# THE FUTURE OF VIDEO MARKETPLACE REGULATION

**Written Testimony of**

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## Executive Summary


- The media landscape has fundamentally changed since 1992, and is still evolving rapidly, with advances in technology, evolving market structure, new business models and a consistent shift among viewers from traditional sources of content to online sources.
- Court decisions may remove several pieces of the current system, forcing reform:
  - The Second Circuit recently held that Aereo did not violate copyrights by retransmitting online content that was originally broadcasted over the air—without paying for it. If the decision stands, broadcasters will insist on a legislative fix.
  - Must-carry and program carriage may be struck down under the First Amendment because cable operators (and MVPDs generally) no longer have the "gatekeeper" power that caused the Supreme Court to uphold must-carry in the mid-1990s.
- The most constitutionally sound—and best—way to govern the video marketplace is to rely on rules of general applicability to govern market power:
  - **Antitrust**: Antitrust is the best tool for policing evolving markets, to ensure that distributors with market power do not use their power to harm consumers, while recognizing the benefits that come from experimentation in new organizational forms and business models for delivering video content to consumers.
    - The legal standard matters more than which agency is applying it, but the FCC has a poor track record of applying antitrust statutes.
  - **Copyright-based rules**: so long as programmers have a clear property right, they can negotiate with MVPDs and OVDs—or become their own OVD.
    - Congress should remove the compulsory license restriction on content owners' copyrights and end the must-carry/retransmission consent system.
- Online Video Distributors are taking off. Competition for OVDs is truly one click away.
- While some claim that online video is the "new satellite," the situation today is entirely different from that faced by DBS in the 1990s. Today we have growing intermodal competition, not only among MVPDs but also broadband providers.
  - In theory, MVPDs that also offer broadband connection might be able to thwart OVD competition if basic data tiers were set low enough, and prices for additional data set high enough, whether or not they exempted their own streaming content from such tiers. But it's hard to see how today's current tiers (*e.g.*, 300GB and $10 for 50GB more) discourage anyone from cutting the cord. Antitrust has likely already encouraged higher tiers and lower prices for additional data.
- The market for delivering video content, whether by MVPDs or OVDs that rely on broadband, could certainly be made more competitive, but not by regulating video programming. Congress should focus on removing barriers to building out wireline and

wireless infrastructure at the local level, opening up more spectrum for wireless uses, and rationalizing subsidies intended to promote broadband adoption.

  - The point is not only that 4G wireless might become a far more effective conduit for video programming than is currently imagined, such as through 4G Broadcasting, but also that exclusive arrangements may be key to incentivizing the development of such technology and should not be prohibited in advance.

- There are smarter ways to promote localism and access to free content than propping up the technological system of broadcasting. The costs of the current system most significantly retransmission fees passed on to MVPD viewers, technological and business model constraints (the development of possible online or other alternatives is retarded by the regulations protecting local broadcasters). Perhaps greatest of all is the enormous opportunity cost of the more efficiently using the spectrum currently used for broadcasting.
- Today's byzantine regulations put just about every party involved (with the exception of the broadcasters) in a worse position than they would be in if the regulations didn't exist at all.
- The provisions most directly at issue in this proceeding govern the relationship between distribution and content. But the concern animating efforts to preserve or extend those provisions – that vertical integration or monopoly power by distribution providers leads inexorably to problematic discrimination against content owners – is weak. Increased competition among MVPDs, the rise of OVDs and the complex market realities of content production and distribution today serve to ameliorate this threat.
- The debate about video programming rests on significant misconceptions:
  - Consumers are getting more, not less, for their money. Average MVPD prices went up just 10% from 2006 to 2010 in real terms, but programming choice exploded, programming expenditures increased, and new features proliferated.
  - An MVPD maximizes revenues not by keeping all others' content off its network or subjugated to remote tiers but by finding the combination of channels that minimizes its costs while maximizing the benefits to consumers
  - That not all content is available from all distribution channels is not proof of market failure. Exclusive arrangements and differential treatment of content among distribution channels facilitate the very dynamism that has led this market to thrive.
  - Ironically, those who demand *a la carte* programming also insist the FCC should have forced Comcast to include in the expanded basic tier the Tennis Channel – one of those less-watched channels that supporters of the Program Access rules elsewhere complain that competitors and Comcast subscribers must accept in order to get more valuable content.
- MVPDs and network content owners should be able to negotiate directly with each other and their respective counterparties (subscribers for MVPDs and affiliate stations for networks) free of the rules that prohibit certain efficient contractual relationships and inefficiently shape others.

- Broadcasters exaggerate harm that would result from dismantling the compulsory license and must-carry/retransmission consent regimes. That the broadcasters' arguments don't promote the public interest is betrayed by their inconsistent support for the broadcast television compulsory licensing scheme (of which they are a net beneficiary) and rejection of a compulsory license for radio performances of copyrighted works (into which they would be a net payor).

# The Future of Video Marketplace Regulation

## Introduction

Today's video marketplace is shaped by a byzantine set of rules from a bygone era. In the 1990s, cable was as mighty as the Byzantines themselves were at the height of their power: Cable's control over the single physical conduit to the home gave cable providers gatekeeper power over video programming, much as the Byzantines' control over the Eastern Mediterranean gave them control over commerce.

But cable today is simply one of several competing conduits for video programming distribution. Today's regulations were intended to prevent cable from thwarting the rise of satellite DBS service. They have succeeded: Virtually the entire country has access to the two primary DBS providers in addition to a cable provider. Meanwhile, telcos like AT&T and Verizon have offered a *fourth* alternative to cable in a third of the country. Even more importantly, the MVPD paradigm is increasingly being challenged by consumers either switching to an OVD like Netflix, Hulu or Amazon ("cord-cutting") or cutting back on their MVPD subscription and relying, in part, on an OVD ("cord-shaving").

In other words, competition is thriving – and not just in the dimensions Congress conceived of twenty years ago. This should cause legislators to revisit the fundamental, if implicit, assumption on which most video regulation currently rests: that antitrust law is insufficient to protect consumers, and must be supplemented with industry-specific regulations. This is the essential debate of all regulatory policy, and it hinges on whether sufficient market power exists across the board to justify replacing antitrust principles of general application, adjudicated primarily on an *ex post* basis, with sector-specific regulations imposed *ex ante*.

Where market power might continue to exist, in particular geographic markets or in particular circumstances, its abuse can be handled under antitrust principles by the FTC and DOJ through enforcement of Sections 1 and 2 of the Sherman Act. In theory, antitrust standards could be applied by the FCC as well, but Congress has already tried giving the FCC antitrust standards in the 1992 Cable Act—which the FCC has contorted into what is essentially a *per se* rule rather than the rule of reason that Congress clearly intended.

Antitrust, properly understood, is preferable as a standard for governing the evolving video marketplace precisely because it is a more resilient, economically-grounded form of law. We need, to borrow legal theorist Richard Epstein's memorable phrase, "simple rules for a complex world."

Further, the often-voiced concern that an MVPD could monopolize a market and begin charging higher and higher prices while offering less and less content makes no economic sense. An MVPD doesn't maximize revenue by keeping all others' content off its network or subjugated to remote tiers, but by finding the combination of channels that minimizes its cost while maximizing the benefits to consumers. Even if an MVPD were an absolute monopolist, it would still consider what consumers wanted, and even under the most draconian monopoly assumptions, consumers would still get *most* of what they want at a price they are willing to pay—or else the monopolist wouldn't maximize its revenue.

In contrast to the Cable Act's outright (*per se*) bans on specific conduct that may not actually harm competition or consumers, relying on antitrust enforcement to govern industry organization in the satellite and cable markets would better serve consumer interests. Moreover, it would allow the market to evolve more rapidly and efficiently by limiting the often enervating, unintended consequences of government intervention to instances when actual harm to consumers can be established. The market has evolved in ways even the most prescient market analyst could not have foreseen 20 years ago when the Cable Act was written. The market changed radically as the Satellite Home Viewer Act of 1999 (SHVA) begat the Satellite Home Viewer Extension and *Reauthorization* Act of 2004 (SHVRA), which begat the Satellite Television Extension and Localism Act of 2010 (STELA), now up for renewal. The market will continue to evolve going forward in ways that we cannot predict today. Allowing the Cable Act's and STELA's most problematic provisions to remain on the books allows the government to pick winners and losers in the future of this industry, something it is not qualified to do. STELA (and its predecessors) and the Cable Act were written to promote competition and to protect consumers, but the market fundamentally changed long ago, becoming quite competitive.

Rather that continuing to try to tweak the laws of a bygone era, Congress should embrace the default tool for dealing with market power across the economy: antitrust law. Properly applied, antitrust is perfectly capable of governing a market in which programmers have clear property rights for their content. Indeed, antitrust is the best tool for policing market power in evolving (if not perfectly competitive) markets, to ensure that distributors with market power do not use their power to harm consumers, while recognizing the benefits that come from experimentation in new ways and business models for delivering video content to consumers.

The provisions most directly at issue in this proceeding govern the relationship between distribution and content. But the concern animating efforts to preserve or extend those provisions – that vertical integration or monopoly power by distribution providers leads inexorably to problematic discrimination against content owners – is weak. Increased competition among MVPDs, the rise of OVDs and the complex market realities of content production and distribution today serve to ameliorate this threat.

Addressing the merits of STELA reauthorization or reform first requires an understanding of the dynamics of the broader home video distribution market, and especially the evolving nature of competition and how it has affected consumers.

## Value for the Consumer

Critics of the modern video content distribution landscape claim that consumers are paying more and getting less, and they use these claims to support retention or expansion of regulations ostensibly aimed at preserving competition.[1] Whatever the merits of their specific regulatory proposals, however, these underlying claims are weak.

Market competitiveness *is* the right touchstone—but proof of it lies in the pudding. As the FCC's Video Competition report appropriately notes:

> The structural and behavioral characteristics of a competitive market are desirable not as ends in themselves, but rather as a means of bringing tangible benefits to consumers such as lower prices, higher quality, and greater choice of services. To determine if the market for the delivery of video programming is producing these kinds of positive outcomes, we look at video prices and provide current prices for a sample of video packages offered by some MVPDs.[2]

But the way the report presents cable pricing data has made it easy for some advocates to argue that the video marketplace is less competitive than it actually is by claiming that rising prices betray structural problems in the market. In nominal dollars, the average price paid for a cable subscription increased a total of 20% from 2006 to 2010.[3] But in real terms, adjusting for inflation, the increase was only 10% (or an average of 2.52% per year).

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[1] *See, e.g., Hearing on The State of Video Before the Subcomm. on Commc'ns, Tech., & the Internet of the S. Comm. on Commerce, Science, & Trans.*, 113th Cong. 10–11 (2013) (statement of John Bergmayer, Senior Staff Attorney, Public Knowledge) [hereinafter *Public Knowledge, State of Video Testimony*], *available at* http://www.publicknowledge.org/files/State%20of%20Video%20Senate%20Hearing%20-%20PK%20Testimony%205-14-13.pdf.

[2] Federal Communications Commission, *In The Matter Of Annual Assessment Of The Status Of Competition In The Market For The Delivery Of Video Programming, Fourteenth Annual Report*, MB Docket No. 07-269, at ¶ 134 (July 20, 2012) [hereinafter *Fourteenth Video Competition Report*].

[3] Federal Communications Commission, *Report on Cable Industry Prices*, MM Docket No. 92-266 at 9, Table 3 (Mar. 9, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-377A1.pdf.

Even this might suggest to some that the marketplace is insufficiently competitive. Local franchising authorities have the ability to regulate prices for the basic tier of cable service, but, to the chagrin of some advocates, they are not required to do so.[4]

But it is not clear that price regulation would reduce prices beyond those delivered by the market. Most importantly, even this 10% real price increase does not account for improvements in product *quality*, which must be taken into account in an assessment of price for value, particularly in a dynamic market such as this one. A few quantitative measures illustrate the point:

- The total number of cable channels available to consumers increased from 565 in 2006 to approximately 800 in 2013,[5] an increase of about 42%.
- Total spending on programming increased 29.18%[6] during this period in real, inflation-adjusted dollars. This comparison offers perhaps the best proxy for the increase in programming quality.
- Indeed, 2010 programming expenditures increased by 2.28%[7] more than the average cable price[8] (both in real, inflation-adjusted dollars). This comparison shows, quite literally, that consumers are getting more programming quality for their money.
- Americans continue to be voracious consumers of TV content, watching 4:39 of live television per day,[9] a slight uptick from 4:37 in 2006[10] (not even including content viewed online). When the average of 26 minutes of time-shifted DVR playback per day is included as well as an average 27 minutes with video online and through mobile devices,[11] the total time spent daily watching TV jumps to 5:32, an increase of 19%.

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[4] Federal Communications Commission, *Regulation of Cable TV Rates*, http://www.fcc.gov/guides/regulation-cable-tv-rates (last visited June 9, 2013).

[5] *Industry Data*, NCTA, https://www.ncta.com/industry-data (last visited June 9, 2013) [hereinafter *Industry Data*]; *see also* Federal Communications Commission, *Notice of Proposed Rule Making*, MB Docket Nos. 12-68, 07-18, 05-192 at ¶26 (March 20, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-30A1.pdf.

[6] Meg James, *Cable TV Networks Feel Pressure of Programming Costs*, LOS ANGELES TIMES (Dec. 8, 2011), http://articles.latimes.com/2011/dec/08/business/la-fi-ct-cable-economics-20111208 (reporting that the amount TV networks spent on programming increased by about 9% annually over the period 2006-2010 to over $21 billion in real, inflation-adjusted dollars by the end of that period).

[7] *Id.* (*citing* SNL Kagan) (reporting that networks spent over $21 billion on programming in real, inflation-adjusted dollars in 2010, up from about $20 billion the year prior. Average real prices over that year increased at a lower rate of 1.28% in real terms. Thus the ratio of total network spending on programming to average cable prices increased by 2.28% in real terms in 2010.).

[8] Federal Communications Commission, *Report on Cable Industry Prices*, MM Docket No. 92-266 at 9, Table 3 (Mar. 9, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-377A1.pdf.

[9] The Nielsen Company, *A Look Across Screens: The Cross Platform Report* (2013)*, available at* http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2013%20Reports/Q1-2013-Nielsen-Cross-Platform-Report.pdf

[10] The Nielsen Company, *Historical Daily Viewing Activity Among Houses & Person 2+* (2009), *available at* http://www.nielsen.com/content/dam/corporate/us/en/newswire/uploads/2009/11/historicalviewing.pdf

[11] Marketing Charts Staff, *TV Still the Dominant Video Viewing Medium; Mobile on the Rise,* MARKETING CHARTS (Sep. 12, 2012), http://www.marketingcharts.com/wp/television/tv-still-the-dominant-video-viewing-medium-mobile-on-the-rise-23329/.

- 9% of cable customers have already "cut the cord," choosing to view video content exclusively online without an MVPD subscription, while a further 13% of consumers with a broadband connection have "shaved the cord," paying for a less expensive cable package because they can get much of the content they want online.[12]

If just these quantitative factors are properly accounted for, consumers actually come out well ahead between 2006 and 2010: They are paying somewhat more to get a lot more choices, a lot more content, and higher quality content. Comparatively, the price per viewing hour of cable, $0.23 per viewing hour, is still much lower than other kinds of entertainment, like a trip to the movie theater, a sporting event or even a DVD rental.[13]

Moreover, having more channels isn't better simply because having more choices is better. The exploding number of channels also means the availability of more tailored content: offerings that allow a viewer to find a category of "curated" content in one place, thus minimizing search costs. In other words, quantity and quality of content could stay exactly the same and there would still be an overall quality increase due to specialization of channels. For example, even if a channel like SyFy shows mostly reruns and creates relatively little original content, its existence probably significantly increases the value of cable for consumers interested in science fiction.

And this does not even account for greater non-price improvements in distribution services launched during the 2006-2010 period, including, among other things:

- The advent of TV Everywhere[14]
- Video quality improvements,[15] including expanded HD channel offerings[16]
- Video compression improvements[17] (increasing DVR capacity and facilitating HD transmission)
- A doubling of broadband speeds—relevant because broadband is generally bundled with MVPD service, and faster broadband means higher-quality OVD choices as well as streaming of TV Everywhere, especially to mobile devices in the home[18]

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[12] *Fourteenth Video Competition Report*, *supra* note 2, at para 341.

[13] *See Industry Data*, *supra* note 5.

[14] Rob Pegoraro, *Comcast, Time Warner Announce "TV Everywhere" Initiative*, THE WASHINGTON POST (June 24, 2009); see also Paul Madsen, *How Does TV Everywhere Work?*, BROADCAST ENGINEERING (Mar. 11, 2013).

[15] Anders Bylund, *From Cinepak to H.265: a brief history of video compression,* ARS TECHNICA (Dec 22 2009), http://arstechnica.com/gadgets/2009/12/from-cinepak-to-h265-a-survey-of-video-compression/

[16] Richard Lawler, *HD Channel Expansion Roundup*, Engadget (May 3, 2010), http://www.engadget.com/2010/05/03/hd-channel-expansion-roundup/

[17] Anders Bylund, *From Cinepak to H.265: a brief history of video compression,* ARS TECHNICA (Dec 22 2009), http://arstechnica.com/gadgets/2009/12/from-cinepak-to-h265-a-survey-of-video-compression/

[18] Federal Communications Commission, *National Broadband Plan: Connecting America*, at xi (March 16, 2010), *available at* http://www.broadband.gov/plan/executive-summary/; *see also* Federal Trade Commission, *Broadband Performance*, OBI

- Access to MVPD content from Xbox and other innovative set-top boxes[19]
- Expanded On Demand Services[20]
- New Features, including:
  - DVR Developments[21]
  - "Start Over" and "Look Back" Features[22]
  - Caller ID on TV[23]

Thus properly understood, price for value seems to have significantly *decreased*. This should make policymakers question whether continued regulation of the video marketplace is necessary—and, certainly, question the need to extend existing regulations, as some have proposed.

## Structure of the Video Distribution Market

Concerns about market structure boil down to two claims, both greatly exaggerated:

1. **Horizontal**: cable providers have too much control over access to content by competing providers, including satellite, new MVPDs like FiOS, U-Verse and Google Fiber, or online video distributors (OVDs); and
2. **Vertical**: vertically integrated cable providers have an incentive to favor their own content and to withhold access by competing content providers to their broad subscriber base.

### Vertical Integration

We discuss vertical integration in the video market at length below. Contrary to popular assumption, the rate of vertical integration has plummeted since the Cable Act was enacted. One chart says it all:

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Technical Paper No. 4, at 11 (Aug. 16, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-300902A1.pdf (Cable broadband speeds nearly doubled from 2006-2010 and increased at a roughly 20% compound annual growth rate from 1997-2010).

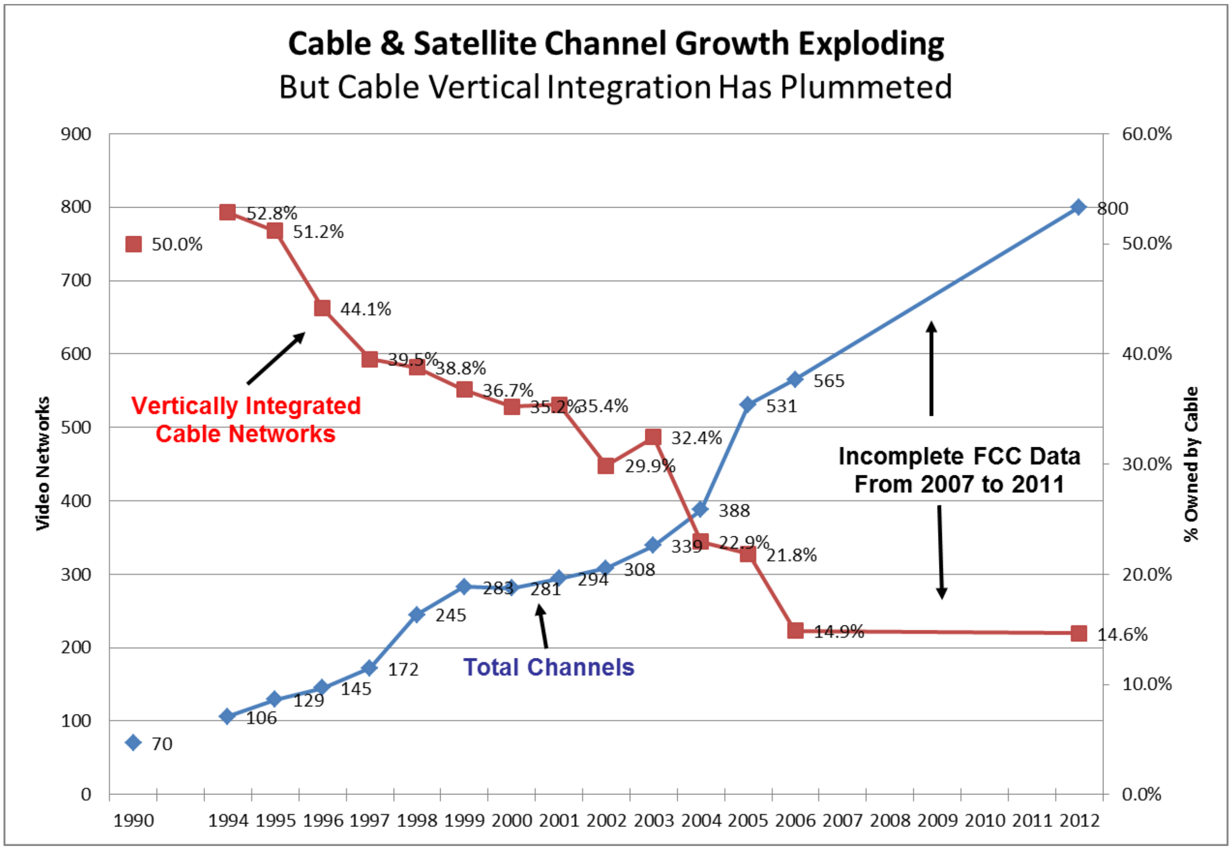
[19] Todd Spangler, *AT&T Gets Game on With U-verse TV on Xbox 360s*, MULTICHANNEL NEWS (Oct. 11, 2010), http://www.multichannel.com/telco-tv/att-gets-game-u-verse-tv-xbox-360s/128245.

[20] *See 20 Billion Views Reached on Xfinity On Demand*, http://www.comcast.com/Corporate/About/PressRoom/20-Billion.html (last visited June 9, 2013).

[21] DIRECTV has a DVR integration that now allows 5 channels to be recorded simultaneously. (*TiVo HD DVR from DIRECTV*, DIRECTV, http://www.directv.com/technology/tivo_receiver (last visited June 9, 2013)).

[22] Victor Godinez, *Time Warner Cable Launching New Start Over And Look Back Features For Dallas-Area TV Subscribers Who Forget To Record Their Shows*, DALLASNEWS (July 23, 2011), http://techblog.dallasnews.com/archives/2011/07/time-warner-cable-launching-ne.html.

[23] *Home Phone Caller ID on TV*, OCEANIC TIME WARNER CABLE, http://www.oceanic.com/products/phone/residential/features/id_on_tv (last visited June 9, 2013).




It is worth noting that the FCC simply stopped including the total number of networks beginning with 2007 data, providing only the number of affiliated networks in the last several Video Competition Reports. This made it impossible to calculate the percentage of vertical affiliation and naturally led the reader to assume that cable must be steadily increasing its control over content.[24] At best, this is highly misleading. At worst, it is a deliberate misrepresentation of a key statistic in the debate, burying the truth: cable's "power" has waned considerably.

Of course, channels are an imperfect proxy because, as noted below,[25] channels are themselves bundles of shows, and measuring affiliation of *shows* would be a far better metric of the things Congress was concerned about in passing the Cable Act and STELA in the first place (the ability of MVPDs to foreclose distribution market competition by limiting entrants' access to content) as well as the things critics of the current marketplace tend to worry about (the idea that vertical integration discourages content production and access). Unfortunately, this imperfect proxy is the best measure of vertical integration we have. And what it shows is clear: The degree of vertical

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[24] *See* Federal Trade Commission, *Notice of Proposed Rulemaking,* In MB Docket Nos. 12-68, 07-18, 05-192, pp. 66-69, Table 2 (Mar. 20, 2013) (Table 2 lists 117 "Cable-Affiliated, Satellite-Delivered, National Programing Networks"); *see also Industry Data supra* note 5 (estimating a total of 800 channels). Dividing 117 by 800 produces the 14.6% as depicted in the table above.

[25] *See infra* pp. 53-57.

integration has essentially stagnated at a level (15%) less than a third that existing at the time Congress enacted the 1992 Cable Act.

### Video Distribution Channels

The market for home viewing of video is more competitive than it's ever been, and more competitive than many critics seem willing to admit. At the time of the Cable Act's passage in 1992, cable operators served 95% of multichannel video subscribers, the first DBS satellite had not been launched, and telephone companies were statutorily barred from providing video programming. It was against this backdrop that the Supreme Court declared in the 1994 *Turner* decision, upholding must-carry: "A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch."[26] Whatever "gatekeeper" or "bottleneck" power cable might have had twenty years ago, clearly no longer exists. Competition from satellite and now telco providers have whittled cable's MVPD market share down to 57.4%—and growing numbers of Americans are dropping MVPD subscriptions altogether in favor of Internet video services. As Comcast noted in its comments on the FCC's most recent Video Competition Report:

> Over 98 percent of Americans can choose from three or more multichannel video programming distributors ("MVPDs"); non-cable MVPDs gained over 1.8 million net subscribers over the course of the last 12 months; and online video consumption continues to increase at an unprecedented rate, with 184 million users watching nearly 37 billion online content videos in July 2012.[27]

In 2006, a mere 4.7% of Americans had access to at least four MVPDs. By 2010, with either Verizon FiOS or AT&Ts U-Verse competing with cable and the two DBS providers in many markets, 32.8% of Americans had access to at least four MVPD choices.[28] DIRECTV, Dish Network, Verizon, and AT&T are now the second, third, fifth, and seventh largest MVPDs, respectively, by number of subscribers.[29] The two largest DBS providers, DIRECTV and Dish Network, now serve approximately 33.8% of MVPD subscribers nationwide.[30] And these providers, like their competitors, continue to innovate and offer valuable services like HD channels[31] and popular exclusive programming.[32]

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[26] *Turner Broadcasting System, Inc. v. FCC*, 512 US 622,656 (1994).
[27] Comments of Comcast Corp., *In The Matter Of Annual Assessment Of The Status Of Competition In The Market For The Delivery Of Video Programming*, MB Docket No. 12-203, at 1 (2012), *available at http://ecfsdocs.fcc.gov/filings/2012/09/10/6017110280.html*.
[28] *Fourteenth Video Competition Report*, *supra* note 2, at ¶ 40, tbl. 2.
[29] *Industry Data*, *supra* note 5.
[30] See Ian Olgeirson et al., *Video Losses Moderate in Q2, Multichannel Penetrations Dip*, SNL KAGAN (Aug. 13, 2012), http://www.snl.com/InteractiveX/ArticleAbstract.aspx?id=15622945.
[31] *DISH Network Claims They Have More HD Channels Than DIRECTV? Is This True?*, DIRECTV, http://support.directv.com/app/answers/detail/a_id/2783/~/dish-network-claims-they-have-more-hd-channels-thandirectv%3F-is-this-true (last visited June 9, 2013).

Meanwhile, online services like Netflix, Hulu, Amazon and YouTube continue to add subscribers and improve their product offerings through technological, business model and programming innovations. Netflix alone has 29 million domestic subscribers, eclipsing even Comcast's 22 million.[33] Competition for OVDs is truly one click away.

The FCC notes that as of June 2011, 83% of Americans have at least two wireline broadband providers and 41.5% of Americans have access to three or more wireline broadband providers.[34] Fiber service, which some critics argue is crucial to reaping the benefits of the Internet,[35] is becoming widely available as Verizon FiOS (16.5 million)[36] and AT&T U-verse (30 million)[37] fiber-based services reach more than 46 million homes combined, approximately 40% of U.S. homes.

4G LTE wireless networks offer additional competition, and these services can already deliver speeds comparable to many wireline services.[38] In April 2012, 20% of U.S. smartphone owners said they watched a video on their phone at least once a month. Nine months later, in January 2013, that number had risen to 41%**.**[39] Ericsson estimates that "67 percent of consumers use mobile devices (tablet, laptop or smartphone) for consumption of TV services. Furthermore the research shows that over 50% of TV consumption on smartphone happens outside of the home (on mobile networks)."[40] Verizon Wireless LTE will reach 285 million Americans by mid-year 2013 and the company recently launched a fixed residential LTE service.[41] With the fixed residential LTE service,

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32 Press Release, DIRECTV*, DIRECTV's Audience Network Goes 'ROGUE'* (May 10, 2012), *available at* http://news.directv.com/2012/05/10/directvs-audience-network-goes-rogue/.

33 Brad Reed, *Netflix has already recouped its $100 million House of Cards investment*, YAHOO! NEWS (Apr. 23, 2013), http://news.yahoo.com/netflix-already-recouped-100-million-house-cards-investment-011527993.html.

34 NTIA, *National Broadband Map* (June 30, 2012), http://www.broadbandmap.gov/summarize/nationwide (last visited June 9, 2013).

35 *See generally, e.g.*, Susan Crawford*,* CAPTIVE AUDIENCE (2013)

36 Verizon, *Investor Quarterly Fourth Quarter 2011* (Jan. 24, 2012), http://www22.verizon.com/idc/groups/public/documents/adacct/2011_4q_quarterly_bulletin.pdf.

37 Press Release, AT&T, *Best-Ever Mobile Broadband Sales and Strong Cash Flows Highlight AT&T's Fourth-Quarter Results; Stock Buyback Begins on Previous 300 Million Share Authorization* (Jan. 26, 1012), *available at* http://www.att.com/gen/press-room?pid=22304&cdvn=news&newsarticleid=33762 (reporting that AT&T surpassed its goal of 30 million living units).

38 Roger Yu, *Questions to consider in deciphering 4G technology*, USA TODAY (Feb. 2, 2012), http://www.usatoday.com/tech/products/story/2012-02-24/4g-network-questions/53234664/1.

39 Josh Luger, *These 5 Mobile Video Data Points Will Blow Your Mind,* BUSINESS INSIDER (June 5, 2013), http://www.businessinsider.com/these-10-mobile-video-data-points-will-blow-your-mind-2013-6

40 Press Release, Ericsson, *World's first complete solution for broadcast video over LTE networks* (Feb 25, 2013), *available at* http://www.ericsson.com/news/1680666.

41 *4G Home Broadband*, VERIZON WIRELESS, http://www.verizonwireless.com/b2c/homefusion/hf/main.do (last visited June 9, 2013).

"average speeds will initially range from 5-12Mbps down and 2-5Mbps up"[42] and theoretical speeds could be well above the currently offered broadband service.[43] By comparison, Netflix recommends a streaming rate of 3 Mbps for DVD-like quality on a large screen (1 hour = 1.4 Gb),[44] 1.5 MBps for acceptable quality, and 700kbps for mobile phone screens (1 hour = .315 Gb).[45] So current 4G service is perfectly capable of streaming high-quality video; the only question is how to manage competing demands for bandwidth on a network whose capacity at any given moment is significantly more limited than cable or fiber.

To put the numbers in perspective:

| **Service** | **Monthly Data tier** | **Monthly streaming** | **Daily Streaming** | **Monthly Price** | **Additional Data Price** |
|---|---|---|---|---|---|
| Comcast | 300 GB | 214h (DVD quality[46] | 7h | $85 | $10 for 50GB |
| Verizon Home LTE | 20 GB (optional) | 14h20 (DVD quality)<br><br>28h40 (standard) | 0h30<br><br><br>1h | $130 or $110 in family plan | $10 for 2GGB |
| Verizon Mobile | 6GB (optional) | 46h40 (phone quality)[47] | 1h33 | $80 (includes unlimited calling & texts) | $10 for 2GGB (6h20/monthly) |

[42] Neal Gompa, *Verizon Wireless launches LTE-based home broadband: $60 gets you 10GB*, EXTREMETECH (Mar. 6 2012, 1:15 PM), http://www.extremetech.com/mobile/121255-verizon-wireless-launches-lte-based-home-broadband-60-gets-you-10gb.

[43] Sean Hollister, *Verizon LTE torture test: Why 4G can't replace your DSL (yet)*, THE VERGE (Nov. 23, 2011, 1:45 PM), http://www.theverge.com/2011/11/23/2578711/verizon-lte-explained ("That may not sound like a lot, but…[a]ccording to content delivery network Akamai's latest "State of the Internet" report, the *average* US broadband connection is just 5.1 megabits per second. That's enough to play back Netflix and YouTube 1080p content, which tops out at around 5Mbps…[W]hether you live in Chicago, Manhattan, or San Jose, LTE speeds are pretty great. We averaged 10.51Mbps down and 5.83Mbps up across our three test sites.").

[44] *Internet Connection Speed Recommendations*, NETFLIX.COM, https://support.netflix.com/en/node/306 (last visited June 9, 2013); *see also Bandwidth Conversion Calculator*, FORRET.COM, http://web.forret.com/tools/bandwidth.asp (last visited June 9, 2013).

[45] *Internet Connection Speed Recommendations*, NETFLIX.COM, https://support.netflix.com/en/node/306 (last visited June 9, 2013).

[46] *See, e.g.,* Neil Hunt, *Netflix Lowers Data Usage By 2/3 For Members In Canada*, NETFLIX US & CANADA BLOG (Mar. 28, 2011), *at* http://blog.netflix.com/2011/03/netflix-lowers-data-usage-by-23-for.html.

[47] Opanga Networks, Inc., *Streaming Video and Wireless: A Fundamental Mismatch?*, p. 3, table 1 (2010), http://www.virtualpressoffice.com/JPContentAccessServlet?fileContentId=1000000013630&source=sd&showId=756.

Obviously, at current prices, 4G service will not be a cost-effective substitute for a wireline connection for today's typical video consumer. But for consumers who watch significantly less video than average and prefer to watch video on a mobile device, 4G may allow them to watch the video they want, where they want it, that they can cut the cord to a wireline provider completely, relying on 4G for data service and an OVD for content. But as more spectrum becomes available, and to the extent that wireless companies are able to construct more towers to increase capacity with the same amount of spectrum, prices per gigabyte should fall over time. Meanwhile, compression technology will continue to reduce the amount of data required to view the same quality of video.

But this paradigm of viewing 4G service, as a more capacity-constrained version of the Internet, may soon prove outdated. Verizon is expected to deploy a broadcast model over 4G in time for the 2014 Super Bowl, and could use the technology to more efficiently replicate the broadcast model, as the MIT Technology Review explains:

> Putting data in broadcast mode reduces congestion but makes the most sense in situations where everyone is watching the same newscast, sports match, or other special piece of content at the same time. In such situations, using LTE Broadcast mode, a carriers' transmitter needs to just send a signal out over one channel rather than separate ones for each mobile device. That's how the traditional TV broadcast works: it doesn't matter if 100 or a million people are watching, because the content is out there for the taking.
>
> The software in a carrier's base station can tweak the LTE signal to include one or more channels that work in broadcast mode–enabling multiple users to receive the same content at the same time.[48]

It is not difficult to imagine such a technology being combined with something akin to the DVR model, allowing consumers to view, at their convenience, content sent to their phones by 4G broadcasting. Nor is it difficult to imagine the emergence of something like a VOD model, where consumers can have content they subscribe to sent to their phones or home 4G router (with attached hard drive).[49] This is precisely the sort of innovative arrangement that the law should encourage, not discourage.

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[48] David Talbot, *Broadcast Video Will Soon Be Packed into Smartphone Signals*, MIT TECHNOLOGY REVIEW (May 6, 2013), http://www.technologyreview.com/news/513311/broadcast-video-will-soon-be-packed-into-smartphone-signals/
[49] *See also infra* at 21.

## Online Video Distributors

Combined with the increasing availability of broadband, the growth in OVD and other online alternatives (like YouTube) to cable and satellite present yet more viable competitors to any alleged distribution monopoly.[50]

Amazon, Hulu, Netflix and YouTube are all offering popular — and exclusive — original programming, and each of the first three of these services has signed deals with a range of content owners to provide (sometimes exclusive) content online.[51] Netflix now has more U.S. subscribers than HBO.[52] And shows aired on ad-supported cable networks are increasingly catching up with network broadcast programming in popularity. Meanwhile, half the successful offerings on Kickstarter are for film, video and music,[53] and a new Veronica Mars movie that seemingly wouldn't otherwise have been made raised over $5 million there and will be produced.[54]

But it is important to note the limitations of this seeming disintermediation and crowd-funding. While these are important sources of competitive pressure for traditional content providers and distribution networks, the unique economics of high-fixed-cost content production and distribution remain. A single episode of *Game of Thrones* costs $6 million to produce,[55] and Netflix reportedly spent $100 million to develop two seasons of *House of Cards*.[56] Misleading claims of cable's unprecedented profitability notwithstanding, the cable industry has invested $200 billion in capital projects since 1996,[57] and while Comcast and Time Warner Cable earned a five year-average Return on Invested Capital (ROIC) of 4.5%[58] and -1.3%,[59] respectively, Apple's five year average ROIC is 32%[60] and Google's is 16%.[61]

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[50] Andrew Wallenstein, *The Big Bet at Intel Corp. That Could Change TV*, VARIETY (Apr. 3, 2013, 3:00 PM), http://variety.com/2013/tv/news/intel-the-big-bet-that-could-change-tv-1200332075/ (reporting that Intel is creating an internet-based competing product to traditional cable).

[51] Timothy Stenovec, *Amazon, Viacom Announce Prime Instant Video Streaming Deal,* HUFFINGTON POST (June 4, 2013, 9:00 AM), http://www.huffingtonpost.com/2013/06/04/amazon-viacom-prime-instant-video_n_3382985.html.

[52] Andrew Wallenstein, *Netflix reports 29.17 million subs in 1Q, edging out HBO's 28.7 million*, VARIETY (Apr. 22, 2013, 1:13 PM), http://variety.com/2013/digital/news/netflix-surpasses-hbo-in-u-s-subscribers-1200406437/

[53] *Kickstarter* Stats*,* KICKSTARTER*,* http://www.kickstarter.com/help/stats (last visited June 9, 2013).

[54] Rob Thomas, *The Veronica Mars Movie Project*, KICKSTARTER (Mar. 13, 2013), http://www.kickstarter.com/projects/559914737/the-veronica-mars-movie-project.

[55] *'Game Of Thrones' Costs $6 Million Per Episode?*, CONTACTMUSIC (May 28, 2012), http://www.contactmusic.com/news/game-of-thrones-costs-6-million-per-episode_1333082

[56] Brad Reed, *Netflix has already recouped its $100 million House of Cards investment*, YAHOO! NEWS (Apr. 23, 2013), http://news.yahoo.com/netflix-already-recouped-100-million-house-cards-investment-011527993.html

[57] *Industry* Data, NCTA, http://www.ncta.com/industry-data (last visited June 9, 2013).

[58] *Comcast on the Forbes Global 2000 List*, FORBES (May 2013), http://finapps.forbes.com/finapps/jsp/finance/compinfo/Ratios.jsp?tkr=cmcsa.

[59] *Time Warner on the Forbes Global 2000 List*, FORBES (May 2013), http://finapps.forbes.com/finapps/jsp/finance/compinfo/Ratios.jsp?tkr=twc

[60] *Apple on the Forbes Global 2000 List*, FORBES (May 2013), http://finapps.forbes.com/finapps/jsp/finance/compinfo/Ratios.jsp?tkr=AAPL

Contrary to the claims of some critics,[62] both the content and distribution markets have perhaps never been as competitive as they are today. Even leaving aside the next tier of companies that own the channels that air enormously popular programs like *Mad Men*, *Breaking Bad,* and *The Walking Dead,* each of the six largest media companies (Disney, Time Warner, Viacom, Comcast/NBCU, News Corp and CBS) owns a number of popular channels and program franchises, and each of these vies with the others to develop or purchase successful programming. At the same time online distributors like Hulu, Amazon, YouTube and Netflix are producing their own, increasingly popular programming.

### How the Law Should Address Market Structure

Even if cable or DBS does achieve a dominant market position in any particular market, that does not necessarily mean that special regulations are necessary beyond antitrust law. Taking undue prescriptive regulatory action punishes success gained by risking private capital. Like companies in any other market, video providers should be able to obtain "dominant" positions through innovation and investment. Intervention is justified only if the dominant firm or firms abuse their dominance in contravention of antitrust law. This Administration's Department of Justice acknowledged as much in its comments on the National Broadband Plan:

> We do not find it especially helpful to define some abstract notion of whether or not broadband markets are "competitive." Such a dichotomy makes little sense in the presence of large economies of scale, which preclude having many small suppliers and thus often lead to oligopolistic market structures. The operative question in competition policy is whether there are policy levers that can be used to produce superior outcomes, not whether the market resembles the textbook model of perfect competition. In highly concentrated markets, the policy levers often include: (a) merger control policies; (b) limits on business practices that thwart innovation (e.g., by blocking interconnection); and (c) public policies that affirmatively lower entry barriers facing new entrants and new technologies.[63]

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[61] *Google on the Forbes Global 2000 List*, FORBES (May 2013), http://finapps.forbes.com/finapps/jsp/finance/compinfo/Ratios.jsp?tkr=goog

[62] *See, e.g.*, *Public Knowledge, State of Video Testimony, supra* note 1, at 2 ("[D]espite all of the great programming and groundbreaking devices, many Americans are locked into a television business model that limits competition and choice: the expensive bundle of channels. Most of the most popular programming is not available except through traditional subscription TV services, and these grow more expensive year after year."); CRAWFORD*, supra* note 35.

[63] Ex Parte Submission of the United States Department of Justice, *In re Economic Issues in Broadband Competition,* GN Docket No. 09-51, at 11 (Jan. 4, 2010), *available at* http://www.justice.gov/atr/public/comments/253393.pdf.

Critics' concerns are indicative of their status quo bias.[64] Such policy discussions need to take a longer view of the market. While today, critics fret over the "dominance" of cable, the conversation may soon switch to one over the dominance of fiber.[65]

To the extent that facilities-based competition is not as robust as some theoretical ideal, at least some of the blame must be laid at the feet of local franchise authorities. While the 1992 Cable Act nominally precludes local authorities from granting exclusive cable franchises or unreasonably refusing to award competitive franchises, as a practical matter franchise regulations still amount to an important deterrent to new entry of MVPDs—and thus ISPs as well. This doubly restrains competition in the video marketplace, both from new MVPDs and from OVDs that rely on broadband to reach consumers.

To be sure, the costs of building physical infrastructure are even more substantial, but the pattern of Google Fiber's growth (as well as that of AT&T's U-Verse) demonstrates both that providers are willing to incur these costs, and that they will do so only where costly local regulations can be avoided.

As many as 30,000 jurisdictions issue video franchises.[66] Twenty states offer statewide franchise licenses, and these have significantly improved entry in those states. But these reforms, and the FCC's 2006 ban on exclusive franchise licensing, has not removed local governments as a barrier to new entry of ISP-cum-MVPDs such as Verizon FiOS or Google Fiber. The franchising processes, fees and imposed terms vary, and can significantly delay entry and even deter it entirely. In addition, "excessive build-out mandates, the inclusion of non-video revenue in franchise 'fees' (including advertising fees), and demands unrelated to the provision of video service" significantly

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[64] Such as when Susan Crawford, author of CAPTIVE AUDIENCE (CRAWFORD, *supra* note 35), declared fiber "future proof" for the next 50 to 100 years when discussing her book at with Diane Rehm. *The Diane Rehm Show: Susan Crawford: "Captive Audience"* (WAMU radio broadcast Jan. 10, 2013), *transcript available at* http://thedianerehmshow.org/shows/2013-01-10/susan-crawford-captive-audience/transcript.

[65] *See, e.g.*, *Wallenstein*, *supra* note 50; Adam Thierer, *The Rule Of Three: The Nature of Competition In The Digital Economy*, FORBES (Jun. 29, 2012, 6:35 PM), http://www.forbes.com/sites/adamthierer/2012/06/29/the-rule-of-three-the-nature-of-competition-in-the-digital-economy/ ("The graveyard of tech titans is littered with the names of many other once-mighty giants. Schumpeter's 'gales of creative destruction' have rarely blown harder through any sector of our modern economy.") (*quoting* Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* 84 (Harper Perennial, 1976)).

[66] *See, e.g.*, William R. Richardson, *FCC Releases New Rules to Streamline the Local Cable Franchising Process for Telephone Companies and Other New Video Entrants*, WILMERHALE (Mar. 28, 2007), http://wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=90848. Note also that, in 2007 when the FCC adopted franchise reform regulations, "Verizon estimates, for example, that it will need 2,500-3,000 franchises in order to provide video services throughout its service area. AT&T states that its Project Lightspeed deployment is projected to cover a geographic area that would encompass as many as 2,000 local franchise areas." (Federal Communications Commission, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, at 8 (Mar. 5, 2007), *available at* http://www.tiaonline.org/gov_affairs//fcc_filings/documents/FCCVideoSec621--Order.pdf).

raise the costs of entry in many jurisdictions.[67] Likewise, regulatory difficulty obtaining pole attachment rights and access to rights of way can prevent infrastructure construction.[68]

The original justification for franchising (consumer protection from natural infrastructure monopoly), although never very strong in the first place,[69] is no longer relevant:

> A large factor in the monopoly status of cable television operators is that no viable technology provided true competition to the array of services available through cable during the 1970s and early 1980s. The further development of competing technologies and services over the next two decades, however, created viable alternatives that weakened cable's *de facto* monopoly status. Thus, after the 1996 Act permitted telephone companies to enter the video marketplace, telephone companies and the improvements of DBS systems posed a significant threat to the monopoly status of cable television.[70]

The existence of viable, willing facilities-based competitors leaves, ironically, franchise regulations standing in the way of infrastructure competition, rather than facilitating it.

And this limitation importantly applies to broadband access, as well. Because OVDs reach consumers via broadband networks, local constraints on the construction of broadband infrastructure generally are problematic. Importantly, it is these regulatory constraints, not theoretical economic constraints, that limit the extent of competition from broadband-delivered OVDs (and the development of broadband itself).

As Google Fiber's experience demonstrates, investment and innovation won't occur where regulatory impediments make them uneconomical. As Milo Medin, Google's vice president for access services, testified last year, "regulations – at the federal, state, and local levels – can be central factors in company decisions on investment and innovation. . . . [Regulation] often results in unreasonable fees, anti-investment terms and conditions, and long and unpredictable build-out

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[67] Fred Campbell, *What Google Fiber Says about Tech Policy: Fiber Rings Fit Deregulatory Hands*, TECH LIBERATION FRONT, August 7, 2012, http://techliberation.com/2012/08/07/what-google-fiber-says-about-tech-policy-fiber-rings-fit-deregulatory-hands.

[68] See, e.g., *American Electric Power Service Corp. v. FCC*, No. 11-1146 (D.C. Cir. Feb. 26, 2013) (upholding FCC regulations mandating local authorities ease certain pole attachment restrictions).

[69] *See* Thomas W. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 U. PA. L. REV. 1335 (1986)

[70] Jonathan E. Samon, *When "Yes" Means No: The Subjugation of Competition and Consumer Choice by Exclusive Municipal Cable Franchises*, 34 SETON HALL L. REV. 747, 762 (2004).

timeframes . . . [that] increase the cost and slow the pace of broadband network investment and deployment."[71]

Wireless providers aren't immune from local regulatory impediments, either. Tower siting, small cell antenna attachment and other infrastructure restrictions have delayed the updating and expansion of mobile broadband networks, as well.[72]

And this limitation importantly applies to broadband access, as well. Because OVDs reach consumers via broadband networks, local constraints on the construction of broadband infrastructure generally are problematic. Importantly, it is these regulatory constraints, not theoretical economic constraints, that limit the extent of competition from broadband-delivered OVDs (and the development of broadband itself).

Critics like Susan Crawford see broadband as a natural monopoly, with economies of scale making competition impossible. But Google, AT&T and Verizon don't seem to agree – as long as indefensible regulatory impediments don't interfere. Google Fiber isn't just a publicity stunt; Google expects it to make money from the endeavor.[73] AT&T is eager to replace its outdated switched networks with all-IP ones. This will bring U-Verse to nearly a third of the country (with data speeds of 45-75 mbps), thus offering both another MVPD service and another channel by which consumers can access OVD content.

Most importantly, wireless services can check the power of wireline. One study predicts that, "As digital consumers become more reliant on their smartphones and tablets for everyday content consumption, we can expect this [mobile] share [of internet traffic] to rise over time and perhaps take over majority share during the course of the next year."[74] Even full-length video streaming, supposedly the unassailable lynchpin of the "cable monopoly," is well within the technical capacity

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[71] Field Hearing on Innovation and Regulation before the S. Comm. on Oversight & Gov. Reform, 112TH CONG. (Apr. 18, 2011), available at http://oversight.house.gov/wp-content/uploads/2012/01/TestimonyofMiloMedin_1.pdf (testimony of Milo Medin, Vice President of Access Services, Google Inc.).

[72] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance,* 24 F.C.C.R. 13994, 14006, 14008 (2009) (finding that "record evidence demonstrates that unreasonable delays in the personal wireless service facility siting process have obstructed the provision of wireless services").

[73] Scott Canon, *Google Fiber's gigabit gamble has implications far beyond KC, The Kansas City Star* (Sept. 24), http://www.kansascity.com/2012/09/24/3832330/google-fibers-gigabit-gamble-has.html

[74] comScore, *Mobile Future In Focus 2013* (Feb 2013), *available at* http://www.comscore.com/Insights/Presentations_and_Whitepapers/2013/2013_Mobile_Future_in_Focus ("[A]n unduplicated view of digital media audiences and consumption across desktop computers, smartphones and tablets, reveals that more than 1 in 3 minutes (37 percent) is now spent beyond the PC.").

of wireless: Consumers increasingly prefer to watch such videos on phones and tablets,[75] and mobile video now comprises the majority of all mobile traffic.[76] While doubtless some of this traffic flows over Wi-Fi, some of it doesn't, and 4G download speeds and advanced devices clearly facilitate increasing wireless/wireline *and* video competition.

Wireless services are already evolving to deliver video, especially to mobile devices. For example, news recently broke that Verizon and ESPN are in negotiations to offer ESPN video content to consumers without counting the data streaming against monthly data plans.[77] We rebut the presumption that such "discrimination" harms consumers below,[78] and here simply note that this kind of arrangement is precisely the kind of innovative business model that could allow 4G wireless service to become yet another distribution channel for OVD content.

If 4G Broadcasting succeeds, it will likely involve such partnerships, especially for content that, unlike sports programming, need not be broadcast live. Much of what consumers want to watch is predictable in advance: they work their way through an entire season or series of a show, and increasingly watch it at their convenience. Or, they might work their way through a queue of movies and TV shows. Especially popular forms of such content could be provided through 4G broadcasting, while the "long tail" of content might be downloaded over the network through standard 4G network technology—but not counted against data caps—when wireless network capacity isn't being utilized, such as during the night, and then stored on a consumer's mobile device or perhaps on a network attached-storage device—a hard drive built into a 4G home modem that doubles as a Wi-Fi hotspot for the home. The point is not only that 4G wireless might become a far more effective conduit for video programming than is currently imagined, but also that exclusive arrangements may be key to incentivizing the development of such technology and should not be prohibited in advance. Again, antitrust principles, properly understood, are perfectly capable of governing concerns about such relationships—without unduly deterring innovation in technologies and business models (the two often go hand in hand) that benefit consumers.

### Market Dynamism

The key point to understanding market conditions and thus regulatory responses in these markets — as in all high-tech markets – is dynamism. The status quo never remains the status quo for long, and regulatory responses (to say nothing of repeal of regulations) are inevitably behind the curve,

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[75] *Global Video Index: 2012 Year in* Review, OOYALA, http://www.ooyala.com/online-video-index/global-video-index-2012-year-review (last visited June 10, 2013).

[76] *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2012–2017*, CISCO 1 (Feb. 6, 2013), http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.pdf

[77] Bret Swanson, *Verizon, ESPN, And The Future Of Broadband*, FORBES (June 4, 2013, 5:10 PM), http://www.forbes.com/sites/bretswanson/2013/06/04/verizon-espn-and-the-future-of-broadband/

[78] *See infra* pp. 57-61.

responding to market conditions that no longer exist by the time regulations are implemented. These markets are full of examples of the types of transformative innovations that undermine competitive assumptions that underlie regulatory arguments. In addition to the general description of market evolution described above, a few examples will illustrate this point:

- **Online-only Content**: "Internet-delivered TV, which until recently was unready for prime time, is the new front in the war for Americans' attention spans. Netflix is following up on the $100 million drama 'House of Cards' with four more original series this year. Microsoft is producing programming for the Xbox video game console with the help of a former CBS president. Other companies, from AOL to Sony to Twitter, are likely to follow. The companies are, in effect, creating new networks for television through broadband pipes and also giving rise to new rivalries — among one another, as between Amazon and Netflix, and with the big but vulnerable broadcast networks as well."[79]
- **TV-Everywhere**: "First popularized by Comcast & Time Warner in 2009… Time Warner claims that over 40 participating networks are involved in deployments and trials. Additionally, a May 2012 report from Parks & Associates cited significant growth in TV Everywhere deployments."[80] Fox's model, for example, allows subscribers to access Fox's streaming shows and videos through various distribution channels. "Fox moved to the TV Everywhere model in August 2011, initially with only Dish as a partner. Previously, the broadcaster had provided new episodes for free to everyone the day after they air on Fox.com and Hulu; now, however, fresh content is available exclusively to TVE partners for eight days… Meanwhile, Fox also has VOD agreements for next-day episodes with a larger set of providers, including Comcast, Time Warner Cable, Cox Communications, Cablevision Systems and Bright House Networks, as well as AT&T U-verse and Verizon FiOS."[81]
- **LTE video**: "LTE Broadcast using evolved Multimedia Broadcast Multicast Service (eMBMS) is a multicast technology that industry players believe will take off this year… Verizon Wireless is working to deliver multicast video to customers using LTE Broadcast, joining a list that reportedly includes Clearwire and others.[82]
- **Microsoft Xbox**: "With more than 3 times as many subscribers as Comcast, Xbox is in prime position to shake up the cable industry because the device is already in so many living rooms…A key principle of disruptive technology is that the original supply does

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79 Brian Stelter, *Don't Touch That Remote: TV Pilots Turn to Net, Not Networks*, N.Y. TIMES (Mar. 4, 2013), http://www.nytimes.com/2013/03/05/business/media/online-only-tv-shows-join-fight-for-attention.html?_r=0.
80 Paul Madsen, *How Does TV Everywhere Work?,* BROADCAST ENGINEERING (Mar. 11, 2013).
81 Todd Spangler, *Fox Trots U-Verse into 'TV Everywhere' Dance*, MULTICHANNEL NEWS (Mar. 19, 2013, 5:21 PM), http://www.multichannel.com/telco-tv/fox-trots-u-verse-tv-everywhere-dance/142285.
82 Phil Goldstein, *LTE Video Broadcasting - Top Wireless Technologies in 2013*, FIERCEWIRELESS (Feb. 20, 2013), http://www.fiercewireless.com/node/240647/print.

not equal the market demand. Disruptive companies take the Field of Dreams approach to innovation: build it and they will come. They anticipate and shape future demands. Even though video and Internet integration are secondary features on the Xbox behind video games, customers' preferences will evolve....As consumer demands evolve, the demand for video options on Xbox will increase and content providers and sports leagues will eventually be forced to give Xbox users the same programming options that they give to cable companies."[83]

### Changing the Definition of MVPD

Even as the paradigm of the 1992 Cable Act has become increasingly irrelevant, some have proposed extending it to online video providers.[84] Indeed, several OVDs have attempted to take advantage of MVPD status.

Aereo and ivi are OVDs that have found themselves sued for copyright violations they are alleged to have committed by retransmitting broadcast signals over the Internet without permission. MVPDs have access to compulsory licenses that prevent them from having to negotiate copyright contracts for every signal they retransmit, but the compulsory license benefit doesn't extend to Online Video Distributor. These situations have sparked a debate about whether the definition of MVPD should be expanded to include Internet/Over-the-top video services—either within the current statutory scheme or by amending it.

While some OVDs might gain some competitive advantage from being treated as MVPDs, it is far from clear that Internet video in general (Hulu, YouTube, etc.) would be improved if subjected to the Cable Act's regulatory requirements. That regulatory burden would include program carriage, Equal Employment Opportunity requirements, and emergency requirements, as well as several other technical requirements. These laws were intended to govern the monopoly video distribution service that existed in 1992—not OVDs—and Internet content providers never expected to have to abide by them. Many OVDs are unwilling and perhaps financially unable to take on these requirements. So, ironically, these requirements could act as a barrier to entry for Internet-based competitors to traditional MVPDs—precisely the opposite of what the Cable Act was intended to do: protect new distribution models from the once-mighty power of cable.

[83] Daniel O'Connor, *Xbox Edges Closer to Disrupting Cable TV,* DISRUPTIVE COMPETITION PROJECT (Sept. 19, 2012), http://www.project-disco.org/cord-cutting/xbox-edges-closer-to-disrupting-cable-tv/.
[84] Comments of Public Knowledge, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, at 7 (June 8, 2011), *available at* http://www.publicknowledge.org/files/docs/PK_Comments_MVPD-Competition-Report.pdf.

In the current competitive climate, it doesn't make sense to treat these different distribution platforms differently—and the same is true for satellite and cable MVPDs, as well. But nor does it make sense to harmonize regulatory regimes around the most restrictive of these; the benefits of harmonization can much better be achieved by removing regulatory burdens from no-longer-dominant market actors.

Similarly, competition would be promoted by removing outdated regulatory benefits from market actors where these stand in the way of this continued evolution of the industry. We turn to these regulations, most directly at issue in the reauthorization of STELA, first.

## Broadcasters and the Satellite and Cable Rules

Several of the provisions at issue in STELA (along with related provisions elsewhere in the Communications Act and the Copyright Act) significantly affect the economic fortunes – and continued viability – of local over-the-air broadcasters; the risk of their repeal or amendment understandably concerns the broadcasters. Particularly at stake is the possible loss of an estimated $2.4 billion in annual retransmission fees, climbing to perhaps $6 billion by 2018.[85]

Companies like Aereo and the courts' treatment of them might well be the catalyst that pushes the industry toward a resolution that, as it happens, tracks the alleged justification for local broadcasters' favorable treatment in the first place:

> The head of the board that represents Fox-affiliated stations said Tuesday that it backed Mr. Carey [News Corp.'s president], and suggested that the stations could start broadcasting two flavors, a light version over the airwaves that would be without hit sports and entertainment programming, and a fuller version for subscribers to cable and satellite providers that pay the necessary fees.[86]

To the extent that the defense of local broadcasters' possession and retention of compulsory license, must-carry, retransmission consent, non-duplication and syndication exclusivity rights (among others) can be explained by a public policy preference for subsidizing the creation and distribution of local news, emergency information and advertising, the (admittedly, perhaps only rhetorical) proposal by Fox-affiliated stations would preserve these products on the free airwaves and remove the implicit subsidy from independently economically valuable programming.

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[85] *SNL Kagan Updates Retransmission Fee Projections to $6B by 2018*, PRWEB (Nov. 5, 2012), http://www.prweb.com/releases/2012/11/prweb10088524.htm.

[86] Brian Stelter, *Broadcasters Circle Wagons Against a TV Streaming Upstart*, N.Y. TIMES (Apr. 9, 2013) http://www.nytimes.com/2013/04/10/business/media/aereo-has-tv-networks-circling-the-wagons.html?pagewanted=all&_r=0.

While the interests of the dwindling percentage of Americans who view television programming only over the air should be considered, we must take seriously the possibility that serving this segment under the current regulatory regime carries with it enormous costs that outweigh the benefits. These costs include most significantly retransmission fees passed on to MVPD viewers, technological and business model constraints (the development of possible online or other alternatives is retarded by the regulations protecting local broadcasters). Perhaps greatest of all is the enormous opportunity cost of the more efficiently using the spectrum currently used for broadcasting. In 2009, economist Coleman Bazelon estimated the value of broadcast spectrum as $62 billion, minus $12 billion for buying out broadcasters and an additional $9 billion to provide free MVPD service to the 10 million households that then relied on over-the-air broadcasting. More importantly, he estimated the total economic benefit from reallocating broadcast spectrum to data services at between $500 billion and $1.2 trillion.[87] While highly notional, this provides some sense of the relative value of that spectrum as compared to its current, broadcasting uses.

These significant costs — imposed on everyone and multiplied because they retard the development of wireless technologies and thus overall economic growth — seem out of proportion to the perhaps 8% of the population who view television programming solely over the air[88] (or maybe it's 15%[89], depending who you ask; either way the point remains).

This doesn't mean we should abandon over-the-air viewers, who tend to be poor or elderly. Rather, it means that we — and they — would be better off with a different, better-targeted and more appropriate subsidy. There is a model for this, of course, in the digital TV transition. Although the digital transition threatened to harm poorer viewers who would be forced to buy new TVs or converters, rather than abandon the plan entirely, Congress authorized subsidies for the purchase of converters. While the problem here is unlikely to be solved with a one-time subsidy, in principle one can imagine a number of possible solutions (any of which might be funded several times over from the revenues of an auction of broadcast spectrum) including:

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[87] Coleman Bazelon, *The Need for Additional Spectrum for Wireless Broadband: The Economic Benefits and Costs of Reallocations* (October 23, 2009) (Consumer Electronics Association White Paper), available at http://apps.fcc.gov/ecfs/document/view?id=7020143019; *see also* John Eggerton, *CEA Study: Reallocating Broadcast Spectrum Could Yield $1 Trillion, Consumer Electronics Association submits economic study to FCC on value of spectrum reallocated for broadband wireless*, BROADCASTING & CABLE, (Oct 26, 2009).

[88] Joseph O'Halloran, *US Adults Loyal to Pay-TV But Tune Out of Over-the-Air*, RAPID TV NEWS (Jan. 6, 2011) ("[O]nly 8% [of US households] rely on over-the-air services.").

[89] Press Release, GfK Knowledge Network, *Over-The-Air Tv Homes Now Include 46 Million Consumers* (June 6, 2011), *available at* http://www.knowledgenetworks.com/news/releases/2011/060611_ota.html ("The 2011 Ownership Survey and Trend Report, part of The Home Technology Monitor™ research series, found that 15% of all U.S. households with TVs rely solely on over-the-air signals to watch TV programming; this compares with 14% of homes reported as broadcast-only for the previous three years.").

- Bazelon's proposed free lifetime MVPD service for those that currently rely on over the air broadcasting;
- Vouchers for MVPD service or data service that could be used watch OVD content; and
- A minimal tier of free content from local programmers (including today's broadcasters).

Such subsidies would impose a fraction of the costs of the current system—because it is so staggeringly expensive in its opportunity costs.

The broadcasters' vulnerable position is a relic of the morass of copyright and telecom rules that artificially create in them a property interest in MVPD retransmission of their broadcasts. But this regime makes little economic sense in the first place, and a proper understanding of the history and dynamics of the relevant provisions of the Copyright and Communications Acts counsels strongly in favor of their demise.

### The Compulsory License, Must-Carry, Retransmission Consent and Other Carriage Rules

If Congress were to write a law today governing how MVPDs gain access to network content, it is hard to believe that it would come up with a system even remotely similar to that built out upon the 1992 Cable Act, the 1999 Satellite Home Viewer Improvement Act and its progeny, and the "transmit clause" and statutory license provisions of the 1976 Copyright Act. But compulsory licenses, must-carry, retransmission consent and the regulations that go along with them function just as they did when the Cable Act was enacted 21 years ago, despite significant changes in the video marketplace. This byzantine and discriminatory system should be repealed to allow for MVPDs to bargain for the rights to network programming on a level playing field and, *a fortiori*, it should not be applied to up-and-coming OVDs, as it will serve only to discourage investment in the industry.

The source of local broadcasters' economic interest in video content licensing by MVPDs lies initially in the decision by Congress to effect two significant reductions in established property rights: The enactment of a compulsory license for video performance and the imposition of must-carry.

Following the Supreme Court's *Fortnightly* decision,[90] which held that cable transmissions of broadcast content received by antenna were not public performances that infringed a content owner's performance right, Congress enacted the "transmit clause" of the 1976 Copyright Act,[91]

[90] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968)

[91] 17 U.S.C.A. § 101 ("(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.")

specifically to bring cable retransmissions within the scope of a copyright owner's performance right: "[A] cable television system is performing when it retransmits the broadcast to its subscribers."[92] Thus, Congress restored full copyright protection against cable retransmissions to content owners.

At the same time, based on the belief that it was necessary to facilitate investments in cable systems, Congress granted a compulsory license for cable retransmissions at a statutorily defined rate in Section 111 of the Copyright Act.[93] This provision, titled a "*limitation* on exclusive rights" (emphasis added), explicitly abrogated the scope of a video content owners' copyright for the retransmission of broadcast video by a cable system. With the 1988 Satellite Home Viewer Act, Congress created a similar provision, Section 119 of the Copyright Act, for satellite providers. The current debate over renewing STELA is essentially a debate over extending this provision.

While well-intentioned, these provisions nevertheless diminished the scope of content owners' copyrights.

> A compulsory license is not only a derogation of a copyright owner's exclusive rights, but it also prevents the marketplace from deciding the fair value of copyrighted works through government-set price controls. . . . In the last five years, the cable industry has progressed from an infant industry to a vigorous, economically stable industry. Cable no longer needs the protective support of the compulsory license. ... A compulsory license mechanism is in derogation of the rights of authors and copyright owners. It should be utilized only if compelling reasons support its existence. Those reasons may have existed in 1976. They no longer do.[94]

Today, broadcast television is viewed by only a relatively small percentage of Americans, and by even fewer to the complete exclusion of other sources for similar content:[95] But in the years leading up to the passage of the 1992 Cable Act, broadcast television and cable were more-closely matched competitors. Congress thought it unfair for cable providers to be able to retransmit their competitors' broadcast signals without compensating them. So Congress required that cable companies and other MVPDs get broadcasters' permission before retransmitting their signals.[96] However, Congress didn't stop there. Driven by the desire to promote localism, Congress passed

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[92] H.R. Rep. 94-1476, 1976 U.S.C.C.A.N. 5659, at 63 (1976)
[93] 17 U.S.C. § 111(d)
[94] *Statement of Marybeth Peters, The Register of Copyrights before the Subcomm. on Courts & Intellectual Property of the Comm. on the Judiciary, United States House of Representatives*, 106TH CONGRESS, 2nd Session (June 15, 2000).
[95] Joseph O'Halloran, *US adults loyal to pay-TV but tune out of over-the-air*, RAPIDTV NEWS (Jan. 6, 2011), http://www.rapidtvnews.com/index.php/2011060112539/us-adults-loyal-to-pay-tv-but-tune-out-of-over-the-air.html#ixzz2VqUkzHG6.
[96] 47 U.S.C. § 325(b).

several other cable-specific regulations (network non-duplication[97] and syndicated exclusivity,[98] in particular) that left cable companies with the ability to negotiate with only one broadcaster for retransmission rights in each market. If a cable company couldn't come to an agreement with the one local broadcaster assigned to it, it simply couldn't carry a network's content; there was no alternative (although the broadcaster could, of course, always elect to exercise its must-carry rights, forcing the cable company to carry its signal at no charge).

The early days of retransmission consent were actually quite beneficial for cable customers. In exchange for allowing MVPDs to retransmit their signals, broadcasters asked them to carry new network-owned channels like FX and The History Channel.[99] There were suddenly a lot more channels for cable customers to watch. Eventually, however, broadcasters stopped asking for the carriage of these new channels and instead began asking for monetary compensation.[100] Knowing that cable companies essentially had no choice but to carry the networks, and given the customer demand for these channels, broadcasters began to demand higher and higher fees.[101] Cable providers had to either meet their demands or face network blackouts. These costs are now being passed on to their customers.

There is no longer any sensible rationale for prohibiting negotiation between MVPDs and content owners over retransmission rights. Today there are approximately 800 channels available on various MVPD systems, the vast majority of which are cable channels without broadcast transmissions and thus not subject to the statutory licenses. And yet MVPDs secure the rights to transmit these channels' programming content nonetheless. Moreover, a significant number of these channels are owned by broadcast networks, meaning retransmission rights for broadcast network programming could be negotiated in conjunction with already-existing licensing negotiations of non-broadcast content. And of course OVDs do not have recourse to the compulsory licensing provisions and nevertheless manage to negotiate comprehensive licensing deals including both broadcast and non-broadcast content, just as cable and satellite MVPDs do for retransmission rights to broadcast programming, where the local broadcaster is owned and operated by a network.[102]

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[97] 47 C.F.R. § 76.92-95.
[98] 47 C.F.R. § 76.101-110.
[99] *See* Comments of National Association of Broadcasters*, In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71, 54-55 (May 27, 2011), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021673096 [hereinafter *NAB Comments*].
[100] *History*, AMERICAN TELEVISION ALLIANCE, http://www.americantelevisionalliance.org/history/ (last visited June 11, 2013).
[101] *See* Comments of DIRECTV, Inc., In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, 4 (May 27, 2011), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021673116.
[102] *See, e.g.,* Mike Farrell, *Online Rights Figure Into New NBCU Deals*, MULTICHANNEL NEWS (Dec. 3, 2012), http://www.multichannel.com/internet-video/online-rights-figure-new-nbcu-deals/140497.

As noted, the compulsory licensing scheme on which retransmission consent is built is more accurately seen as a derogation of content owners' existing copyrights than as the establishment of a new, efficient property right held by broadcasters. Absent compelling efficiency justification there is no reason to preserve that right, and every reason to restore video content owners' copyrights to their full measure.

The establishment of the must-carry regime for cable providers in the 1992 Cable Act (as well as the "carry one, carry all" variant extended to satellite providers) effects a further derogation of property rights and is similarly an unwarranted intervention into market transactions.

The must-carry rules remove from distributors the right *not* to carry local broadcast channels. As a result, carriage negotiations with local broadcasters are lopsided. Content for which the broadcaster values retransmission more than the cable provider does (who is, of course, nevertheless the one with a financial interest in and knowledge about its subscribers) will be retransmitted, and cable MPVDs cannot demand compensation in return. Consumers will be saddled with basic tier programming of lower quality than they would prefer, and perhaps even see price increases for content they do prefer as cable providers move more programming to higher tiers. The must-carry rules require that, for cable providers offering 12 or more channels in their basic tier, at least one-third of these be local broadcast retransmissions.[103] The forced carriage of additional, less-favored local channels results in a "tax on capacity," and at the margins causes a reduction in quality (*e.g.*, a shift from CSPAN to home shopping channels).[104] In the end, must-carry rules effectively transfer significant programming decisions from cable providers to broadcast stations, to the detriment of consumers.

The deleterious effects of the must-carry provisions are exacerbated by the "basic tier" and "buy through" provisions of the Act. The basic-tier provision requires MVPDs to maintain a rate-regulated,[105] basic tier of service on which local broadcasters are entitled to carriage and which subscribers are entitled to purchase without being required to purchase other content.[106] The buy-through provision, meanwhile, prohibits MVPDs from selling subscriptions for higher content tiers unless subscribers have first purchased the basic tier.[107] These provisions serve to further constrain channel capacity and remove programming decisions from MVPD operators' control. Particularly in a market where competition has increasingly come from OVD providers offering unbundled access to premium-only content without any basic carriage or subscription requirements, these provisions reduce MVPD competitiveness. And although they may have inadvertently helped to fuel the

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[103] 47 U.S.C. § 534.
[104] Thomas W. Hazlett, *Digitizing "Must-Carry" Under* Turner Broadcasting v. FCC (1997), 8 SUP. CT. ECON. REV. 141 (2000).
[105] Rates for the basic service tier and cable programming services tiers given in 47 CFR 76.922 (2010).
[106] 47 U.S.C. § 543(b)(7).
[107] 47 U.S.C. § 543(b)(8).

creation of, and demand for, all-you-can-eat and a la carte OVD services, the ever-increasing incidence of cord-cutting by would-be and former MVPD subscribers suggests these provisions increasingly do not reflect consumer preferences.

Although the ability of local broadcasters to opt in to retransmission consent in lieu of must-carry permits negotiation between local broadcasters and cable providers over the price of retransmission, must-carry sets a floor on this price, ensuring that payment never flows from broadcasters to cable providers for carriage, even though for some content this is surely the efficient transaction.

While even in an unfettered market networks may choose to structure their contracts with affiliated broadcasters to give them exclusive territories and the right to negotiate over retransmission of licensed content, there is no longer any basis for the government to prohibit direct licensing of copyrighted national broadcasts by the networks themselves. Instead, the current regulatory scheme largely removes any pretense of market involvement from the process of distributors acquiring access to broadcast content. In doing so, today's byzantine regulations manage to put just about every party involved (with the exception of the broadcasters) in a worse position than they would be in if the regulations didn't exist at all.

### The Subscriber-MVPD Relationship

The relationship between subscribers and MVPDs is directly disrupted by must-carry, buy-through and basic tier provisions, which disadvantage both parties. Cable providers are required to carry all local broadcast stations on their basic tier of service, and customers are required to purchase this basic tier before they can purchase any additional service tiers. That means cable customers can't purchase just the higher tiers of service alone, which contain channels like HBO and the NFL Network. Whether they want it or not, they have to purchase the basic tier with all of the local broadcast content first and add on additional tiers of service from there.

Without these rules, cable customers and cable providers would have considerably more freedom in selecting which channels they actually want as part of their cable package. If subscribers don't value the channels on the basic tier (particularly the broadcast channels that cable companies are forced to provide), they could just bypass it and go right for the higher tiers of service. Although required for the effective operation of the compulsory license and must-carry/retransmission consent regime these rules enforce the unnecessary regime only by imposing significant harm on consumers.

### The MVPD/Content Owner Relationship

By operation of compulsory licenses, must-carry and retransmission consent, MVPDs essentially have no direct relationship with broadcast network copyright holders. Compulsory licenses allow MVPDs to gain the public performance right to broadcast content by paying a statutory fee to the government for subsequent redistribution to copyright holders and prohibit direct negotiation over licensing terms by the parties.

The regime passes on the negotiation for rights to the broadcasters, and gives them the right to control what happens to their transmissions of content actually owned by the network. And non-duplication and syndicated exclusivity provisions prohibit networks from even assigning the right to control distribution negotiations to any particular affiliate by precluding negotiations between MVPDs and distant broadcasters over the retransmission rights to national programming.

Without these rules, MVPDs could go directly to the networks (or at least other broadcast affiliates) for access to the right to retransmit broadcast signals. MVPDs could then carry only the content that their customers want, at market-determined prices, and networks would, appropriately, retain based on copyright, the right to determine which providers could distribute their content and on what terms.

### The MVPD/Broadcaster Relationship

Must-carry offers local broadcasters a spot in cable lineups in situations where cable companies might otherwise not carry those channels. It requires cable companies to set aside channels specifically for local broadcasters, and, if a broadcaster opts for must-carry, the cable company must retransmit its broadcast on one of the set-aside channels. Must-carry is most often used by smaller broadcasters whose channels are not in high demand by cable customers, and thus would likely not be carried if the cable company had meaningful programming discretion over local content. For DBS providers, must-carry works slightly differently. There is no obligation to carry local broadcasts, but if a DBS provider chooses to carry *one* local broadcast station's signal it must carry *all* local broadcast signals.

While these obligations sound sensible, they are unneeded in today's market. In the absence of the carriage and copyright rules, to the extent that demand for locally created content is sufficient to support local broadcast programming, MVPDs would have appropriate incentives to carry such content. To the extent that it is not (particularly when the local content is often available online), mandated access for local broadcasts does not serve consumer interests. Meanwhile, the rules that grant special privileges to local broadcasts of *national* programming inappropriately constrain market negotiations over this content in order to preserve guaranteed carriage of *local* content. But this is a costly means of encouraging carriage of local content, and the rules unnecessarily burden MVPDs and harm consumers by taking up valuable channel space in MVPDs' lineups and constraining their bargaining power.

The more problematic alternative to must-carry, retransmission consent, began as a way to support local broadcasting, but has evolved into a system for the large broadcasting groups, and especially the networks themselves, to hold their signals hostage and charge ever-increasing fees to cable and satellite operators backed by blackout threats. Prior to the 1992 Act, cable companies were allowed to retransmit broadcast signals without permission as long as they paid a compulsory license fee to the copyright holders. Congress viewed this as a problem: Local broadcasters were largely left out of the loop because they didn't hold the copyrights for the most of the programming they broadcast.

At the very least, Congress should do away with the network non-duplication and syndicated exclusivity rules that prevent a cable provider from negotiating with any network broadcaster other than its one local network affiliate in each market. Doing so would give cable companies options other than a network blackout if they couldn't reach an agreement with their local broadcasters.

DBS providers are not subject to network non-duplication or syndicated exclusivity, but the goals of those regulations are merely accomplished through different mechanisms for satellite. STELA preserves the rule that distant signals may only be provided to viewers in "unserved households," meaning that there is not a local broadcaster providing them with a strong enough broadcast television signal.[108] If network non-duplication and syndicated exclusivity were eliminated, the rule for importation of distant signals for DBS providers must also be modified to keep the playing field level for all MVPDs. This could be accomplished by allowing DBS providers to import distant signals in the event that a retransmission consent negotiation was at an impasse.

Under a theoretical system that removed just non-duplication and syndicated exclusivity, there would still be mechanisms in place to preserve localism. First, compulsory license fees are lower for the retransmission of local signals than they are for distant signals.[109] Second, as the broadcasters have argued, cable customers want their local news coverage.[110] That means that cable companies would prefer to retransmit local broadcasts and would likely pay a higher price to their local broadcaster than they would to carry a distant broadcasters' signal. They would resort to seeking out distant broadcasters only if they were at an impasse with their local broadcasters.

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[108] 17 U.S.C. § 119(a)(2)(B).
[109] Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, 2005 WL 2206070, ¶ 33 (FCC) (September 8, 2005).
[110] *See NAB Comments*, *supra* note 99, at 4.

This system would help drive down retransmission consent fees and wouldn't allow local broadcasters to threaten blackouts if an agreement couldn't be reached.

### The Network/Broadcast Affiliate Relationship

Broadcasters, however, have argued that, because of the contracts in place between the broadcasters and the networks, simply removing network non-duplication and syndicated exclusivity rules would have no actual impact. Contracts between broadcasters and networks often contain "exclusivity of territory" clauses, which give broadcasters the rights to have their signals retransmitted only in a limited geographical area. These clauses could prevent broadcasters from competing with one another in the event that the network non-duplication and syndicated exclusivity rules were removed.

More fundamentally, affiliated broadcasters fear irrelevance if the compulsory license and must-carry/retransmission regime were scrapped altogether. But, as noted, this scheme artificially and substantially constrains the range of contract options between networks and affiliates, leaving essentially only the current, ham-handed system for managing transfer payments between networks and affiliates. Retransmission consent fees are the only means networks have of propping up affiliate broadcaster distribution of content only because the rules require it, not because it is the optimal system.

But if the networks truly value the local broadcasters as much as they claim, in a deregulated system they wouldn't let the broadcasters suffer serious financial harm. Instead, the networks and broadcasters would simply re-negotiate the contracts between one another to give the broadcasters a cut of the copyright proceeds. Or they may continue to assign their affiliates territorial, exclusive licenses, thereby enabling them to continue dealing directly with MVPDs, with payment from the affiliates traveling back up the chain. Or they may create some other form of contract. The point is, there is nothing sacrosanct about the current system that finances local programming through both advertising and retransmission fees, and, in principle, any of a number of contractual arrangements between networks and their local broadcast affiliates to redistribute copyright license fees could support local programming.

The broadcasters have also claimed that eliminating the retransmission consent scheme would mean the end of local news coverage.[111] But if MVPD customers want local news coverage, MVPDs will find a way to make it available to their customers, networks will facilitate it, and local broadcasters will receive copyright royalties for such locally created content. That may mean finding an outlet for their content online, either through OVDs or by offering it directly to

[111] *NAB Comments*, *supra* note 99, at 6.

consumers online—or perhaps in partnership with 4G broadcasters. The broadcasting model may be born anew—if only the spectrum currently used innovative wireless services, such as 4G Broadcasting.[112]

These arguments that the broadcasters have put forth show that they see the writing on the wall: that broadcast is becoming an irrelevant medium. But eliminating retransmission consent and all of its components doesn't directly spell the end for broadcasters. It merely lets the networks and the public determine if there's truly a demand for them, and it enables the market price for this demand to be determined unencumbered instead of by the artificial retransmission consent regime. And if there is a need, broadcasters will survive. But if it turns out that the demand for what broadcasters deliver is no longer there, isn't that a sign that broadcasters simply are necessary anymore? Technological progress is bound to make certain older technologies unnecessary. If the modern video marketplace determines that broadcasting falls into this category, why should consumers continue to subsidize it if it's longer needed? Why shouldn't local programming, like news and sports, be distributed over the Internet?

Regardless of whether broadcasting as a medium—as distinct from broadcasters as local programmers who could use MVPDs or the Internet for retransmission—is necessary in today's video marketplace, broadcasters have adduced two additional legitimate concerns about eliminating the current legal regime. They are correct that it would lead to a period of uncertainty as MVPDs, broadcasters and networks attempt to navigate the new regulatory landscape to determine the best way to do business with one another. And they are also correct that there are currently long-term contracts in place, negotiated under the old regulations that would be interfered with if the regulations change. But these are not reasons in and of themselves to keep the compulsory license scheme in place. Because of the long-term contracts, customers are unlikely to be affected by a transition and likely won't lose access to content. And these contracts can be modified over time to deal with the new reality and likely won't have the drastic impact that the broadcasters claim; after all, affiliate contracts are often regularly renegotiated anyway. And networks, MVPDs, and especially broadcasters will to have to adjust to the realities of competition from OVDs eventually.

All of this is contingent, of course, on the compulsory license, must-carry and their statutory brethren never being applied to OVDs at all. The debate over whether to eliminate retransmission consent for MVPDs has already been raging for years, and there seems to be an acknowledgement from all parties that it will eventually disappear . Applying this antiquated and artificial method of acquiring access to network content makes little sense today for MVPDs, and applying it to OVDs could severely damage a growing industry that needs as few regulatory barriers as possible to

[112] *See supra* at 48.

thrive and compete with incumbent video providers. OVDs are already blazing their own path for acquiring rights to content, and they are doing just fine without compulsory licenses and the Communications Act's carriage regime. Their model is actually giving us hints of what the future might look like when retransmission consent finally goes away—replaced by a regime based on copyrights and policed by antitrust.

We don't exactly what the video marketplace will look like following the elimination of compulsory licenses and the retransmission consent regime. Even some MVPDs have stayed out of the retrans fight, preferring the devil they know to the one they don't. And broadcasters are loathe to give up guaranteed revenue in exchange for unknown contractual alternatives. But that doesn't mean that the system serves the public interest anymore.

Finally, while broadcasters adamantly defend their right to receive payment via compulsory license and retransmission consent for licensing television content, they nevertheless just as adamantly oppose the creation of a compulsory license for radio broadcasts.[113] The difference, of course, is that, whereas the Cable Act amendments to the Copyright Act preserved the underlying performance right for video (subject to the compulsory license), the performance right for sound recordings does not extend to cover broadcast public performances.[114] Broadcasters are net recipients of retransmission consent fees for television broadcasts through operation of the Byzantine carriage rules and established contracts with networks, but the same revenue sharing arrangement would not exist for radio and broadcasters presume they would instead be net payors of a compulsory radio performance right. It is disingenuous to argue that the one system serves the public interest while the other would imperil it when the primary difference between them is merely the distribution of revenue among the relevant players.

## Aereo and Copyright

The discussion of the future of the video marketplace in a post-retransmission consent world is premised on one significant assumption: that the 2nd Circuit's recent decision in the *Aereo* case[115] does not remain the law of the land. Why? Because the *Aereo* decision potentially changes everything.

Aereo is an online video provider with a unique service: for $8 per month, the company "leases" to each subscriber a remote television antenna, located at an Aereo data center, that enables

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[113] *A Performance Tax Puts Local Jobs at Risk,* NATIONAL ASSOCIATION OF BROADCASTERS (2013), http://www.nab.org/advocacy/issue.asp?id=1889 (last visited June 11, 2013)

[114] *See, e.g.*, Paul Maloney, *Copyright chief Pallante renews priority for "full sound recording performance right," aka on-air radio royalty,* RADIO AND INTERNET NEWSLETTER (June 6, 2013), http://kurthanson.com/news/copyright-chief-pallante-renews-priority-full-sound-recording-performance-right-aka-air-radio-r.

[115] *WNET v. Aereo*, Docket Nos. 12-2786-cv, 12-2807-cv, (2d Cir. 2013).

subscribers to watch broadcast programming on Internet-connected devices.[116] Subscribers may also record broadcast transmissions on Aereo servers and access those programs at any time (much like a DVR). According to the Second Circuit, because Aereo is not a cable provider, it is not subject to the Copyright Act's performance right and thus does not have to get consent from or pay broadcasters for the retransmission of broadcast signals.[117]

The Second Circuit found that, because Aereo customers are capturing their programming through individual antennas, and because their servers keep a unique recording for every customer who records a program, their rebroadcast of content is not a "public performance" under copyright law.[118] The decision is rooted in the Second Circuit's 2008 *Cablevision* decision, holding that Cablevision's remote storage DVR (which enables subscribers to record programs on servers hosted by Cablevision at remote locations) did not violate copyright laws.[119] Aereo merely built a technological Rube Goldberg Machine to mirror the Rube-Goldberg-like nature of current law.

So Aereo can now legally retransmit broadcast signals to its customers with zero content acquisition costs, and reap the profits. It doesn't have to pay broadcasters, but more fundamentally, it doesn't have to pay copyright holders. And now other OVDs can attempt to emulate Aereo's business model and also avoid having to pay for access to broadcast content.

Broadcasters have decried the decision, and the networks have even threatened to take their content off the air and become MVPD channels in response.[120] They have good reason to be upset: The *Aereo* decision could drive the best programming off of broadcasting and onto networks carried only by MVPDs. Otherwise, the trend to cord-cutting may accelerate, as OVDs like Aereo (and larger OVDs using Aereo's technology) begin to offer broadcast programming. Either way, the decision may financially threaten the viability of broadcasting by reducing or even eliminating both the revenue broadcasters receive from MVPDs for retransmission and the ad revenue they earn by showing content that shifts to MVPD networks like the still-hypothetical "Fox Channel." This could ultimately put the broadcasters out of business. But most importantly, it undermines content owners legitimate copyright interest in performance of their works in contravention of the spirit, if not the letter, of the Copyright Act.

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[116] Larry Downes, *Aereo TV: Barely Legal By Design*, *Harvard Business Review Blog*, (March 7, 2013), http://blogs.hbr.org/cs/2013/03/aereo_tv_barely_legal_by_desig.html.
[117] *WNET v. Aereo,* at 2.
[118] Id. at 5.
[119] *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).
[120] Andy Fixmer, *News Corp. to Take Fox off Air if Court Backs Aereo*, *Bloomberg* (April 9, 2013), http://www.bloomberg.com/news/2013-04-08/news-corp-says-it-will-take-fox-off-air-if-courts-ok-aereo-1-.html.

The Second Circuit's decision could still be overturned by the Supreme Court if four Justices decide to hear the case. And at least one other court has already found that the Second Circuit's interpretation of the Act is incorrect, holding (appropriately, I believe) that Aereo's system fits clearly within the Act's meaning.[121] The real issue is that the exclusion of as system like Aereo's was clearly not intended by Congress, and the holding exists perhaps only because the public performance right language was poorly worded. Congress could and should act to revise the statute and make its intent clear by codifying an exclusive "right to make available" for broadcasts.[122]

If the decision stands and Congress doesn't overrule it, we could see the rise of OVDs and the demise of the broadcasters happen more quickly than expected. One of the biggest problems with the decision is that it sets a clear dividing line between MVPDs, who still have to abide by retransmission consent for access to broadcast content, and OVDs, who suddenly have a way to deliver broadcast content for free.

Whether *Aereo* stands or not, its awkward outcome is an example of the unintended consequences of the cobbled together copyright and carriage regimes regulating MVPDs.

## Vertical Integration

Many industry critics are concerned about the extent of vertical integration between content and distribution, and myriad existing rules and proposals for additional restrictions are animated by professed concerns about vertical integration. Other rules and proposals involve related issues (similar to those discussed above) around the regulation of the relationship between content and distribution. These concern, among other things, program access rules, program carriage rules, unbundling and tiered pricing.

### Background

We have some experience with how rules prohibiting integration of video content producers and distributors play out, and our economic understanding of the issue is well developed. The Supreme Court's 1948 *Paramount*[123] decision ended the system of studio ownership and control of theaters, then the only significant distribution outlet for films, and restrained their ability to bundle content

[121] *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, CV 12-6921-GW JCX, 2012 WL 6784498 (C.D. Cal. Dec. 27, 2012) (enjoining Aereo-like service upon finding plaintiffs would likely prevail in claiming the service infringed on the public performance right). *See also WNET v. Aereo*, Docket Nos. 12-2786-cv, 12-2807-cv, (2d Cir. 2013), Chin, C.J., dissenting.

[122] *See, e.g.*, *New paper examines distribution and 'making available,' Copyrights & Campaigns*, http://copyrightsandcampaigns.blogspot.com/2010/09/new-paper-examines-distribution-and.html

[123] *See United States v. Paramount Pictures*, 334 U.S. 131 (1948) (landmark case restricting block-booking and forcing major movie studios to divest themselves of their movie theater chains).

in contracts with distributors. But far from serving consumer interests, the decision led to a marked decrease in the quantity of content. The most "noticeable trend is from 1950 to 1955, when output share from the seven majors, excluding United Artists, fell by nearly 30 percent. After 1951, the year by which all studios had spun off their theatre holdings, output of the major studios dropped significantly and rental rates rose accordingly. Although this reaction had beneficial results for the independent producers, the increase in rental prices severely worsened the plight of exhibitors" and consumers.[124]

Transaction costs explain this reduction in consumer welfare. As with bundling, vertical integration reduced both *ex ante* costs from negotiation and *ex post* costs from monitoring. As studios lost control over distribution, they "became more uncertain about revenues, [and] their discount rates went up... Thus, transaction cost increases meant supply contracted, which led to market excess demand and rising rental rates."[125] Essentially, the studios could only afford to produce the most profitable content, thus curtailing the quantity of content produced. One should not overlook, though, that this period also coincided with the expansion of television into the American home, which dramatically altered the video distribution landscape.

Similarly, transaction costs in the cable market are high because licensing is inherently complicated.[126] The process of licensing the MGM library presents a tangible example of this largely unseen complexity. The sticker price of the revenue from licensing rights to content, content which is already in existence and fully completed, is a misleading figure,

> [A]s it had to be split with others who had rights in the titles. Each title had its own contractual terms governing payments to partners, talent, guilds, and third parties. Just making these payments entailed issuing more than 15,000 checks per quarter. Not only did titles have different pay-out requisites, but their future revenue stream depended on factors specific to each movie, such as the age of its stars, its

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[124] Gregory M. Silver, *Economic Effects of Vertical Disintegration: The American Motion Picture Industry, 1945 to 1955* 16-17 (London School of Economics Working Paper No. 149/10) ("This sharp drop in output illustrates one of the most interesting ironies of Paramount: that many of the typical characteristics of a restrained market became more apparent in the industrial organisation after divorcement than before it. M.A. Adelman, a prominent MIT economist of the 1950s stated that the signs of a controlled market 'are not size, or agreement, but restricted output, higher prices, and excess capacity.'").
[125] *Id.* at 19.
[126] Gregory L. Rosston, "An Economic Analysis of Competitive Benefits from the Comcast-NBCU Transaction," *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal Inc. For Consent to Assign Licenses or Transfer Control of Licensees,* MB Docket No. 10-56, at 8 (May 4, 2010), *available at http://www.comcast.com/nbcutransaction/pdfs/ROSSTON%20-%20Public%20Version%20Stamp%20In.pdf* [hereinafter Rosston, *Economic Analysis*] ("There are many issues to resolve and agree upon, including the ability of the content provider to determine the amount and type of content that will be made available under certain conditions, the level of restrictions on licensing content to other distributors and for other services, most favored nation ('MFN') clauses, required marketing efforts by the parties, rights over the sale of advertising, release timing for programming, quality of programing, and many other factors.").

> topicality, and its genre. To evaluate the library, Viacom [a prospective licensee] assigned a team of fifty of its most experienced specialists to evaluate how much each and every title would bring on over a decade. The Herculean job took the team two months.[127]

Reduced transactions costs, a benefit of vertical integration and bundling, are very likely to facilitate an increase in the sort of high-value programming that consumers desire. A drama with high production-value or a documentary that requires extensive research is expensive to create and, therefore, becomes more risky as the licensing becomes less certain. A vertically integrated firm can reduce that risk by increasing the certainty of licensing, making the production and distribution of that content more likely as well as cheaper.[128] If regulators impose restrictions on vertical integration in cable, similar to those in Paramount, we should expect similar results: reduced quantity and increased price.

Another reason an MVPD operator may want to own content is to reduce the costs of obtaining it. Program networks generally charge MVPDs license fees on a per-subscriber, per-month basis. But and MVPD can eliminate these costs by owning the channel.[129] This pro-competitive effect is called the elimination of double marginalization, and it often leads to lower prices for consumers.[130] Double-marginalization can be found when licensing films for distribution, either in theaters or on television:

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[127] Edward Jay Epstein, *Hollywood Economist 2.0* § 865 (2d ed. 2012).

[128] Rosston, *Economic Analysis*, *supra* note 126, at 10 ("Developing such new platforms requires risky, business-specific investment...Comcast has incurred significant upfront and ongoing expenditures for its new distribution platforms...However, expenditures such as these may be profitable only if sufficient content is available now and in the future at arm's length terms without protracted delay. While Comcast has made significant investments in developing new delivery platforms, it will have a greater incentive to make these investments (and make them sooner) when it expects to have more efficient access to sufficient quality and variety of content...Content providers, however, also need to ensure that new revenue streams will provide the financial support necessary to justify the large investments that are required to create high-quality, professionally produced programming before they risk undercutting established revenue streams by allowing their content to be delivered over new distribution platforms."); *See also* Gregory L. Rosston & Michael D. Topper, "Response to Comments and Petitions Regarding Competitive Benefits and Advertising Competition," *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal Inc. For Consent to Assign Licenses or Transfer Control of Licensees,* MB Docket No. 10-56, at 2 (July 21,2010), *available at* http://www.comcast.com/nbcutransaction/pdfs/REDACTED%20Rosston-Topper%20Reply%20Report%20-%20FINAL.pdf [hereinafter Rosston, *Response*] ("Comcast's track record demonstrates that it significantly increases programming investments in its networks that it controls.").

[129] Thomas W. Hazlett, *Vertical Integration in Cable Television: The FCC Evidence* 5 (Oct. 19, 2007) *available at* http://www.arlingtoneconomics.com/studies/vertical-integration-in-cable-television.pdf ("Firms that create or purchase inputs would be expected to employ these internal assets over external purchases, given transactional efficiencies available. In cable TV, for instance, program networks routinely charge cable operators license fees on a per-subscriber, per-month basis. These charges result in each additional subscriber costing more to the operator. Such marginal costs can be eliminated, however, by owning the channel.").

[130] Rosston, *Response*, *supra* note 128 ("the reduction in double marginalization...is based on empirical evidence").

> Along the metaphoric road of getting movies to the greater public, the studios act as the toll collector. The major studios collect this toll in the form of a distribution fee not only on the movies that they produce and finance but on other people's movies that they distribute. No matter how well or badly a movie fares at the box office, no matter how much money outside investors have sunk into it, the studio takes its cut from the gross emanating from the box office, the video store, and the television stations."[131]

The myopic focus on MVPDs' carriage decisions misses the larger questions about incentives for greater content production and whether new content can reach consumers. And importantly, this is true not only for affiliated content, but for independent programming, as well.

A rule mandating the separation of content and distribution could lead to fewer opportunities for independent programmers to reach audiences because it could reduce incentives for MVPDs to invest in infrastructure, thus reducing the incentive to invest in valuable content that relies on distribution. The decision to increase infrastructure also benefits other content owners. These investments are what lead to expanded channel capacity in the first place.[132] One scholar described this process as a virtuous circle:

> [C]able TV systems invest in program networks [and] they simultaneously invest in complementary assets… Better content improves the value of distribution conduits, just as improved transport facilities make cable programming more valuable. Hence, if cable operators see profits available from creating new programming, they enjoy incentives to build additional capacity (adding channel slots to cable infrastructure) in order to realize those returns. Given economies of scale and scope in capacity upgrades, an operator expanding its distribution network for some of its own programming can simultaneously add capacity to deliver much more."[133]

While integrated distributors might have an incentive to withhold access to their affiliated content from competing MVPDs, as discussed below, this fear may be overstated, and most discussions of the issue (in significant part because the rules requires it) fail to look at the broader economic consequences of dealing with this potential problem through mandated carriage.

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[131] Hollywood Economist 2.0, § 1055.

[132] Hazlett, *supra* note 129 at 9 ("Again, any evidence of favoritism exhibited by cable TV operators towards their own programming must be evaluated in the light of these market outcomes. Even where favoritism may exist, and cannot be explained by production or transaction cost efficiencies, dynamic efficiencies may well result. These occur where operators, partly in response to economic incentives offered by the lack of regulation, undertake to expand channel capacity. As seen currently, the dominant share of the capacity created by cable operators is allocated to unaffiliated program networks. Hence, the net effect of the incentives in place is to facilitate entry by non-MSO basic cable channels.").

[133] *Id.* at 6.

In a related fashion, vertical integration can be pro-competitive by increasing incentives for innovation. The evidence suggests that when a company is vertically integrated, it is easier to bring innovative products to market more quickly. Comcast's development is informative:

> [H]istorical adoption patterns of video on demand (VOD), DVD day-and-date release, Fancast Xfinity TV, and advanced advertising demonstrate that the launch and expansion of these products took longer than expected or necessary because of limits on the quantity, quality, and variety of content that was available to Comcast. There is no claim that the launch and delivery of new offerings was possible without vertical integration; rather, the critical point is that vertical integration can accelerate the launch and expansion of new products, services, and platforms, and increase experimentation."[134]

Vertical integration with NBCU, as well as exclusive contracts and other contract restrictions, allows MVPDs to bring innovative products like these to the market much more quickly because of reduced concern about risk.[135]

Furthermore, vertical integration overcomes disparate marketing incentives between content owners and distributors, ensuring that not only access to content, but also information about content is made optimally available to consumers.[136]

Ever-increasing competition in the distribution market also ensures that consumers are protected. Now, more than ever, it is possible for programming to be freed from dealing with limited distribution options. There is little reason that networks and other content owners must rely on cable or DBS for distribution, even in markets with only a single MVPD.  Where there is more than one MVPD, networks (and consumers) can choose among them. But if the content owner does not

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[134] Rosston, *Response*, *supra* note 128, at 9 ("In fact, DirecTV's example of Comcast gaining access to Sony/MGM content demonstrates this point...Comcast was unable to use contractual means along to overcome these frictions and had to participate in Sony's purchase of MGM to reach an agreement for VOD rights to Sony and MGM content. This access to content allowed Comcast to create 'Free Movies' category on VOD.").

[135] NBC Universal, *Response to Competition Commission Statement of Issues relating to the Movies on Pay TV Market Investigation* ¶4.2, http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2010/movies_on_pay_tv/pdf/universal_response_to_issues_statement.pdf (last visited June 9, 2013) ("The current exclusive supply arrangements are usual and typical in other geographic markets, and considered by NBC Universal to be the most efficient way to optimise returns and protect the value of content to customers and consumers in subsequent windows, which is particularly important given the significant financial investments and risks involved in movie production. Any change to the nature of these arrangements, even if it were possible, would create uncertainty and threaten to jeopardise the number and quality of films produced by NBC Universal.").

[136] *See, e.g.,* Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free-Riding*, FTC Hearings on RPM (2009), *available at* http://www.ftc.gov/opp/workshops/rpm/docs/bklein0217.pdf

find the prices for distribution appealing, it can use other distribution outlets, including self-distribution online and online distribution through OVDs like Hulu, Netflix and YouTube.[137]

Fears about the death of "independent" programming absent regulation mandating dis-integration or carriage are also unconvincing. As noted above, independent producers may be net beneficiaries of the economic consequences of vertical integration. But perhaps more important, it is unclear what critics mean by "independent." If independent means "not affiliated with a distribution network," this amounts to a preference for ABC's "The Bachelor" (owned by Disney) over NBC's "The Biggest Loser" (owned by Comcast). If it means "not affiliated with a network," this amounts to a preference for "Wheel of Fortune" (started by Merv Griffin) over CBS's "The Price is Right." Both "The Voice" on NBC and "Survivor" on CBS were developed by the same independent producer — Mark Burnett. It seems extremely unlikely that Comcast would refuse to distribute "Survivor," or forego the licensing fees and withhold "The Voice" from competing distributors, not least because independent program developers like Burnett wouldn't tolerate reduced revenues. The complex incentives of the marketplace makes it impossible to draw simplistic lines between affiliated and independent content. As more and more popular programming is successfully produced and distributed outside of the usual channels (i.e., on non-network channels and by and through OVDs like Netflix and Amazon), this distinction is less and less relevant.

Finally, it is important to note that discussions of possible efficiencies from vertical integration are not purely academic. Consumers receive a pass-through rate of approximately 50% once the reduced price and increased investment in product and infrastructure are taken into account.[138] In his analysis of the 2002 AT&T-Comcast transaction, Professor Howard Shelanski, currently Director of the Bureau of Economics at the Federal Trade Commission and a former Chief Economist at the FCC stated:

> The case for pass-through efficiencies is compelling for a firm that faces competition, particularly competition as vigorous at that in the MVPD market…Reductions of the direct costs of procuring programs will result in both a lower cost per-program for subscribers and in an increased number of programs being made available to subscribers…Efficiency gains from the merger may also be

[137] The FCC's definition of an Online Video Distributor (OVD) in the *Fourteenth Video Competition Report* includes programmers and content producers/owners (Hulu), affiliates of online services (YouTube), and affiliates of manufacturers, retailers, and other businesses (Netflix). *Fourteenth Video Competition Report*, *supra* note 2, at 3 n.6.

[138] Rosston, *Response*, *supra* note 128, at 17. Pass through may be as high as 90%, in fact. See Ex Parte of News Corp., General Motors Corp., and Hughes Electronics *Corp., Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control,* MB Docket No. 03-124 (Sept. 8, 2003) ("CRA Second Expert Report"), nn.41- 43, Table 1.

passed through to consumers in a less direct way through increased investment in network upgrades and the development and deployment of innovative services."[139]

## Program Carriage

I agree with Public Knowledge's John Bergmayer, who testified before the Senate Commerce Committee earlier this year that:

> [T]here are some rules on the books today that seem designed to prop up legacy business models and have long outlived any functions they may once have served. Many of them can and should be repealed today. Examples of these include sports blackout rules, network non-duplication, and syndicated exclusivity provisions, and the previously mentioned basic tier buy-through rule that requires that all cable subscribers pay for free over-the-air television.[140]

Bergmayer goes on to defend program carriage (as well as program access) rules. But the same competition that undermines the relevance of the rules mentioned above also already "protects independent programmers from the negative effects of bottleneck control by some MVPDs, . . . ensuring that viewers can enjoy content from diverse sources." One can hardly conceive of an environment with more product diversity than cable, DBS and OVD programming. And the same market forces that led not only unaffiliated Disney, but also Comcast's NBCU to enter into comprehensive, cross-platform carriage agreements with multiple distributors make clear that content owners and platforms alike, whether independent or not, have strong incentives to distribute content as widely as possible.

Perhaps more important, we should question the implicit assumption – or aspiration – that all content in a competitive market should essentially be available from all distribution channels. Such a demand does not serve consumers and does not reflect economic realities. The incentive to develop innovative distribution channels and content and to invest in infrastructure improvements depends on the ability to differentiate products and to earn significant returns on such investments. Far from being an indicator of market failure, the availability of exclusive arrangements and differential treatment of content among distribution channels facilitates the very dynamism that has caused this market to thrive.

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[139] Mark Israel and Michael L. Katz, "The Comcast/NBCU Transaction and Online Video Distribution," *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal Inc. For Consent to Assign Licenses or Transfer Control of Licensees,* MB Docket No. 10-56 (May 4, 2010), *available at* http://ecfsdocs.fcc.gov/filings/2010/05/04/6015593666.html

[140] *Public Knowledge, State of Video Testimony*, supra note 1, at 13.

Pursuant to Section 616 of Communications Act,[141] the Commission adopted § 76.1301(c), which states:

> No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

To prove a violation of the Commission's Program Carriage rules, a complaining programmer must show: (1) that the MVPD discriminated against a programming vendor in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation; and (2) that the effect of such discrimination unreasonably restrained the ability of the programming vendor to compete fairly.

Section 616 does not track the anticompetitive foreclosure test of the essential facilities doctrine of antitrust, where "the indispensable requirement for invoking the doctrine is the unavailability of access to the 'essential facilities."[142] As the Supreme Court noted in *Trinko*, mandatory access "serves no purpose" when the input in question is otherwise available through other channels.[143] As interpreted by the FCC, Section 616 is in fact a more expansive restriction on vertical integration abuses and likely a step away from the careful economic analysis done by antitrust authorities and courts. In other words, the FCC's interpretation of Section 616 likely restricts pro-competitive activity and represents an overregulation of vertical integration.

The recent *Tennis Channel* decision at the Commission (even more recently struck down by the D.C. Circuit) was reviewed under this provision.[144] In *Tennis Channel v. Comcast Cable*, the FCC upheld the ALJ's determination that the Tennis Channel was similarly situated to the Golf Channel and Versus (Comcast holdings) and that the placement of the Tennis Channel on a lower-penetrating tier was unfair discrimination based upon channel affiliation.[145] Relying heavily upon Hal Singer's economic analysis,[146] the FCC found the channels to be similarly situated based on their all having sports programming, the same target audiences and advertisers and similar ratings. The FCC also agreed with the ALJ that Comcast treated the Tennis Channel differently than the Golf Channel and

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[141] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); *see also* 47 U.S.C. § 536.

[142] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).

[143] *Id. See also* Daniel F. Spulber & Christopher S. Yoo, *Mandating Access to Telecom and the Internet: The Hidden Side of Trinko*, 107 COLUM. L. REV.1822–1907 *(2007), available at* SSRN: http://ssrn.com/abstract=978534.

[144] *Comcast Cable Commc'ns, LLC v. F.C.C.*, 12-1337, 2013 WL 2302737 (D.C. Cir. May 28, 2013).

[145] Memorandum Opinion and Order, *in re The Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-78A1.pdf.

[146] Declaration of Hal J. Singer, *In re The Tennis Channel, Inc. v. Comcast Cable Commc'ns, available at* http://www.naviganteconomics.com/docs/Singer%20Declaration%20(Redacted,%20final)%201.4.10.pdf.

Versus because of affiliation status, rejecting all of Comcast's proffered reasons for differential treatment.[147] Comcast appealed the FCC's order, and the FCC's ruling was overruled by the D.C. Circuit Court of Appeals, where a three judge panel unanimously held that the FCC had not met its factual burden under the statute.

Despite the FCC's ruling, and as confirmed by the court, it is not clear that Comcast moved the Tennis Channel to a less-penetrated tier for anticompetitive reasons. As noted in Commissioner McDowell and Commissioner Pai's dissent, the placement of the Tennis Channel on a less penetrated tier was within industry mainstream practices.[148] The channel is one of the less-watched sports channels – one of those bundled channels that supporters of the Program Access rules elsewhere complain that competitors and consumers of Comcast must accept in order to get more valuable content. Comcast's decision to place it on a lower-penetrating tier could have been pro-competitive if the money saved by Comcast were passed on to consumers in the form of lower cable bills or investment in better content or other innovation.

And it is not clear that the lower placement was inconsistent with viewer preferences. Generally, allowing distributors to make channel placement choices in their best interests will coincide with the interests of consumers; if it did not, the consumers would switch providers or access content in an alternative way. This is the essential point about the structural nature of today's video market: consumers have a variety of MVPD choices and, critically, can get most of the content they want from OVDs, either instead of an MVPD subscription (cord-cutting) or in addition to it (cord-trimming).

While some scholars have suggested extending the FCC's Section 616 jurisdiction to other platforms, including broadband access providers,[149] there is no justification for extending the provision, already more restrictive than even the essential facilities doctrine, beyond that doctrine's "outer-boundaries"[150] of antitrust law. Put simply, while mandated access may have made sense in the cable industry once, it no longer does. The law should not restrict economic activity that is far more likely pro-competitive than not.

But Section 616 suffers from a more fundamental problem. Because it focuses solely on competitors and not competition, and, because, with only a limited exception discussed below, it proscribes conduct without consideration of economic effect, it is inconsistent with a sensible

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[147] Memorandum Opinion and Order, *see supra* note 145, at 26-31.

[148] Robert McDowell & Ajit Pai, FCC Commissioners, Joint Dissenting Statement *in re The Tennis Channel v. Comcast Cable Communications*, File No. CSR-8258-P, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-78A2.pdf.

[149] *See* Robert Hahn & Hal Singer, *Is the US Government's Internet Policy Broken?: A Review of Captive Audience by Susan Crawford*, *available at* http://www.gcbpp.org/files/EPV/EPV_HahnInternetBroken_12013.pdf.

[150] *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. at 399 (2004).

consumer welfare standard. (It also raises First Amendment problems, as noted by Judge Kavanaugh's *Tennis Channel* concurrence.[151])

The problem is that, even though the Commission's interpretation of Section 616 forbids only carriage decisions motivated by discriminatory intent, *discrimination*, without demonstrable anticompetitive harm, shouldn't be proscribed at all. The court in the Tennis Channel case noted that:

> There is also no dispute that the statute prohibits only discrimination *based on* affiliation. Thus, if the MVPD treats vendors differently based on a reasonable business purpose (obviously excluding any purpose to illegitimately hobble the competition from Tennis), there is no violation. . . . In contrast with the detailed, concrete explanation of Comcast's additional costs under the proposed tier change, Tennis showed no corresponding benefits that would accrue to Comcast by its accepting the change.[152]

But in a competitive content market with uncertain investments, high fixed costs and extreme product differentiation, there is no reason why discrimination against competing content shouldn't itself be considered a valid business decision.

In his concurring opinion, Judge Kavanaugh makes a stronger case for reversing the FCC, pointing out that, by his reading, the limitation on discriminatory carriage decisions was intended to be less rigid and to encompass antitrust standards:

> I write separately to point out that the FCC also erred in a more fundamental way. Section 616's use of the phrase "unreasonably restrain" – an antitrust term of art – establishes that the statute applies only to discrimination that amounts to an unreasonable restraint under antitrust law. Vertical integration and vertical contracts – for example, between a video programming distributor and a video programming network – become potentially problematic under antitrust law only when a company has market power in the relevant market. It follows that Section 616 applies only when a video programming distributor possesses market power. But Comcast does not have market power in the national video programming distribution market, the relevant market analyzed by the FCC in this case.[153]

While Judge Kavanaugh makes an important statutory interpretation point, the underlying rationale for limiting the prohibition of contracts to cases where anticompetitive foreclosure can be proven

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[151] *See Comcast Cable Commc'ns, LLC v. FCC*, No. 12-1337, 2013 WL 2302737, at *6 (May 28, 2013) (Kavanaugh, J., concurring); *see also infra* p. 61.
[152] *Comcast Cable Commc'ns,* at 2.
[153] *Id.* at 5 (Kavanaugh, J., concurring).

is important. In the antitrust context *discrimination* is not *per se* illegal precisely because discrimination makes perfect business sense and presents a problem only when it leads to demonstrable anticompetitive harm.

As with bundling, this determination requires an assessment of the full range of distribution opportunities, a question that turns on a much broader economic assessment than simply whether discrimination occurred or even whether it harmed a particular competitor. The relevant question becomes whether Tennis Channel could maintain minimum viable scale but-for Comcast's actions, thus preserving competition. Given that Comcast *did not* simply refuse carriage but rather carried Tennis Channel on a programming tier with smaller penetration, and given the strong evidence that Comcast's carriage on any tier (let alone the higher-penetrating tier) was not essential to Tennis Channel's survival, this would be extremely difficult to prove.

Unfortunately, it's not clear that "unreasonably restrain" as Judge Kavanaugh interprets it gets us to this sort of foreclosure analysis. According to his concurring opinion,

> Section 616 thus does not bar vertical integration or vertical contracts that favor affiliated video programming networks, absent a showing that the video programming distributor at least has market power in the relevant market.[154]

Market power is important, but it isn't sufficient to reach the economically sensible result, and nowhere does Judge Kavanaugh explicitly discuss foreclosure analysis. Nevertheless, Judge Kavanaugh does close this section of his opinion by noting that, "[i]n sum, Section 616 targets instances of preferential program carriage that are anticompetitive under the antitrust laws."[155]

If applied consistently, this interpretation might salvage Section 616, although there is reason to doubt the FCC could actually do so, given the reading of the statute by the Commission's current majority (and its ALJ).[156] The sort of intervention in business decisions contemplated by Section 616 as interpreted by the Commission is unwarranted. Alleged vertical-integration abuses are routinely examined under current antitrust law, without the need for specific prohibitions like the

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[154] *Id*. at *10*.

[155] *Id*.

[156] The minority (the ALJ's decision in Tennis Channel was approved by the Commission on a 3-2 vote), however, has a much better take. As Commissioner Pai noted in commenting on the court's decision,

I hope that the Commission will heed the lesson of today's D.C. Circuit decision and refrain from attempting to micromanage cable operators' programming decisions. Given the current state of the video marketplace, I agree with Judge Kavanaugh that the FCC cannot tell Comcast how to exercise its editorial discretion about what networks to carry any more than the Government can tell Amazon or Politics and Prose or Barnes & Noble what books to sell…

Statement of Commissioner Ajit Pai on the D.C. Circuit's Decision in *Comcast v. FCC*, May 28, 2013, *available at* http://www.fcc.gov/document/statement-commissioner-pai-dc-circuits-decision.

FCC's program carriage rules. While the Commission's case-by-case approach to carriage complaints is helpful, the ban on discrimination is an unwarranted categorical limitation.

It is worth noting that Hal Singer, Tennis Channel's expert in the case, recently noted in criticizing the FCC's Open Internet Order that:

> A superior way to adjudicate discrimination complaints is with *ex post*, case-by-case review before an administrative law judge rather than through broad anticipatory rules like those embodied in the order or, at the other extreme, through potentially lengthy and costly antitrust litigation in the courts.[157]

He distinguishes the Commission's approach to carriage disputes and program access disputes (discussed below), defending them on this basis and distinguishing them from the Open Internet Order's "anticipatory" limitation on discrimination in the Internet context. But the existence of *ex post* adjudication of what amount to *per se* rules prohibiting discrimination without the economic apparatus of antitrust is no better than a outright *per se* ban. The problem is the presumption that discrimination in these contexts is problematic rather than of concern *only* when an effects-based analysis demonstrates them to be anticompetitive (a rule of reason). In this fundamental regard, the statute's prohibitions against discrimination in carriage (and access) as interpreted by the Commission are no better than the Commission's self-created rule against discrimination on the Internet.

### Program Access

Program Access rules prohibit, on a case by case basis, certain exclusive contracts between cable operators and content providers that restrict the ability of other providers to carry content. The sunsetting of the outright ban on exclusive contracts for satellite providers in 2012 was a significant improvement, even if it was essentially mandated by the courts.[158] But the Commission's rationale for that decision actually applies more broadly and, particularly given the First Amendment concerns inherent in such regulation and the availability of antitrust enforcement,[159] there is no longer a basis for maintaining any of the rules constraining vertical contracting. As the Commission noted:

> We recognize that the potential for anticompetitive conduct resulting from vertical integration between cable operators and programmers remains a concern. For

[157] Litan & Singer, THE NEED FOR SPEED (2013) at p. 43.
[158] Report And Order In Mb Docket Nos. 12-68, 07-18, 05-192 Further Notice Of Proposed Rulemaking In Mb Docket No. 12-68 Order On Reconsideration In Mb Docket No. 07-29), ¶ 11 (Oct. 5, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-123A1.pdf.
[159] *See infra* at 61.

> example, in some markets, vertical integration may result in exclusive contracts between cable operators and their affiliated programmers that preclude competitors in the video distribution market from accessing critical programming needed to attract and retain subscribers and thus harm competition. While the amount of satellite-delivered, cable-affiliated programming among the most popular cable networks has declined since 2007, some of that programming may still be critical for MVPDs to compete in the video distribution market. Congress has provided the Commission with the authority to address exclusive contracts on a case-by-case basis. We thus conclude that, in the context of present market conditions, such an individualized assessment of exclusive contracts in response to complaints is a more appropriate regulatory approach than the blunt tool of a prohibition that preemptively bans all exclusive contracts between satellite-delivered, cable-affiliated programmers and cable operators.[160]

Not surprisingly, it is linear sports programming that seems to drive much of the concern around exclusivity, and the Commission made clear in its action allowing the ban on exclusive satellite programming contracts to expire that the "presumption" against exclusive contracts regarding regional sports networks remained for both satellite and terrestrial operators:

> This case-by-case consideration of exclusive contracts involving satellite-delivered, cable-affiliated programming will mirror our treatment of terrestrially delivered, cable-affiliated programming, including the establishment of a rebuttable presumption that an exclusive contract involving a cable-affiliated RSN has the purpose or effect prohibited in Section 628(b) of the Act.[161]

But an analysis of one of these arrangements will serve to illustrate the defects of the general principle that Commission regulations impeding exclusive vertical contracting are appropriate at all, even in the sports programming context.

In her book, *Captive Audience*, Susan Crawford points to Comcast's exclusive right to air Portland Trail Blazers games in the Portland market.[162] Crawford alleges that Comcast has refused to license this popular content to competing distributors and allows only Comcast subscribers to access it online — thus harming competing providers and limiting exposure for the team. Comcast, for its part, has argued that it would have licensed the programming to other MVPDs, but simply failed to come to a deal with Dish and DirecTV.

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[160] Report and Order, at ¶ 3.
[161] Report and Order, *In the Matter of Revision of the Commission's Program Access Rules*, MB Docket Nos. 12-68, 07-18, and 05-192, para. 3, *available at* http://www.fcc.gov/document/revision-commissions-program-access-rules.
[162] *See Id.* at 146, 148-49.

On its face and assuming some sort of bad faith by Comcast in its negotiations with Dish and DirecTV,[163] this sounds like unwarranted exclusive dealing, leading to consumer harm and harm to Comcast's competitors. Digging deeper, though, one can see that Comcast's 2007 deal with the Blazers — the price of which would have been considerably lower without the ability to exercise exclusivity — may have been a contributing factor in keeping afloat what had been a financially struggling franchise.[164]

Moreover, the ten-year, $120 million contract with the Blazers not only helped the team out of a tough financial situation, but it also immediately *increased* the overall television exposure of the team.[165]

> In the season before CSN-NW [Comcast's Regional Sports Network including the Portland area] launched, 21 Trail Blazers games were not televised anywhere on any outlet. Upon launch, CSN-NW significantly increased the amount of Trail Blazers-related content, including live games, available to local fans. Now, between the Trail Blazers' over-the-air partner (which telecast 15 Trail Blazers games during the 2009-10 NBA season), the package of games made available on CSN-NW, and games carried on nationally distributed networks (which telecast seven Trail Blazers games during the 2009-10 NBA season), *all* of the team's regular season games are televised. In addition, prior to the advent of CSN-NW, only about 10 Trail Blazers games were available in HD. Now, all 60 games shown on CSN-NW are available in HD.[166]

Absent the exclusive deal, it seems possible that there might have been *no* Blazers games in the Portland market – either on television or live in the Rose Garden Arena.

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[163] An unwarranted assumption in reality, however, given that Comcast licensed the content to 11 other providers and offered it to Dish and DirecTV on the same terms. Those providers decided not to carry CSN-NW, Comcast's RSN carrying Blazers games, however. *See* Comcast's Opposition to Petitions to Deny and Response to Comments, *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56 at pp. 313-14.

[164] In the years leading up to the Comcast deal in 2007, the Portland Trail Blazers were in dire economic straits. The owner, Paul Allen, was considering selling the team and there were complaints of a "broken economic model." The deal struck in 2007 provided much needed revenue and exposure for the team, which was close to bankruptcy in 2004 and put up for sale in 2006 (before the owner deciding not to sell). *See* Portland Trailblazers, WIKIPEDIA, http://en.wikipedia.org/wiki/Portland_Trail_Blazers#2003.E2.80.932006.

[165] Comcast SportsNet, *Portland Trail Blazers Announce a New Regional Sports Network* (May 21, 2007), http://www.nba.com/blazers/news/Comcast_Sports_Net_Portland_T-225869-1218.html ("During its launch season Comcast SportsNet Northwest will carry at least 55 regular season Trail Blazers games, which when combined with the Trail Blazers' over-the-air coverage, means that 81 regular season Trail Blazers games will be on television next season, the most in the team's history. Comparatively, the Trail Blazers had 61 total regular season games on television last season. Comcast SportsNet Northwest will also dramatically increase the number of Trail Blazers' games in HDTV by nearly 200%, airing 28 of 36 home games in HDTV.").

[166] Comcast's Opposition to Petitions to Deny and Response to Comments, *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56, at 315 (Jan 20, 2011).

The problem is that a theoretical FCC analysis of the deal and its exclusivity[167] would not have turned on these facts. The program access rules turn entirely on harm to competitors, not overall economic effects, despite the existence of the Communications Act's ubiquitous "public interest" standard in the provision:

> **Purpose**
> The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.
>
> **Prohibition**
> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[168]

Strangely, the statute uses *consumer protection* language ("unfair methods of competition" and "unfair or deceptive acts and practices," terms borrowed from Section 5 of the Federal Trade Commission Act[169]) as the basis for its mandate, even though it explicitly considers only the effect on competitors.

Tellingly, the statute's test for determining whether exclusive satellite contracts were in the public interest turned on these factors:

> In determining whether an exclusive contract is in the public interest for purposes of paragraph (2)(D), the Commission shall consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:
>
>> (A) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

[167] The issue *was* raised as an objection to the Comcast-NBCU merger, where Comcast pointed out that, if it were a real issue, it could be dealt with in a program access challenge.
[168] 47 U.S.C. § 548, *available at* http://www.law.cornell.edu/uscode/text/47/548.
[169] 15 U.S.C. § 45, *available at* http://www.law.cornell.edu/uscode/text/15/45.

> (B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;
> (C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;
> (D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and
> (E) the duration of the exclusive contract.[170]

None of these factors would seem to permit a consideration of overall economic effect outside the effect on competing providers.

It is hard to argue that local fans were hurt by Comcast's deal with the Blazers. The fact that the team was previously unable to license so many games points to the likelihood that there was nobody else trying to buy that content at a reasonable price. It certainly does not indicate that it is highly desired content that is now being withheld from competing distributors. But competing providers could plausibly argue harm under the statute. By focusing not on the effects of such contracts in the *content* market but only on their narrow effects on distribution, the statute may be harming, not serving, the public interest.

The purpose of the Program Access rules was to open the door for competition to cable operators in the MVPD market, and that goal has clearly been achieved. Customers have a wide variety of options to receive video content today, but 1992's rules, designed for a cable-dominated world, still regulate the industry. They force cable companies to help out their competitors in a competitive market, and improperly discriminate against cable-affiliated programming while competitors like Netflix cultivate their own original programming that faces no regulation whatsoever. Additionally, the Program Access rules today essentially bar MVPDs from competing on any basis other than price, which prevents MVPDs from implementing new business models and packages that could improve quality and ultimately lighten costs for cable and satellite subscribers.

## Bundling and *a la Carte* Mandates

Bundling has nuanced effects on businesses and consumers. The practice can be pro-competitive because it allows for economies of scope in production for businesses and lower consumer search costs.[171] Programmers often bundle more popular content with less popular content to distributors. Distributors usually then sell bundles of channels to consumers. In a high fixed-cost industry like

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[170] 47 U.S.C. § 548(c)(4), *available at* http://www.law.cornell.edu/uscode/text/47/548.

[171] Bruce Kobayashi, *Does Economics Provide A Reliable Guide To Regulating Commodity Bundling By Firms? A Survey of the Economic Literature*, 1 JOURNAL OF COMPETITION LAW & ECONOMICS 707, 717 (Dec. 2005), *available at* http://www.law.gmu.edu/assets/files/publications/working_papers/05-35.pdf.

cable, bundles reduce transaction costs and these savings often outweigh the costs of providing the less-valued commodity to the consumer. For instance, the savings gained by a cable distributor in providing a basic tier of channels to the consumer is greater than the cost of providing "wasted" channels that the consumer may not watch. Further, this is not necessarily bad for the consumer. In the context of cable channels, for instance, consumers can obtain many extra channels at an overall lower price. Similarly, the bundling of Internet access with video distribution can be positive when the two can be offered at a lower combined price than the consumer values each independently.

While bundling of content is often assumed to constitute proof that the market is uncompetitive, bundling occurs not only my monopolists *but by all market participants* because it is (or tends to be) efficient, whether it is done by the content owner bundling programs into a channel or bundling channels into a licensing package, or by distributors bundling channels into tiers or bundling multiple services into a package.

Economists offer several explanations for the bundling of products, but the most likely applicable here is that bundling is an efficient way of pricing and marketing products with low marginal costs, high fixed costs, and insufficient (or unknown) demand to cover the fixed costs of the product. Ironically, understood in this fashion, both of the following may well be products of competition rather than its absence:

- The sort of bundling practiced by Viacom and complained about by Cablevision in its pending antitrust case against Viacom,[172] and
- The bundling practiced by Cablevision and complained about by every consumer who flips past hundreds of unwatched channels on their way from MTV to PBS.

With heterogeneous consumer demand being served by not only hundreds of channels but also thousands of programs bundled into each channel, there can be no doubt that the sometimes enormous fixed costs of program *production* are incurred *ex ante* with a more than reasonable risk that any given program will be met with an audience insufficient to compensate the program's developers. Infrastructure investments are similarly made under conditions of uncertainty and are similarly risky. At the time programming, infrastructure and even some marketing investments are made, the quality of, and economic return on, any particular program is unknown and highly variable. Requiring individuated and *ex post* contracting would dramatically increase the riskiness of any particular investment decision, which, by definition, must be made *ex ante* without certainty about consumer demand. The bundling of programs into channels and channels into tiers in

[172] Patricia Hurtado & Edvard Pettersson, *Cablevision Sues Viacom Claiming Antitrust Violation*, BLOOMBERG (Feb. 27 2013), http://www.bloomberg.com/news/2013-02-26/cablevision-sues-viacom-claiming-antitrust-violation.html.

contracts between both viewers and distributors and distributors and content owners helps to guarantee an overall rate of return sufficient to support the production and distribution of a wider and more varied range of programming.

Moreover, it is actually *less* expensive for MVPDs to offer a wide range of channels to all customers than it is to offer smaller, individualized bundles to each customer. Far from saddling consumers with unwanted channels for which they nevertheless have to pay, bundling likely facilitates the production and distribution of much of the programming *every* consumer watches at the price she is willing to pay for only what she watches. This dramatically expands consumer welfare. "[I]n this case bundling goods together increases demand for a product without increasing costs."[173] Even if no consumer wants every channel or every program offered on every channel, it is cheaper to provide and to negotiate over bundles of programs and channels together than it is to provide each separately. If forced to do the latter, some programming would simply not be either produced in the first place or offered in the second.

Despite these economic realities, some critics have called for mandatory unbundling, whether by statute, regulation or judicial order. Whether explicit or not, these claims are premised on the theory that bundling reduces consumer choice and thus constitutes anticompetitive conduct.

But as the Ninth Circuit held in 2012 in *Brantley v. NBC Universal*,[174] Supreme Court precedent—in particular *Leegin v. PSKS*[175] and *Hirsh v. Martindale-Hubbell*[176]—restricts, rather than authorizes, a pure "consumer choice" antitrust claim. Specifically:

> Even vertical agreements that directly prohibit retail price reductions, eliminating downward competitive pressure on price and thereby resulting in higher consumer prices … are not unlawful absent a showing of actual anticompetitive effect. [citing *Leegin* at 888]. As *Leegin* explained, higher consumer prices can result from pro-competitive conduct. … Had the plaintiffs succeeded in pleading an injury to competition, the complaint's allegations of reduced choice **…** and increased prices would sufficiently plead the fourth element of a Section 1 claim, namely that they had been harmed by the challenged injury to competition. But here, these allegations show only that plaintiffs have been harmed as a result of the practices at issue, not that those practices are anticompetitive.[177]

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[173] David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. ON REG. 37 (2005), *available at* http://www.justice.gov/atr/public/hearings/single_firm/comments/219224_d.htm (*citing* Yannis Bakos & Eric Brynjolfsson, *Bundling Information Goods: Pricing, Profits, and Efficiency*, 45 *Mgmt. Sci.* 1613 (Dec. 1999)).
[174] *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 573 (2012).
[175] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
[176] Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1349 (9th Cir. 1982).
[177] *Brantley*, 675 F.3d at 1202 (citation omitted).

> …
>
> Plaintiffs have not alleged that the contracts between Programmers and Distributors forced either Distributors or consumers to forego the purchase of other low-demand channels, . . . but only that consumers could not purchase programs a la carte and they did not want all of the channels they were required to buy from Distributors. "[C]ompelling the purchase of unwanted products" is not itself an injury to competition. [citing *Hirsh* at 1349 n. 19].[178]

Perhaps most important is the holding that, in order to demonstrate that bundling actually causes competitive harm, a plaintiff must show that the conduct *actually* reduces competition by foreclosing access to *competing* programming market-wide. The proliferation of programming, as well as distribution networks, serves to ensure that, even if bundling (and exclusive contracts, for that matter) impede access to specific programs, they don't necessarily impede access to competing programs, and not only is there no basis for *ex ante* rules prohibiting such conduct, in many cases even *ex post* antitrust complaints will and should fail.

Moreover, as the Court in Brantley correctly points out, slavish adherence to any anti-bundling principle would foreclose market activities roundly unquestioned and profoundly enjoyed:

> A rule to the contrary could cast doubt on whether musicians would be free to sell their hit singles only as a part of a full album, or writers to sell a collection of short stories. Indeed, such a rule would call into question whether Programmers and Distributors could sell cable channels at all, since such channels are themselves packages of separate television programs.[179]

Pressure for *a la carte* pricing (and antitrust restrictions on bundled program contracts between content owners and MVPDs) is borne out of the erroneous assumption that the range of choices and relative costs of programming would be the same with forced unbundling as without and the concomitant assumption that resort to a different set of specific programs constitutes harm. Unless we are prepared to bear the consumer harm from reduced variety, weakened competition and possibly even *higher* prices (and *absolutely* higher prices for some content), there is no economic justification for interfering in these business decisions.

In any case, for unbundling proposals to work, they must also include price control regulation:

> [Unbundling] rules are entirely irrelevant in the absence of rate regulation. That is because a mandate to price channels (or additional, smaller tiers) individually is

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[178] *Id.* at 1203 (citation omitted).
[179] *Id.* at 1202 n.10.

> thwarted by video providers by simply pricing the new content such that customers universally opt for the "extended basic" package. Forcing cable operators to price each channel separately, but failing to cap that price, renders the constraint non-binding."[180]

But because nearly everyone recognizes that price controls are entirely indefensible, "[n]o party today makes a serious attempt to resuscitate this regulatory corpse." [181]

## Data Pricing, Tiers & Online Video Distributors

As consumers increasingly turn to OVDs to either replace or supplement an MVPD subscription, the debate about the future of video marketplace is morphing into the net neutrality debate. Now that the MVPD marketplace is highly competitive, critics of cable have shifted their focus to alleging that the broadband marketplace is insufficiently competitive, allowing cable to exercise gatekeeper power to kill OVDs. Ironically, these concerns are reaching their apogee even as Google Fiber is demonstrating that broadband is *not* a natural monopoly, that a new entrant can make money building a new network *where local governments get out of the way*.

While we believe that there is much that could be done to unleash broadband competition, the current debate about foreclosing online video competition focuses on one particular issue: can MVPD-cum-ISPs keep consumers from cord-cutting or cord-trimming (to protect their MVPD service) by "capping" their monthly data allowance? More specifically, if a broadband provider, whether wireless or wireline, does not count data from its own services, or partners' services, against the cap, does this "discrimination" foreclose competition from OVDs? The right answer, analyzed under antitrust law, is: it depends. It is certainly conceivable that an antitrust case *could* be established—but probably not given the current size of the basic tier (300 gb/month on Comcast[182]) and the pricing of additional data ($10 for each additional 50 gb/month[183]) relative to consumer demand.

Concerns over data caps received their most prominent airing in the Data Cap Integrity Act, recently proposed by Senator Wyden.[184] Like the Cable Act itself, this attempt to replace antitrust principles of general application with sector-specific, prescriptive regulations isn't likely to serve

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[180] Thomas W. Hazlett, *Shedding Tiers for a la Carte? An Economic Analysis of Cable TV Pricing* 4 (2006) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=889187.
[181] *Id.*
[182] Jon Brodkin*, Comcast data caps hit test cities, range from 300GB to 600GB,* ARS TECHNICA (Sept. 18, 2012, 2:55 PM), http://arstechnica.com/business/2012/09/comcast-data-caps-hit-test-cities-range-from-300gb-to-600gb/.
[183] *Id.*
[184] Press release, Ron Wyden, *Wyden Data Cap Legislation Will Protect Consumers and Promote Innovation* (Dec. 20, 2012), *available at* http://www.wyden.senate.gov/news/press-releases/wyden-data-cap-legislation-will-protect-consumers-and-promote-innovation.

consumers well. Indeed, given the real economics of tiered pricing, the practical effects of the bill would be to impose a kind of reverse-Robin Hood form of price control for broadband.

Senator Wyden worries that "data caps" will discourage Internet use and allow "Internet providers to extract monopoly rents," quoting a New York Times editorial from July 2011 that stirred up a tempest in a teapot.[185] The bill is based on four faulty premises.

First, U.S. ISPs aren't "capping" anyone's broadband; they're experimenting with usage-based pricing—service tiers. If a consumer wants more than the basic tier, his usage isn't capped: he can always pay more for more bandwidth. But few users will actually exceed that basic tier. For example, Comcast's basic tier, 300 GB/month, is so generous that 98.5% of users will not exceed it.[186] That's enough for 130 hours of HD video each month (two full-length movies a day) or between 300 and 1000 hours of standard (compressed) video streaming.[187] And again, consumers can always buy more data—because the 300gb/month figure is just the basic tier, not a "cap."

Second, the bill sets up a false dichotomy: "Caps" (or tiers, more accurately) are, according to Senator Wyden, "appropriate if they are carefully constructed to manage network congestion," but apparently for Wyden the only alternative explanation for usage-based pricing is extraction of monopoly rents.[188] This simply isn't the case, and propagating that fallacy risks chilling investment in network infrastructure—the key to ensuring that OVDs can, in the long run, compete effectively with MVPDs. In fact, usage-based pricing allows networks to charge heavy users more, thereby recovering more costs and actually *reducing* prices for the majority of us who don't need more bandwidth than the basic data tier permits—and whose usage is effectively subsidized by those few who do. Unfortunately, the bill wouldn't allow pricing structures based on cost recovery, only network congestion. So, for example, an ISP might be allowed to price usage during times of peak congestion, but couldn't simply offer a lower price for the basic tier to light users.

That sort of intervention into business' pricing decision-making is unsupportable, from the perspective of social justice as well as basic economic rationality. Even as the FCC issued its Net Neutrality regulations (no slouch with respect to intervention in business decision-making), the agency rejected proposals to ban usage-based pricing, explaining:

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[185] Editorial, *To Cap or Not*, *N.Y. Times* (July 21, 2011), *available at* http://www.nytimes.com/2011/07/22/opinion/22fri2.html?_r=0.

[186] Sandvine, *2H 2012 Global Internet Phenomena Report, available at* http://techfreedom.org/sites/default/files/NCTA_Connects_Breakfast_Sandvine_Final.pdf#page=7.

[187] Daniel A. Lyons, *The Impact Of Data Caps And Other Forms Of Usage-based Pricing For Broadband Access* 9 (Mercatus Center Working Paper No. 12-27, Oct. 2012), *available at* http://mercatus.org/sites/default/files/UsagebasedPricing_Lyons_v-1_1.pdf#page=9.

[188] Ron Wyden, U.S. Senator from Oregon, Statement of Introduction for the Data Cap Integrity Act (Dec. 20, 2012), *available at* http://www.wyden.senate.gov/download/?id=e4f1badd-9148-4a9d-9710-3a1a4facd728&download=1.

> [P]rohibiting tiered or usage-based pricing and requiring all subscribers to pay the same amount for broadband service, regardless of the performance or usage of the service, would force lighter end users of the network to subsidize heavier end users. It would also foreclose practices that may appropriately align incentives to encourage efficient use of networks.[189]

Of course some cross-subsidization is inherent even in the tiers themselves, as, like bundling, it is an all-you-can-eat model for which, within any given tier, all users pay the same regardless of usage. But there is no reason to expand this subsidy beyond the range determined by providers to be most efficient.

Third and related, charging heavy users more isn't just more equitable, it's actually a solution to the very problem critics worry about: ensuring that ISPs have an incentive to encourage Internet use—rather than trying to strangle emerging OVDs in their crib. Tiered pricing means ISPs actually benefit from heavy use—even if that means the same companies suffer from increased competition as MVPDs. Data tiers help to align incentives so that, rather than try to slow use or discriminate against bandwidth-heavy applications — which is how the Net Neutrality fight started — ISPs will continue to build out faster networks.

Now, it's certainly possible that, if the basic data tier were set low enough or if additional data were expensive enough, cable companies could indeed effectively discourage their subscribers from canceling a cable subscription and switching to a competing OVD service like Netflix (cord-cutting) or simply cutting back to a more basic tier and relying partially on an OVD (cord-shaving). But it's hard to see how a 300 GB basic tier deters anyone, especially when users can buy additional blocks of 50 GB for just $10/month—enough for nearly two more hours a day of streamed video. If there actually were a problem here, antitrust law could address it far better than blunt pricing restrictions. Indeed, such an investigation is already reported to be underway.[190] And antitrust may already be operating here in the way that is most effective, but least appreciated: helping to steer ISPs to set higher thresholds for the basic data tier and lower prices for additional data than they otherwise might in a truly “unregulated” marketplace.

Finally, and most critically for the debate about OVDs, Senator Wyden’s bill would require that broadband providers count content downloaded from them against the so-called “cap”—fearing that a “discriminatory” cap would harm competing video providers. But if the cap is high enough,

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[189] Federal Communications Committee*, In The Matter Of Preserving the Open Internet Broadband Industry Practices*, MB Docket No. 09-191, at 41 (2010), *available at* http://www.fcc.gov/document/preserving-open-internet-broadband-industry-practices-1.

[190] Thomas Catan & Amy Schatz, *U.S. Probes Cable for Limits on Net Video,* WALL STREET JOURNAL (Jan. 13, 2012), http://online.wsj.com/article/SB10001424052702303444204577462951166384624.html.

who cares? Under antitrust law, such "discrimination" is illegal only if it harms consumers by foreclosing competition—and it's hard to see how consumers suffer from being able to download *more* video. Would they really be better off if every hour of video they streamed from their cable company meant an hour less they could stream from Netflix? That's what Wyden's bill would require.

The recent kerfuffle over Comcast's decision in October to make some of its television (pay per view) content available through Xbox without counting against Internet usage limits brought this point into stark relief.[191] While some activists decried the decision for the same reasons as Wyden, they missed the fact that by removing some of its content from usage limits Comcast was actually freeing up users to access *more* content at lower prices.

If Wyden's concern is that usage-based pricing would allow ISPs to extract "monopoly profits" from users who bump up against tiers, then "preferencing" some of their own content will reduce, not increase, that risk: Users would be able to access, say, bandwidth-heavy video content just as they do television content now—without it counting against Internet usage limits. That this might "discriminate" against other Internet-based content providers does not mean that it harms consumers or forecloses their access to consumers—quite the opposite, in fact. Again, to the extent that it might, antitrust rules are more than sufficient to discourage such practices in the first place or punish them if they arise—*without* restricting firms' ability to price their content and manage their networks to ensure a reasonable return on their investments.

The Wyden bill appears to cover wireless as wireline networks, and indeed a similar debate is beginning in the wireless context. As mentioned above, news recently broke that Verizon and ESPN are in negotiations to offer ESPN video content to consumers without counting the data streaming against monthly data plans.[192] This news has outraged some, for the same reasons as the Xbox kerfuffle, but the consumer benefits here from such arrangements are even more clear, given the constraints on wireless capacity: Such arrangements could help make wireless an effective distribution channel for video, especially if it drives innovation in how wireless networks deliver content, whether through more effective live streaming or by pre-caching at off-peak times content a user has subscribed to (*e.g.*, the remaining episodes in a season or the next movie in a queue).[193] From a dynamic perspective, such arrangements can benefit consumers, even if they appear to be discriminatory. Antitrust law is far better equipped to evaluate such trade-offs than is any form of

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[191] Larry Downes, *No, Comcast is not breaking the Internet...again,* CNET (Apr. 2, 2012), http://news.cnet.com/8301-1023_3-57407867-93/no-comcast-is-not-breaking-the-internet...again/?tag=mncol;cnetRiver.
[192] Bret Swanson, *Verizon, ESPN, And The Future Of Broadband*, FORBES (June 4, 2013, 5:10 PM), http://www.forbes.com/sites/bretswanson/2013/06/04/verizon-espn-and-the-future-of-broadband/.
[193] *See also supra* at 16.

prescriptive regulation (such as Wyden proposes) or regulations that amount to *per se* rules masquerading under the veneer of antitrust's analytical rigor.

## First Amendment Challenges to Video Regulation

The transformation of the video marketplace since 1992 renders much of the Cable Act obsolete not merely as a policy matter, but probably also as a constitutional matter—despite recent, inconclusive case law on the issue. In *Turner I* (1994) and *Turner II* (1997),[194] the Supreme Court upheld special regulatory burdens imposed on cable because it found that there was a "special characteristic" of the cable medium—namely its bottleneck or gatekeeper power. But that special characteristic, if it ever existed, no longer exists today. The D.C. Circuit reached this conclusion in 2009, when it struck down the Cable Act's cap on the percentage of cable subscribers a single cable operator could reach: "Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992."[195] As Judge Kavanaugh said in his concurrence to the D.C. Circuit's recent decision in the *Tennis Channel* case:

> In today's highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market. To be sure, beyond an interest in policing anticompetitive behavior, the FCC may think it preferable simply as a communications policy matter to equalize or enhance the voices of various entertainment and sports networks such as the Tennis Channel. But as the Supreme Court stated in one of the most important sentences in First Amendment history, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).[196]

Shortly after the D.C. Circuit handed down its decision in *Comcast*, implying that it would decide *Turner* differently today, the Second Circuit rejected Cablevision's challenge to must-carry rules.[197] Cablevision objected when the FCC redrew boundaries, placing a broadcast station within the area covered by its cable system, thus allowing the broadcaster to claim must-carry rights. The court rejected Cablevision's argument that the station was too far away for the government to establish a substantial interest in promoting localism, deferring to the FCC's determination that the revised boundary would promote localism. While the court focused its analysis on the interests at stake in

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[194] *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994); *see also Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

[195] *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009). *See also*, Brief of Amicus Curiae The Progress & Freedom Foundation in support of Petitioner Comcast Corp, *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (No. 08-1114). http://www.pff.org/issues-pubs/filings/2008/081203CableOwnershipAppellateBrief.pdf.

[196] *Comcast Cable Commc'ns, LLC v. FCC*, No. 12-1337, 2013 WL 2302737, at *11 (May 28, 2013) (Kavanaugh, J., concurring).

[197] *Cablevision v. FCC*, 570 F.3d 83 (2d. Cir. 2009).

must-carry and whether it was content-neutral (as the *Turner* Court clearly said it was), the court left the door to a future First Amendment challenge more squarely focused on the issues at stake in *Turner*:

> We think that the *Turner* cases do not foreclose the possibility of a successful as-applied First Amendment challenge to the 1992 Cable Act's market modification provisions. In this case, however, Cablevision has failed to demonstrate that the FCC applied the market modification provision unconstitutionally.[198]

Cablevision's complaint had focused on the *way* the FCC applied must-carry to it, rather than the larger principle at stake. Indeed, the Second Circuit's decision did not discuss whether must-carry discriminated among speakers and whether that discrimination could be justified because of a "special characteristic"—nor did the court mention the D.C. Circuit's decision weeks earlier in the cable cap case (*Comcast*), that no such characteristic existed.

Cablevision *did* raise this argument in its petition for cert, which the Supreme Court denied, but the denial of a cert petition does not indicate how the Supreme Court would rule on a petition that squarely presented the issue at stake in both the *Turner* decisions and the D.C. Circuit's cable cap decision. This is especially true given that Justice Sotomayor recused herself from considering the petition as a former Second Circuit Judge, making it that much harder for Cablevision to gather the four votes required for cert.[199]

So, notwithstanding the *Cablevision* case, it seems likely that the D.C. Circuit or some other Circuit, or perhaps even the Second Circuit itself (given its disclaimer about possible future challenges) could well still strike down the must-carry provisions. If some other Circuit takes this route, the Second Circuit's *Cablevision* decision simply makes it more likely that the Supreme Court would grant cert to the FCC if it loses.

Specialty video regulations that restrain editorial discretion (*e.g.*, by limiting available channel capacity) can be constitutionally permissible only where it is true, as it was of cable in 1994, that a video distributor has true "bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home" and can thus "prevent its subscribers from obtaining access to programming it chooses to exclude."[200] Where it is no longer true that

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198 *Id.* at 95-96.
199 Lyle Denniston, *No review of "must-carry" rule*, SCOTUSBLOG, May 17, 2010, http://www.scotusblog.com/2010/05/no-review-of-must-carry-rule/.
200 *Id.*

any one medium has the ability to "silence the voice of competing speakers with a mere flick of the switch,"[201] the First Amendment requires laws of general application.

## Program Carriage

The antitrust laws already govern OVDs, as well as MVPDs, in, for example, disputes about program carriage (as well as program access). But the Cable Act's program carriage rules govern only MVPDs (cable and satellite). This is equivalent to the situation at issue in *Turner*: must-carry and program carriage similarly interfere with an MVPD's editorial discretion by reducing the channel capacity available for them to fill as they see fit. The only difference is that the class of speakers (distributors) to which the program carriage rules apply is slightly broader: all MVPDs rather than just cable—but not OVDs. Nonetheless, for a court to apply intermediate scrutiny to this speaker-discriminatory rule, the government would have to establish that a "special characteristic" distinguished MVPDs from OVDs (essentially facilities-based distributors from virtual ones).

The government might argue that MVPDs are uniquely able to deliver high-quality, linear programming in a more efficient fashion, and that OVDs are subject to lower quality and, at some point, different limitations on data allowances as well as bandwidth constraints. Ultimately, the court would have to decide whether these differences were sufficient to establish that MVPDs possess the kind of bottleneck power that the Supreme Court found cable possessed in *Turner*. Given that Netflix has more subscribers than Comcast, and that consumers are flocking to online-only content, it is difficult to see how MVPDs, as a class, possess any kind of bottleneck power to silence a content owner. Moreover, it isn't clear that the same analysis even applies where we are talking not about *one* distributor (cable in 1994) but between three and four competing distributors in any given market (cable, two DBS providers and perhaps a telco provider).

One way to avoid the *Turner* problem would be to extend the program carriage rules to OVDs, as Public Knowledge proposes.[202] In principle, a rule of general application that required all MVPDs and OVDs to make affiliated programming available to all competitors would not raise the same problems under *Turner* because it would be speaker-neutral. Thus, no special characteristic of gatekeeper power would be required to ensure that the rule received intermediate scrutiny.

But of course, we already have a rule that applies to OVDs as well as MVPDs: antitrust. It is unlikely that any *more* restrictive rule would be imposed on OVDs at a time when everyone seems to agree we should remove whatever barriers might prevent them from flourishing—just as Congress did in the 1990s for satellite.

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[201] *Turner I* at 656.

[202] *Public Knowledge, State of Video Testimony*, supra note 1, at 14.

### Retransmission Consent and the Compulsory Retransmission License

Second, retransmission consent and the compulsory retransmission license are probably not vulnerable to the same legal challenge. The D.C. District Court upheld the retransmission consent provisions of the Cable Act in 1993, not on the "special characteristic" grounds by which the Supreme Court would, a year later, uphold must-carry, but because the court held retransmission consent was essentially similar to copyright protection and thus did not violate the First Amendment:

> Congress has independent constitutional authority, however, to provide creative artists — and broadcasters are arguably such — with copyright protection for their work. Congress clearly could have amended the copyright law to provide infringement remedies for cable retransmission of broadcast material. But it is not constitutionally significant that Congress has done in the Cable Act what it otherwise could have done in the Copyright Act. Whatever title of the United States Code Congress chooses to place its law in, the law is still authorized by Congress' Article I power.[203]

A First Amendment challenge to the compulsory license would likely fail for the same reason: it lies within Congress's copyright power and does not burden any particular class of speakers or advance a particular viewpoint. Of course, the fact that either may be Constitutional does not make them any more advisable as a policy matter—or any less outdated.

## Conclusion

Instead of the Communications Act's outright bans on specific types of conduct that may not actually harm competition or consumers, using antitrust enforcement to govern the MVPD industry would allow the market to evolve in a natural way, with the government intervening only when actual harm to consumers can be established—and when intervention is actually likely to serve consumers. The market has evolved in ways no one could have ever foreseen 20 years ago when the Cable Act was written, and it will continue to evolve going forward in ways that we cannot predict today. Allowing the Copyright and Communications Acts' provisions to remain on the books allows the government to pick winners and losers in the future of this industry—something it is not remotely qualified to do. The Cable Act and STELA and its predecessors were written to promote competition and protect consumers, but the market has grown competitive. Government's role should be protect the copyrights of content owners and police market power through antitrust. Properly applied, antitrust is the only regulatory tool necessary—indeed, the best tool—to ensure that those with power in the MVPD industry don't use that power to harm consumers.

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[203] *Daniels Cablevision v. United States*, 835 F. Supp. 1, 12 (D.D.C. 1993).