reportedly, shifting its advertising algorithms such that niche content is unsupported by major brand advertising. It is important to note that content is not self-marketing -- that is, simply uploading a film or television program that cost hundreds of thousands or millions of dollars to produce does not by itself draw an audience (any more than an unannounced screening of a film on an obscure corner would); the major platforms are key to reaching the audience.

Today, these conglomerates are some of the largest companies in the world and wield their market power and control of distribution to disregard commercial fairness by refusing to deal directly with independent producers, eliminating third-party content, self-dealing in favor of owned or preferred content by with restricting access to information, including consumer viewing behavior, and denying access to anti-piracy tools.

Below, we have responded to the questions posed by the Commission where the experience of IFTA members may be of greatest assistance in the evaluation of the current marketplace, as the Commission continues its consideration of whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and policy.

## Question 1

### **Is there a role for the government in advancing or supporting innovation?**

Yes, government’s role is to encourage and protect commerce, of which a vital element is to ensure that creativity is prioritized as envisioned in the Constitution’s Copyright Clause.<sup>5</sup> As part of its involvement in advancing and supporting innovation, the Commission’s general mandate in the FTC Act is to prevent unfair business practices that are likely to reduce competition and lead to higher prices, reduced quality or levels of service, or lessen innovation.<sup>6</sup> In that regard, IFTA continues to urge the Commission to exercise its broad investigatory

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<sup>4</sup> <https://www.businessinsider.com/amazon-video-direct-plans-to-dramatically-change-its-royalty-amount-2018-2>

<sup>5</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>6</sup> Section 5(a) of the Federal Trade Commission Act (FTC Act) (15 U.S. Code § 45) prohibits “unfair or deceptive acts or practices in or affecting commerce.”

authority to examine how today’s dominant internet platforms engage in practices that harm competition or create obstacles for distribution, to the detriment of consumers and independent content suppliers. The Commission should insist that the online platforms take responsibility to ensure that they do not facilitate and profit from criminal activity and that they assist in providing a safe and vibrant online marketplace to deliver independent content to consumers, in all the manners in which they wish to receive it.

Unfortunately, the lack of legally acquired independent content on these platforms creates a vacuum and fuels piracy of that independent content, forcing these producers into competition with “free” copies. Both legal and illegal content has fed the advertising-based revenue stream on which the platforms have built their financial foundation. The combination of safe harbor from copyright infringement, the burden on rights holders to provide notice for each illegal copy, and advertising revenue have created perverse incentives for the platforms that now are being recognized by Congress and other public decision-makers around the world.<sup>7</sup> IFTA has joined with others in the creative community in calling on Congress, and now on the Commission, to address and define new policies of platform responsibility by law and regulation.<sup>8</sup>

For independents, who generally operate with limited resources and are primarily focused on their core business of filmmaking, pursuing high-cost civil enforcement actions, particularly for the massive volume of online infringement, is impractical. As a result, independents also rely on government for *ex officio* enforcement, and to mandate that any copyright protection tools available to affiliated, or major rightsholders are provided to third party, independent rights holders.

## Question 2

**What is the importance of intellectual property – all forms – in advancing, protecting, and supporting innovation? Does it differ because of industry-specific or other market-based factors, or because of the form of intellectual property?**

Copyright and the ability to exclusively control the use of a protected work is the fundamental basis for the commercial exploitation of rights and the primary driver of innovation. As such, copyrighted works are a leading export of the United States and key component of the overall U.S. economy. In 2017 alone, the core copyright industries contributed more than \$1.3 trillion dollars to the U.S. Gross Domestic Product, accounting for 6.85% of the U.S. economy.<sup>9</sup>

The creation of film and television programming is the epitome of the innovation that drives the development of the digital economy. Evidence also confirms that both intellectual property protection and competition are important to spur innovation.<sup>10</sup> Moreover, the *DOJ/FTC*

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<sup>7</sup> See House Judiciary Committee Hearing on July 17, 2018, “Facebook, Google and Twitter: Examining the Content Filtering Practices of Social Media Giants” available at <https://judiciary.house.gov/hearing/facebook-google-and-twitter-examining-the-content-filtering-practices-of-social-media-giants/>.

<sup>8</sup> <http://thehill.com/policy/technology/398394-hollywood-urges-congress-to-bring-google-to-testify>.

<sup>9</sup> International Intellectual Property Alliance, *Copyright Industries in the U.S. Economy: The 2018 Report* (December 6, 2018); <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf>.

<sup>10</sup> See *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, Volume I, Page 4.

*Antitrust Guidelines for the Licensing of Intellectual Property* identify intellectual property licensing as procompetitive.<sup>11</sup>

In contrast to the six major MPAA studios,<sup>12</sup> independents do not own and are not exclusively or preferentially affiliated with worldwide distribution channels. Independents rely on the confidence and investment of third-party distributors around the world in order to produce content. Distributors are key investors in a film through minimum guarantee license commitments made to producers in advance of production in exchange for the exclusive right to distribute the finished product in their particular territory. Those agreements are then used as collateral to secure bank loans to support the physical production. Digital rights are an increasingly important element of production financing as the online marketplace continues to develop and consumer demand evolves.

The independent sector accounts for over 70% of all films produced in the U.S. each year and the jobs generated by that economic activity. Collectively, IFTA members generated revenue over \$4.8 billion in 2017, of which approximately \$2 billion came from foreign (non-U.S.) markets and \$2.8 billion from domestic activity. With over half of IFTA member companies' revenue earned in the U.S. each year, IFTA has a strong interest in preserving the health and fostering growth of a safe and competitive digital marketplace.

Certain market-based factors resulting from the practices of dominant online distributors, such as rejecting individual producers as suppliers, requiring instead that content aggregators be used, result in increased costs and reduced licensing fees or opportunities for independent producers, as well as reduced choices of programming for American consumers. Independent program suppliers today have limited leverage in negotiating for access, good placement, marketing, and revenue shares with these giant enterprises and thus consumer access to such independent programming is under threat. As noted above, competition in copyrighted works is hindered by the general lack of meaningful commitments to control piracy by these online platforms. Even more harmful to the independents is the platforms' discriminatory practice of making their anti-piracy tools available only to a handful of major studios and suppliers while refusing to address illegal content for "small" rights holders.

It is especially frustrating that these large corporate entities have tried to maintain a "start-up" image and have shunned any type of transparency, responsibility, or regulation, but still try to claim the mantle of "innovators". While it is important that the platforms and communication infrastructure continue to grow and improve the online environment, these entities should not be immune to the concerns of the copyright owners, nor so large or unregulated to address fairly the needs of independent suppliers and the consumers who want access to their content. The commercial reality is that the major online platforms and distributors of content hold market power that is unbalanced to the detriment of program suppliers and consumers, and there is a heightened need for intervention to achieve the Commission's mission

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<sup>11</sup> See *DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property, Section 2.3, Procompetitive Benefits of Licensing*, Page 5.

<sup>12</sup> Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; and Warner Bros. Entertainment Inc.

to protect consumers by preventing anti-competitive and unfair business practices, and enhancing informed consumer choice.

#### **Question 4**

**How can the FTC use its enforcement and policy authority to advance innovation? What factors should the FTC consider in attempting to achieve this objective?**

IFTA urges the Commission to investigate and propose a new legal and regulatory approach that requires the online platforms and services to accept responsibility for their operations as do “bricks and mortar” businesses. IFTA further urges the Commission to consider specifically the market power of today’s dominant internet giants and to investigate the discriminatory practices pursued by these platforms and services that place independent content providers at an unfair competitive disadvantage, particularly against self-produced content.

Earlier this month, the House Judiciary Committee held a hearing entitled, “Transparency & Accountability: Examining Google and its Data Collection, Use and Filtering Practices.”<sup>13</sup> While this hearing was narrowly focused on Google’s potential bias and the need for greater transparency, broader concepts were also raised at the hearing that should be further investigated.

Prior to the hearing, Majority Leader Kevin McCarthy (R-CA) pointed out that “Google ... accounts for nearly 90 percent of worldwide search traffic. Google therefore has great influence over what millions of people can and cannot find on the internet. That comes with a responsibility to its users.” Adding that, “Unfortunately, recent reports suggest Google might not be wielding its vast power impartially. ... .”

In his opening statement at the hearing, Ranking Member Jerry Nadler (D-NY) raised Google’s dominance and the need to ensure that other companies can compete. The Ranking Member also noted the existence of pirated material on Google, which is at the expense of legitimate content. Similarly, Representative David Cicilline (D-RI) noted Google’s dominant position and that, “[he] strongly believe[s] in structural antitrust enforcement,” adding that he plans to work with the FTC on legislation to address discriminatory conduct online. In response, Mr. Pichai testified that Google would “engage constructively” with Congress on legislation in that area.

As momentum is building toward regulating the internet giants with respect to various consumer protections and as more perspectives heard, the FTC as the expert federal agency with both consumer protection and competition jurisdiction should position itself to provide clear recommendations on the reasons and means by which greater accountability can be achieved.

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<sup>13</sup> <https://judiciary.house.gov/hearing/transparency-accountability-examining-google-and-its-data-collection-use-and-filtering-practices/>

## Question 6

### How should the current status of copyright law and current business practices influence the FTC's enforcement and policy agenda?

IFTA is a strong advocate to update U.S. law to provide for a criminal (felony punishment) for illegally streaming on a commercial scale, and updating the 1998 Digital Millennium Copyright Act<sup>14</sup> to ensure that no safe harbor from liability for infringement may be taken by internet service providers unless notice and STAYdown has been provided. In light of today's marketplace realities, a new balance must now be struck that accounts for the rights of every copyright owner to control the use of their property, the rights of consumers to privacy and free expression, and the responsibility of online services to monitor, identify, and control illegal activity on their systems. Notwithstanding the need for such targeted legislative action, the FTC should use its authority to monitor and effectuate changes to curtail anti-competitive action, including calling for more detailed hearings, prohibiting conduct that distorts the content marketplace or discriminates against independent content, and incentivizing the online platforms to work cooperatively with rights holders to develop and deploy copyright protection tools to all content suppliers.

Notably, in a written testimony for the House Judiciary Committee, Google CEO, Sundar Pichar recently testified that, "We recognize the important role of governments, including this Committee, in setting rules for the development and use of technology."<sup>15</sup> However, Google (as the dominant internet search engine) and its YouTube service (as the dominant user generated video platform) continue to deny their commercial responsibility to monitor illegal activities on their systems in order to assist all rights holders to protect their copyrighted works. Independents need transparency and access to this platform's protection tools (*i.e.*, Content ID<sup>16</sup>, Copyright Match<sup>17</sup>, and deprioritizing pirated sites in search results). These tools are reserved for "major" rights holders or those affiliated with or owned by Google. In many cases, independent producers are relegated to a single response to piracy – they must accept Google's continued distribution of these unauthorized versions of their protected works in return for a fee per view because they cannot negotiate legitimate licenses to this distribution channel nor (in the absence of a mandatory notice and STAYdown) effectively enforce their copyrights without expensive and lengthy legal intervention.

## Conclusion

For independents, the U.S. marketplace reality is that a few major online platforms and distributors of content hold market power that is unbalanced to the detriment of program suppliers and consumers. This reality combined with the lack of meaningful "platform

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<sup>14</sup> Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

<sup>15</sup> <https://judiciary.house.gov/wp-content/uploads/2018/11/Pichai-Testimony.pdf>

<sup>16</sup> <https://support.google.com/youtube/answer/2797370?hl=en>

<sup>17</sup> Earlier this year, Google unveiled a "Copyright Match Tool" to a limited subset of channels in the YouTube Partner Program as part of a small pilot. This appears to be an abbreviated version of its existing Content ID tool, which can detect identical video reuploads and then enable rights holders to take certain actions. However, the tool is premised on first upload as a public video to YouTube, rather than on copyright ownership.

responsibility” to avoid illegal content means that platforms are effectively evading regulations and responsibilities.

We support the FTC’s continued review of the current state of antitrust and consumer protection law and policy and hope the results will lead to more focused discussion involving the copyright industries and improvement toward achieving the Commission’s vision of a vibrant economy characterized by vigorous competition and consumer access to accurate information.

***Respectfully submitted by the Independent Film & Television Alliance***

Jean M. Prewitt, President & Chief Executive Officer  
Susan Cleary, Vice President & General Counsel  
Eric D. Cady, Senior Counsel