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August 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

Re: Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201[1]

The Independent Film & Television Alliance® (IFTA®) respectfully submits these comments in response to the above-referenced matter as the Federal Trade Commission (FTC or Commission) considers 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.

IFTA strongly believes that as a matter of public policy the consumer interest requires wide access to an ongoing supply of creative content, ranging from major blockbuster films to the diverse and unexpected creative productions of independent companies and individuals. We support the FTC's comprehensive review of the state of antitrust and consumer protection law and policy in the nearly quarter-century since the Pitofsky Hearings and appreciate this opportunity to provide the unique perspective of the independent sector of the film and television industry.

As producers of much of the innovative audiovisual content that propels the digital economy, IFTA and its members are strong supporters of measures that promote competition, ensure consumer protection, and foster diversity in programming and choice for consumers. IFTA has long been on record with regard to the competitive challenges facing independent producers in today's marketplace, arising from the integration of major broadcast, cable and broadband companies and the extraordinary growth of a handful of online platforms, all of whom now produce and promote their own programming. Independent program suppliers today have limited leverage in negotiating for access, good placement, marketing, and revenue shares with these conglomerates and thus consumer access to such independent programming is under threat.

At the same time, encouraging the growth of online platforms and services has been prioritized as a matter of policy over protecting the public from traffic in illicit content, which

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[1] *See* 83 Fed. Reg. 38307 (August 6, 2018).

has generated profit for the platforms and services at the expense of legitimate rights holders, among other interests. With this backdrop, there is a growing and serious concern in the United States and worldwide about the lack of responsibility and accountability exercised by major internet platforms toward harmful and illegal activities taking place on their services, resulting in a toxic environment to conduct business and reach consumers.

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. This reality combined with the lack of meaningful platform responsibility to avoid illegal content means that the FTC must be even more vigilant in its efforts with respect to competition and consumer protection. With a small number of large online platforms wielding massive control over the content that consumers view today, there is a heightened need for intervention to achieve the Commission's mission to protect consumers by preventing anticompetitive, and unfair business practices, and enhancing informed consumer choice.

About IFTA and its Member Companies

Based in Los Angeles, IFTA is the trade association for the independent motion picture and television industry worldwide, representing 140 companies in 20 countries, the majority of which are small to medium-sized U.S.-based businesses[2] 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. Unlike the six major MPAA studios,[3] independents do not own worldwide distribution channels and they completely depend on third-party distributors around the world. In many cases, these distributors also become key investors in the film through minimum guarantee license commitments 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. Increasingly, these advance distribution deals, which are critical to independent production finance, involve the major online platforms and services.

Our sector accounts for **over 70% of all films produced in the U.S.** and the jobs generated by that economic activity. For calendar year 2017, U.S. independent production companies shot 551 feature films. This resulted in over 36,363 full time jobs directly related to this production activity and another 109,611 full time jobs for the various vendors that service the film industry. Combined, both classes of employees earned over $15.03 billion. Total business revenue that resulted from this production activity totaled over $23.04 billion in economic output. Independent production generated over $3.12 billion in income and sales tax for both the federal government and individual state governments. Federal government share of income tax received was over $1.97 billion. A thriving online marketplace directly impacts the

[2] A complete list of IFTA Members is available online at: http://www.ifta-online.org.
[3] 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.

independent sector's revenue streams and thus its ability to sustain business operations and to employ American workers.

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.

The economic ability of the independent film and television industry to continue to offer diverse and unexpected programming will determine whether consumers have true choices across today's many content viewing avenues. IFTA's comments focus on the extent to which the major online platforms and distributors are failing to take responsibility for the integrity of the marketplace which they now control and have been allowed to amass the power to act as gatekeepers to that marketplace, to the detriment the health of the broad-based distribution infrastructure that is necessary to fuel ongoing independent production and provide consumer choice.

IFTA joins other representatives of the creative industries to call upon the Commission to exercise its broad investigatory authority under the FTC Act to examine how the dominant internet platforms engage in practices that harm competition in the creation and distribution of copyrighted works, and, in doing so, harm consumers.

As recommended in the Notice, IFTA will file a separate comment for each topic posed by the Commission where the experience of IFTA members may be of greatest assistance in the evaluation of the current marketplace.[4] We hope the results will lead to targeted and effective dialogue and improvement toward achieving the FTC's vision of a vibrant economy characterized by vigorous competition and consumer access to accurate information.

[4] See IFTA's specific responses to Topics 1, 3, 6, and 8 in the instant proceeding.

Independent Film & Television Alliance® (IFTA®) submission dated August 20, 2018 in response to Topic 1 with respect to Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201.[1]

Historically, the U.S. Government has prevented media ownership monopolies.

Independent film and television are an integral part of American culture. Recognizing that a thriving independent industry fosters competition and enriches America's marketplace of ideas, the federal government has in the past taken decisive steps to prevent major motion picture studios from dominating the broadcast industry. In addition to FCC ownership rules, there were the 1970 Financial Interest and Syndication Rules (Fin-Syn) and the Consent Decree of 1977, which prevented the networks from establishing massive media conglomerates, along with the Paramount Decrees of the 1940's stemming from FTC action with respect to theater ownership and block booking.

In 1995, the Commission's "Global Competition and Innovation Hearings" under the leadership of then-Chairman Robert Pitofsky established a comprehensive process for information gathering in support of the FTC's dual mission to promote competition and to protect consumers from unfair and deceptive practices. These hearings are widely regarded as "the first major step in establishing the FTC as a key modern center for … 'competition policy research and development'" and "sought to 'articulate recommendations that would effectively ensure the competitiveness of U.S. markets without imposing unnecessary costs on private parties or governmental processes.'"[2]

Roll-back of media ownership rules has stifled competition.

At the time Chairman Pitofsky sought to examine a path for an even playing field in the emerging internet marketplace, the Fin-Syn rules were still in effect – if in their dying days -- to prevent the monopolization of broadcast television by establishing ownership parameters for programming aired in prime time; the home video market was developing; cable television channels were multiplying; and foreign markets were emerging rapidly.

However, since the mid-nineties, the safeguards against media monopolies have been stripped away. The result has been the emergence of a handful of giant media conglomerates that now dominate the film, television, cable, and broadband industries. These conglomerates produce their own programming, show it on their own networks, and rerun it on their secondary networks or affiliated cable stations or move it to affiliated video on demand services. This has made it nearly impossible for independents to enter the market. For example, the major television networks have stopped acquiring independent feature films or movies of the week for broadcast. Independent production has fallen from 50% in 1995 to only 5% of network prime time programming.[3] It was once hoped that the cable networks would be the antidote to this

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[1] *See* 83 Fed. Reg. 38307 (August 6, 2018).
[2] Timothy J. Muris, More Than Law Enforcement: The FTC's Many Tools – A Conversation with Tim Muris and Bob Pitofsky, 72 ANTITRUST L.J. 772, 773 (2005).
[3] Figure current as of 2008.

trend, but they are now commonly owned with the networks and, in significant part, have also closed their doors to the independents. Few cable networks will acquire from independents on equitable terms if at all.

Harmful pattern replicated in the online environment.

In the nearly quarter-century since the Pitofsky Hearings and staff reports[4], the marketplace for audiovisual content in the U.S. has dramatically evolved. Technology and internet bandwidth have increased exponentially with the ability for internet users to stream or download full-length films and television programs on demand to a wide range of devices.

The marketplace has shifted to the internet -- once considered a viable path for creators to reach their audience. However, the internet and the platforms that sit on top to provide streaming services have either become "must get" portals for films but wield enormous market leverage like Google and Amazon so they can unilaterally dictate the terms of license agreements including the licensee fee; or have become consolidated with traditional distribution platforms and media companies like NBCU Comcast, soon to be Fox and Disney (which will substantially control Hulu), and AT&T-DirecTV and now Time-Warner.

Moreover, following the recent news that the U.S. is considering a rollback of the Paramount Decrees[5], there are now reports that Amazon and Netflix are seeking to acquire brick-and-mortar theaters, such as the Landmark theater chain and its more than 50 theaters in over 27 key markets across the U.S.[6]

When independents can't compete, it is the viewer who loses out.

In this consolidated marketplace, cord-cutting (*i.e.*, the cancellation of cable and other traditional pay-TV subscription services by television viewers in favor of internet-only access), is occurring at an increasingly rapid pace[7] but independents are still disadvantaged as content suppliers because the internet and platforms themselves still exercise inordinate buying power. In a prime illustration of such market power, a consumer who cuts the cord with their cable company in most cases will continue to acquire internet service from the same company that supplies both internet and television service.

The independents are also challenged with relying on the internet platforms to effectively deal with piracy. While the internet creates opportunities for expanded distribution, new audiences, and new revenue streams for independents, it also has fostered the biggest threat to our industry: online infringement is allowed to flourish without any effective way under current law to prevent or stop the introduction and rapid proliferation of infringing copies across the internet. It is a painful irony that the platforms are able to turn down legitimate independent

[4] FED. TRADE COMM'N STAFF, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (1996); FED. TRADE COMM'N STAFF, ANTICIPATING THE 21ST CENTURY: CONSUMER PROTECTION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (1996).
[5] https://www.bloomberg.com/news/articles/2018-08-02/u-s-eyes-end-of-film-distribution-system-that-rules-hollywood
[6] https://www.bloomberg.com/news/articles/2018-08-16/amazon-is-said-to-be-in-running-to-acquire-landmark-movie-chain.
[7] https://variety.com/2018/digital/news/cord-cutting-2018-estimates-33-million-us-study-1202881488/

content offers while also refusing to proactively prevent that same content from being uploaded illegally via their broadband services.

In the U.S., it is also the pattern that the major internet platforms and service providers already deploy enhanced anti-piracy protections with respect to their own content and in the context of agreements on a "voluntary" basis negotiated with large suppliers while refusing to extend those enhanced services to smaller content suppliers. In the case of Google/YouTube, these enhanced protections include proactive "take down stay down" options for large companies, but smaller companies are only offered the option of monetizing the illegal copies – allowing Google/YouTube to place advertising on the illegal copies and sharing a fraction of the ad revenue derived from the illegal use, rather than preventing the further upload and illegal distribution of the infringing material. This discriminatory treatment creates a marketplace distortion of revenue and a substantial barrier for smaller content suppliers seeking to use the internet as a major pathway to audiences.

We urge the FTC to take notice that while it may appear that the internet offers endless opportunities for independents to reach audiences, those opportunities are constrained by the decisions and actions of a few major market players. It is incumbent upon Government to ensure that notwithstanding the multiple layers of consolidation and sheer market power of the internet giants, they are forced to act in a transparent and fair manner and not exercise unfair market leverage against independent producers of films and television programming, whether through specific commercial practices or by continuing to foster-by-inaction a marketplace plagued with illegal content.

In that regard, we urge the Commission to use its authority to investigate fully the extent to which the large internet platforms, including Google and Facebook, and service providers today are allowed, and arguably incentivized, to avoid taking action to halt the spread of illegal content and services across their systems. This investigation should encompass those devices, services and streaming apps that are marketed on the basis of access to illegal or pirated content (so-called "preloaded boxes"). We further recommend that the Commission evaluate actions by these platforms and services that have the effect of foreclosing market access for smaller content providers.

The hearings and report that the Commission contemplates have the potential to set forth ground-breaking conclusions about how today's legal and enforcement framework must be adapted to encourage the steady supply of legal content and the establishment of a marketplace online that consumers and users can trust. We encourage the Commission to move forward aggressively and to follow the record to a body of solid recommendations and regulatory actions.

Independent Film & Television Alliance® (IFTA®) submission dated August 20, 2018 in response to Topic 3 with respect to Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201.[1]

The online platform business model has unique implications for antitrust and consumer protection law enforcement and policy, particularly as it relates to matters of privacy and security and the free flow of information. Congress is beginning to take notice and question the statutory immunities such as Section 230 of the Communications Decency Act of 1996. At a recent Senate Intelligence Committee hearing on August 1, 2018, Senator Ron Wyden (D-OR) was quoted as saying, "I just want to be clear, as the author of Section 230, the days when these pipes [of information] are considered neutral are over – because the whole point of 230 was to have a shield and a sword, and the sword hadn't been used and these pipes are not neutral."

Ensuring that the internet offers content suppliers and users the same protections that are available in the brick-and-mortar environment is critical to maintaining a safe and vibrant online marketplace to deliver independent content to consumers, on the devices and as they wish to receive it. If these platforms are allowed to continue to operate within a policy framework that prioritizes their growth and profit over accountability, American creativity and consumers will be harmed.

As consumer preference continues to evolve, the internet giants have amassed billions of users who are eager to watch professionally produced content on their platforms. According to a recent estimate, about 147.5 million people in the U.S. watch Netflix at least once per month, followed by Amazon Prime Video (88.7 million), Hulu (55 million), HBO Now (17.1 million) and Dish's Sling TV (6.8 million).[2]

An independent content producer who is unable to access these key distribution outlets is increasingly unable to reach the bulk of the potential audience and is relegated to the open internet – the equivalent of CATV "local access channels" which are known for their tiny viewerships. While there are niche online platforms that deal in certain specialty genres or that focus exclusively on foreign language audiences and content, the mass audience and the revenues generated by advertising and subscription packages are drawn to the major platforms.

The revenues generated by streaming platforms are increasingly important as other forms of home entertainment (including traditional cable and satellite television) decline. They are also now are a significant element in securing third-party production finance. Without confidence that independent programming can reach the major online platforms, and that revenues will not be undercut by competition from free illegal copies, this important foundation for financing new independent content will not continue to develop. The internet must be governed in a fair and transparent manner worldwide so that independents can continue to provide consumers "on demand" ways to watch alternative and diverse content.

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[1] *See* 83 Fed. Reg. 38307 (August 6, 2018).
[2] https://variety.com/2018/digital/news/cord-cutting-2018-estimates-33-million-us-study-1202881488/.

Today, the prevailing internet platforms are closing off the market for independently produced films and television programming through a combination of self-production, acquisition of and reliance upon major studio production houses, and use of strategies designed to reduce the volume of independent content offered on the platform. Those strategies reportedly include unilateral across-the-board reductions in license fees and ad revenue shares for such content, refusal to deal directly with individual small suppliers versus aggregators (packagers), and shifting of advertising placement away from content featuring unpopular themes or imagery. For example, YouTube and Amazon unilaterally lowered license fees they pay the creators of the content which draws users, sponsors and advertisers to their sites.[3]

IFTA calls upon the Commission to exercise its broad investigatory authority under the FTC Act to examine how the dominant internet platforms engage in practices that harm competition in the creation and distribution of copyrighted works, and, in addition, harm and deceive consumers.

The U.S. is not alone in grappling with questions of competition law as it relates to the internet giants. Most recently, Germany initiated an inquiry into the major platforms[4] and the European Commission has offered an assessment of the rapidly changing economic and regulatory environment in which online platforms are growing.[5]

[3] https://www.indiewire.com/2018/02/amazon-video-direct-lowers-royalty-rates-1201925708/
[4] https://promarket.org/german-approach-antitrust-digital-platforms/; https://www.insidetechmedia.com/2016/06/13/german-competition-authority-publishes-a-working-paper-on-market-power-of-platforms-and-networks/
[5] https://www.insidetechmedia.com/2016/06/21/the-european-commissions-approach-to-online-platforms-and-the-collaborative-economy/

Independent Film & Television Alliance® (IFTA®) submission dated August 20, 2018 in response to Topic 6 with respect to Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201.[1]

IFTA members are independent third-party suppliers of content to an extremely consolidated distribution market. In the U.S., these distributors are often the major MPAA studios.[2] Our sector continues to be disadvantaged as new mergers threaten to further limit the number of buyers (distributors) for different channels of distribution, lowering the value of the exploitation of the rights through extreme market power and undue leverage. For example, the future of Fox Searchlight, a significant buyer of independent content, is now in jeopardy as a result of the Disney/Fox transaction.

IFTA was active in opposing the Comcast/NBCU merger because Comcast made clear its intention to rely on NBCU content to fuel its own Xfinity video on demand service to the exclusion of independent suppliers and because the merger would accelerate the displacement of independent content on NBCU's own television and cable channels. As a condition on that transaction, IFTA negotiated an agreement with Comcast and NBCU to provide enhanced independent programming opportunities on NBCU's broadcast and cable networks, as well as Comcast Cable's VOD and online platforms.[3] However, those commitments now have expired and independents today generally must work through agents and aggregators (third parties who assemble limited, cherry-picked packages of content for online platforms and outlets), rather than being able to directly negotiate deals to reach Comcast's audiences, lessening the value of the license for the content producer.

The same concentration has occurred on the internet with platforms that stream on demand content like Google/YouTube, Facebook, Netflix and Amazon growing larger and at the same time narrowing opportunities for independent suppliers of content. Increasingly, these internet giants are pushing smaller suppliers and individual producers away from their platforms, clearing space for self-produced films and television series and for output deals with major suppliers. This year, Netflix is projected to spend close to $8 Billion on content and another $2 Billion on marketing[4], the bulk of which will go toward its budget for producing and promoting the platform's original programming.[5]

The economic forces so evident in traditional media will inevitably also push online platforms to prefer their own content, services and applications, discriminate against lawful, independent content, services and applications, and deprive the public of access to competing offerings. Consequently, the quantity, quality and diversity that should come from competition will be lost, along with the associated consumer benefits that flow from such diversity of choice

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[1] *See* 83 Fed. Reg. 38307 (August 6, 2018).

[2] 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.

[3] https://docs.fcc.gov/public/attachments/FCC-11-4A1.pdf.

[4] https://www.netflixinvestor.com/ir-overview/long-term-view/default.aspx.

[5] https://techcrunch.com/2018/05/14/netflix-original-content-spending/.

in programming. In the case of Netflix, a recent study found that 80 percent of Netflix U.S. viewing is from licensed content.[6]

The revenues generated by streaming platforms are increasingly important as other forms of home entertainment (including traditional cable and satellite television) decline and potential streaming revenues now are a significant element in securing third-party production finance. Without confidence that independent programming can reach these online major platforms, and that revenues will not be undercut by competition from free (and illegal) copies, this important foundation for financing new independent content will not continue to develop. The internet must be governed in a fair and transparent manner worldwide so that we can continue to provide consumers alternative "on demand" ways to watch content.

IFTA urges the FTC to take notice of the global presence of these few major online platforms that offer a wide audience but also wield enormous power to push disfavored content and other online distributors to the side-lines. This is particularly troubling given that these platforms, notably Google/YouTube and Facebook, continue to profit from illegal content appearing on their systems and remain unwilling to adopt or make broadly available solutions to diminish accessibility of illegal content through their platforms.

[6] https://variety.com/2018/digital/news/netflix-licensed-content-majority-streaming-views-2017-study-1202751405/.

Independent Film & Television Alliance® (IFTA®) submission dated August 20, 2018 in response to Topic 8 with respect to Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201.[1]

The creation of film and television programming is the epitome of the innovation that fuels the development of the digital economy. Evidence confirms that both intellectual property protection and competition are important to spur innovation.[2] Moreover, the *DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property* identify intellectual property licensing as procompetitive.[3]

Copyright and the ability to control exclusively the use of a copyrighted work is the building block for commercial exploitation of rights. The 1998 Digital Millennium Copyright Act (DMCA)[4] was enacted right after the Pitofsky reports were issued. At that time the Notice and Takedown provisions[5] seemed to strike a balance between the rights of the copyright owner to control the use of their property and the ability of ISPs to patrol their network without unreasonable burdens. But time and technology have overtaken our industry. In the current high speed, on demand, mobile world, pirated and other illicit content can be duplicated and shared worldwide instantaneously; at the same time, the tools now exist to identify content and to block illegal and unauthorized versions automatically and accurately. The balance that made sense in 1998 is no longer effective. There is a desperate need to evaluate the responsibility that the major platforms must be required to assume to ensure that the internet is a legitimate and safe place for users.

We have seen the impact of wide broadband growth and availability and the importance of high value content in driving consumer take up of broadband offers. Unfortunately, we have also seen the cost of prioritizing broadband growth over the interests of the legitimate owners of that content. Widespread distribution of illegal content has been accepted and enforcement of existing copyright laws deferred or denied as the networks offered up "free" content to all subscribers. For example, in Spain, the country's broadband network growth was propelled by government's failure to intervene as the growing network transported free but illegal entertainment content – and legitimate avenues of distribution (such as DVD) and the ability to finance film production died. Every country, including the U.S., have seen the impact of trying to "compete with free" while enforcement efforts flagged. At the same time, illegal supplied content and black services have directly damaged consumers: invasions of consumer privacy, the spread of malware and spyware, and the threat of consumer identity theft are fellow travelers of illegal content.

Under U.S. law, online platforms and service providers are afforded a "safe harbor" from liability for the third party content they carry providing that they are minimally responsive to

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[1] *See* 83 Fed. Reg. 38307 (August 6, 2018).
[2] *See Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, Volume I, Page 4.
[3] *See DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property, Section 2.3, Procompetitive Benefits of Licensing*, Page 5.
[4] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.
[5] 17 U.S.C. § 512.

notices that a specific item, in a specific online location, is unauthorized or otherwise illegal.[6] The requirement that each and every copy be identified over and over has spawned, among other things, an industry of companies that for a price will scan the networks, then click to report, click to report, click to report *ad infinitum.* Meanwhile, for the owner of the film, any prospect of significant revenue generation from legitimate channels is rapidly destroyed. But the platforms and services have no requirement to deploy technology to proactively delete these copies or to prevent the illegal citations from popping up for any consumer who searches for the titles and - given the safe harbor protections – substantially little reason to do so.

At the same time, the audience built up through the content offer (both legal and illegal) has fed the advertising-based revenue stream on which the platforms have built their financial foundation. The combination of safe harbor and advertising has created perverse incentives for the platforms that now are being recognized by Congress and other public decision-makers around the world.[7] 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.[8]

As previously noted, independents are particularly at a disadvantage in trying to obtain "voluntary" assistance from the platforms and online services. Unlike the major MPAA studios[9], independents are unable to secure more effective private content protection arrangements beyond those provided to the general public. Platforms offer companies with which they license content increased content protection mechanisms, which are normally unavailable to independents because they do not have the negotiating leverage to achieve exclusive content distribution deals. These types of preferred private copyright protections should be available to all content providers, regardless of their size and commercial leverage.

In the case of Google/YouTube, smaller companies are offered only the options of continuing to file thousands of individual "notices and takedowns" or of monetizing the illegal copies – allowing YouTube to place advertising on the illegal copies and sharing a fraction of the ad revenue derived from the illegal use, rather than preventing the further upload and illegal distribution of the infringing material.

This has the effect of pushing small content providers to accept piracy and an even more unfair "partnership" with YouTube, rather than receiving the revenue that could be generated from exploiting the content in a legitimate marketplace where stolen copies are not available for "free". It also may force small providers to cease distributing directly on the internet and instead place their content with aggregators (third-party intermediaries) who package content for a fee and who may receive enhanced protections offered to larger suppliers.

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[6] 17 U.S.C. § 512

[7] 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/.

[8] http://thehill.com/policy/technology/398394-hollywood-urges-congress-to-bring-google-to-testify.

[9] 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.

In recognition of this disparity, the European Commission recently proposed a notice, takedown and staydown obligation under proposed Article 13 of the Copyright Directive[10], which if enacted would force the large platforms to take on the responsibility of monitoring their own sites and providing tools to every copyright owner to effectuate stay down of their work if they chose. As illustrated by its agreement in the United Kingdom to a "Voluntary Code of Practice" that is dedicated to the removal of links to infringing content from the first page of its internet search results, Google is equipped to do much more with respect to platform responsibility but continues to limit its remedial actions unless under pressure from government or its major contract partners.[11]

IFTA asks 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 these distributors and to investigate the discriminatory practices pursued by these platforms and services that place independent content providers at an unfair competitive disadvantage.

[10] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593
[11] https://www.gov.uk/government/news/search-engines-and-creative-industries-sign-anti-piracy-agreement