Independent Film & Television Alliance®

Testimony of

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before the

House Judiciary Committee

Regarding

"Competition in the Media and Entertainment Distribution Market"

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Mr. Chairman and members of the House Judiciary Committee:

I am President and CEO of the Independent Film and Television Alliance (IFTA). I appreciate the opportunity to testify before you today about the merger of Comcast and NBC Universal and its negative impact on source diversity and distribution of independently produced content.

We know what is good for Comcast and NBC in this merger: the "cost savings" and "synergies", which they define clearly as the ability to self-source programming across their many platforms from free television to cable to video on demand to the internet, avoiding the "transaction costs" involved in acquiring independent content and extending the reach of those channels and the self-sourced content to a wider audience.

But what is good for Comcast and NBC is not good for the American public. This merger is a further step in the extensive drive toward vertical integration in the media industries that has already severely reduced the chances for independently sourced programming to reach the public. If allowed to go forward, the merger will give the American public far less choice in programming as more channels and distribution platforms are closed to independent content. This conflict between a corporate interest and the public interest is at the heart of the larger issue that I would like to discuss today – an issue that cuts to the core of the American values of diversity, creativity and free exchange of ideas.

The Larger Issues at Stake

The issues surrounding this merger are not only a particular concern of IFTA's – the impact of the merger on independently produced creative content in this country -- but are also of utmost concern to the public. The impact of this merger will be felt across the entertainment and communications industries, from motion pictures to cable and broadcast television to the Internet.

The issue is the very future of creative life, cultural expression, and the free exchange of ideas. These questions are fundamental: (1) *whether Americans will continue to have the opportunity to be informed, entertained and challenged by a diversity of ideas*; and (2) *whether independent artists will continue to have access to mass audiences through mainstream distribution outlets* -- or conversely, *whether a handful of corporations – however well-led and intentioned – will be allowed to use control of production and distribution to eliminate original, independent content from the competitive equation.*

In an era of media consolidation and corporate giants, I represent and speak on behalf of the independents. IFTA is the nonprofit trade association for the independent film and television industry representing production and distribution companies worldwide. We represent more than 150 companies engaged in every facet of the industry. Our members include independent production and distribution companies, sales agents, television companies, and institutions engaged in financing films.

By "*independents*," we mean those companies and individuals apart from the six major studios that assume the majority of the financial risk for production of a film or television program. This is not a test that relies on the "spirit" of the production or its budget level to define independence – it reflects only the economics that drive individual entrepreneurs to select a project, assemble financing and move to production and distribution.

Together, IFTA Members produce over 400 feature films and countless hours of programming annually. Over the last six years alone, independent production companies have produced nearly 80% of all feature films. The independent film and television industry is responsible for the creation of nearly 200,000 American jobs annually. Total worldwide export revenues from the independent sector are more than $2.3 billion for 2008.

Independents bring high-quality, diverse and creative programs to the public, enriching and informing the nation's cultural life. Since 1982, IFTA members were involved in the financing, production and US and international distribution for 63% of the Academy Award Winning Best Pictures. These offerings include *Gandhi, Dances with Wolves, Braveheart, Million Dollar Baby, Crash, The Departed, No Country for Old Men,* and *Slum Dog Millionaire.* This year's award season has featured independent films including *The Hurt Locker* and *The Last Station.*

Yes, the content that independents produce is entertainment – not news, talk or public affairs. But other formats such as situation comedies, dramas and documentaries have changed how Americans think about themselves and others.

For instance, *The Cosby Show* was produced by an independent company. In the popular series, a middle class, African American family was presented to a national television audience, *helping to transform racial attitudes.* Similarly, such independently produced films as *Gandhi, Crash* and *Million Dollar Baby* prompted public discussion of issues as varied as pacifism, social divisions, and euthanasia.

Compared to conglomerates, independent producers are more likely to embrace diverse voices, viewpoints and backgrounds. Films such as *Crash, Million Dollar Baby* and even *Lord of the Rings* found no home at the major studios. Public policies should encourage such diversity – not collude in stifling it.

To understand the independent industry, it is critical to understand the role that distribution plays not only in bringing the programming to the public, but also in ensuring that production finance can be assembled. With rare exception, the independents must guarantee that distribution through major channels is available in the United States to secure production financing. As vertical integration has led first television networks, then premium pay channels and family-specialized basic channels to turn away independent programming and to rely on self produced (and in many cases recycled) programs, the ability of producers to generate programming independently has also been eliminated.

For the past 15 years, industry trends have promoted consolidation and uniformity – not independence and diversity. Through the almost unlimited domination and control created by vertical integration between the studios, broadcast and cable networks and, if this merger goes through, the Internet, a small group of executives in the major conglomerates has wielded almost total control to choose how, when and whether films and programs will reach the public. The financial preference by conglomerates for affiliated programming, which they can then replay, re-purpose across their various distribution platforms and remarket to sell countless theme park and concert tickets, all types of merchandising, clothes, cereal, toys, CDs and video games may be good for *their corporate profits* but not so good for the American public who is cheated out of diverse sources of programming regardless of whether a film's or program's topic would make for a theme park ride. The public loses when they are limited to "major conglomerate brands" and cross-promotable programming produced by the gatekeepers -- and are not exposed to the diversity and breadth that independent programmers offer.

This merger of two powerhouses in the entertainment world will only worsen this troubling trend. Yes, Comcast has said that they will add independent channels commencing in 2011. But this assurance does not address the fundamental concerns of independent content providers and the audiences they serve.

Comcast has not clearly outlined its definition of an "independent channel". We do not know what percentage of its content will be truly independent. We do not have binding assurances that budgets for acquiring content will be competitive with those on the major channels. In short, we do not know whether these new channels will simply be a walled and sparsely tended garden.

This much we do know:

There should be independently produced programming across all channels of the merged entity and in meaningful quantities so as to provide real choice and options for the American public and real commercial distribution outlets for independent producers.

This merger should not be approved unless there are strong, enforceable conditions included to ensure that independent program suppliers will have more access to distribution slots on competitive conditions as a result of this merger. We respectfully urge decision-makers to insist on specific and enforceable requirements on the minimum number of program slots that must be filled with independent programming, or a percentage of the overall acquisition and production budget for content that must be allocated to independents. These requirements must operate to expand the number of sources and the diversity of programming offered to the public after the merger rather than allowing any decline.

The Declining Distribution Opportunities for Independent Programming

In the past, public policies encouraged diversity and independence. More recently, government has been largely silent about media consolidation and its negative effects on the American public and independent producers. I am here today to urge that, once again, public policies support source diversity and varied voices in media.

From the 1940s through the early 1990s, the independent production industry flourished as a result of several Justice Department and Federal Communications Commission decisions. For the most part, such decisions barred studios from owning theaters and prohibited them from vertically integrating their production divisions with television distribution and theatrical exhibition.

As a result, independent producers were provided greater access to these markets. This benefited independent companies, who were able to create diverse content, obtain U.S. distribution and maintain profitable businesses (which in turn funded future production). More important, it benefited the American people who had access to high quality, engaging programming.

However, in the mid-1990s, two major developments severely limited the viability of independent producers and distributors:

First, the elimination of the Financial Interest / Syndication Rules ("fin/syn") and removal of the related consent decrees left independent producers and distributors vulnerable; and then the inevitable vertical integration of major studios with the major national broadcast television and thereafter with cable networks occurred effectively closing off to independents the majority of broadcast and cable television distribution.

These two trends eliminated most independent feature films and television programming from broadcast television, including from lucrative primetime viewing hours. The public was left with limited programming because the same five major studio conglomerates that produce their own programming also act as gatekeepers for the majority of U.S. distribution in all media.

Yes, the networks claimed that the expiration of the Financial Interest/ Syndication Rules would create *more* competition. But, once again, this just isn't true.

In fact, the removal of those regulations, which in essence guaranteed a certain level of competition in video programming distribution, has permitted a rapid acceleration of consolidation. This has allowed the major conglomerates to prefer their own programming and their affiliates' programming because in order to maximize their profits it is in their best interest to exercise control over all aspects of the economic life of the program – which translates into the *least amount of competition* in video programming. Without government regulation or oversight, U.S. distribution opportunities for independently produced programming have steadily dwindled and in some program categories have disappeared altogether.

The lack of distribution opportunities today for independent programming is evidenced by some glaring statistics. Five major conglomerates now own the national broadcast networks and 24 out of 30 of the top cable channels that offer fictional programming, which are available to over 85% of U.S. cable households. These same companies produce over 80% of all primetime programming, and control 85% of the primetime television market share. Additionally, during the years 2002 – 2008, nearly 100% of the fictional TV series that met the minimum episode requirements for off-network syndication eligibility were produced by the network / major studio conglomerates.

As the major networks have been allowed greater vertical integration, the percentage of independently produced series on the national broadcast networks have declined from over 50% in 1989 (when there were four national networks) to just 5% (on the now five networks) in 2008. This has resulted in these same broadcast networks airing over 70% of their own programming in syndication on basic and pay cable channels. Based on this staggering result, it is clear that first run television syndication once was a significant market for independent programming. But now this market is gone.

Because of these developments, the independent film and television industry has suffered – and so has Americans' access to diverse sources of entertainment and information.

In 2007 and 2008, only 3% and 5% respectively of the total fictional TV series aired in network primetime viewing hours were independently produced. Such minimal distribution opportunities for pilots or series means that independent series programming is no longer being produced.

From 2002-2008, just 10% of feature films on network TV were from independent producers. Those independent producers seeking distribution for their feature films on network television are just plain out of luck. For a sampling of programming weeks, in 2007, only 1 independent feature film was aired by U.S. networks and during the sample week in 2008 none was aired. In both 2007 and 2008, only 22% of the total network and cable television slots for feature films were occupied by independently produced films.

Children's Programming Has Suffered

Americans want the best for our children. But children's programming has suffered because of increasing vertical integration in the entertainment industry. Today, the public is left with limited sources of children's programming because major studio conglomerates control the primary distribution channels for children's programming and often prefer their own or affiliated programming. This leaves children and their parents with limited perspectives and choices in programming.

In the past, independent producers created a variety of family and child-friendly entertainment and educational programming that continue to shape American culture today. These include *Sesame Street*, *The Muppets* and *Scooby Doo animated series*, just to name a few.

However, in the mid-1990s, the vertical integration of major studios with the major national broadcast television and cable networks severely limited the choices for children's or family programming. This is especially true on commercial broadcast networks, while PBS continues to offer excellent educational programming. Many of the major independent producers of children's programming of the past have been bought out by major studios, e.g., Hanna Barbera to Warner Bros., The Jim Henson Company and Keystone to Disney, and Saban Entertainment to Fox Family, then later to ABC Family. Between 2002 and 2009, family programming by independent producers accounted for only 18% of the programming on the three major children's programming networks- ABC Family, Cartoon Network and the Disney Channel. As noted above, these conglomerates look to fuel merchandise, toys, theme parks and other products aimed at children – potential they only see in programming that is produced internally or for which they control all rights in perpetuity. There is no market here for programming produced independently and offered in competition with the "major store brand" and the public's range of choice has become negligible.

The Consequences of the Merger for Traditional Distribution Platforms

Since the 2002-2003 season, the major opportunities for independent programming have been shifted to a handful of basic cable channels which routinely acquire a pre-defined number of feature length films or movies of the week (usually on a flat fee basis) for each season or are willing to take a limited number of episodes of innovative series. If this merger goes through, many of those channels (ranging from G4 to SyFy to USA Network) will be subsumed in the new combined entity. These channels are currently the only outlets that regularly offer the public access to independently produced, commercial program fare and they sustain a segment of the independent production industry. This merger must not be permitted to go forward without an express requirement that independent program offerings are maintained at or above the current level, at competitive terms and with arms-length negotiation, on these and successor channels.

The Consequences for Internet and New Media Distribution

In today's media world, the Internet and major Video on Demand services are largely a mirror of traditional distribution platforms. The proprietors of the key services are either the conglomerates themselves, offering "catch-up TV" on branded websites. Catch-up TV is merely a code word for reruns as they were commonly known on broadcast television because these sites only repeat what has already aired on the primary cable or broadcast channel (e.g., see http://disney.go.com/videos/#/videos/tvshows/ which replays what has already aired on the Disney Channel). Media conglomerates launch ventures that primarily seek to drive traffic to their sites by offering only programming that has been supported by major theatrical marketing campaigns or television series runs. Therefore, if independently created programming is shut out of network television, it is automatically shut out of commercial Internet distribution opportunities that may follow.

Initiatives such as "TV Everywhere" do not address and indeed further exacerbate the problems of lack of access and competition in video programming since the programming offered on destination sites will be the same programming of the underlying cable service and/or major studio theatrical fare. Comcast has been crystal clear in its filings to the Federal Communications Commission that it does not intend to seek programming outside its own NBC-Universal backlot, thus dispensing with the "transaction costs" inherent in dealing with third parties. It is proceeding with this merger in order to feed its own pipelines with pre-defined and priced content. As one of the nation's major broadband providers and the third largest telephone provider in the country, Comcast is able – and apparently ready and willing – to define a marketplace that is merely a closed system for its own manipulated distribution and maximized profits. This is a step that can deprive the American public of meaningful choices in the content it is offered and that will undermine the ongoing viability of independent production in the new media environment.

It is tempting for those outside the industry to argue that the Internet is an unlimited highway and that delivery to the public is a simple matter of posting programming on line. This is unrealistic in the context of commercially produced, feature length films and high-concept series for the simple reason that the Internet, used merely as free distribution and marketing, provides no realistic model to support future production and wide availability of programming on the Internet discourages distributors in other media from investing in either distribution or production costs. Because of these realities, the Internet at large is not an alternative to the major sites (such as *Hulu.com*) or to cable-delivered Video on Demand or to original distribution on traditional media. These are platforms that support commercial investment – but many, today, lead back to Comcast, NBC Universal or the handful of similarly placed conglomerates.

Conclusion

This merger places at risk the opportunities for diverse, original and independent programming to reach the public through traditional media and the new platforms. It should not be permitted to go forward without conditions that firmly protect access for unaffiliated content providers and the rights of the public to make its own programming choices.

Now, as in the past the American ideals of competition, independence, and diversity must be the watchwords of our nation's public policy. Now, as in the past, Americans deserve the greatest variety of voices in the entertainment they enjoy and the information they receive. Now, as in the past, Congress and the regulatory agencies must make sure that a few media magnates do not determine what the American public can see and hear.