

**REMARKS OF FCC COMMISSIONER AJIT PAI
BEFORE THE CHURCHILL CLUB**

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Ten years ago, Jawed Karim stood in front of the elephant exhibit at the San Diego Zoo and was filmed uttering these immortal words: “The cool thing about these guys is they have really, really, really, long trunks.” The resulting video, entitled *Me at the Zoo*, became the first ever uploaded to YouTube, which Karim co-founded. From my perspective, the fact that YouTube got its start with elephants rather than donkeys was a good omen of what was to come.

Me at the Zoo ends with Karim claiming, “that’s pretty much all there is to say.” But that certainly was not the case with Internet video. In the intervening decade, over-the-top video has dramatically reshaped the media marketplace and redefined entertainment for the American people.

While YouTube began with that 19-second clip, today 300 hours of video are uploaded to that platform each minute. Much of this content is personal—I myself have posted videos of my two children so that family members in India can watch them grow up. Other YouTube videos are professional productions with broader appeal. For example, DreamWorks Animation is the majority owner of AwesomenessTV, a multi-channel network producing high-end content with popular characters like Shrek and Kung Fu Panda.

Of course, user-generated platforms like YouTube are just one way consumers watch online video. Subscription video-on-demand companies like Netflix have revolutionized the video marketplace, giving birth to the phenomenon of “binge watching.” Netflix started its online streaming service in 2007. At that time, it was a sideshow to the DVD-by-mail business. Today, Netflix has 65.6 million subscribers worldwide and over 42 million in the United States, which is far more than any cable or satellite company. The company has also made a splash by producing a wide range of original content. From *Orange Is the New Black* to *Daredevil*, Netflix is now a serious competitor to broadcast networks and cable channels. And it’s even getting into the feature film business.

Netflix is not alone. Other subscription services are creating original shows and movies, giving artists more outlets to share their work with audiences. Hulu has created popular TV shows like *The Awesomes*. CuriosityStream produces hundreds of hours of documentaries. And Amazon offers original programs like *Transparent*, *Mozart in the Jungle*, and *Alpha House*, a satirical political show that would be even funnier if, rather than following four Senators living together, it tracked the hijinks of five FCC Commissioners. For now, the FCC just has videos of its monthly meetings, which are available—of course—online.

The success of subscription video-on-demand platforms has led broadcasters and cable companies to make stand-alone over-the-top plays too. For example, consumers can watch *True Detective* and *Game of Thrones* with HBO Now or *Homeland* and *Penny Dreadful* on Showtime’s stand-alone service that launched earlier this month. If you like classic TV shows, such as *Star Trek*, or current hits, such as *The Big Bang Theory*, or live local broadcasts, there’s CBS All Access. And if you are in the mood for melodrama, Lifetime began an on-demand subscription service in July featuring its movies.

Beyond user-generated platforms and subscription on-demand services, many more business models are succeeding. Some services offer customers bundles of programming channels. PlayStation Vue, for example, carries over 80 networks such as FOX, TBS, and Comedy Central. Sling TV offers about 75 channels including ESPN, CNN, and AMC. And Spanish speakers can subscribe to more than 50 channels through YipTV for \$14.99 a month.

Consumers can also purchase movies and television shows *à la carte* through services such as iTunes, Google Play, and M-GO. And ad-supported on-demand services are becoming increasingly popular. Platforms like Crackle and PopcornFlix allow consumers to watch over-the-top content for free.

Interestingly, facilities-based video providers are increasingly responding to this competition. Cable operators like Time Warner Cable are offering subscribers live TV and recent programs no matter where they are or what device they are using. Through its acquisition of AOL, Verizon hopes to create a thriving online, on-demand, ad-supported platform. And Comcast is launching its Xfinity Stream service, offering HBO and the major broadcast networks online for just \$15 a month.

It's unclear which business models have the most long-term potential. But what is clear is that the American consumer is the big winner. We have broken free from zoo-like constraints on our television viewing. For the first time in the history of video, we are in control. We watch what we want to watch, when we want to watch it, and on the device, at the location, and over the platform of our choice. Indeed, according to a study released this year by Pew Research, half of all smartphone owners, and 75% of those 18-29 years old, use their devices to watch videos during the course of a week. Today, 78% of all U.S. adults use the Internet to watch or download videos.

And in order to meet demand, programmers have improved the quality of online content. Recently, Academy Award winner and Hollywood legend Dustin Hoffman said: “[R]ight now television is the best that it’s ever been.” I think that’s *Justified*—and that’s not merely an endorsement of the FX show I’ve enjoyed watching on Amazon.

What has brought us this golden age of television? The free market. Without the burden of legacy rules, entrepreneurs took risks to deliver programming to consumers in ways unimaginable just a few years ago. And content creators have produced a wide array of innovative programming, taking advantage of new opportunities to target particular audiences.

This is something all of us should celebrate.

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But some in our nation’s capital don’t see it that way. When they look at the over-the-top video business, they see companies that have somehow escaped their regulatory clutches. Even though online video has thrived precisely because of the government’s hands-off approach, they view the Internet as too important not to regulate. And so they want to do for online video what many governments have done for—or more accurately, to—Uber or Airbnb.

In particular, the FCC’s leadership has announced that this fall, the agency will consider classifying certain online video providers as multichannel video programming distributors (MVPDs). That term of “art” comes from the 1992 Cable Act. Its meaning is as clunky and outdated as the term itself: essentially, the FCC will regulate those online video providers like cable operators or satellite companies—to treat PlayStation Vue like Comcast.

This morning, I would like to make clear that I strongly oppose this proposal. Given the remarkable success of the over-the-top video industry, the burden should be on those who favor new regulations to prove what’s wrong and explain why we should change. That case just hasn’t been made. Amazon put it well when it told the Commission, “there has been no indication that additional regulation is needed to enable this new industry to grow and bring consumers even more benefits.”

To be sure, supporters of more regulation paint a benign picture. The FCC’s rules, they claim, will assist online video providers. Or, to put in another way, we are from the federal government, and we are here to help. These words have sent shivers down the spines of generations of entrepreneurs, and over-the-top video providers should feel the same way.

To begin with, the benefits promised are illusory. For example, some claim that additional FCC regulation would make it easier for online providers to carry television broadcast stations by obligating

those stations to negotiate in good faith with providers to reach retransmission consent agreements. But there's one big problem. Even with such agreements, over-the-top video providers still could not show broadcast programming unless they also had the copyright licenses to do so. Right now, cable operators have a legal right to a compulsory license. But that license only applies to "cable systems," and the U.S. Copyright Office has taken the position that over-the-top providers don't qualify.

Some hope that the Copyright Office will change its mind, but I wouldn't bet on it. To state the obvious, an over-the-top provider with no physical distribution infrastructure is not a "cable system." On top of that, the Copyright Office believes that "the internet market is thriving . . . without any statutory licensing in place." And notwithstanding yesterday's federal district court decision to the contrary, the Second Circuit has already endorsed the Copyright Office's view. So the FCC's regulations would likely compel retransmission consent negotiations that lead to the carriage of little to no programming. In English: These would be negotiations to nowhere.

The truth of the matter is this. Right now, nothing prevents broadcast programmers and over-the-top providers from negotiating carriage and licensing agreements. Indeed, plenty of broadcast programming is currently available online. To give just one example, PlayStation Vue already carries CBS, FOX, and NBC. But if broadcast programmers don't want to give their content to particular online providers, there is nothing that the FCC can do about it because copyright law stands in the way.

And let's consider the opposite scenario. Let's say that a broadcast programmer wants an over-the-top provider to carry its programming but that provider has no interest in paying for it. Right now, that provider is free to say no and walk away. But under the FCC's proposal, the government would require that provider to negotiate with that broadcast programmer over how much the provider should pay for the broadcaster's programming. If they don't, they could be sanctioned. I fail to see how this would promote over-the-top video, and I don't think that over-the-top providers want this kind of regulatory "help."

The only other benefit that pro-regulation advocates mention is access to channels owned by cable companies. But here are some facts to keep in mind. Today, only 11% of program networks are affiliated with cable operators, and just 3 of the top 20 are controlled by cable companies. Moreover, over-the-top providers already have access to that programming. For example, PlayStation Vue carries Bravo, CNBC, MSNBC, NBC Sports Network, and USA, all of which are owned by Comcast. Sling TV carries AMC and WeTV, which are affiliated with Cablevision. As a result, all that the FCC's additional regulations would do is give over-the-top providers access to a few channels that are already available online.

Stepping back and looking at the big picture: If the benefits are so minimal, what exactly is motivating this push to regulate over-the-top video companies as if they were cable companies? Why try to fix what isn't broken? In my view, it's all about increasing the FCC's authority—about putting the FCC at the head of the digital table and bringing another industry within our reach.

Today, the FCC's leadership says that it only wants to regulate certain online providers as MVPDs, those that provide multiple channels of linear programming. But once that camel's nose is under the tent, I am confident that the body will follow and that the FCC will seek to regulate other business models as well. I can even predict one of the arguments that will be made: How is it fair to regulate one type of online video provider but not another?

So over-the-top providers should think long and hard about whether they really want the FCC as their regulator. For example, do you want the FCC telling you what programming you must purchase and at what price? Because if the FCC regulates you as MVPDs, programmers will be able to file complaints at the Commission regarding both your decisions to refuse to carry programming as well as the terms and conditions of that carriage. Do you want the FCC to regulate the volume of the advertisements that you show? Do you want the FCC to regulate your employment practices? Do you want the FCC to impose

greater closed captioning and video description requirements upon you? And that's not to mention arcane rules pertaining to navigation devices, signal leakage, inside wiring, and access to apartment buildings. It's unclear how those rules would apply.

Many in the industry understand the risks. For example, the Digital Media Association, which represents over-the-top providers including Apple, Microsoft, and Sony, has told the FCC that “[e]xcessive or ill-advised regulation at this point could deter continued investment. The tremendous developments in [over-the-top] services have emerged in an environment that permits innovators to be flexible and unencumbered. . . . [T]he addition of regulation could alter the foundation that has supported these developments and that has encouraged investment for continued growth.” As a result, the Commission’s proposal “could [] end up back-firing, reducing resources and opportunities for these innovators rather than expanding them.” I agree.

Even supporters of the FCC’s proposals see the risk. For example, Pluto, a linear streaming service, says: “Certain of the FCC’s regulations applicable to legacy MVPDs would ‘unduly and unnecessarily burden companies seeking to offer innovative new services,’ thus deterring entry into and stifling success in the emerging market for online video services.” Pluto thus asks to be exempted from virtually all of the regulatory burdens placed on MVPDs and only to receive what it sees as the benefits of MVPD status. But the Communications Act doesn’t let you pick and choose which rules apply. The choice is binary: Either you are an MVPD, or you aren’t.

For me, the way forward on over-the-top video is simple. There is no market failure. There is no problem to be solved. There is thus no need for the FCC to get involved and impose regulations that are over a decade older than *Me at the Zoo*.

Just look at headlines from the past month alone. Hulu entered into a partnership with Showtime, reached an agreement for three more seasons of *South Park*, and started streaming every episode of *Seinfeld*. Netflix announced the 2015 release dates for its first original feature films. Amazon reached a deal for programming from PBS’s *Masterpiece* franchise. Verizon agreed with Scripps to carry HGTV, Food Network, and Travel Channel on its forthcoming wireless, over-the-top subscription-video service. Comcast jumped into the fray with its Stream offer. And Showtime and Lifetime launched new over-the-top subscription services. Just about every day, it seems, there is another market-driven, privately negotiated deal that benefits online providers, content creators, and most importantly, consumers. This is happening without government intervention.

In some regards, the way this issue is playing out reminds me of the lyrics from the classic James Bond theme song *Goldfinger*, sung by the great Shirley Bassey. Like *Goldfinger*, the FCC’s leadership is pouring golden words into the ears of over-the-top providers, beckoning them to enter its web of sin, or in this case, regulation. But my advice to providers is the same as Dame Bassey’s: “Don’t go in.” For you will soon find yourselves ensnared in a web of regulations from which you will never escape.

Switching gears, there is another emerging government threat to over-the-top video that I find troubling: taxation. The City of Chicago, for example, recently announced that, beginning in September, it will impose a 9% tax on video streaming services. This new “Netflix tax” will apply not only to monthly subscription platforms such as Netflix and Hulu Plus, but also to *à-la-carte* movie rentals through services such as iTunes. And who will bear the burden of this tax? The people of Chicago. Netflix has already confirmed that it will pass the additional cost onto its subscribers, and I’m sure that other companies will do the same.

Here in California, by contrast, digital streaming services are not taxed. In my view, that’s the right approach. Government should welcome the growth of online video, not discourage it. And it is a basic principle of economics that the more you tax something, the less of it you get. That’s why, for example, Congress prohibits states and localities from taxing Internet access through the Internet Tax Freedom Act.

And that's why I am pleased that a bipartisan group of lawmakers, including Senators John Thune and Ron Wyden and Representatives Lamar Smith and Steve Cohen, have co-sponsored the Digital Goods and Services Tax Fairness Act. This legislation, which has already cleared the U.S. House of Representatives Judiciary Committee, would prevent states and localities from imposing duplicative and discriminatory taxes on digital goods and services, including over-the-top video. As Senator Thune put it, the bill would "help[] to ensure that the digital economy remains a source of innovation and economic vitality."

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To this point, I've spoken about what government should not be doing. So you might wonder whether there is anything that the government should be doing to aid the growth of online video. And the answer to that question is yes.

I have not yet mentioned one element that has been critical to all of this digital innovation: broadband infrastructure. Broadband, and a lot of it, is essential for online video to thrive; all those bits have to go "over the top" of something, after all. Since 1996, companies have spent over \$1.3 trillion in the United States to lay fiber, upgrade cable systems, launch satellites, construct towers, and otherwise build the networks over which Internet video travels. If we want to fast forward, so to speak, our policies should encourage greater infrastructure investment and network capacity.

That means streamlining the permitting process for building wired and wireless infrastructure, a process that is especially difficult here in California. That means making available to the commercial marketplace plenty of additional spectrum—from cellular to Wi-Fi—to handle the surging demand for mobile video. That means changing FCC regulations to promote broadband deployment in rural America in order to connect and grow the customer base of online video providers. That means allowing broadband providers to focus on building next-generation networks rather than requiring them to also maintain the fading networks of yesterday. And it means lifting heavy-handed economic regulations designed for the telephone monopolies of the past. The more ubiquitous and robust high-speed networks become, the more creative online providers can be in meeting the demands of the video consumer.

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Let me close with a brief personal observation. Last weekend, my wife and I struggled but ultimately succeeded in getting the aforementioned kids to bed. Exhausted, I then picked up my laptop and visited Crackle. I caught up on Jerry Seinfeld's fantastic show *Comedians in Cars Getting Coffee*—including the episode featuring the unforgettable Miranda Sings.

Aside from laughing throughout the episode—I mean, who wouldn't when Miranda gives Jerry tips on becoming "famouser"?—I realized something. In a sense, Jerry and I had entered the digital age together. Twenty years ago, I either organized my Thursday nights around NBC's "Must-See TV" or programmed an analog VCR in order to watch a comedic master of his domain on a virtually immovable television. Now, Jerry could pick how to reach me, and I could easily pick when, where, and how to watch him. What a dramatic and positive change that is, when you think about it.

It's for that reason that I think the government should let this success story continue to develop. Let's not treat over-the-top video companies like the next Uber or Airbnb—yet more entrepreneurs that have to fight endlessly against regulations inspired by the past. Let's let innovators innovate and consumers consume. And, to borrow from Jawed Karim a decade ago, that's pretty much all there is to say.

Thank you very much to the Churchill Club for organizing this morning's event, and I look forward to participating in the panel discussion that is to follow.