



**Statement for the Record of Sandra M. Aistars, Chief
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**Before the Committee on Judiciary Subcommittee on
Courts, Intellectual Property and the Internet**

Compulsory Video Licenses of Title 17

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The Copyright Alliance is a non-profit, public interest and educational organization of artists, creators, and innovators of all types. Our members include artist membership organizations and associations, unions, companies and guilds, representing millions of creative individuals. We also collaborate with and speak for thousands of independent artists and creators and small businesses who are part of our One Voi@e grassroots group.

We submit these comments to aid the Subcommittee's understanding of the significant investments made by creative individuals and businesses of all types in producing and distributing high quality programming, and to underscore the importance of ensuring that appropriate vehicles remain in place to ensure that compensation flows to the creators of such works, in order to stimulate further investment in creative endeavors that benefit us all.

Innovation in the video marketplace, and the costs of producing high quality works

Innovation in the creation and distribution of video programming is happening throughout our membership and all across the spectrum of creators – from major motion picture companies and television show creators, to young, indie filmmakers, documentarians and web-based artists and programmers working on their own.

As a result, audiences have never had as many options for watching movies,

television shows and original web-based programs.

Creating audiovisual works with high production values is an expensive proposition whether you are an independent documentarian, a major motion picture studio, or a television production company. Writing, directing, producing, acting in, staging, filming, and editing such works is labor and talent intensive, and can carry commensurately large costs. Independent filmmakers routinely invest hundreds of thousands or millions of dollars whether they are creating documentaries, animated works or live action films.

Two of our grassroots members, mother/daughter filmmaking duo Gail Mooney and Erin Kelly, spent three years making a film documenting the stories of eleven individuals on six continents who are working to make a positive difference in the world. The documentary, *Opening Our Eyes*, seeks to create awareness about the power of the individual and inspire others to do what they can to improve the world. After six months of pre-production work, it took 99 days, travel to six continents and seventeen countries, and thirty flights, fourteen vaccinations, eight visas, 2900 gigabytes of storage, 150 hours of footage, and 5000 still image captures, followed by a year of post production, and another year of marketing and promotion to produce and distribute the film. Gail and Erin are currently using web 2.0 technology and social media to screen their film around the world and are pursuing video on demand distribution via Vimeo and VHX.

On the other end of the spectrum, Hollywood movie studios routinely invest hundreds of millions of dollars creating, distributing and marketing blockbuster films to entertain us. And creating original episodic programming is likewise expensive and talent intensive. Netflix reportedly spent \$100 million dollars to create its original series *House of Cards*.¹ HBO spends an average of \$6 million an

¹ Steven Rosenbaum, *Netflix's Risky Strategy For 'House of Cards'*, Forbes (Feb. 5, 2013), <http://www.forbes.com/sites/stevenrosenbaum/2013/02/05/netflix-risky-strategy-for-house-of-cards/>.

episode to make *Game of Thrones*.² Creators large and small take big financial risks in developing their works. Encouraging them to keep creating will require respecting their choices in how they distribute their works.

Innovation in modes of distribution

Happily, because creators are pursuing diverse modes of distribution, audiences have more choices than ever before for viewing films and television programs. Services such as Netflix, Hulu, VUDU, HBOGO, Crackle, MUBI, Amazon, and EpixHD; devices such as AppleTV and Roku; and technologies such as UltraViolet enable consumers to watch what they want, when they want, where they want. The creative community has embraced all of these options, and is continually creating more opportunities for audiences.

Five years ago, video streaming was still fairly rough in terms of quality and reliability, but today viewers are enjoying a growing number of high definition streaming services including:

- *Maker.tv*, a website formally unveiled this past Tuesday, will include premium shortform content produced by Maker Studios.
- *Vimeo On Demand*, which allows filmmakers to charge for access to videos. Demonstrating how the video marketplace is evolving on all levels, Vimeo recently began offering advances to filmmakers in exchange for temporary exclusive streaming rights to their works.
- *YouTube* -- in addition to its free videos, YouTube launched paid subscription channels last May, and currently offers over 125 channels with fees starting at \$0.99/month.
- Cable and satellite companies and networks have collaborated to launch a variety of video on demand services, including *TV Everywhere* services for delivering online, on-demand television programs and movies to cable

² Leslie Gornstein, *Holy Flaming Warships! How Expensive is Game of Thrones, Anyway?* E Online (May 28, 2012), <http://www.eonline.com/news/318306/holy-flaming-warships-how-expensive-is-game-of-thrones-anyway/>.

- subscribers via a variety of devices.
- *Stageit* is a service that allows creators to broadcast live, interactive shows with monetization opportunities. Although the service is primarily geared toward musicians, as a video platform it has application to other types of works.
 - And the rising popularity of Webisodes -- short episodes, outtakes character explorations or other additional content of television programs and films developed specifically for the internet – shows that not just the services but also the programming available to audiences is evolving and changing.

Today more households than ever have access to this variety of programming. Almost 42 million homes—more than 35 percent of TV-households—have a TV connected to the Internet directly or through a game console, online set-top box, or Blu-ray player, according to estimates cited in the FCC's 2013 video competition report. Using these technologies, more than 400 legitimate streaming services worldwide are offering movies and TV shows, including programming produced specifically for online distribution. This includes nearly 90 services in the United States. (To see a current list visit www.WhereToWatch.org.)

These examples show that the technologies and business models underlying the video industry are evolving daily and at an ever-increasing pace. The creative community is innovating and experimenting with different ways of creating, funding, and delivering video to viewers. This experimentation is healthy and spurs the development of other delivery systems. We must allow artists to create, entrepreneurs to innovate, and markets to operate in this burgeoning environment without imposing the constraints of new compulsory licenses on them

The economic contributions of the creative community

Allowing breathing space for creativity is good for the economy. The creative community is producing jobs and other important economic benefits locally and nationally.

In 2011, the motion picture and television industry supported 1.9 million jobs; \$104 billion in wages, with an average production salary of \$84,000. These businesses also contributed \$16.7 billion in sales, state income, and federal taxes; and exports of these works created a \$12.2 billion trade surplus in the sector. Importantly, the motion picture and TV industry includes more than 108,000 businesses located in every state in the country. Many of these are small businesses -- 85 percent employ fewer than 10 people. Truly, innovation in the video marketplace knows no bounds.

The Founders recognized that a creator's right to control the distribution of his or her work would spur creativity and innovation

Article I, Section 8 of the Constitution grants Congress the authority "to Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." As one of the few constitutionally enumerated powers of the Federal government, this grant of authority reflects the Founders' belief that copyright protection is a significant governmental interest, and that ensuring appropriate rights to authors would drive innovation and benefit society. Ensuring the author's right to control the distribution of his or her works is key to these societal benefits.

In Federalist Paper 43, James Madison said of the Clause, "The utility of this power will scarcely be questioned. " And he asserted that "the public good fully coincides in both cases with the claims of individuals." Early Supreme Court cases reinforce the belief that "[t]o promote the progress of the useful arts is the interest and policy of every enlightened government." ³

Because, in Madison's words, "[t]he public good fully coincides with the claims of individuals," in ensuring authors' rights would be protected, the focus of copyright law has properly been first on the author, but the ultimate effect is a benefit to society at large. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual

³ *Grant v. Raymond*, 31 US 218 (1832).

effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and the useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.”⁴

In *Twentieth Century Music Corp. v Aiken*, the Supreme Court reiterated this goal.⁵ “The immediate effect of our copyright law is to secure a fair return for an “author’s creative labor. But the ultimate aim is by this incentive to stimulate artistic creativity for the general public good.”

It is axiomatic that to benefit society, copyright law must have a dual purpose: to create a framework that encourages both creation and dissemination/commercialization of works. As the Court explained in *Golan v. Holder*, “Nothing in the text of the Copyright Clause confines the “Progress of Science” exclusively to “incentives for creation.” Evidence from the founding, moreover suggests that inducing dissemination – as opposed to creation – was viewed as an appropriate means to promote science. Until 1976, in fact, Congress made “federal copyright contingent on publication [,] [thereby] providing incentive not primarily for creation, but for dissemination. [Later Supreme Court] decisions correspondingly recognize that “copyright supplies the economic incentive to create *and disseminate* ideas.”⁶

As Justice Sandra Day O’Connor eloquently wrote “In our haste to disseminate news, it should not be forgotten the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”⁷

Since the dissemination of works properly requires the consent of the author, the

⁴ *Mazer v Stein*, 347 US 201,219 (1954).

⁵ 422 U.S. 151, 156 (1975).

⁶ *Golan v. Holder*, 565 US_(2012)

⁷ *Harper & Row v Nation Enterprises*, 471 US at 557-558 (1985)

history and development of copyright law reflects both economic and other societal goals. A creator's control over the use of his or her work – the right to determine how and when to license it – drives innovation and creativity. In fact, international law elevates this right to a human right.⁸

Compulsory licenses

There is no justification for expanding the existing compulsory license regime. To the contrary, Congress should consider sunseting it consistent with the public interest. Compulsory licenses are an extraordinary departure from normal copyright principles which ensure that creators have the right to distribute their works how they see fit. They are appropriate only in narrow circumstances to address market failure. International treaties restrict their use to such cases because they abrogate the rights of property owners and force them to license their works to government favored entities at rates set by the government. Economists and policy experts criticize them on the grounds that (1) the supposed cost savings such licenses are intended to deliver in the short term are usually more than offset by the inefficiencies that they cause over time; (2) they limit the diversity of services that would ordinarily develop via marketplace licensing; and (3) because the rates and restrictions quickly become outdated and are difficult to change, they are subject to “legislative lock-in” and result in price stagnation. This latter point about legislative lock-in is amply demonstrated with respect to the renewal of the Satellite Television Extension and Localism Act (“STELA”).

Accordingly, given the creative and compelling works and the new and innovative distribution models that exist today, there is no need to regulate in this sector by imposing new compulsory licenses or renewing STELA. Indeed, many Copyright Alliance members, to a greater or lesser extent, believe that the existing cable and

⁸ See UN Declaration of Human Rights, Article 27: (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

satellite compulsory licenses are an anachronism. As a result we see no present justification for expanding the compulsory licenses provided in the Copyright Act, or for renewing STELA. We underscore, however, that to the extent the present system is retained, the Subcommittee should ensure that it retains intact all the elements necessary to deliver compensation for the creation of works to creators, as accomplished through video marketplace negotiations.