

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

In the Matter of	)	
	)	
Expanding Consumers' Video Navigation Choices	)	MB Docket No. 16-42
	)	
Commercial Availability of Navigation Devices	)	CS Docket No. 97-80
	)	

**COMMENTS OF WRITERS GUILD OF AMERICA, WEST, INC.**

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## **I. Introduction and Summary**

Writers Guild of America, West, Inc. (“WGAW”) is pleased to submit the following comments in response to the Federal Communication Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking and Memorandum Opinion and Order, “In the Matter of Expanding Consumers’ Video Navigation Choices, Commercial Availability of Navigation Devices,” released February 18, 2016, MB Docket No. 16-42, CS Docket No. 97-80.

WGAW is a labor organization representing more than 8,000 professional writers working in film, television and digital media, including news and documentaries. 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”). WGA members are also the creators of original programming available online through services such as Netflix, Amazon, Hulu and Crackle. WGAW is an advocate for a media marketplace that features competition at all stages of the value chain and allows diverse stories created by writers an opportunity to reach the public.

The current market for cable set-top boxes lacks substantive competition contrary to the intent of Congress embodied in Section 629 of the Communications Act. Virtually all cable subscribers lease a navigation device from their multichannel video programming distributor (“MVPD”) and pay exorbitant fees for the privilege of using a set-top box that, from a technological standpoint, pales in comparison to the myriad of advanced electronics that fill today’s households. When Congress passed Section 629 of the Communications Act, it sought to give consumers real choice in what devices they use to access the TV services that they pay for. Inspired by the *Carterphone* decision, Congress hoped that allowing third-party devices on cable

networks would introduce competition and innovation that ultimately benefits consumers and businesses, just as they did for landlines and cell phones.

While consumers would benefit from lower prices and innovation, content creators would also benefit from competition in set-top boxes. Such competition would reduce the gatekeeper power of television networks and MVPDs over video programming. Independent programming has suffered as a result of vertical integration in the video industry, dwindling as a source of programming ever since the repeal of the Financial Interest and Syndication (“Fin-Syn”) Rules in 1993. As a result, a small number of corporations largely control what airs on television, limiting what writers create and viewers ultimately see. As writer Amy Berg states, “In traditional network and cable television, content does not reach audiences directly; it passes through multiple layers of scrutiny and many alterations are [often forcibly] made before it is seen by anyone.”

However, the open Internet has led to new outlets for independent programming and open platforms like YouTube, Vimeo and many others have created new opportunities for writers to create and distribute their own content. Forty-nine percent of TV-length series released online in the 2014-2015 season were independently produced.<sup>1</sup> Writer Amy Aniobi says “Having additional buyers for our content from online platforms means more jobs. It's exciting that devices like Chromecast and Apple TV exist, so we can watch what's on our phones on our televisions. That means YouTube shows become ‘real’ shows - because they can be viewed on a ‘real’ screen.” The Commission’s proposal to allow set-top boxes to incorporate both traditional and online content would even the playing field between content affiliated with the

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<sup>1</sup> Comments of the Writers Guild of America, West, Inc., In the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41 (Mar. 30, 2016) at 13. (“WGAW NOI Comments”)

current gatekeepers and independent sources, promoting competition in programming and enhancing offerings to consumers.

MVPD gatekeeper power also denies Americans the opportunity to enjoy programming that reflects the diversity of our country. The video industry perpetuates an outdated lack of diversity that fails to harness the talents of people of color, women, the LGBTQ community and people with disabilities. Only a few of the hundreds of networks MVPDs offer serve diverse communities or incorporate programming that is produced with a staff that is as diverse as the American TV audience. By lowering the barriers to accessing television viewers, set-top box competition would increase the ability of diverse content to reach a wider audience.

Congress and the FCC have historically encouraged competition in media and communications. Such competition in traditional and cellular telephony as well as consumer electronics in general has led to fair prices and dynamic innovation that benefits our society. For that reason, the mandate of a competitive set-top market in Section 629 must be fulfilled. Consumers are tired of price gouging from MVPDs and content creators are tired of the outsized influence cable and network executives exert on one of the most important communication mediums in our society. We support the Commission's rules to require that MVPDs provide the necessary data for third-party devices to replicate the functions of MVPD-provided boxes while also allowing innovation in user interfaces and channel placement. We also agree that the rules should apply to both hardware and software. WGAW supports the proposed rules because we believe they will promote greater competition in devices and programming, end an unjustified bottleneck in content distribution and, in keeping with Commission goals, promote independent and diverse programming. With content and consumer privacy safeguards, the proposed rules will promote innovation and competition while still protecting consumers and content creators.

## II. The Market for MVPD Services and Devices Lacks Competition

Consumers have few options when it comes to choosing a TV provider. The high cost of entry into the market and economies of scale thwart competition and give MVPDs immense power over the set-top box market. The top 5 MVPDs by subscribers at the end of 2015 controlled approximately 79% of the market.<sup>2</sup> Market concentration is increasing due to the merger of AT&T and DirecTV. As a result, most consumers in AT&T U-verse markets now have only three MVPD providers available. Concentration will further increase should the FCC approve the Charter-Time Warner Cable-Bright House merger. Not surprisingly, cable costs in general continue to climb at more than double the rate of inflation. According to the Commission's *Report on Cable Industry Prices*, "the average price of expanded basic service grew at a compound annual rate of 5.9 percent over the 19-year period from 1995-2014...For comparison, the CPI for All Items, published by the Bureau of Labor Statistics (BLS) as a measure of general price inflation, grew annually at 2.4 percent over the 19 years."<sup>3</sup>

At the same time, the cable build out of telephone company systems has slowed significantly. Verizon is no longer interested in expanding FiOS and has already sold some local systems to Frontier. Meanwhile, AT&T plans to discontinue promoting U-verse video in favor of selling DirecTV and the company refuses to disclose how many homes its fiber-to-the-home project will cover, although its capital expenditures dropped by about \$1.4 billion between 2014

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<sup>2</sup> WGAW calculation based on data from Leichtman Research Group and SNL Kagan.

<sup>3</sup> Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, *Report on Cable Industry Prices*, MM Docket No. 92-266, 29 FCC Rcd. 14895, 14903, ¶ 17 (2014).

and 2015.<sup>4</sup> According to SNL Kagan, U-verse TV homes growth slowed to about 3.9% between the end of 2014 and 2015 while FiOS TV homes passed grew by 4.5%.<sup>5</sup> AT&T also appears to be taking a litigious approach to dealing with emerging competition. Earlier this year, it sued the government of Louisville, Kentucky to stop an ordinance that would facilitate pole attachments for new telecommunications entrants.<sup>6</sup>

As a result of this concentration in MVPD services and lobbying by the industry to weaken CableCARD, the vast majority of cable subscribers lease their set-top box from their TV service provider. Senators Markey and Blumenthal recently released the findings of a study on the set-top box market. Their analysis found “approximately 99 percent of customers renting their set-top box directly from their pay-TV provider.”<sup>7</sup> They further found that the average American household spends more than \$231 per year on set-top box rental fees for total costs of about \$19.5 billion per year. This market more closely resembles the AT&T monopoly era as opposed to today’s competitive consumer electronics markets.

What is especially galling is that MVPDs are further profiting from the data provided by their set-top boxes while accusing independent consumer electronics companies of wanting to do exactly the same thing. Cable companies are collecting, using and selling detailed viewer information for their own profit. According to the Wall Street Journal, “Comcast is in talks with

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<sup>4</sup> *Annual Financials for AT&T Inc.*, MarketWatch, <http://www.marketwatch.com/investing/stock/t/financials/cash-flow> (last visited Apr. 18, 2016).

<sup>5</sup> *Multichannel sub loss tops 1 million in 2015, residential penetrations decline*, SNL Kagan (Mar. 11, 2016), <https://www.snl.com/interactivex/article.aspx?id=35718941>.

<sup>6</sup> Jon Brodtkin, *AT&T sues Louisville to stop Google Fiber from using its utility poles*, Ars Technica, Feb. 25, 2016, <http://arstechnica.com/tech-policy/2016/02/att-sues-louisville-to-stop-google-fiber-from-using-its-utility-poles/>.

<sup>7</sup> Press Release, Senator Ed Markey, Markey, Blumenthal Decry Lack of Choice, Competition in Pay-TV Video Box Marketplace, (July 30, 2015), <http://www.markey.senate.gov/news/press-releases/markey-blumenthal-decry-lack-of-choice-competition-in-pay-tv-video-box-marketplace>.

audience-measurement firms and television networks, including Walt Disney Co.'s ESPN, Time Warner Inc.'s Turner Broadcasting and Discovery Communications Inc., about licensing its data to them. It already has a deal with its own NBCUniversal unit and at least one other media company.”<sup>8</sup> As Sam Schwartz, Comcast's chief business development officer, put it, referring to the set-top box data, “We do believe it's an unprecedented set of information.” Comcast has also held discussions with Cablevision and Time Warner Cable to pool their data and sell it as a package.<sup>9</sup>

Comcast is not alone in this practice. In 2006, Charter Communications struck a deal to sell set-top box data to TNS Media Research and in 2008 to its competitor, Nielsen.<sup>10</sup> Meanwhile, Dish Network has sold its customers' data to Rentrak and recently made a deal with Nielsen as well.<sup>11</sup> DirecTV has sold set-top box data to Kantar, which resold it to Nielsen, and to Rentrak.<sup>12</sup> MVPDs selling customer information seems to be as common as excessive set-top box fees and the advertisements MVPDs run on their channel program guides.

Part of the reason for the dominance of set-top box leasing is the industry's delay tactics in implementing CableCARD. Independent navigation devices have to be certified by the cable

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<sup>8</sup> Shalini Ramachandran and Suzanne Vranica, *Comcast Seeks to Harness Trove of TV Data*, Wall Street Journal, Oct. 20, 2015, <http://www.wsj.com/articles/comcast-seeks-to-harness-trove-of-tv-data-1445333401>.

<sup>9</sup> *Id.*

<sup>10</sup> Steve McClellan, *Nielsen, Charter in Set-Top Box Deal*, Adweek, Mar. 12, 2008, <http://www.adweek.com/news/television/nielsen-charter-set-top-box-deal-95210>.

<sup>11</sup> Katy Bachman, *Rentrak Adds DISH to Set-Top-Box Ratings*, Adweek, Feb. 8, 2010, <http://www.adweek.com/news/television/retrak-adds-dish-set-top-box-ratings-114686>; Brian Steinberg, *Nielsen Adds Set-Top Box Data to Its Ratings*, Variety, Apr. 4, 2016, <http://variety.com/2016/biz/news/nielsen-dish-set-top-box-data-tv-advertising-1201744810/>.

<sup>12</sup> Wayne Friedman, *Nielsen, Kantar Media Strike Deal For DirecTV Set-Top-Box Data*, MediaPost, July 26, 2011, <http://www.mediapost.com/publications/article/154713/nielsen-kantar-media-strike-deal-for-directv-set-.html>; *Rentrak Deal Offers Juice For Set-Top-Box Data Advocates*, Viamedia, Aug. 8, 2013, [http://www.viamediatv.com/news\\_436.htm](http://www.viamediatv.com/news_436.htm).



industry research arm, CableLabs, which is an expensive and time-consuming process. The CableCARD rules also lacked a requirement to enable two-way communication. This prevented MVPD subscribers with third-party boxes from enjoying some of the features they paid for, such as video-on-demand. To make matters worse, installation of CableCARDs sometimes required a visit from a cable technician, who was not always knowledgeable in activating third-party boxes. One Bloomberg reporter described his experience activating a TiVo this way: “It took Comcast installers two trips to my house—a total of about four hours' work—and extensive consultations with TiVo technicians to get the unit running properly. This isn't going to cut it. Cable operators and their research arm, CableLabs, must make plug-and-play a reality or the cost will be ruinous.”<sup>13</sup>

MVPD opposition to the Commission's proposed rules on competitive navigation devices is unsurprising because pay-TV distributors have a strong incentive to limit competition from emerging online video sources, and this motivation is compounded when MVPDs are also Internet service providers. One form of anti-competitive conduct is the use of data caps to artificially limit access to data intensive video streams despite a lack of evidence of network congestion. Data caps are now being coupled with exemptions for MVPD-affiliated online video services from those caps, also known as zero-rating. For instance, Comcast has launched StreamTV, an Internet Protocol based video streaming service that is exempt from its data caps.<sup>14</sup> Comcast claims that StreamTV is not an Internet service but Stanford net neutrality expert Barbara Van Schewick argues that, “Comcast is engaging in economic discrimination, through

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<sup>13</sup> Stephen H Wildstrom, *TiVo, Minus the Tangle*, Bloomberg, July 26, 2007, <http://www.bloomberg.com/news/articles/2007-07-26/tivo-minus-the-tanglebusinessweek-business-news-stock-market-and-financial-advice>.

<sup>14</sup> Klint Finley, *Comcast May Have Found a Major Net Neutrality Loophole*, Wired, Nov. 20, 2015, <http://www.wired.com/2015/11/comcast-may-have-found-a-major-net-neutrality-loophole/>.

zero-rating, and technical discrimination, by giving its own video service preferential treatment.” She goes on to say, “What Comcast is doing is a textbook example of an ISP using its gatekeeper power to pick winners and losers online, and that is one of the core things that the FCC’s open internet rules were designed to prevent.”<sup>15</sup>

MVPDs know that online video is a nascent competitor and seek to limit or control how online video distributors (“OVDs”) acquire video content. This is done by negotiating contract provisions with programmers that directly limit online distribution or make such distribution more difficult. As Charter CEO Tom Rutledge said recently, “Anybody who sells their content over-the-top and also expects to continue to exist within a bundle sold to cable or satellite providers is really deluding themselves.”<sup>16</sup> This power over distribution has led Time Warner Inc. and HBO to express concern to the Commission over the current merger attempt between Charter Communications and Time Warner Cable. As they explained to FCC staff, Time Warner and HBO are concerned that “if the merger is approved, a combined Charter-Time Warner Cable-Bright House will attempt to harm the continued development of over-the-top video broadband competition.”<sup>17</sup>

MVPD control of the current set-top box market also allows them to discriminate against online sources of programming through the device that most consumers use to watch video

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<sup>15</sup> Sam Gustin, *Comcast Hit With FCC Zero-Rating Complaint Over ‘Stream TV’*, Motherboard, Mar. 3, 2016, <http://motherboard.vice.com/read/comcast-hit-with-fcc-zero-rating-complaint-over-stream-tv>.

<sup>16</sup> Ted Johnson, *Charter-Time Warner Cable Merger Faces Fierce Opposition From New Coalition*, Variety, Jan. 21, 2016, <http://variety.com/2016/biz/news/charter-time-warner-cable-merger-dish-network-1201684570/>.

<sup>17</sup> Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations, MB Docket No.15-149, *Letter re: Notice of Ex Parte Presentation from Kyle Dixon, VP of Public Policy, Time Warner, to Marlene H. Dortch, Secretary, FCC* (Mar. 3, 2016).

programming on home televisions. For example, Comcast's X1 platform includes an app for Comcast's own Watchable online video service but not for Netflix or YouTube.<sup>18</sup> In its filings with the FCC in the review of the Charter-Time Warner Cable- Bright House merger, Charter has touted Spectrum Guide, a cloud-based user interface with a programming "guide [that] enables customers to find video content more easily across cable TV and on-demand options."<sup>19</sup> Charter's economist Fiona Scott Morton writes, "Charter designed the Spectrum Guide so that it could be expanded to include OVDs in the program grid. Charter is actively working with OVDs, including some of the largest, national OVDs, to include their programming applications within the Charter program grid. This would allow subscribers to access the OVD programming directly from the grid rather than via a separate Internet session using a PC, mobile phone, tablet or other device. Charter believes this will improve the overall experience for its subscribers, and also for OVD subscribers."<sup>20</sup> Such a disclosure reveals that MVPDs clearly see the value of a user interface that incorporates both television and online video programming. Yet opposition to the FCC's proposal for this to occur in a competitive market suggests they would like to control development of this market. Absent FCC action, MVPDs are well positioned to use control of set-top devices to extend their gatekeeper power over content to online video as well, choosing which OVDs are easily accessible to their customers and which are not.

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<sup>18</sup> Julia Boorstin, *Comcast launches 'Watchable' video app to tackle digital advertising*, CNBC, Sep. 29 2015, <http://www.cnbc.com/2015/09/29/>; Kyle Wiggers, *Comcast's Xfinity Share lets you stream content live to any X1 set-top box*, Digital Trends, May 4, 2015, <http://www.digitaltrends.com/home-theater/comcast-announces-xfinity-share/>.

<sup>19</sup> Applications of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership For Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 15-149 at 25.

<sup>20</sup> Fiona Scott Morton, Public Interest Statement concerning the Merger of Charter, Bright House, and Time Warner Cable, MB Docket No. 14-57, (June 25, 2015), ¶ 32 (attached as Exhibit D to Applications of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership For Consent to Transfer Control of Licenses and Authorizations).

MVPDs have also used their control of access to television programming to limit the attractiveness of competing set-top devices. MVPDs have been both slow to make TV Everywhere applications available on competing set-top devices and go so far as to block their own apps from running on certain third-party devices. As WGAW noted in its comments on the Downloadable Security Technical Advisory Committee Report “Comcast does not make its MVPD service available on third-party streaming boxes like Roku and until recently also blocked authentication of TV Everywhere apps like HBO GO.”<sup>21</sup> While Comcast offers its Xfinity application for download on an iPhone or iPad, it does not offer an application for the Apple TV, a device that would directly compete with its own set-top box. When asked about an application for the Apple TV, Marcien Jenckes, Executive Vice President of Consumer Services for Comcast Cable responded, “We’re not philosophically against it, we just haven’t seen the need to run out and do that, given the fact that we’re already delivering content to the TVs in a way that has our customers already satisfied.”<sup>22</sup> Yet just this week, and likely in response to the public’s reaction to the FCC’s proposal, Comcast announced it would make its Xfinity service available on Roku streaming devices and Samsung smart TVs.<sup>23</sup> MVPDs can also block their own apps from running on certain third-party devices as another form of anti-competitive discrimination. As the Computer & Communications Industry Association (CCIA) recently wrote to the Commission, “Charter prevents some lawful, non-harmful third-party devices —

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<sup>21</sup> Comments of the Writers Guild of America, West, Inc., In the Matter of Downloadable Security Technical Advisory Committee Report, MB Docket No. 15-64, (Oct. 8, 2015) at 3 (internal citations omitted).

<sup>22</sup> Tim Stenovec, *Comcast wants nothing to do with the Apple TV*, Tech Insider, Nov. 9, 2015, <http://www.techinsider.io/no-comcast-app-on-the-new-apple-tv-2015-11>.

<sup>23</sup> Janko Roettgers, *Comcast Announces Xfinity Apps for Samsung Smart TVs, Roku Streamers*, Variety, Apr. 20, 2016, <http://variety.com/2016/digital/news/comcast-xfinity-tv-roku-samsung-1201757609/>.

particularly devices that most closely compete with its own set-top boxes — from accessing the authentication credentials necessary to utilize those apps.”<sup>24</sup>

It is clear that absent Commission action, MVPDs will continue to exercise their power to limit competition in the set-top box and programming market.

### **III. Bringing True Competition to the Set-Top Box Market**

In order to meet the goals of Section 629, the Commission must ensure that MVPDs and third-party set-top box makers meet certain criteria. First, we agree that Section 629 applies to any equipment, hardware or software such as apps, that allows subscribers to access the multichannel video programming and services that they pay for each month. Independent vendor devices must also have access to all MVPD service features in a subscriber’s package, such as cloud DVR service and video on demand, so that they may develop a device that is truly competitive with an MVPD set-top box. In addition, devices should be nationally portable rather than restricted to the small number of providers for a given local market.

We agree with the Commission that MVPDs should be required to provide service discovery, entitlement and content delivery data to third-party devices. Such information is necessary to allow third parties to innovate the user interface. An Open Standards Body that includes consumer electronics manufacturers, MVPDs, content companies and consumer organizations as members is the appropriate forum for setting the specifications for these information flows. WGAW also supports protections against content copyright infringement as

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<sup>24</sup> Applications of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership For Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 15-149; Media Bureau Request for Comment on DSTAC Report, MB Docket No. 15-64, *Ex Parte Communication from Daniel O’Connor, VP of Public Policy, Computer & Communications Industry Association to Marlene H. Dortch, Secretary, FCC* (Feb. 11, 2016).

our members create intellectual property and therefore have a strong interest in the protection of copyrighted works. We support the Commission’s requirement that MVPDs must support, “a content protection system that is licensable on reasonable and nondiscriminatory terms, and has a ‘Trust Authority’ that is not substantially controlled by an MVPD or by the MVPD industry.”<sup>25</sup> MVPDs should only be required to validate devices that certify compliance with approved content protection systems. WGAW also supports strong privacy protections for consumers and urges the FCC to adopt rules that require third-party devices to adhere to the same level of privacy protections required of MVPDs.

While third-party devices should have the ability to innovate through new user interfaces, channel lineups and universal search, the Commission should take steps to protect the integrity of network programming. Advertising is a major source of funding for content creation while ad-free networks and services are able to charge consumers a premium for the lack of ads, giving consumers the expectation of enjoying programming in an ad-free environment. To protect consumers and content creators, we ask the FCC to consider how to clearly address the issue of advertising manipulation or insertion on third-party set-top devices.

#### **IV. Set-Top Box Competition Would Increase Opportunities for Independent Programming**

As the WGAW has often reported to this Commission, the repeal of the Fin-Syn rules led to consolidation and vertical integration in the video industry that drove out independent content. Despite broadcast networks claims to the contrary, the advent of the cable television market did

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<sup>25</sup> Expanding Consumers’ Video Navigation Choices, Commercial Availability of Navigation Devices, MB Docket No. 16-42, CS Docket No. 97-80, *Notice of Proposed Rulemaking and Memorandum Opinion and Order* (Feb. 18, 2016).

not lead to the competition that supposedly justified repeal of the Fin-Syn rules. Rather, as a recent WGAW analysis of cable networks reveals, the cable television market is tightly controlled by major media conglomerates and MVPDs. In 2015, 99 cable networks reached 50 million households or more. Of those 99 networks, 79 (80%) are affiliated with a large media conglomerate<sup>26</sup> or an MVPD.<sup>27</sup> Among the top 20 most widely distributed cable networks, 17 (85%) are affiliated with either a large media conglomerate or an MVPD.<sup>28</sup>

Television programming features a similar lack of independence. Broadcast network primetime programming remains some of the most watched content but also shows a stark decline in independently produced content. In 1989, under Fin-Syn, independent productions made up 76% of the fall broadcast network primetime lineup.<sup>29</sup> By 2013, independent productions accounted for only 10% of fall broadcast network primetime programming.<sup>30</sup> In the 2014-2015 television season, only 5% of scripted series airing on the broadcast networks in primetime were independently produced.<sup>31</sup> Across basic cable and pay TV networks the result is not much better, only 12% of scripted series were independently produced.<sup>32</sup>

Independent networks have also face discrimination by MVPDs. Comcast placed the Bloomberg news channel outside of its channel “neighborhood” in violation of the Comcast-

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<sup>26</sup> Fox, CBS, Viacom, Disney, Comcast and Time Warner.

<sup>27</sup> WGAW NOI Comments at 9.

<sup>28</sup> *Id.*

<sup>29</sup> This analysis includes all genres of series programming including documentary and reality.

<sup>30</sup> Comments of the Writers Guild of America, West, Inc., In the Matter of Annual Assessment of Competition in the Market for Delivery of Video Programming, MB Docket No. 14-16 (Mar. 21, 2014) at 5.

<sup>31</sup> WGAW NOI Comments at 12.

<sup>32</sup> *Id.*

NBCUniversal merger agreement.<sup>33</sup> Comcast also placed the Tennis Channel on a more expensive tier than its own sports networks prompting a complaint to the Commission. Although an appeals court ultimately rejected the complaint, both an administrative law judge and the Commission found that Comcast violated carriage rules.<sup>34</sup> Just recently, Liberman Broadcasting, parent of Estrella TV, filed a complaint against Comcast for favoring its own Spanish-language networks and demanding disproportionate digital rights. As Public Knowledge attorney John Bergmayer stated, “The complaint raises legitimate concerns that Comcast favored its own affiliated programming over Estrella and demanded that Liberman turn over digital rights, and used proprietary data about viewers gathered from its locked-down set-top boxes to make claims about Estrella's audience.”<sup>35</sup>

The traditional television ecosystem is not conducive to independent programming. The large media conglomerates that dominate the market have pushed out independent networks and producers. In contrast, the Internet provides an opportunity to reverse this trend. As the WGAW has found, independent productions are flourishing online, with 49% of the online TV series made for the likes of Netflix, Amazon and others coming from independent producers.<sup>36</sup> Placing such content on the same device as traditional television programming or in the same user

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<sup>33</sup> Bill Donahue, *Bloomberg Wins FCC Ruling Over Comcast Channel Placement*, Law360, Sep. 26, 2013, <http://www.law360.com/articles/476236/bloomberg-wins-fcc-ruling-over-comcast-channel-placement>.

<sup>34</sup> Alina Selyukh, *Court grills FCC, Tennis Channel in Comcast discrimination suit*, Reuters, Feb. 25, 2013, <http://www.reuters.com/article/us-usa-fcc-comcast-tennis-idUSBRE91O16S20130225>.

<sup>35</sup> Press Release, Public Knowledge, *Complaint Against Comcast by Spanish-Language Program Network Highlights Video Market Problems*, (Apr. 8, 2016), <https://www.publicknowledge.org/press-release/complaint-against-comcast-by-spanish-language-program-network-highlights-video-market-problems>.

<sup>36</sup> WGAW NOI Comments at 12.



interface would clearly have a pro-competitive effect that would enhance the availability of programming from independent sources.

#### **V. Set-Top Box Competition Would Enable Wider Distribution of Diverse Content**

Even before the “Oscars So White” controversy, it was apparent that Hollywood films and television failed to reflect the wide diversity of American audiences both in front of and behind the camera. For example, despite making up about 40% of the country and a majority of those in Los Angeles County, people of color represented only 12.9% of the lead roles in 163 films released in 2014, according to scholars at UCLA.<sup>37</sup> This was a *decrease* from 16.7% in 2013. On the television side, minority actors made up only 8.1% of the lead roles on broadcast scripted programs in the 2013-2014 season.<sup>38</sup> Women comprised only 25.8% of lead roles in 2014 films, a slight increase from 2013 but a decrease from 2012’s 30.8%. Representation of women in lead roles on broadcast scripted television declined from 48.6% in the 2012-2013 season to 35.8% in the 2013-2014 season. A USC study of the top 100 films of 2014 found that of 4,610 speaking roles, “only 19 were Lesbian, Gay or Bisexual. Not one Transgender character was portrayed.”<sup>39</sup>

The major studios have also failed to hire diverse writers in film and television.

According to the most recent Hollywood Writers Report, in 2014 the number of white males

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<sup>37</sup> Dr. Darnell Hunt, Dr. Ana-Christina Ramón and Michael Tran, *2016 Hollywood Diversity Report: Busine\$\$ as Usual?*, Ralph J. Bunche Center for African American Studies at UCLA (Feb. 2016) at 10.

<sup>38</sup> *Id.* at 14.

<sup>39</sup> Dr. Stacy L. Smith, Marc Choueiti, Dr. Katherine Pieper & Traci Gillig, Dr. Carmen Lee, Dylan DeLuca, *Inequality in 700 Popular Films: Examining Portrayals of Gender, Race, & LGBT Status from 2007 to 2014*, USC Annenberg’s Media, Diversity, & Social Change Initiative, Aug. 2015, at 2.

employed as writers (3,339) far outpaced the number of women (1,310) and minority (601) writers.<sup>40</sup>

By reducing the gatekeeping power of networks and MVPDs, set-top box competition will lower the barriers to entry of diverse networks and programming. Online video represents a new opportunity for diverse writers, producers and networks to distribute content to a larger audience without needing approval from the incumbent networks and distributors. Contrary to industry critics, the proposed rules will allow more consumers to watch diverse content. BET founder, Robert L. Johnson, responded to such detractors by saying: “It is hypocritical that one of the arguments used by the video network operators to fight the new program access technologies is that they would disadvantage minority programmers or raise their cost of cable to consumers. On the contrary, the frontier of new media and innovative access to programming through streaming and OTT content, allows newcomers, particularly minority programmers, to have a voice in the age of digital content.”<sup>41</sup>

Or as Eric Easter of the National Black Programming Consortium and CEO of streaming service BLQBOX put it, “There are no minority-owned cable systems, no minority-owned Hollywood studios and no minority-owned major tech companies poised to take profit away from any of them, so pitting civil rights organizations and channels like TV One and Fusion

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<sup>40</sup> Darnell M. Hunt, Ph.D., *The 2016 Hollywood Writers Report: Renaissance in Reverse?*, Writers Guild of America West, Mar. 2016, at 38.

<sup>41</sup> Robert L. Johnson, *Consumers deserve choice and minority programmers deserve opportunity*, The Hill, Jan. 22, 2016, <http://thehill.com/blogs/congress-blog/technology/266653-consumers-deserve-choice-and-minority-programmers-deserve>.

against up-and-coming streaming channels is a distraction at best, a cynical ploy for sympathy at worst.”<sup>42</sup>

## **VI. Writers Support Competition in Video Distribution**

WGAW members have been some of the most vocal proponents of increased competition in media because they understand that a multitude of outlets will lead to better and more diverse storytelling. The success of the open Internet has allowed writers and viewers to confirm this hypothesis. In this filing several WGAW members share their experiences and offer support for a competitive set-top box market that brings together both television and online programming in one interface.

### **Amy Berg, Writer & Co-Creator, *Caper***

I'm a television showrunner by trade, meaning I write and produce TV under the auspices of large conglomerates. I'm beholden to their mandates, which often times requires creative sacrifices to tell stories that are more suited to their specific audiences and commercial interests. This is why I created *CAPER*, a series that was specifically made for the internet and distributed solely online via YouTube and Hulu. It was the first time since I'd made short films in college that I'd had almost exclusive control of the content. The direct-to-consumer digital marketplace is unique and wonderful. In traditional network and cable television, content does not reach audiences directly; it passes through multiple layers of scrutiny and many alterations are [often forcibly] made before it is seen by anyone.

Making something for the internet not only allows for more creative freedom, but also affords a platform for diverse voices to be heard. Not only are there fewer hurdles between conceptualization and the final cut, but there are fewer hurdles in the selling process. Pitching ideas to film or television producers and executives is no easy task. Accessibility is a huge obstacle to overcome. Opportunities are often afforded to the most well-known, high status creators with proven track records.

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<sup>42</sup> Eric Easter, *FCC's set-top box proposal is really about a level playing field*, The Hill, Feb. 17, 2016, <http://thehill.com/blogs/congress-blog/technology/269588-fccs-set-top-box-proposal-is-really-about-a-level-playing>.

Breaking through the glass ceiling of the establishment is a rare feat, particularly for new voices.... it's difficult to just get into a room with the right people to pitch them your ideas. In the digital world, audiences are global and diverse voices are welcome, thus opportunities are more plentiful.

When there is more content to consume, it's audiences who are the big winners. They have more choices than ever as to what to watch and how to watch it. The evolution of television is only beginning. How programming is produced will not change, but how it's distributed will. In the future, every outlet through which we consume "television" will be found online. And as more platforms are created, more projects will be needed to fill them, allowing new, emerging talent to be discovered almost by necessity.

**Bernie Su, Writer & Executive Producer, *The Lizzie Bennet Diaries*, *Emma Approved*, *Frankenstein MD***

I am a story teller who is curious and loves challenges. I came to Hollywood to be a television writer, but began experimenting with the online space because I was curious about what it would be come. Experimenting in the online space launched my career, has won me two Emmys for *The Lizzie Bennet Diaries* and *Emma Approved*, and is where I've continued to create. When I tried the traditional route of pitching the *Lizzie Bennet Diaries* to television networks, I ran into poor timing. "It wasn't what they were developing right now." I eventually realized I'd hit a road block and had to pivot in a different direction. When I looked at the audience I was targeting, young and predominantly female, I saw an opportunity in the online space. Instead of creating a traditional show, we created series with a variety of different episodes numbers and lengths. We made the shows multi-platform and we made them interactive. Our characters talk to the audience, have Twitter and Facebook accounts, and can respond to readers' questions while still telling a coherent story. And the stories don't end with the episodes—they inspire curiosity in the viewers and can lead to their own creative projects.

The online video market has opened up a whole new arena where I've found I can define my canvas. I have creative freedom in the online world that I wouldn't have had on traditional platforms. Rather than creating stories for the traditional format, I can create the structure for my shows. Through the *Lizzie Bennet Diaries* and *Emma Approved* I have seen that the online, interactive world speaks to younger audiences and speaks their language. When I recently created *Frankenstein MD* for PBS, beyond ensuring the material was appropriate

for kids, I was given virtually free rein to create and was encouraged to be innovative. I've only seen these opportunities in the online space and I want to be sure that younger viewers can easily access these dynamic programs going forward. FCC action to make content like mine more easily accessible and widely available on consumer TV sets will only enhance competition and consumer choice.

**Ruth Livier, Writer & Creator, *YLSE***

President Obama's announcement last week that he is "calling on the FCC to open up set-top cable boxes to competition"<sup>43</sup> means that the cable companies will no longer get to be the programming gatekeepers who rent out the boxes -- for ever-increasing profits—that keep Internet content away from consumers.

This initiative is a huge step towards increased competition in the realm of content creation and distribution because it will help blur the gap between traditional big-budget programming and independent online productions by neutralizing the antiquated non-inclusive television distribution paradigm. For independent content creators, this translates into a great opportunity to reach our potential audiences because it will allow viewers to access the content of their choice –digital or traditional-- from a single device that they own.

This new democratizing distribution model is a win for the people: It empowers and motivates independents to create content, knowing there is a more equitable distribution outlet for their work, AND viewers have the power of choice and the right to not be systematically overcharged by cable companies.

**Amy Aniobi, Writer, *Misadventures of Awkward Black Girl***

I wrote for a web series called "Awkward Black Girl" that was created by Issa Rae and eventually bought by Pharell's YouTube channel - I didn't create it, but I can speak to writing for it. Of course writing an online series encourages greater creativity. Of course. There are fewer execs and fewer checks and balances and smaller audience segments to please - plus lower financial risks, which means less fear on the side of the developers. That means artists can say what they want, how they want, usually without fear of "low ratings." Unlike on network television,

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<sup>43</sup> Jason Furman, Jeffrey Zients, *Thinking Outside the Cable Box: How More Competition Gets You a Better Deal*, The White House Blog, Apr. 15, 2016, <https://www.whitehouse.gov/blog/2016/04/15/ending-rotary-rental-phones-thinking-outside-cable-box>.

where content must appeal to a broad audience to survive, on the internet, specificity of voice is king. That leads to greater content diversity - as well as talent diversity. I know that working on the web and creating my own content is a lot of why I have progressed quickly as a writer. I learned how to do it in my voice, first. And as a writer, it's essential to know your voice.

Having additional buyers for our content from online platforms means more jobs. It's exciting that devices like Chromecast and Apple TV exist, so we can watch what's on our phones on our televisions. That means YouTube shows become "real" shows - because they can be viewed on a "real" screen. It legitimizes both sides of the playing field.

Online platforms encourage diversity and the public benefits by seeing diversity. When writers don't have to be confined to the 22-minute, ad-friendly pace and structure of network television, they can create unique stories told in unique ways. And when audiences are able to find those shows that speak directly to them, they're more invested in watching. Network television is scared of the "binge-viewer" - but more and more, I see audiences binge programming because they love it. It's easier to binge online - so audiences are more likely to fall in love with characters, worlds, themes and stories presented online. In other words, with new possibilities to consume content online, audiences have new opportunities to fall in love with TV again.

## **VII. Conclusion**

Twenty years after the enactment of the 1996 Telecommunications Act and Section 629, competition in the video industry has only decreased, giving undue control to a small number of firms. These companies have used their power to discourage competition in programming, distribution and devices. Without FCC action it is clear that the MVPDs intend to use their market power to continue to control the set-top market and parlay that control into gatekeeper control of online video. By opening the TV set-top box to competition, the FCC's proposed rules can finally fulfill Congress's intent and give both content creators and consumers a more robust video watching experience.