Senator Klobuchar's Question for the Record

For Ms. Stutzman, Writer's Guild West

Independent programing that is not affiliated with a major studio or network is an important part of the video ecosystem. Over the past decade, we've seen an increase in consolidation among large programmers and cable companies. With this consolidation, we have heard increasing concerns from independent programmers about the challenges that they face in the market. The Writer's Guild represents writers who work for all programmers, large and small, affiliated and independent. Can you tell us about challenges that independent programmers and their writers in particular face? How would any changes to STELA reauthorization impact those challenges?

The most significant challenge facing independent programmers and the writers who work for such producers is finding an outlet that will license their content. In the two decades since the repeal of the Financial Interest and Syndication Rules (Fin-Syn), consolidation through vertical integration between television networks and studios has all but eliminated independently produced programs from primetime television.

According to WGAW analysis of the broadcast network schedules, only 10% of the 2013 fall primetime lineup was independently produced. This is down from 76% independently produced in 1989, when the broadcast networks were prohibited from owning the content they aired.

Broadcast Fall Primetime Lineup, 1989-2013

Fall Primetime Lineup	1989	1999	2008	2009	2010	2011	2012	2013
Independently Produced[1]	76%	28%	21%	13%	12%	11%	11%	10%
Media Conglomerate Produced Series	24%	72%	79%	87%	88%	89%	89%	90%

In addition, most of the independent programs airing on broadcast television are reality series such as *Dancing with the Stars* and *The X-Factor*. These programs are typically viewed once and do not generate significant revenue from reruns, syndication and DVD sales in the way scripted programs do. As a result, the broadcast networks are less interested in owning this programming.

At the time of the repeal of the Fin-Syn rules, the broadcast networks argued that increased competition from cable networks justified retiring the rules. The proliferation of cable channels, however, has not increased competition: seven companies, five of which own broadcast networks, are responsible for 95% of all television viewing in the

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

United States.[2] These seven companies – CBS, Disney, Discovery, NBCUniversal, 21st Century Fox, Time Warner and Viacom – create and distribute the majority of content seen on broadcast and cable.

When the WGAW examined the original comedies and dramas offered by basic cable networks, we found a similarly low and declining amount of independently produced series. Over the past five seasons, independently produced series have declined from 41% of basic cable dramas and comedies to only 22%.

Analysis of Original Scripted Programming on Basic Cable Networks

	2008-2009	**2009-2010**	**2010-2011**	**2011-2012**	**2012-2013**
Independently Produced	41%	33%	26%	26%	22%
Media Conglomerate Produced Series	59%	66%	74%	74%	78%

The lucrative downstream market for scripted content – from sources such as cable and local station syndication, international licensing, and SVOD services – has created significant incentives for networks to own their lineups. In 2012, domestic syndication revenues were an estimated $20 billion;[3] international licensing of domestic televisions series was estimated at $3.5 billion;[4] and SVOD deals represented an additional $2 billion in revenue.[5] The importance of content ownership was recently confirmed in an *Advertising Age* interview with the executives in charge of FX and A&E Networks.[6] Mr Landgraf, CEO of FX Networks said,

> "We started FX Productions almost 10 years ago to own the content. A big part of our revenue stream is still the advertising business. A big part of our revenue is still affiliate-sales business and subscription revenue, but ultimately, if you think about a piece of content like "Hatfields & McCoys," anything that Charlie makes or "Fargo," something that can generate revenue over 10 or 20 years, if you don't own it, that revenue is going to somebody else. Our studio partnership is not always helpful, because obviously they have a goal of maximizing revenue, and that often means taking away from us and selling it to somebody else. So you have to take ownership."

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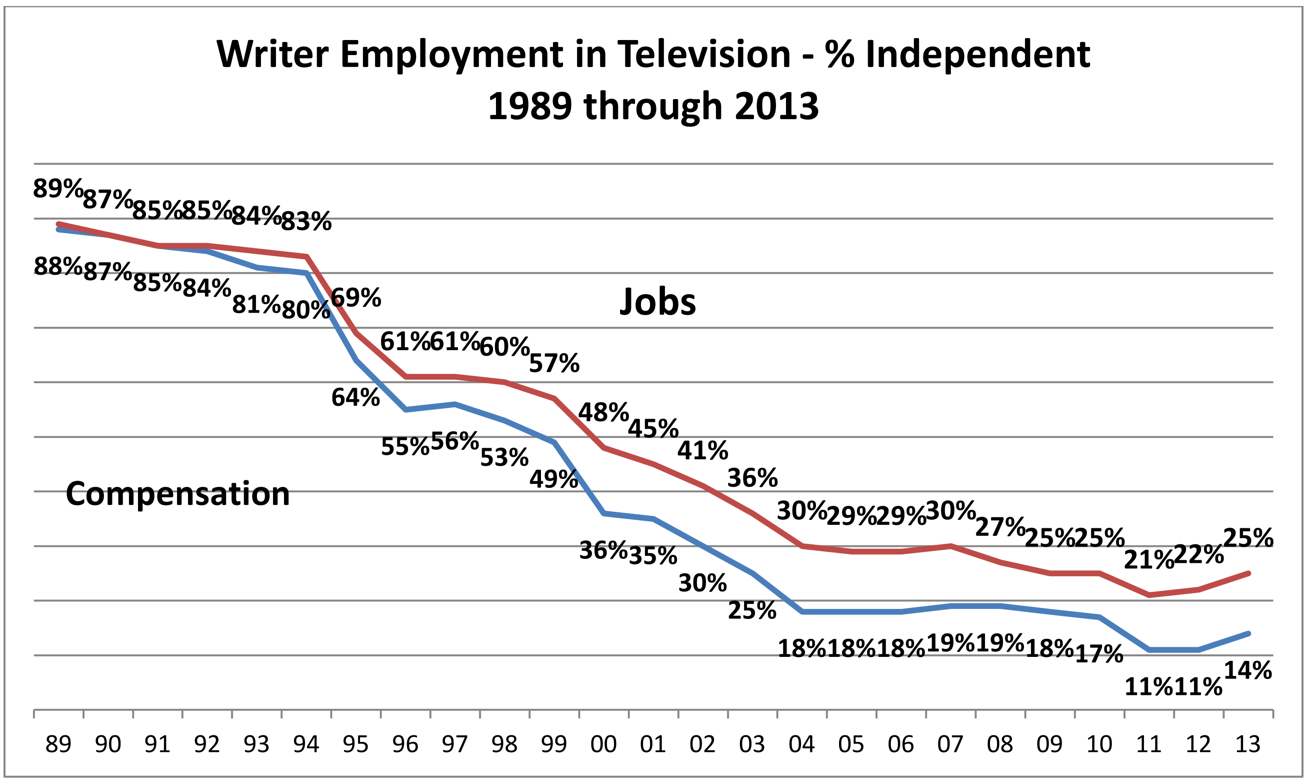
[2] United States Government Accountability Office, "Video Marketplace: Competition is Evolving, and Government Reporting Should be Reevaluated," GAO-13-576, June 25, 2013, p 6.
[3] Anthony DiClemente and Chris Merwin, "Why TV Studio ROIC Should Improve," Barclays, October 1, 2012, p. 5.
[4] SNL Kagan, "Worldwide TV Programming Market for US Produced Programming," May 21, 2013, http://www.snl.com.
[5] Todd Juenger, "Weekend Media Blast: SVOD-The Journey So Far," Bernstein Research, June 17, 2013, p 3. Revenue estimates for CBS, Time Warner, Disney, News Corp, Viacom, Discovery and NBCU.
[6] Jeanine Poggi, "Meet the Hitmakers: AMC's Collier, A&E's Dubuc, FX's Landgraf Are Keeping Broadcast Nets Up at Night," *Advertising Age*, April 7, 2014.

Ms. Dubuc, President and CEO of A&E Networks also said, "Even in the distribution, if you don't own it, you're not going be a part of the over-the-top [selling content to streaming services]. Ownership is critical."

Downstream revenues incentivize network ownership of content and because rules no longer exist to ensure independent content is offered on television, independent producers lack the power to get their content on television.

The decline in independent programming has reduced the number of potential employers for writers. In 1989, 89% of TV writing jobs and 88% of TV writing compensation came from outside the conglomerates. By 2013, those figures have declined to 25% and 14%, respectively.[7] The pivotal moment was the repeal of Fin-Syn in the 1990s. Despite the expansion of television outlets, both jobs and compensation have shifted from independent studios and production companies to vertically integrated media conglomerates.



The consolidation has caused considerable harm to the creative community. The market power possessed by these media conglomerates allows them to capture a majority of the economic value created by television production, to the detriment of actual content creators. Studios, now guaranteed distribution by virtue of having vertically integrated with networks, no longer compete for talent as a means of differentiation. The inordinate power held by these media conglomerates allows them to make increasing demands on

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

the talent community. The result is that writers must do more work for less pay and are deprived of the funds necessary to continue developing creative works.

Because television networks insist on content ownership, the WGAW believes that independent programming will continue to decline on television unless regulations are put in place that require minimum levels of independent programming for broadcast and cable networks.

However, the rise of the Internet as a platform for original video programming offers some promise for the reintroduction of independent content. 2013 marked the debut of original television-length programming from outside the television ecosystem as Netflix and Amazon began offering original drama and comedy series directly to consumers. Press reports indicate Xbox, Sony Playstation and Yahoo! will be the next online providers to offer such programming.[8] Many of the original series debuting on Netflix have come from independent producers who do not own a television network, including Media Rights Capital, Lionsgate, Sony and Gaumont International Television. Press reports indicate that content being developed for the Xbox will also come from independent sources. These additional outlets have created new space for independent producers, but only an open Internet that prohibits discrimination at interconnection points or over the "last mile" will ensure this progress continues.

We do not believe that reauthorizing the Satellite Television Extension and Localism Act will improve or worsen the availability of independent programming on television.

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[8] Nellie Andreeva, "XBox Develops Pro Skater Comedy Series," *Deadline Hollywood*, December 6, 2013; Marc Graser, "Microsoft to Launch First Original Shows on Xbox in Early 2014," *Variety*, December 13, 2013; Nellie Andreeva, "Xbox Developing 1990s Music Series Based on Rapper Nas' Life," *Deadline Hollywood*, February 11, 2014; Bryan Bishop, "Sony's first original TV series for Playstation will be 'Powers,'" *The Verge*, March 19, 2014; Mike Shields, "First Netflix and Amazon. Now Yahoo to Get Into TV Programming Game," *The Wall Street Journal*, April 5, 2014.

SENATOR GRASSLEY'S WRITTEN QUESTIONS FOR SENATE JUDICIARY COMMITTEE HEARING "REAUTHORIZATION OF THE SATELLITE TELEVISION EXTENSION AND LOCALISM ACT," MARCH 26, 2014

<u>Questions for Ellen Stutzman (Writers Guild)</u>

What are your views on how the video marketplace has changed since Congress last authorized STELA? What has happened in terms of technology, competition and pricing for consumers?

> Over the last five years, there have been positive developments in the video marketplace including new devices for video consumption like tablets and Internet connected set-top boxes, new video services like Netflix and Amazon Prime, and increased on-demand programming options, almost all a result of rise of the Internet as a video distribution platform. But, this progress has largely occurred at the edges of the video marketplace, while the state of the multichannel video programming distribution (MVPD) business has remained largely unchanged. MVPDs remain the dominant video providers, with 90% of television households having an MVPD subscription.[1] And, the MVPD market is concentrated, with four companies controlling two-thirds of subscribers.[2] The proposed Comcast-Time Warner Cable merger would further concentrate market control through the combination of the first and fourth largest MVPDs. In its most recent report on cable industry prices, the Federal Communications Commission reported that the average cost of expanded basic cable service was $61.63 per month in 2012, up almost 18% from 2009.[3]
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> Because cable operators have largely chosen not to compete directly, satellite has provided consumers with some measure of choice for cable television service. But the choice between 3 operators can hardly be considered robust competition. While AT&T and Verizon have also entered the MVPD market, they only serve about 40% of the country and Verizon has stopped expanding its service to new markets.[4][5] Because satellite does provide consumers with an alternative to cable, it is important that Congress reauthorize STELA.
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> Online video has the potential to increase competition and provide consumers with additional choices that may address price concerns. For instance, a Netflix or Hulu Plus subscription is available for only $7.99 a month and both offer thousands of on-demand video choices. However, online video services are not substitutes for an MVPD service. A service such as Netflix is akin to an individual television network like HBO. It offers only a limited menu of programming, and, in the case, does not offer must-have content such as news or live sporting events. So, the availability of such alternatives may exert

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[1] FCC, *In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket 12-203, Table 17, (2013).
[2] SNL Kagan, "U.S. Multichannel Industry Benchmarks," 2013 and "U.S. Cable Subscriber Highlights," 12/13Q.
[3] FCC, *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-266, p. 23, June 7, 2013.
[4] SNL Kagan, "Media Trends," 2013 Edition, p. 212.
[5] Steve Donohue, "Verizon pressured to expand FiOS in New Jersey," *Fierce Cable,* October 4, 2013.

some pressure on competing channels such as HBO or Showtime, but exerts no pressure on MVPDs. But, online video services will only flourish in an environment where Internet service providers (ISPs) do not act as gatekeepers. Unlike traditional MVPDs, online services rely on ISPs to deliver their content to consumers. Since most ISPs are also MVPDs, the online video market requires strong nondiscrimination rules to ensure that incumbent firms do not limit the development of robust competition. This is particularly important given the history of Comcast throttling Bit Torrent traffic and exempting its own video service from data caps when watched through Xbox devices.

What is the proper role for Congress in responding to marketplace disputes in the communications industry?

The proper role for Congress is to broadly review market activity to determine if existing laws promote competition, diversity, innovation and consumer choice. Such a role is preferred to responding to individual disputes between MVPDs and broadcast and cable channels.

It's been reported that incidents of television programming blackouts have been steadily increasing, from 12 blackouts in 2010 to over 100 blackouts in 2013. What do you believe is causing this trend? Is this evidence of a system that is broken, or just a function of the free market?

While retransmission consent has been in place since the passage of the Cable Television Consumer Protection and Competition Act in 1992, the recent change in practice has been for broadcasters to seek per-subscriber compensation as a part of retransmission negotiations. Prior industry practice had been to use retransmission negotiations to secure carriage of additional cable networks. This change may be undesirable for MVPDs, but broadcasters are within their rights to seek compensation and doing so does not mean the system is broken.

Broadcasters appropriately have the right to withhold programming if they cannot reach an acceptable agreement with an MVPD. This is necessary because television networks sell to a concentrated MVPD market, controlled by a few large and powerful buyers. While households can access local stations using a digital antenna, almost all television households use an MVPD service to watch the broadcast networks. That broadcast networks must go through MVPDs to reach the public gives these distributors significant negotiating leverage. It is, therefore, appropriate that broadcasters have the right to resist MVPD efforts to avoid paying for content. Without the right to engage in retransmission negotiations, revenue available to invest in programming would decline, harming content creators and consumers.

We believe that broadcasters continue to have sufficient incentive to reach agreement. Broadcast stations cannot afford a strategy in which they lose viewers, even temporarily. The business model of network television and the competition for television viewers necessitate uninterrupted distribution of broadcast programming through MVPDs.

Further, broadcast network programming is funded by advertising revenue with retransmission revenue playing a small but important supplementary role.

If local programming is truly valuable to consumers, some argue that the free market alone is sufficient to ensure that this content will be negotiated for and distributed to consumers who are willing to pay for it. Do you agree or disagree with this statement? Why or why not?

In a free market, we would expect that the content valued by consumers would be the content they would choose to purchase. However, at present consumers do not have the ability to select only the content they want to watch. Rather, large and powerful distributors in a concentrated MVPD market sell bundles of television channels in various programming packages as well as bundles of services that include telephone and Internet access. Absent a la carte requirements, these middlemen set the price for bundles of content and through their size and control of access to consumers have both the means and incentive to limit both consumer choice and compensation paid to broadcast and cable networks. This is why rules such as retransmission consent are necessary, as they help provide some balance between broadcasters and MVPDs. Other rules, such as independent programming and a la carte programming requirements would also restore competition to this marketplace and give consumers the ability to make choices in a free market; currently such a free market does not exist.

Do you believe that any laws currently affecting the video marketplace are unnecessarily creating higher costs for consumers?

The ability of incumbent MVPDs to bundle programming such that consumers must pay for channels they do not wish to purchase costs some consumers more than if they were free to choose just the channels they wish to subscribe to.

How should we address the nascent online video distribution models which may displace the traditional distribution methods altogether? Should internet-based video distribution models receive statutorily-imposed rights, obligations, and prohibitions like their satellite and cable company counterparts? Or should the government let the free market work?

To enhance competition and make online video a viable substitute to MVPD offerings, the WGAW believes that changes to existing regulations are necessary and should include the expansion of the definition of an MVPD. In 2012 the FCC sought comments on the interpretation of the terms "Multichannel Video Programming Distributor" and "Channel" arising from a Program Access complaint involving an OVD provider of a cable subscription service.[6] The WGAW supports an MVPD definition that recognizes that programming distributors need not provide the transmission path in addition to the

[6] Public Notice, *Media Bureau Seeks Comment on Interpretation of the Terms, "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, DE 12-507, March 30, 2012.

video programming. The inclusion in the MVPD definition of entities that make use of third-party facilities to provide video programming would be consistent with Congressional intent to enhance competition in video programming distribution. In recent years, with the development and adoption of high-speed Internet, it has become possible for MVPDs to deliver multiple channels of video programming without owning the "facilities" or the transmission path. Given the concentration that currently exists in the MVPD market, this technological breakthrough could play an integral role in enhancing competition. We are encouraged by recent press reports that indicate satellite provider Dish has reached agreement with Disney to offer its channels in a virtual cable package, but we are at the same time concerned that only large incumbents like Dish have the power to negotiate such deals, with new competitors continuing to be barred from the market.[7] Intel abandoned its virtual MVPD efforts in 2013, selling its technology to Verizon.[8] Sony has been working on a virtual cable service for its Playstation console, but reports indicate that licensing negotiations have slowed progress.[9] A change in the MVPD definition would help with content licensing, ensuring these virtual MVPD efforts become a reality.

Another critical component necessary for a competitive online video market is an open Internet. Online services rely on Internet service providers (ISPs) to deliver their content to consumers. Since most ISPs are also MVPDs, the online video market requires strong network neutrality rules to ensure that incumbent firms do not engage in anti-competitive conduct. Such action is necessary because the broadband Internet market is not competitive. Four companies control 68% of the broadband market.[10] In addition, almost one in three Americans has only a single option for Internet service fast enough to stream videos.[11] The large capital expenditures necessary to build out broadband service limits consumer choice. Verizon and AT&T fiber offerings are only available in about 40% of the country. While ISPs may point to Google's entry into the broadband market as evidence of competition, it is worth noting that even if Google were to expand into all of the 34 cities it recently expressed interest in, its fiber network would only pass a total of about 3.9 million households out of 119 million occupied U.S. households in 2013.[12] The lack of competitive broadband offerings coupled with MVPD control of broadband, makes strong net neutrality rules that apply to interconnection as well as the "last mile" of broadband service necessary. This is the only way to guarantee a robust, competitive online video market.

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[7] Todd Spangler, "Disney Deal Gives Dish the Rights for a Virtual-MSO Foray," *Variety*, March 12, 2014.
[8] Steve Kovach, "Intel's Revolutionary Internet TV Service Is Coming To Verizon," *Business Insider*, January 21, 2014.
[9] Liana B. Baker, "Sony to test PlayStation-based cloud TV service," *Reuters*, January 7, 2014.
[10] Leichtman Research Group, "2.6 Million Added Broadband from Top Cable and Telephone Companies in 2013," March 17, 2014.
[11] FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2012*, December 2013, p 9.
[12] Kamran Asaf, "Google targeting over 3 million households with its planned fiber expansion," *SNL Kagan*, March 4, 2014.