
COPYRIGHT'S LATEST COMMUNICATIONS POLICY: CONTENT-LOCK-OUT AND COMPULSORY LICENSING FOR INTERNET TELEVISION

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I. INTRODUCTION

Among the most popular ways to watch television over the Internet is a Web site called Hulu, a joint venture among NBC, ABC, Fox, and others.¹ Over 40 million users watch Hulu every month.² Another popular way is Miro, an open source technology offered by a nonprofit group in Boston, Massachusetts, called the Participatory Culture Foundation. Miro permits anyone to broadcast his or her own “channel” online in high-definition, and now includes thousands of channels, from PBS and the Onion News Network to the channels of any individual creator.³ Hundreds of thousands of Americans can adopt the user-friendly interface of software like Boxee or Plex App to program a remote control and watch, on their biggest living room television screens, Internet content in high-definition through Hulu and Miro.⁴

In February 2009, however, in perhaps the most famous incident exemplify-

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¹ Brian Stelter, *Web-TV Divide Is Back in Focus with NBC Sale*, N.Y. TIMES, Dec. 4, 2009, at A1; Mike Farrell, *Hulu Partners Eye Subscription Model*, MULTICHANNEL NEWS, Sept. 15, 2009, http://www.multichannel.com/article/353933-Hulu_Partners_Eye_Subscription_Model.php.

² Stelter, *supra* note 1.

³ Miro HD Video Player | Our Organization, <http://www.getmiro.com/about/>; Miro Guide - Onion News Network, <http://www.miroguide.com/feeds/1838>; Miro Guide - Video Podcast Directory, <http://www.miroguide.com/search?query=PBS> (search for term “PBS”).

⁴ Posting of Marvin Ammori, *The Holiday Season of Internet TV. Time to Cancel Your Cable Subscription*, to HUFFINGTON POST, http://www.huffingtonpost.com/marvin-ammori/the-holiday-season-of-int_b_382658.html (Dec. 7, 2009, 11:56 EST).

ing the clash between online television and traditional distribution, Hulu blocked the Boxee browser from accessing Hulu's content offerings.⁵ That is, Hulu made itself unavailable to the hundreds of thousands of Boxee users by changing its code so that Boxee could not integrate Hulu offerings. In an apologetic blog post, Hulu's CEO explained that pressure from its content partners—which include NBC, Fox, and Disney—forced Hulu's executives to stop supporting Boxee.⁶ Despite an outcry from Hulu users,⁷ Hulu went on to block Boxee from Hulu's public RSS feed as well.⁸ Hulu's terms of service for its desktop software now forbid using the software with any device other than a personal computer—including television screens.⁹

The response of Hulu's content partners provides a window into the thinking of incumbent providers in the television industry. Many believe that the content partners were responding to cable operators, satellite companies, and phone companies—all of which are called, in the language of attorneys at the Federal Communications Commission ("FCC" or "Commission"), multichannel video programming distributors ("MVPDs").¹⁰ Indeed, Hulu may have been responding to the content partner then likely negotiating for purchase by an MVPD—NBC, which was negotiating with Comcast.¹¹ Incumbent MVPDs,

⁵ Chris Foresman, *Hulu Puts the Kibosh on Streaming Boxee Integration*, ARS TECHNICA, Feb. 19, 2009, <http://arstechnica.com/media/news/2009/02/hulu-puts-the-kibosh-on-streaming-boxee-integration.ars>.

⁶ See Posting of Jason Kilar, *Doing Hard Things*, to Hulu Blog, <http://blog.hulu.com/2009/02/18/doing-hard-things/> (Feb. 18, 2009).

⁷ See *id.* (including reader comments decrying Hulu's dropping of Boxee service).

⁸ Posting of Brad Stone, *Boxee Brings Hulu Back to Its Service*, to N.Y. TIMES BITS BLOG, <http://bits.blogs.nytimes.com/2009/03/06/sidestepping-objections-boxee-brings-hulu-back-to-its-service/> (Mar. 6, 2009, 12:42 EST); Posting of Brad Stone, *Hulu Evades Boxee's Embrace (Again)*, to N.Y. TIMES BITS BLOG, <http://bits.blogs.nytimes.com/2009/03/06/hulu-evades-boxees-embrace-again/> (Mar. 6, 2009, 17:34 EST).

⁹ Hulu - Labs: Hulu Desktop, <http://www.hulu.com/labs/hulu-desktop> (click download for Windows, and then begin installation process. Before the installation begins, the user must agree to the Hulu End User License Agreement, Terms of Use and Privacy Policy) (last visited March 23, 2010). The site states,

You may not download, install or use the Hulu Software on any device other than a Personal Computer including without limitation digital media receiver devices (such as Apple TV), mobile devices (such as a cell phone device, mobile handheld device or a PDA), network devices or CE devices (collectively 'Prohibited Devices'). You may not use any hardware, software or service other than the Hulu Software to stream, re-encode, project or transmit Hulu Content.

Id.

¹⁰ See HARRY NEWTON, *NEWTON'S TELECOM DICTIONARY 752* (25th ed. 2009).

¹¹ Comcast and General Electric, the parent company of NBC Universal, announced in December 2009 that Comcast would take a fifty-one percent ownership stake in NBC Universal. Press Release, Comcast, Comcast and GE to Create Leading Entertainment Company (Dec. 3, 2009), [available at http://www.comcast.com/nbcutransaction/pdfs/Press%20Release_Final_12.3.09.pdf](http://www.comcast.com/nbcutransaction/pdfs/Press%20Release_Final_12.3.09.pdf).

from Comcast to Verizon, realize that the Internet could upend the traditional television market. Today, consumers usually have a choice of very few MVPDs—no more than one local cable operator (like Comcast or Time Warner Cable), a satellite operator (like DirecTV), and a local phone company (like Verizon or AT&T, in at best forty percent of the nation).¹² Because of the high costs of laying cable or phone lines or launching satellites, new entry into the MVPD market through these means is highly unlikely.¹³ As a result, the current market structure provides limited competition among MVPDs, with no additional competition on the horizon.

This uncompetitive market structure provides MVPDs with the usual fruits of limited competition: supracompetitive profits and little need to innovate or respond rapidly and decisively to consumer demands. The traditional industry agreements confer a cut of the MVPDs' supracompetitive profits on programmers powerful enough to negotiate a cut, such as Time Warner (owner of CNN, TBS, and others) and NBC (owner of Bravo, MSNBC, NBC network, and others, which is now merging with the MVPD, Comcast). As a result, the incumbent MVPDs and the powerful incumbent programmers are quite happy with the existing uncompetitive MVPD market structure. The only losers are the rest of us—consumers stuck with limited competition, every-increasing prices, and fewer choices.

Congress and the FCC have attempted for years to marginally increase competition in the MVPD market,¹⁴ generally failing on every front. The incumbent MVPDs understand, however, that the Internet could enable the same kind of disruptive competition in the MVPD market that it has enabled in other markets, from book sales to travel.¹⁵ It could enable “virtual cable companies” to assemble packages of content online to compete with the MVPDs. It could also enable programmers to distribute films and movies (known, in FCC-speak, as “video”) directly to consumers, without going through MVPDs, enabling programmers themselves to act as MVPDs. Thus, ABC.com, or Hulu.com, could

¹² See *infra* notes 27–31 and accompanying text.

¹³ See JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE* 362 (2005). These overwhelming economies of scale are understood as one of the biggest challenges to competition in any network industry. *Id.* at 10–16.

¹⁴ See, e.g., *In re* 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, *Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 5101, ¶¶ 1–5 (2006) [hereinafter Section 621 NPRM]; Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 7, 106 Stat. 1460, 1483 (codified at 47 U.S.C. § 541).

¹⁵ See Tim Arango, *Cable TV's Big Goal: Web Profits*, N.Y. TIMES, June 24, 2009, at B1; Max Frankel, *Memoir of a Memoirist*, N.Y. TIMES MAG., June 27, 1999, at 21; HARRELL ASSOCIATES, *THE INTERNET TRAVEL INDUSTRY, WHAT CONSUMERS SHOULD EXPECT AND NEED TO KNOW, AND OPTIONS FOR A BETTER MARKETPLACE* 26 (2002).

compete directly with MVPD sites like Comcast.com. The Internet could also spur competition among existing MVPDs.

Indeed, the Internet has the potential to unleash some of the fiercest competitors to the traditional MVPDs—other traditional MVPDs. Through the Internet, cable operators and phone carriers could compete “out of market”; though Cox or Comcast generally are the only cable operator in a given community—and therefore do not compete with one another—the Internet could change that. Uncoupling the network from the service, the Internet enables a “Comcast Online TV” and a “Cox Online TV” to compete head-to-head nationally against an AT&T or Verizon Online TV. Just as you can now reach any radio station or newspaper in the nation, competing for your business and attention online through different packages of news stories and diverse songs, you could choose among packages of television and movie content.

In addition to the incumbent MVPDs competing online, consumers could also choose among dozens of online, virtual MVPDs. For example, Apple is attempting to offer a monthly subscription service to supplement its iTunes offering on AppleTV devices that connect to televisions; Netflix offers shows and movies online to subscribers; companies like Vuze and Joost had attempted to create virtual MVPDs; Amazon offers a video on demand service; Roku offers a multichannel service of independent channels through an inexpensive end user device (made by Roku).¹⁶ While these services are still nascent and often perceived as complements to MVPDs rather than competitors, these new services could quickly become legitimate competitors to pay television. With such competition—a consumer “dream”¹⁷—consumers could watch their choice of television shows or films, on demand or on schedule, at competitive prices, on their own schedule, through preferred interfaces, and on a preferred screen—laptop, handheld, or wall-mounted television.

The incumbents do not like this picture. They benefit from the current concentrated market larding them with high profits while they fail to compete or innovate. They have long feared some users would “cut the cord” on pay-television by canceling their MVPD subscription, deciding, instead to choose a potentially competitive “virtual MVPD” providing video content through the Internet.¹⁸ Many programmers—including both broadcast programmers and non-broadcast programmers—have increasingly begun to circle the wagons with incumbent MVPDs, concluding that they too are better off with a cut of the MVPDs’ supra-competitive profits than with the potential wild-west competition enabled by the Internet.

¹⁶ See Ammori, *supra* note 4.

¹⁷ Daniel Roth, *Netflix Inside, See Ya, Cable*, WIRED, Oct. 2009, at 120, 124 (“The dream of routing around cable companies just may be in sight.”).

¹⁸ See, e.g., *infra* note 146 and accompanying text.

As a result, the incumbent MVPDs and programmers have engaged in a series of practices to undermine the competitive threat of online video. This paper will focus on copyright-based, content-lock-out tactics. Other tactics have received considerable attention. Some incumbents, like cable operators, have used their control of Internet access to block or limit online television by violating network neutrality;¹⁹ some have announced overage charges based on Internet capacity used by a consumer, in ways apparently targeted directly at online television to ensure users keep their cable subscriptions as well;²⁰ many have crippled consumers' ability to use end-user devices, like cable set-top boxes, to access online television in an interface that can combine MVPD programs.²¹

The content-lock-out strategies are even simpler. The incumbents make sure that the most popular programming that consumers would like are not available conveniently online. People will not watch television online if there is nothing online they *want* to watch. Rather than block competing technologies in the network (which the network neutrality rule proposed by the FCC would clearly prohibit),²² MVPDs can simply starve their competitors of popular shows, movies, and channels. To keep this content off the Internet, the MVPDs (notably the cable operators, like Time Warner Cable and Comcast) are pressuring incumbent programmers (such as Viacom, which owns Comedy Central) not to put their content online—on programmers' own sites or through third-party distributors like Vuze or Apple.²³ In addition—as the Boxee-Hulu incident highlights—MVPDs want to keep online television off the living room television screen, even if it (unfortunately for incumbents) ends up on computer lap-

¹⁹ See *In re* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," *Memorandum Opinion and Order*, 23 F.C.C.R. 13,028, 13,030, ¶ 6 (Aug. 1, 2008) [hereinafter *Free Press-Comcast Order*]; Posting of Nate Anderson, *Cox, Comcast Biggest BitTorrent Blockers in the World*, to ARS TECHNICA, <http://arstechnica.com/old/content/2008/05/us-isps-biggest-bittorrent-blockers-in-the-world.ars> (May 15, 2008, 13:23 EST); Chloe Albanesius, *Cox Says It Will Delay P2P, Software Updates*, PCMAG.COM, Jan. 28, 2009, <http://www.pcmag.com/article2/0,2817,2339756,00.asp> (last visited Apr. 11, 2010).

²⁰ See, e.g., Tom Lowry, *Time Warner Cable Expands Internet Usage Pricing*, BUSINESSWEEK.COM, Mar. 31, 2009, http://www.businessweek.com/technology/content/mar2009/tc20090331_726397.htm (last visited Apr. 11, 2010).

²¹ See *infra* Part IV.C.3.

²² See Posting of Nate Anderson, *FCC Chairman Wants Network Neutrality, Wired and Wireless*, to ARS TECHNICA: LAW & DISORDER, <http://arstechnica.com/tech-policy/news/2009/09/fcc-chairman-wants-network-neutrality-wired-and-wireless.ars> (Sept. 21, 2009, 11:39 EST).

²³ See, e.g., *infra* notes 188–92 and accompanying text.

top screens.

This content-lock-out tactic follows the common historical practice of dominant incumbent distributors—from music composers to broadcasters and cable operators—throughout the past two centuries to deprive upstart distributors of the content necessary to compete.²⁴ In almost every instance where incumbent distributors engaged in content-lock-out tactics, government intervention was eventually necessary to ensure competition. This intervention, often long overdue, has taken many forms, but generally involved tweaking the government-made laws at the root of these content-lock-out tactics—copyright law. Common remedies include immunities from liability and compulsory licenses for new distributors, which are also likely necessary here.

This Article is the first exploration of the incumbent television industry's programming-based tactics, their effect on online television, and how federal copyright policy could counteract these tactics and therefore ensure the opportunity for disruptive competition and innovation in video-delivery.

This Article addresses these issues in four parts. Part II provides background on the current market structure for video-delivery and previous government attempts to promote competition in that market. Part III discusses the rise of online video-delivery, and the incumbent industry's previous three tactics to undermine online television. Part IV details the incumbents' programming-based strategies, notably content-lock-out for both computers and the big screen TV, and a new industry-wide initiative called TV Everywhere. Finally, Part V discusses potential remedies for policy-makers to counteract the effects of these content-lock-out tactics and provide breathing space for the disruptive competition made possible by Internet technologies. The main policy proposal is a sweeping compulsory license to benefit copyright-holders and new entrants while limiting the ability of incumbent MVPDs to engage in content-lock-out.

II. THE INCUMBENT MVPD INDUSTRY

This part provides background on the existing cable market structure and on how online television would hurt dominant distributors. It then discusses the incumbents' earlier tactics used to thwart online television. The MVPD industry historically has not been competitive. As a result, its few dominant players have long feared the Internet would create disruptive new competitors upsetting that market structure. The Internet can enable cord-cutting, injecting competition, and increasing independence for programmers. The incumbents have

²⁴ See, e.g., MARVIN AMMORI, FREE PRESS, TV COMPETITION NOWHERE: HOW THE CABLE INDUSTRY IS COLLUDING TO KILL ONLINE TV 2 (2010), <http://www.freepress.net/files/TV-Nowhere.pdf>.

engaged in network neutrality violations, over charges on data and device-control to undermine TV online.

A. The Cable Industry's Current, Concentrated Market Structure

The cable industry consists of two cozy overlapping oligopolies—the powerful distribution companies and the powerful programming companies, which often own stakes in one another.²⁵ Companies like Comcast, Time Warner Cable, Viacom, CBS, and NBC Universal love the current market structure. Consumers pay a high price every month for channels chosen by the distributors, for on-demand channels, and to rent the set-top box of the distributors' choice. The powerful programmers negotiate for a cut of those above-lost profits.

The only losers in this arrangement are smaller programmers (which either cannot get carried on an MVPD or must give equity to a big MVPD or big programmer to get carried) and smaller MVPDs (which have to pay through the nose for popular programming because they lack the leverage of larger distributors).²⁶ The ultimate loser, however, is the U.S. consumer stuck with rising bills, a limited choice of distributors, and an inability to watch smaller programmers that are shut out of the system.

Online television strikes at the very heart of the cozy cable model. The incumbents fear that online television would inject competition into this stagnant, concentrated market, would liberate television by giving viewers control over what channels and programs they watch, and would return thousands of dollars to pockets of consumers.

1. Distribution

In a market worth billions annually,²⁷ a cable operator such as Comcast, Time Warner Cable, or Cox is usually the lone local cable operator in any town, having long ago received government-backed monopolies and guaranteed returns.²⁸ In the 1990s, satellite operators were able to compete more ef-

²⁵ Cf. Posting of Marvin Ammori, *Cable Industry Claims Collusion is Pro-Consumer: Response of NCTA on TV Everywhere*, to HUFFINGTONPOST, http://www.huffingtonpost.com/marvin-ammori/cable-industry-claims-col_b_411748.html (Jan. 5, 2010, 11:45 EST).

²⁶ See Posting of Adam Lynn, *How Cable Programming is 'Chosen' – The Implications for Comcast-NBC*, to StopBigMedia.com, <http://www.stopbigmedia.com/blog/2010/01/how-cable-programming-is-chosen-the-implications-for-comcast-nbc/> (Jan. 11, 2010).

²⁷ One Wall Street analyst, Laura Martin of Soleil Media-Metrics, estimates “the current worth of all the companies involved in television production and distribution” at \$300 billion. Arango, *supra* note 15.

²⁸ *Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 183 (D.C. Cir. 1995) (“The monopo-

fectively, largely through regulatory changes such as a compulsory copyright license for broadcasting and program access rules requiring cable operators to make their content available to rival satellite providers.²⁹ This decade, after years of promises, telephone companies finally entered the MVPD business, with the benefit of regulatory changes,³⁰ though their deployment currently does not reach more than forty percent of U.S. homes at best.³¹ So far, government attempts to increase competition in the MVPD market have resulted in only four players at most, with the local cable operator still dominant. And entry barriers are so high that additional facilities-based competitors are not expected to emerge.³² For consumers, the distribution market is local, not national. The local cable operator retains roughly 68 percent of the local MVPD consumer market, according to the most recent FCC study in 2007.³³ The satellite operators DirecTV and EchoStar roughly split most of the rest, though phone companies are making inroads.³⁴ More recent figures, which are not available, would likely show that Verizon's FiOS product has taken some market share, though FiOS is available only in a few, generally wealthy, and densely populated communities. These local markets are oligopolies; indeed, the cable operators' 68 percent share may signify monopoly power, and certainly constitutes market power.³⁵ This limited competition and the insur-

lies most cable operators now enjoy resulted from exclusive franchises granted by local authorities." Congress passed the 1992 Cable Act in part to prohibit local franchising authorities from granting exclusive franchises to cable operators. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 7(a), 106 Stat. 1460, 1483 (codified at 47 U.S.C. § 541(a)(1) (2006)). However, competition among cable operators has not materialized, primarily due to the high cost of entry in established markets. See Gary Wax, *Cable Company Monopoly: Comcast and Time Warner Control the Board*, 28 LOY. L.A. ENT. L. REV. 159, 173-74 (2008).

²⁹ 17 U.S.C. §§ 119, 122(a); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, sec. 19, § 628(c)(2)(C), 106 Stat. 1460, 1494 (1992).

³⁰ Section 621 NPRM, *supra* note 14, ¶¶ 1-5. See also Sarah Jane Tribble, *TV, Phone, Internet: Choosing a Provider of All Three*, N.Y. TIMES, Oct. 16, 2008, at B5.

³¹ See Verizon, Verizon FiOS - Fact Sheet, <http://newscenter.verizon.com/kit/fios-symmetrical-internet-service/all-about-fios.html> (last visited Mar. 31, 2010) (noting that the total FiOS network passed 15.4 million homes as of Dec. 31, 2009); AT&T, U-verse Update: 4Q09, http://www.att.com/common/merger/files/pdf/4Q09_U-verseUpdate.pdf (noting that U-verse passed nearly 23 million homes as of December 31, 2009).

³² Cf. *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report*, 24 F.C.C.R. 542, ¶ 7 (Nov. 27, 2007) [hereinafter 2007 MVPD Competition Report].

³³ *Id.* ¶ 8.

³⁴ *Id.* ¶¶ 75, 178; Verizon, All About FiOS, <http://newscenter.verizon.com/kit/fios-symmetrical-internet-service/all-about-fios.html> (last visited Mar. 23, 2010) (noting that Verizon's FiOS TV offering had 2.86 million customers in the U.S. at the end of 2009).

³⁵ See U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 19-22 (Sept. 2008) (report withdrawn in 2009 for reasons not affecting veracity of source material).

mountable barriers to entry have resulted in even higher prices than existed with just one competitor³⁶ (despite FCC predictions).³⁷ This minimal competition results in bad outcomes for consumers. Cable operators have the lowest consumer satisfaction ratings of any industry,³⁸ even while they soak up large profit margins and raise prices.³⁹ Some had predicted that the advent of competition from satellite and phone companies would decrease prices and increase quality.⁴⁰ Those predicted benefits to consumers have not materialized. Broader competition is sorely needed.

For programmers, unlike consumers, the distribution market is more national or regional; programmers can sell to more purchasers if different distributors operate, even if they operate in different towns. This national market is also highly concentrated. In 2006, four MVPDs throughout the country, which included the two primary satellite operators, “served 63 percent of all MVPD subscribers.”⁴¹ The top 10 MVPDs in the country served 87 percent of subscribers.⁴² The two largest were Comcast and Time Warner Cable.⁴³

³⁶ See KAYE HUSBANDS FEALING ET AL., CTR. FOR SCI. TECH & PUB. POL’Y, STATEWIDE VIDEO FRANCHISING LEGISLATION: A COMPARATIVE STUDY OF OUTCOMES IN TEXAS, CALIFORNIA AND MICHIGAN 16 (Mar. 2009) (noting that the price of MVPD services grew in both California and Michigan, despite increased competition). See e.g., Brian Stelter, *Next on Cable, A Higher Bill*, N.Y. TIMES, Jan. 4, 2010, at A1.

³⁷ Section 621 NPRM, *supra* note 14, ¶ 2 (“New competitors are entering markets for the delivery of services historically offered by monopolists: traditional phone companies are primed to enter the cable market We believe this competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings.”).

³⁸ See American Customer Satisfaction Index, Q1 2009 and Historical ACSI Scores, May 19, 2009, http://www.theacsi.org/index.php?option=com_content&task=view&id=180&Itemid=203 (last visited Apr. 15, 2010) (ranking the cable industry tied – with newspapers – for lowest overall in the Information sector at 63 in 2009, and falling below wireless telephone companies).

³⁹ See *In re A National Broadband Plan for Our Future, Reply Comments of Free Press*, GN Docket No. 09-51, at 23–24 (July 21, 2009), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7019917712> (providing charts comparing investment and profit margins of major telecom and cable providers, and comparing the investment and margins with other capital-intensive sectors); see also *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Reply Comments of Free Press*, MB Docket No. 07-269, at 4–6 (Aug. 28, 2009), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020036944> [hereinafter *Free Press MVPD Reply*] (discussing increasing prices in the MVPD marketplace).

⁴⁰ Section 621 NPRM, *supra* note 14, ¶ 2.

⁴¹ 2007 MVPD Competition Report, *supra* note 12, ¶ 9.

⁴² *Id.* ¶ 178.

⁴³ *Id.* ¶ 178 n.636.

2. Programming

The programming market is also concentrated, with a few dominant programmers, including both non-broadcasters and broadcasters.⁴⁴ Large *non-broadcast* players, whose content is available only through an MVPD subscription, include Viacom—owner of MTV Networks, Comedy Central and others—and Time Warner, a content company that split off from Time Warner Cable, and currently owns TBS, TNT and CNN.⁴⁵ Broadcasters, available both on MVPDs and free over-the-air, include ABC, NBC, CBS, and Fox.⁴⁶ Cable programmers have high profit margins based on adding two revenue sources—advertising and per-subscriber fees.⁴⁷ While programmers are sometimes “cagey” about their financials, the head of NBC’s cable channels stated her channels’ operating profit margins “are well over 50 percent.”⁴⁸

Programming is often vertically integrated, with distributors owning programmers. In the FCC’s last report in 2007—before Time Warner’s split from Time Warner Cable—the FCC found that “of the 565 national non-broadcast channels [it] identified, 84 [were] affiliated with a cable operator”⁴⁹ Dozens more channels were affiliated with a satellite operator.⁵⁰ Furthermore, at the time, “[f]ive of the top seven cable operators . . . [held] ownership interests in satellite-delivered national programming networks.”⁵¹

The industry may become more consolidated if the proposed Comcast-NBC Universal merger is approved.⁵² For example, Comcast currently owns E! En-

⁴⁴ See MARK COOPER & DEREK TURNER, FREE PRESS, THE NEGATIVE EFFECT OF CONCENTRATION AND VERTICAL INTEGRATION ON DIVERSITY AND QUALITY IN VIDEO ENTERTAINMENT 2 (2007), available at <https://www.policyarchive.org/bitstream/handle/10207/8001/cooper%2520video.pdf>.

⁴⁵ About Viacom, <http://www.viacom.com/aboutviacom/Pages/default.aspx> (last visited Feb. 22, 2010); Time Warner: Turner Broadcasting, http://www.timewarner.com/corp/businesses/detail/turner_broadcasting/index.html (last visited Feb. 22, 2010).

⁴⁶ These networks own stations and then affiliate with stations across the country they do not own. The network may negotiate carriage for its affiliates. See Melissa Grego, *Retrans: The Bloody Battle to Save Broadcast Television*, BROADCASTING & CABLE, Dec. 14, 2009; Paige Albinak, *NAB 2009: Top 25 Station Groups*, BROADCASTING & CABLE, Apr. 20, 2009, available at http://www.broadcastingcable.com/article/209430-NAB_2009_Top_25_Station_Groups.php.

⁴⁷ See Pew Project for Excellence in Journalism, Cable TV: Economics, http://www.stateofthedia.org/2009/narrative_cabletv_intro.php?media=7 (last visited Feb. 22, 2010).

⁴⁸ David Lieberman, *Hammer Determined to Extend Cable Reach*, USA TODAY, Mar. 23, 2009, at 6B.

⁴⁹ 2007 MVPD Competition Report, *supra* note 12, ¶ 187.

⁵⁰ *Id.* ¶¶ 187–88.

⁵¹ *Id.* ¶ 20.

⁵² Posting of Ian Paul, *NBC-Universal-Comcast Merger: What We Do and Don’t Know*, to Today@PCWorld,

ertainment Television, Versus, The Golf Channel, regional sports networks, G4, and The Style Network, and has investments in TV One, PBS Kids Sprout, MGM Holdings, NHL Network, Music Choice, Pittsburgh Cable News Channel LLC, and the MLB (Major League Baseball) Network.⁵³ If the Comcast-NBC merger is approved, then Comcast would also own MSNBC, CNBC, Bravo, USA Network, Syfy, the NBC network (which affiliates with hundreds of broadcast stations), Telemundo, and a minority share in broadcaster ION media, as well as more than 20 local NBC-owned-and-operated broadcast stations and a major interest in the online video service Hulu.⁵⁴ Comcast also has disclosed its equity interests in several smaller cable programmers.⁵⁵

In a common practice that further increases vertical integration, MVPDs require small programmers to give up much of their companies' equity stock to MVPDs just to get carried.⁵⁶ As one programmer's CEO explained, "Cable and satellite TV companies want to own you before they put you on television."⁵⁷ (If true, this is already illegal under communications laws.)⁵⁸ Programmers have argued that distributors collectively "blackball" any programmer who files a carriage complaint against one distributor;⁵⁹ in addition, distributors may simply copy the programmers' format and deny carriage (or threaten to do so in negotiations).⁶⁰ In addition to the formal consolidation, a former cable ex-

http://www.pcworld.com/article/183652/nbcuniversalcomcast_merger_what_we_do_and_dont_know.html (Dec. 3, 2009, 16:40 EST).

⁵³ Mike Farrell, *Is Comcast Trolling For Content?*, MULTICHANNEL NEWS, Sept. 9, 2009, http://www.multichannel.com/article/340014-Is-Comcast-Trolling-For-Content_php; Posting of Matthew Lasar, *What Exactly Does Comcast Already Own? Here's a List*, to ARSTECHNICA, <http://arstechnica.com/media/news/2009/12/what-exactly-does-comcast-already-own-heres-a-list.ars> (Dec. 7, 2009, 10:05 EST); Paul, *supra* note 52; Posting of Andrew Ross Sorkin, *In NBC Universal Bid, Comcast Seeks an Empire*, to N.Y. TIMES DEALBOOK BLOG, <http://dealbook.blogs.nytimes.com/2009/10/02/in-nbc-universal-bid-comcast-seeks-an-empire/> (Oct. 2, 2009, 07:30).

⁵⁴ NBC Universal, NBCU TELEVISION GROUP (cont.), http://www.nbcuni.com/About_NBC_Universal/Company_Overview/overview03.shtml (last visited Apr. 10, 2010); NBC Universal, NBC UNIVERSAL TELEVISION GROUP, http://www.nbcuni.com/About_NBC_Universal/Company_Overview/overview02.shtml (last visited Apr. 17, 2010).

⁵⁵ Rafat Ali, *Comcast Units Not Part of The Deal, and Its Undisclosed Stakes*, PAID-CONTENT.ORG, Dec. 4, 2009, <http://paidcontent.org/article/419-sec-watch-comcast-units-not-part-of-the-deal-and-its-stakes-including-c/>.

⁵⁶ See Free Press MVPD Reply, *supra* note 39, at 9–10.

⁵⁷ *Id.*

⁵⁸ 47 U.S.C. § 536(a)(1) (2006); 47 C.F.R. § 76.1301(a).

⁵⁹ FCC Tackles Cable Programming Bundling Practices, www.freepress.net/files/MM%2012-12-08%20TRANSCRIPT.doc (last visited Feb. 23, 2010) (transcript of Media Minutes podcast from Dec. 12, 2008)

⁶⁰ See, e.g., Jon Hemingway, *WealthTV Files Carriage Complaint Against Time Warner*, BROADCASTING & CABLE, Dec. 21, 2007, <http://www.broadcastingcable.com/article/111728->

ecutive points out “[a]ll of the executives at the top of these [cable] companies have been in and around the industry for years and have close personal and professional ties.”⁶¹

3. Money Flows

MVPDs charge consumers monthly subscription fees for packages of content at generally unregulated high prices.⁶² With these revenues, the distributors pay programmers (their suppliers) a per-subscriber fee for every house that receives the programmers’ channel.⁶³ The fee may decrease based on granting advertising slots to the distributor and based on channel placement.⁶⁴ MVPDs pay about a third of collected subscriber fees to cable programmers (the other two-thirds includes much of the continued profit from TV subscriptions). These fees comprise half of the programmers’ revenues, with the other half coming largely from advertising.⁶⁵ These deals vary based on the market power of the programmer and the distributor.⁶⁶ Some “must-have” non-broadcast programmers, such as ESPN (owned by Disney) can charge large per-subscriber fees. For instance, Comcast pays ESPN’s owners \$4.08 per subscriber per month.⁶⁷

WealthTV_Files_Carriage_Complaint_Against_Time_Warner.php.

⁶¹ Posting of Will Richmond, *The Cable Industry Closes Ranks*, to VideoNuze.com, <http://videonuze.com/blogs/?2008-11-12/The-Cable-Industry-Closes-Ranks/&id=2004> (Nov. 12, 2008, 09:45 EST).

⁶² See Free Press MVPD Reply, *supra* note 39, at 3–4.

⁶³ See Posting of Joe Flint, *Cable vs. Broadcast Isn't a Fair Fight*, to COMPANY TOWN, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2009/11/cable-vs-broadcast-isnt-a-fair-fight.html> (Nov. 2, 2009, 10:23 PST).

⁶⁴ Brian Steinberg, *Conan Deal Shows the Power of the Cable TV Business Model*, TVWEEK, http://www.tvweek.com/news/2010/04/conan_deal_shows_the_power_of.php (last visited April 20, 2010); posting of Joe Flint, *Want A Better Spot On The Dial In New York City? Open Up Your Wallet*, to COMPANY TOWN, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2009/07/want-a-better-channel-in-new-york-city-open-up-your-wallet.html> (July 22, 2009, 14:35 PST).

⁶⁵ U.S. GEN. ACCOUNTING OFFICE, ISSUES RELATED TO COMPETITION AND SUBSCRIBER SERVICE RATES IN THE CABLE TELEVISION INDUSTRY 29–31 (2003) [hereinafter GAO REPORT]; see Posting of Bill Niemeyer, *Today's Cable TV 'Revenue Split' and Why Over the Top Likely Can't Be Ad-Supported Only*, to BillNiemeyer.tv, <http://billniemeyer.tv/2009/05/10/todays-cable-tv-revenue-split-and-why-over-the-top-likely-cant-be-ad-supported-only/> (May 10, 2009).

⁶⁶ Broadcasters, such as ABC (owned by Disney), have the legal benefits of “must-carry,” under which they can generally require MVPDs to carry their broadcast channels. See 47 U.S.C. 534. Broadcasters can also select not to exercise “must-carry,” but to negotiate for payment or other additional benefits for carriage. Most popular broadcasters elect negotiations. This is known as retransmission consent. See 47 U.S.C. § 325(b).

⁶⁷ Posting of Peter Kafka, *Hate Paying for Cable? Here's Why*, to All Things Digital, <http://mediamemo.allthingsd.com/20100308/hate-paying-for-cable-heres-the-reason-why/> (Mar. 8, 2010, 5:00 PST).

Because broadcast channels (such as affiliates of ABC, NBC, Fox, and CBS) are available over the air for free, cable operators historically resisted paying fees to broadcasters for carriage. Rather, operators would agree to carry other programming owned by the broadcaster (like NBC's cable properties).⁶⁸ Today, some broadcasters have succeeded in negotiating per-subscriber fees.⁶⁹ Perhaps because their content is already available for free over the air, broadcasters like those participating in Hulu have been *relatively* quick to distribute content online.

4. MVPDs' Interest in Internet Access Providers

MVPDs can attempt to use their control of Internet access in targeting online television. All the dominant providers of high-speed Internet access are also MVPDs. The local cable and phone monopolies dominate residential fixed-line Internet access; 96 percent of the country has two or fewer choices for wired broadband.⁷⁰ The top high-speed Internet access providers include AT&T, Comcast, Verizon, Time Warner Cable, Cox, and others. This situation allows these MVPDs to charge consumers twice—once for Internet access and once for an MVPD subscription.⁷¹ Today, cable operators make between fifty percent and sixty percent of their revenues from their MVPD service, while the balance comes from Internet access and phone services.⁷² They would make less money, all else equal, if consumers paid them *only* for Internet access.

5. Standardized Contract Terms

Negotiations for programming are often long-term, with contracts between distributors and content providers lasting as long as seven years.⁷³ Moreover,

⁶⁸ GAO REPORT, *supra* note 65, at 29–30.

⁶⁹ See Mike Farrell & Linda Moss, *Ops, Broadcasters Give Peace A Chance*, MULTICHANNEL NEWS, Jan 10, 2009, at 6.

⁷⁰ See, e.g., FED. COMM'NS COMM'N, CONNECTION AMERICA: THE NATIONAL BROADBAND PLAN, at 37. See also Comments of Free Press, (Sixth) Inquiry Concerning the Deployment of Advanced Telecommunications Capability Pursuant to Section 706, GN Docket 09-51, Sep. 4, 2009, at 46, 48. Satellite operators also offer Internet access, as do wireless providers, but their offerings are inferior to wireline offerings; even if these offerings are considered competitive with wireline offerings, they have minimal market share. *Id.* at 47.

⁷¹ In the 1990s, cable companies began offering telephony services as part of a “double play” package. See INT'L ENGINEERING CONSORTIUM, ACHIEVING THE TRIPLE PLAY: TECHNOLOGIES AND BUSINESS MODELS FOR SUCCESS: COMPREHENSIVE REPORT 55 (2006). Today, many companies offer “triple play” packages that provide high-speed Internet, telephone, and video services to consumers. *Id.*

⁷² See, e.g., Comcast, Comcast Investor Relations – Earnings, <http://www.cmcsa.com/earnings.cfm> (following “Trending Schedules” hyperlink).

⁷³ Sinclair Broadcast Group, Inc., Annual Report (Form 10-K), at 39 (Mar. 4, 2009),

these contracts, particularly among the largest distributors, generally include “most favored nation” clauses that grant the distributor the benefit of any contract negotiated with a rival distributor.⁷⁴ As a result, terms of the contracts often are standardized across the MVPD industry. In addition, and of particular relevance to this paper, these contracts cover “alternative distribution methods,” such as online television delivery. These terms generally limit what content the programmer can make available online on its own Web sites and, particularly, on third-party Web sites, to ensure that these online distributors (like Apple or Verizon) cannot compete with MVPDs.⁷⁵

6. Set-Top Boxes

MVPDs also derive revenue from leasing set-top boxes to consumers.⁷⁶ These boxes are often needed for on-demand and high-definition offerings and frequently include DVR capabilities.⁷⁷ The incumbents can generate huge fees from renting these boxes because they dominate the market for them and have made it difficult for consumers to purchase boxes from any independent company.⁷⁸

available at http://www.sec.gov/Archives/edgar/data/912752/000110465909014310/a09-1328_110k.htm.

⁷⁴ Gil Ehrenkranz, *Mapping the ‘Most Favored Nation,’* MULTICHANNEL NEWS, Feb. 10, 2008, http://www.multichannel.com/article/88046-Mapping_the_Most_Favored_Nation_.php.

⁷⁵ Richmond, *supra* note 61 (“The cable industry . . . has closed ranks to frown heavily on the idea of cable programming, which operators pay those monthly affiliate fees for, showing up for free on the web, or . . . in online aggregators’ (e.g. Hulu, YouTube, Veoh, etc.) sites.”).

⁷⁶ See Posting of Saul Hansell, *F.C.C. May Pry Open the Cable Set-Top Box*, to N.Y. TIMES BITSBLOG, <http://bits.blogs.nytimes.com/2009/12/04/watch-out-comcast-the-fcc-may-not-let-you-favor-nbc/> (Dec. 4, 2009, 12:58 EST).

⁷⁷ See Comcast Cable, *Digital Cable Frequently Asked Questions*, http://www.comcastcableoffers.com/faq_video/ (last visited April 14, 2010) (“The Digital Cable box is required to view any programs ON DEMAND (where available) and premium or pay per-view channels that Comcast offers.”); Comcast, *DVR & HD-DVR Service from Comcast*, <http://www.comcast.com/Corporate/Learn/DigitalCable/DVR.html> (last visited Apr. 16, 2010).

⁷⁸ See Posting of Cecilia Kang, *Consumer Electronics Group Calls for Broad FCC Set Top Box Review*, to WASH. POST POST TECH, http://voices.washingtonpost.com/posttech/2009/11/its_been_more_than_six.html (Nov. 24, 2009, 09:26 EST); Matthew Lasar, *Sneak Peek at FCC National Broadband Plan Gets Mixed Reviews*, ARS TECHNICA, Dec. 17, 2009, <http://arstechnica.com/tech-policy/news/2009/12/sneak-peek-of-fcc-national-broadband-plan-gets-mixed-reviews.ars> (pointing out that “to this date only 14 set-top boxes not directly leased from a cable company were on the market in the United States”).

B. Government Attempts to Promote Competition in the MVPD Markets

The government has attempted to promote competition in the MVPD market for many years, with very limited success, largely because of the difficult traditional cost-structure and poor implementation. Congress' attempts to foster competition took the form of two major revisions to the Communications Act in 1984 and 1992, and numerous FCC implementing regulations.⁷⁹ With these statutes and rules, the government has attempted to foster competition in both the MVPD market and in adjacent markets that the MVPDs could threaten to dominate, such as programming and end-user devices.

To foster competition in the MVPD market, Congress and the FCC attempted to encourage market entry by competitors such as traditional phone companies and satellite operators. For example, Congress and the FCC have removed numerous federal regulatory limits on satellite operators,⁸⁰ forbidden exclusive cable franchises,⁸¹ and radically streamlined the process for phone companies to obtain a local cable franchise.⁸²

In addition, the government has employed rules to address content-lock-out to ensure that MVPDs could exist and grow. For example, in 1974, the Supreme Court determined that the Copyright Act granted cable operators an effective immunity to air local and out-of-market broadcast channels.⁸³ In response to the Supreme Court's decision, Congress enacted a compulsory license statute regulating out-of-market broadcasts, enabling cable operators to air such broadcasts without permission, and maintained the immunity for in-market stations.⁸⁴ In addition, Congress enacted a compulsory license provision for satellite operators to air broadcasting and directed the FCC to adopt rules forbidding cable operators from coercing exclusive arrangements with cable programmers or discriminating in the provision of affiliated programming.⁸⁵

⁷⁹ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (codified as amended in scattered sections of 47 U.S.C.); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

⁸⁰ Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, app. I, 113 Stat. 1501A-523 (codified as amended in scattered sections of 17 & 47 U.S.C.).

⁸¹ 47 U.S.C. § 541(a)(1) (2006).

⁸² See *In re* 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, *Second Report and Order*, 22 F.C.C.R. 5101, ¶¶ 4, 6.

⁸³ See *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 405 (1974) (holding that CATV operators were not liable for copyright infringement of broadcasters' rights because they did not "perform" the broadcasts under the definition of the Copyright Act).

⁸⁴ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. § 111(c) (2006)).

⁸⁵ Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935, 3949 (codified at 17 U.S.C. § 119 (2006)); Cable Act of 1992, Pub. L. No. 102-385, 106 Stat. 1484,

These acts have had very limited success, as the cost-structure of wireline deployment and satellite operations ensure very few competitors in the market. While the government has helped the marketplace develop some competitors, even that limited competition has yet to result in the usual benefits of real competition, such as lower prices.⁸⁶

The government has also adopted laws ostensibly to ensure competitive markets in the adjacent programming and end-user device markets. For programmers, the government sought to bar coercive actions by cable operators and to promote independent programmers through vertical ownership caps and leased access rules, both of which have failed.⁸⁷ For end user devices, Congress attempted to unlock cable operators' control over set-top box devices and to spur competition in the market in both the 1992 Cable Act and the 1996 Telecommunications Act.⁸⁸ The FCC has implemented ineffective rules to follow through, and, having recently conceded failure, appears to be attempting again.⁸⁹

While these policies have failed, partly due to the pre-Internet technological realities, and partly due to the perennial capture of the FCC, the Internet provides the best hope for meaningful competition in video resulting in competitive benefits to consumers.

III. THE TECHNOLOGIES, POTENTIAL FOR, AND THREATS TO ONLINE TV

New technologies and services enable Americans to watch television, in high-definition, on their television screens, through the Internet. This part discusses (1) these technologies and services, (2) the ways such technologies and services threaten the incumbent industry by enabling cord-cutting, competition, and increased programmer independence, and (3) several strategies implemented by incumbents to attack online television: network neutrality, cap-and-

1488 (1992) (codified at 47 U.S.C. § 536(a)(2)–(3) (2006)).

⁸⁶ See Frank Ahrens, *Comcast Wins Appeal of FCC Ownership Cap*, WASH. POST, Aug. 29, 2009, at A10.

⁸⁷ See *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1137 (2001) (holding that the FCC's forty percent vertical limit was based on insufficient information and analysis); John Eggerton, *Court Grants Stay of FCC's Leased-Access-Rate Reduction*, BROADCASTING & CABLE, May 22, 2008, available at http://www.broadcastingcable.com/article/113842-Court_Grants_Stay_of_FCC_s_Leased_Access_Rate_Reduction.php.

⁸⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, § 304, 110 Stat. 56, 125–26 (codified at 47 U.S.C. § 548); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C. (2006)).

⁸⁹ Nate Anderson, *FCC Admits CableCARD a Failure, Vows to Try Something Else*, ARS TECHNICA, Dec. 4, 2009, <http://arstechnica.com/tech-policy/news/2009/12/fcc-admits-cablecard-a-failure-vows-to-try-something-else.ars>.

metered prices, and set-top-box control.

A. Technologies of Online Television

With new technologies, companies can deliver television content through an Internet connection (or, as they say in the industry, “over the top”⁹⁰ of an Internet connection) and deliver that content to the television screen.⁹¹ Online television distribution includes a range of business models, including subscription, per-episode fees, advertiser-supported, or some combination. Distributors include Hulu, which already has 40 million monthly viewers and hundreds of advertisers.⁹² Companies like Miro and Vuze have also offered high-definition video.⁹³ Apple has enjoyed success selling movies and shows by the episode,⁹⁴ and is now in the process of assembling a monthly subscription television service that may prove disruptive to the MVPD industry.⁹⁵ YouTube is adding full-length films to its user-generated content and splitting the resulting ad revenue with the content owners.⁹⁶ Some niche start-up entities offer specialized content; for example, one company caters to aviation and air-show enthusiasts with high-definition video.⁹⁷

Users are also now streaming online television content to more screens—to the computer, the mobile handheld, and the television set. Consumers use simple technological connections like inexpensive cords or more convenient methods like set-top box devices (Apple TV, Roku, Vudu), and gaming consoles (Sony’s Playstation 3 and Microsoft’s Xbox), BluRay players, and Wi-Fi enabled televisions. Apple TV is a device retailing at a few hundred dollars that connects a television screen to an Internet connection and gives users the

⁹⁰ Leslie Ellis, *Get Ready For Over-the-Top Video*, MULTICHANNEL NEWS, July 10, 2005, http://www.multichannel.com/article/88089-Get_Ready_For_Over_the_Top_Video.php.

⁹¹ See, e.g., Jacqui Cheng, *Possible Apple TV Subscription Service Faces Uphill Battle*, ARS TECHNICA, Dec. 22, 2009, <http://arstechnica.com/apple/news/2009/12/possible-apple-tv-subscription-service-faces-uphill-battle.ars>.

⁹² See sources cited *supra* note 1.

⁹³ See, e.g., Vuze, <http://www.vuze.com/> (last visited Feb. 26, 2010); Miro, <http://www.getmiro.com/> (last visited Feb. 26, 2010).

⁹⁴ See Jacqui Cheng, *iTunes Welcomes HD TV From More Major Networks*, ARS TECHNICA, Oct. 16, 2006, <http://arstechnica.com/apple/news/2008/10/itunes-welcomes-hd-tv-from-more-major-networks.ars>.

⁹⁵ Sam Schechner & Yukari Iwatani Kane, *Apple TV Proposal Gets Some Nibbles*, WALL ST. J., December 22, 2009, at B1.

⁹⁶ Jacqui Cheng, *YouTube Launching Premium Section with Movies, TV Shows*, ARS TECHNICA, Apr. 16, 2009, <http://arstechnica.com/media/news/2009/04/youtube-to-gain-premium-movie-tv-section.ars>.

⁹⁷ Ben Griffiths, *Superfly Guys: Three Enthusiasts Believe Online TV Can Revolutionise Air-Shows*, CITY A.M., Sept. 8, 2009, available at <http://www.cityam.com/the-punter/other/superfly-guys>.

ability, using a remote control, to purchase and watch high-definition movies and television shows from the iTunes store, listen to music, and view photos.⁹⁸ Roku, spun off by Netflix, sells a device for under \$100 that streams television content from Netflix, Amazon VOD (offering 45,000 movies and television shows⁹⁹), and Major League Baseball's site.¹⁰⁰ Vudu also enables online television viewing through use of an add-on box.¹⁰¹ The Playstation 3 and Xbox are popular gaming consoles that also function as home entertainment centers, particularly when beaming online television to television screens. Xbox offers high-definition movies through Netflix.¹⁰² BluRay players, now the industry standard for high-definition disc-based video, often have online television capabilities, including Netflix capability.¹⁰³

Boxee is software that enables users to explore online content from CBS.com, Comedy Central and other sites using a device like Apple TV or a computer, and potentially a television's built-in Internet connection, game consoles, and Blu-Ray players.¹⁰⁴ In December 2009, Boxee unveiled its plan for set-top box pre-loaded with Boxee software.¹⁰⁵ The *New York Times* has reported that Boxee's software has a "well-organized directory,"¹⁰⁶ "unlike the increasingly long and convoluted channel directories on most cable and satellite systems."¹⁰⁷ Boxee also embeds social networking features enabling users to view, rate, and recommend content through its interface.¹⁰⁸ Boxee has raised millions from investors.¹⁰⁹ And Boxee is not alone: another technology called

⁹⁸ Apple TV, <http://www.apple.com/appletv/what-is.html> (last visited Feb. 26, 2010); Apple TV - Apple Store (U.S.), http://store.apple.com/us/browse/home/shop_ipod/family/apple_tv?aid=AIC-WWW-NAUS-K2-BUYNOW-APPLETV-WHAT+IS+APPLE+TV%3F&cp=BUYNOW-APPLETV-WHAT+IS+APPLE+TV%3F (last visited Feb. 26, 2010).

⁹⁹ Roth, *supra* note 17, at 122.

¹⁰⁰ *Id.*

¹⁰¹ Vudu-Product-Overview, http://www.vudu.com/product_overview.html (last visited Feb. 26, 2010).

¹⁰² Netflix on Xbox LIVE, <http://www.xbox.com/en-US/live/netflix/default.htm> (last visited Feb. 26, 2010).

¹⁰³ See, e.g., Crutchfield, Samsung BD-P3600, http://www.crutchfield.com/S-ddUwMcm8Akvp/p_305BD3600/Samsung-BD-P3600.html (last visited Apr. 13, 2010).

¹⁰⁴ See Chloe Albanesius, *Boxee Lands Deal for Set-Top 'Boxee Box,'* PCMAG.COM, Nov. 12, 2009, <http://www.pcmag.com/article2/0,2817,2355815,00.asp>.

¹⁰⁵ See *id.*; Posting of Andrew Kippen, *Step 1: Make a Boxee Box (No Need to Cut a Hole)*, to Boxee Blog, <http://blog.boxee.tv/2009/12/09/step-1-make-a-boxee-box-no-need-to-cut-a-hole/> (Dec. 9, 2009, 9:00 EST).

¹⁰⁶ Brad Stone, *Way to View Web on TV Finds Fans*, N.Y. TIMES, Jan. 17, 2009, at B1.

¹⁰⁷ *Id.*

¹⁰⁸ Posting of Greg Sandoval, *Turning the TV into a 'Social-Media Center,'* to CNET NEWS BLOG, http://news.cnet.com/8301-10784_3-9965864-7.html (June 11, 2008, 10:14 PDT).

¹⁰⁹ See Posting of Brad Stone, *Boxee Raises Another \$6 Million for Assault on Big Media*, to N.Y. TIMES BITS BLOG, <http://bits.blogs.nytimes.com/2009/08/12/boxee-raises->

Plex Media Center, built off the same open source media player, is available for and popular among Mac Users.¹¹⁰

One of the most popular online television offerings is Netflix, a company known initially for offering DVDs through the mail for monthly subscription fees.¹¹¹ Netflix now offers media content through the Internet. It has close to 11 million subscribers and offers programming to numerous devices, having embedded its software in nearly 10 million televisions, DVD players, game consoles like Microsoft's Xbox 360, and laptops.¹¹² As Wired noted, "Microsoft incorporated the service into its Windows Media Center software, meaning everyone with [Microsoft] Vista can stream Netflix to their TV."¹¹³ As a result, Netflix "routs around" the MVPDs. In so doing, Netflix acted "surreptitiously" to avoid "the wrath of the [cable] giants."¹¹⁴

B. The Incumbents' Fears of Online Television

The availability and popularity of these devices and technologies causes three main fears for the MVPDs—cord-cutting, competition, and losing market power over programmers.

1. Cord-cutting

"Cord-cutting" refers to cancelling an MVPD subscription.¹¹⁵ It consists of consumers leaving the market for MVPDs, or, alternatively, selecting virtual MVPDs as competitive substitutes. As one cable trade publication noted, cord-cutting is "becoming easier than ever" since consumers can watch television through the Internet, supplemented by over-the-air digital broadcasts.¹¹⁶ By 2009, eight percent of Internet users had hooked up their computers to their televisions so they could stream Internet content to the larger screens.¹¹⁷ Publications often feature families cutting the cord and saving hundreds or thousands of dollars a year.¹¹⁸

another-6-million-for-assault-on-big-media/ (Aug. 12, 2009, 11:00 EST).

¹¹⁰ See Plex Media Center for OS X, <http://www.plexapp.com/> (last visited Apr. 15, 2010).

¹¹¹ Netflix, Overview, <http://ir.netflix.com/> (last visited Mar. 7, 2010).

¹¹² Roth, *supra* note 17, at 123–24.

¹¹³ *Id.* at 125.

¹¹⁴ *Id.* at 124.

¹¹⁵ Cf. HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 319 (25th ed. 2009).

¹¹⁶ Todd Spangler, *Breaking Free*, MULTICHANNEL NEWS, Nov. 1, 2008, http://www.multichannel.com/article/85964-Cover_Story_Breaking_Free.php.

¹¹⁷ MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, THE AUDIENCE FOR ONLINE VIDEO-SHARING SITES SHOOTS UP 4 (2009).

¹¹⁸ See, e.g., Douglas Quenqua, *Can a Mouse Cut the Cable?*, N.Y. TIMES, Mar. 11,

One publication quoted a user who canceled cable and uses Apple TV: "It's tough to justify paying \$100 a month for TV programming when so much is available online."¹¹⁹ Another publication noted that some think Boxee is "a way to euthanize that costly \$100-a-month cable or satellite connection,"¹²⁰ and quoted one Boxee user saying, "[m]ost people my age would like to just pay for the channels they want, but cable refuses to give us that option."¹²¹ The CEO of Roku has publicly stated, "[o]ur goal is to have everyone cancel their cable subscription."¹²² Roku provides 10 channels to its box; as one reporter noted, "if some bigger names in content—Hulu, are you listening?—were to sign on to make channels, [Roku] would be truly be an excellent replacement for cable."¹²³

A recent article in the *New York Times* described one family's use of an inexpensive mini computer, an Xbox (which was not even "absolutely necessary"), Boxee, Hulu, and Netflix to cancel their monthly \$140 cable subscription and save \$1,600 a year.¹²⁴ Thirty-five percent of respondents in a March 2009 survey said they would consider canceling their MVPD subscription within the next five years to watch television exclusively on the Internet.¹²⁵ Americans already could watch a third of their television hours without an MVPD subscription on over-the-air standard- and high-definition digital channels available with an antenna for free.¹²⁶ While clearly not all Americans will cancel their subscriptions in the short term, millions of households could. As one financial analyst observed, "people are starting to wonder, do we even need the cable connections?"¹²⁷

Whether or not consumers will actually cut the cord, cable providers clearly

2010, at D1; Nick Bilton, *Cable Freedom, Aided by a Mouse*, N.Y. TIMES, Dec. 10, 2009, at B5. See also Marguerite Reardon, *You Don't Need Satellite TV When Times Get Tough*, CNET.COM, Dec. 19, 2008, http://news.cnet.com/8301-1035_3-10125962-94.html.

¹¹⁹ Spangler, *supra* note 116.

¹²⁰ Stone, *supra* note 109.

¹²¹ *Id.*

¹²² Roth, *supra* note 17, at 124. As *Wired* noted, MVPDs and programmers are "some of the most powerful incumbents in media," and they "have successfully stymied or co-opted all previous entrepreneurial efforts." *Id.*

¹²³ Chris Foresman, *First Look: Roku Channel Store Expands Connected Set-Top Box*, ARS TECHNICA, Nov. 23, 2009, <http://arstechnica.com/media/news/2009/11/first-look-roku-channel-store-expands-connected-set-top-box.ars>.

¹²⁴ Bilton, *supra* note 118.

¹²⁵ *Cable TV Follows Its Subscribers to the Internet*, Knowledge@Wharton, July 22, 2009, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2295>.

¹²⁶ Cf. Wayne Friedman, *Cable Share Grows, Broadcast Recedes*, MEDIA POST NEWS, Dec. 9, 2009, http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=118859 (last visited Apr. 15, 2010).

¹²⁷ Dawn C. Chmielewski & Meg James, *Hulu's Tug of War with TV*, L.A. TIMES, May 11, 2009, at B1.

fear the possibility. “We are starting to see the beginning of cord cutting . . . People will choose not to buy subscription video if they can get the same stuff for free,” said Glenn Britt, the chief executive of Time Warner Cable in February 2009.¹²⁸ A senior vice president at Cablevision-owned Rainbow Media Holdings, which owns channels like AMC and IFC, said, “My biggest fear would be not so much people cutting the cord, but the younger generation coming up and never buying into [an MVPD].”¹²⁹ A recent report by the firm SNL Kagan concludes that “videos over the Internet will continue to erode the subscriber base from the multichannel services vendors in the United States,” though perhaps less than MVPDs fear.¹³⁰

While cord-cutting is likely further in the future for most Americans, many Americans may turn to existing devices and services—like Netflix and Hulu—instead of paying a few dollars for a television show on-demand or a monthly fee to rent a cable DVR. As the cable industry would like to preserve and expand DVR and on-demand revenues, this is a real threat to them. MVPDs. They would rather charge consumers—for MVPD, for on demand video, and for Internet service. These operators “worry that the proliferation of free video on the Web—and downloadable shows on Apple iTunes—may be harming the \$60-billion-a-year subscription video business by allowing people to unplug their cable services.”¹³¹ As Professor Jonathan Taplin noted, MVPDs would prefer you not cancel your MVPD subscription and “that you pay them 70 bucks a month for maybe a lot of channels you don’t use.”¹³²

MVPDs fear, in short, “cannibalizing” their existing MVPD subscriptions

¹²⁸ Deborah Yao, *Cable Companies See Customers Cutting Back: “The Beginning Of Cord Cutting,”* HUFFINGTON POST, Feb. 8, 2009, http://www.huffingtonpost.com/2009/02/09/cable-companies-see-custo_n_165138.html.

¹²⁹ Steve Donohue, *Cisco: Set-Top Data Could Boost ‘TV Everywhere,’* LIGHT READING, Nov. 19, 2009, http://www.lightreading.com/document.asp?doc_id=184825&site=cdn.

¹³⁰ Mike Robuck, *Report: OTT Eating Into Video Market Share Pie,* CED MAGAZINE, Oct. 9, 2009, available at <http://www.cedmagazine.com/News-OTT-video-market-share-100909.aspx>.

¹³¹ Brad Stone & Brian Stelter, *Web TV, for Subscribers Only,* N.Y. TIMES, Mar. 30, 2009, at B1.

¹³² Laura Sydell, *Hooking Up PC To TV Could Be Near,* NPR.ORG, Mar. 12, 2009, <http://www.npr.org/templates/story/story.php?storyId=101823872>. Cable operators note this reality themselves when discussing the benefits of moving to switched digital video. Comcast CTO Tony Werner noted, “It’s clear that the last 200 to 300 channels are watched such a small fraction of the time . . . if you never have more than 40 streams watched out of 200.” Leslie Ellis, *How Sexy is HFC? (Answer: Plenty),* CED MAGAZINE, May 1, 2007, <http://www.cedmagazine.com/article.aspx?id=146993>. The FCC has confirmed that cable service prices continue to rise out of pace with inflation or investment. See *In re Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices*, 21 F.C.C.R. 15,087, ¶ 2 (2006).

with their Internet subscriptions.¹³³ The idea of consumers watching online television on television sets “terrifies television networks and distributors,”¹³⁴ and programs such as Boxee represent a “potentially dangerous idea for the TV industry.”¹³⁵ As a result, according to press reports, “some [MVPDs] are trying to make sure people have a reason to keep paying hefty cable bills.”¹³⁶

2. Competition

Online television could disrupt the cable industry’s oligopoly markets, injecting long-sought competition in markets like subscription and on-demand viewing. The entry costs for building an entire network—like the cable or phone networks, built under government-sanctioned monopolies—or launching a satellite are very high.¹³⁷ Because of the economics of *Internet*-based distribution, online television distributors have low costs of entry. As a result, new competitors like Roku could enter and take some market share, while MVPDs will likely have to lower their MVPD prices or provide higher quality—in short, *to compete*—to the benefit of consumers.

With online competition, companies like Comcast and Cox would be forced to compete nationally with one another and with programmers. Today, Comcast and Cox have local cable monopolies that do not overlap.¹³⁸ In the online space, all these distributors could compete with one another through Internet delivery, even if Comcast does not have a cable network in a traditional Cox market like San Diego. Programmers like the owners of Hulu also could become direct competitors to Comcast and Cox. Finally, new entrant programmers could use the Internet to reach consumers, forcing existing programmers to lower their prices to consumers, perhaps through fewer ads, or to provide greater value, perhaps through innovation.¹³⁹

¹³³ Stone & Stelter, *supra* note 131.

¹³⁴ *Id.*

¹³⁵ See Stone, *supra* note 109 (“The more free Web video that makes its way to the television, the fewer reasons people have to pay those hefty monthly bills to the cable and satellite companies, which split revenue with cable networks.”).

¹³⁶ Stone & Stelter, *supra* note 131.

¹³⁷ THEODORE BOLEMA, MACKINAC CENTER FOR PUBLIC POLICY, AN EVALUATION OF LEGISLATIVE PROPOSALS FOR HIGHER CABLE FEES TO FINANCE PUBLIC, EDUCATION AND GOVERNMENT ACCESS CHANNELS 3 (2008), <http://www.mackinac.org/archives/2008/2008-11REGfeesWEB.pdf>; *Hearing Before the Subcomm. On Sci. Tech., and Space of the S. Comm. on Commerce, Sci., and Transportation*, Commercial Space Launch Industry, 105th Cong. 8 (1998) (statement of Daniel S. Goldin, Administrator, National Aeronautics and Space Administration).

¹³⁸ Compare Comcast, Comcast Investor Relations, http://www.comsk.com/our_company.cfm (last visited Apr. 17, 2010) with Cox Communications, <http://www2.cox.com/> (last visited Apr. 17, 2010).

¹³⁹ Industry analysts looking at Hulu and other current sites warn that ad revenues from

3. Control Over Programming and Talent

With competition from online television, MVPDs could lose some of their market power over smaller programmers. Today, powerful “distributors have ‘incredible power’ over smaller programmers”¹⁴⁰ With the ability to decide whether a programmer can succeed, the distributors often pay little to carry smaller programmers or can demand an equity stake in exchange for carriage.¹⁴¹

A large online television market could subvert that dynamic. Programmers could go directly to consumers without cutting a deal with the MVPD. As a result, programmers would have greater leverage in negotiating with the MVPD, as programmers could reach an audience without being wholly dependent on a few powerful distributors. In addition, if there are more distributors to negotiate with, both online and offline, smaller programmers could negotiate for better terms with distributors.

Widespread online television also could give unions, such as screenwriters, more bargaining power to negotiate more favorable deals with MVPD programmers. Such talent would have the option of working for more programmers, as smaller programmers succeed. The talent would also have the ability to distribute content directly to consumers online, becoming programmers themselves.

IV. EARLIER ACTIONS TO ATTACK ONLINE TELEVISION

Since the advent of high-speed Internet access service, MVPDs have used at least three methods to stop the spread of online television. All have been famously unpopular and controversial, and they have prompted investigations, legal action, legislation, and regulations.

A. Network Neutrality Violations

MVPDs that are also Internet access providers have targeted and blocked online software enabling high-definition online television. As early as the

online video will never match those of broadcast and cable television, amplifying fears over losing cable programming fees. Steve Donohue, *Online Distribution Threatens TV Ad Revenue*, CONTENTINOPLE, June 5, 2009, http://www.contentinople.com/author.asp?section_id=603&doc_id=177656 (last visited Apr. 16, 2010).

¹⁴⁰ Posting of Patrick Ross, *TV Everywhere and Ten Canards on Copyright*, to Copyright Alliance Blog, <http://blog.copyrightalliance.org/2010/01/tv-everywhere-and-ten-canards-on-copyright/> (Jan. 5, 2010, 13:16 EST).

¹⁴¹ See *supra* notes 56–60 and accompanying text.

1990s, the operators made “efforts to block or otherwise impair a user’s ability” to access streaming video longer than 10 minutes,¹⁴² fearing that Internet access would undermine MVPD revenues.¹⁴³ The CEO of AT&T Broadband and Internet Services (then a cable operator) explained AT&T would not “allow others to freely transmit movies and TV shows” over AT&T’s Internet access connections because “AT&T didn’t spend \$56 billion to get into the cable business ‘to have the blood sucked out of our vein’” by online television.¹⁴⁴

A more high-profile and recent example is Comcast’s degradation of peer-to-peer applications, such as BitTorrent, used to distribute, among other things, high-definition online television from providers such as Vuze and Miro.¹⁴⁵ In the FCC’s *Free Press-Comcast Order* directing Comcast to stop blocking these technologies, the Commission noted Comcast’s clear anti-competitive motives: “Peer-to-peer applications . . . have become a competitive threat to cable operators such as Comcast because Internet users have the opportunity to view high-quality video with BitTorrent that they might otherwise watch (and pay for) on cable television.”¹⁴⁶ Other carriers also engage in questionable conduct.¹⁴⁷

¹⁴² *Excite@Home Keeps a Video Collar*, ZDNET UK, Nov. 1, 1999, <http://news.zdnet.co.uk/hardware/0,1000000091,2074794,00.htm> (noting that the other major cable ISP—a joint venture including cable operators, called Road Runner—limited only those streaming videos created particularly for its service).

¹⁴³ *Id.* The article goes on to quote two industry insiders:

Part of the genesis of the ten minute restriction was from the concern that folks would start watching streaming media on the computer instead of going to the core cable business and watching TV shows,” said Gary Arlen, a Maryland-based consultant, adding that the cable companies were concerned “that video on the Net would take away from the core business and maybe make customers not watch what the advertising supported cable programming side was offering.” David Card, senior analyst for Jupiter Communications, puts a fine edge on the reason for the restriction: “They don’t want the cable modem business to cannibalize their basic core business, which is delivering filmed entertainment, news and sports.

Id.

¹⁴⁴ David Lieberman, *Media Giants’ Net Change: Major Companies Establish Strong Foothold Online*, USA TODAY, Dec. 14, 1999, at 3B, available at LEXIS, News & Business Library.

¹⁴⁵ Declan McCullagh, *BitTorrent Firms: Comcast Throttling is Anticompetitive*, CNET NEWS, Feb. 14, 2008, http://news.cnet.com/8301-13578_3-9872464-38.html.

¹⁴⁶ See *Free Press-Comcast Order*, *supra* note 19, ¶ 5.

¹⁴⁷ Cox Communications trialed a system to prioritize supposedly “time-sensitive” Internet applications, excluding peer-to-peer services from its category. Todd Spangler, *Cox To Test Bandwidth-Throttling System*, MULTICHANNEL NEWS, Jan. 28, 2009, [http://www.multichannel.com/article/162872-](http://www.multichannel.com/article/162872-Cox_To_Test_Bandwidth_Throttling_System.php)

[Cox_To_Test_Bandwidth_Throttling_System.php](http://www.multichannel.com/article/162872-Cox_To_Test_Bandwidth_Throttling_System.php). AT&T Wireless specifically prohibits any P2P file sharing and redirecting television signals. Lynnette Luna, *AT&T Revises Data Usage Rules*, FIERCE BROADBAND WIRELESS, May 3, 2009, <http://www.fiercebroadbandwireless.com/story/t-revises-data-usage-rules/2009-05-03>.

The distributors' "technical" defenses of these practices are questionable. Internet networking experts have maintained that increases in capacity to meet increased usage are economical.¹⁴⁸ While carriers initially claimed they could not handle the peer-to-peer or video traffic,¹⁴⁹ the largest carriers are "flush with cash, enough to upgrade and expand their broadband networks on their own" without government subsidies.¹⁵⁰ They also now hope to carry increased amounts of online television—their own—through an initiative called TV Everywhere, discussed below in Part IV.C.4.¹⁵¹

These network neutrality violations have resulted in thousands of consumer complaints, several bills proposed in Congress, two FCC enforcement actions, and an imminent FCC rulemaking.¹⁵²

AT&T Wireless has an exclusive deal with Apple for the iPhone to encourage Apple to reject BitTorrent, SlingPlayer and other video applications. AT&T cited network burdens and un-adjudicated copyright infringement as justifications. Posting of David Kravets, *Apple Rejects iPhone BitTorrent App*, to WIRED THREAT LEVEL BLOG, <http://www.wired.com/threatlevel/2009/05/apple-rejects-bittorrent-iphone-app/> (May 11, 2009, 16:53 EST); Posting of Dan Moran, *AT&T Defends SlingPlayer's Wi-Fi Limit*, to MACWORLD IPHONE CENTRAL, http://www.macworld.com/article/140600/2009/05/att_sling.html (May 13, 2009, 16:21).

¹⁴⁸ *Net Neutrality: Hearing before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 66 (2006) (statement of Gary R. Bachula, Vice President, External Affairs, Internet2). *But see id.* at 32 (statement of Walter McCormick Jr., President/Chief Executive Officer, United States Telecom Association) (emphasizing the need for economic incentives to increase bandwidth).

¹⁴⁹ *See, e.g., In re Preserving the Open Internet Broadband Industry, Comments of Free Press*, WC Docket No. 07-52 (Jan. 14, 2010) at 35–37 (accessible via FCC Electronic Comment Filing System).

¹⁵⁰ Cecilia Kang, *Major Carriers Shun Broadband Stimulus*, WASH. POST, Aug. 14, 2009, at A12.

¹⁵¹ *See* Todd Spangler, *Pay TV's Internet Acid Test*, MULTICHANNEL NEWS, July 6, 2009, http://www.multichannel.com/article/307423-Pay_TV_s_Internet_Acid_Test.php. Time Warner CEO Jeff Bewkes predicted that TV Everywhere would exceed the popularity of YouTube and Hulu, proclaiming "[t]his will be by far the highest amount of online video watched in the United States." *Id.* Similarly, AT&T made a deal with Major League Baseball ("MLB") to carry the MLB's television channel on the iPhone, providing customers with live games streamed over the 3G network for a single \$9.99 application charge. Posting of Jordan Golson, *MLB iPhone App to Live-Stream Games Over 3G; Still No Sling*, to GigaOm.com, <http://gigaom.com/2009/06/18/mlb-iphone-app-to-live-stream-games-over-3g-still-no-sling/> (June 18, 2009, 12:03 PST).

¹⁵² *In re Preserving The Open Internet Broadband Industry Practices, Notice of Proposed Rulemaking* FCC 09-93, GN Docket No. 09-191, WC Docket No. 07-52, at ¶ 2 (Oct. 22, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf. The Commission noted:

[We have] considered the issue of openness in a wide variety of contexts and proceedings, including: a unanimous policy statement, a notice of inquiry on broadband industry practices, public comment on several petitions for rulemaking, conditions associated with significant communications industry mergers, the rules for a major spectrum auction, and specific enforcement actions against particular parties.

Id. See, e.g., H.R. 5273, Network Neutrality Act of 2006, 109th Cong. (2006).

B. Targeted Cap-and-Metered Pricing

Cable and phone companies have proposed cap-and-metered pricing for Internet service with details that appear to target online television.¹⁵³ Unlike the current all-you-can-eat monthly fee-plans for Internet access, cap-and-metered pricing would charge users based on the capacity used.¹⁵⁴ As a result, downloading or streaming large files would be more expensive than smaller files. In March 2009, Time Warner Cable announced metered pricing trials in four cities with prices that would have made watching online television cost-prohibitive.¹⁵⁵ AT&T is testing a metering plan on its wireline U-verse service with hopes for national expansion.¹⁵⁶

In response to trials by Time Warner Cable, a House bill was introduced in Congress, and Time Warner Cable dropped its immediate plans under consumer pressure.¹⁵⁷ The company stated the plans would be reintroduced following a “customer education process.”¹⁵⁸

C. Control Over Set-Top Boxes

While many devices can put online television programming onto television screens, the cable operators have made it nearly impossible to attach independent devices to the MVPD connection or, in doing so, to integrate online television content and MVPD content through the same convenient interface.¹⁵⁹ So

¹⁵³ S. DEREK TURNER, FREE PRESS, BLOCKING OR METERING: A FALSE CHOICE 1, 5 (2008).

¹⁵⁴ *Id.* at 1.

¹⁵⁵ Wendy Davis, *Time Warner's Pay-Per-Download Plan Under Fire*, ONLINE MEDIA DAILY, Apr. 10, 2009, http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=103854. Time Warner Cable offerings started at only 5 GB for a month, with \$1 charges for each GB of overage. *Id.* Meanwhile, downloading a single high-definition movie often requires 3.8 GB. See Stacey Higginbotham, *The Twilight Problem: Why Metered Broadband Could Suck*, GIGAOM.COM, Apr. 14, 2009, <http://gigaom.com/2009/04/14/the-metered-broadband-math-as-much-as-2459-to-rent-twilight/>.

¹⁵⁶ John Timmer, *Sorry, Beaumont! AT&T Brings (More) Bandwidth Caps to Texas*, ARS TECHNICA, Dec. 2, 2008, <http://arstechnica.com/old/content/2008/12/sorry-beaumont-at-brings-bandwidth-caps-to-texas.ars>. AT&T has said that their metered pricing plan “experiment” ended in April 2010. See Posting of Mike Masnick, *Bad Publicity, BBB Complaints Causing A&T To Reconsider Metered Broadband?* to TECHDIRT, <http://www.techdirt.com/articles/20100222/1722418259.shtml> (Feb. 22, 2010, 21:10 EST).

¹⁵⁷ See Posting of Ryan Singel, *Time Warner Cable Cancels Download Cap Plans*, to WIRED EPICENTER, <http://www.wired.com/epicenter/2009/04/time-warner-c-1/> (Apr. 16, 2009, 11:47 EST).

¹⁵⁸ Chloe Albanesius, *Time Warner Scraps Bandwidth Cap Testing*, PCMAG.COM, Apr. 16, 2009, <http://www.pcmag.com/article2/0,2817,2345430,00.asp>.

¹⁵⁹ See International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act; A National Broadband Plan for Our Future; Development of Ad-

while you can connect an Apple TV to the Internet connection, it is very difficult to use independent devices with the cable TV connection.

Third-party makers have little to no hope of penetrating the set-top box market for delivering MVPD programming (including video-on-demand). Cable operators continue to actively thwart congressional and FCC efforts—two statutes and several rulemakings—meant to ensure consumers can attach devices to the network.¹⁶⁰ As a result, the set-top box is not subject to competition or innovation (many boxes consist of very old technology),¹⁶¹ and cable operators rent boxes to users at high monthly prices.¹⁶² As a *Wired* author noted, “[t]he set-top box has proven to be a closed and well-guarded fortress against a world of clouds and openness,” and the incumbents “work strenuously to keep it that way.”¹⁶³

The FCC has admitted that its policies have failed. In late 2009, the FCC concluded that “set-top box market competition has not emerged, limiting innovation.”¹⁶⁴ In 2008, there were only “14 set-top boxes on the market, including those leased by [MVPDs] . . . compare[d] with nearly 900 mobile de-

vanced Telecommunications Capability to All Americans in a Responsible and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act, Implementation of the Telecommunications Act of 1996, *Comments of TIVO, Inc.*, GN Docket Nos. 09-47, 09-137, 09-80, at 4–6 (Dec. 22, 2009) [hereinafter *TIVO Comments*]. This process already revolutionized online music: Though few consumers would have switched to the iPod from compact discs based merely on the legal digital content then available, many users moved quickly to the iPod because it permitted users to listen also to their existing libraries. This created a larger market for digital downloads, making a CD-free life then feasible for millions. Because of cable operator strategies, however, “Apple has largely failed to ignite the same fire in the video and TV markets as the audio market.” Cf. Alex Salkever, *Three Reasons Why Verizon’s App Store Doesn’t Threaten Apple*, DAILY FINANCE, July 15, 2009, <http://www.dailyfinance.com/story/company-news/three-reasons-why-verizons-app-store-doesnt-threaten-apple/19098107/>.

¹⁶⁰ See Free Press MVPD Reply, *supra* note 39, at 6–8.

¹⁶¹ Saul Hansel, *Like Apple, TV Explores Must-Have Applications*, N.Y. TIMES, Sept. 7, 2009, at B1. The cable industry supplies tens of millions of consumers with “old set-top boxes that have limited memory and processing capabilities” and the chief software architect for Comcast admits that the “lowest end set-top box [still supplied by Comcast] is the equivalent of a Mac II from 1991.” *Id.*

¹⁶² Cf. Jacqui Cheng, *Angry Customer Sues Time Warner Over Forced Cable Box Rental*, ARSTECHNICA, Aug. 14, 2008, <http://arstechnica.com/gadgets/news/2008/08/angry-customer-sues-time-warner-over-forced-cable-box-rental.ars> (last visited Apr. 14, 2010) (reporting on a law suit alleging that, by requiring set-top box rental, a cable company “forces the class to pay a much larger amount of money than would be the case if they were allowed to purchase a cable box of their choice from the manufacturer of their choosing”).

¹⁶³ Roth, *supra* note 17, at 124.

¹⁶⁴ Press Release, Fed. Comm’n Comm’n, FCC Identifies Critical Gaps in Path to Future Universal Broadband (Nov. 18, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-294706A1.pdf.

vices.”¹⁶⁵ The Consumer Electronics Association, which represents thousands of companies, has fought for years to open up the set-top box market. As their vice president recently summarized, “It’s been a long slog Cable operators have been loath to give up control.”¹⁶⁶

Device-makers can, however, attach boxes to an Internet connection—for example, through an Ethernet jack.¹⁶⁷ This has resulted in devices like Apple TV, Roku, Vudu, and Boxee’s announced box—as well as the ability to connect televisions, gaming consoles, computers, and BluRay players.

In a move that drastically reduces the consumer-friendliness of these Internet-connected boxes, however the cable industry forbids outside boxes from integrating MVPD offerings within the same interface used for navigating Internet television.¹⁶⁸ Boxee’s popularity rests on it being a user-friendly interface that displays, in one place, television content from users’ hard drives and multiple sites across the Internet.¹⁶⁹ As a result of the cable industry’s restrictions, users cannot easily “change channels” among online and MVPD programs.¹⁷⁰

While public television distributors in Europe have moved to incorporate online and MVPD into one interface,¹⁷¹ the cable industry lobbying association in the United States has recently argued, with “Chicken Little” rhetoric, that

¹⁶⁵ Kang, *supra* note 78.

¹⁶⁶ *Id.*

¹⁶⁷ *In re* Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices, *Report and Order*, 13 F.C.C.R. 14,775, ¶ 8 (June 11, 1998).

¹⁶⁸ See, e.g., Memorandum of Understanding Among Cable Operators and Consumer Electronics Adopters Regarding Interactive Digital Cable Ready Products, Apr. 25, 2008, available

at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=652001334 5. As one DBS operator notes, “tru2way products are forbidden by license from (1) providing any choice in user interface when accessing interactive services, and (2) including non-MVPD programming services, such as Internet-delivered content, in the user interface that displays the available cable programming.” *TIVO Comments, supra* note 159, at 4.

¹⁶⁹ See Posting of Peter Kafka, *Boxee: WebTV That Makes Sense. Is That Good or Bad for Big Cable?*, to All Things Digital, <http://mediamemo.allthingsd.com/20090112/boxee-webtv-that-makes-sense-is-that-good-or-bad-for-big-cable/> (Jan. 12, 2009, 10:19 PST). Boxee is a “New York-based start-up [that] makes elegant software that cobbles together offerings from all of those services [Hulu and Netflix], plus many more—with whatever media you have stored on your hard drive—and serves it up to you on your big screen, with a minimum of fuss.” *Id.*

¹⁷⁰ Even the Supreme Court has noted that consumers prefer not to switch between MVPD offerings and non-integrated offerings. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 219–21 (1997).

¹⁷¹ Posting of Brian Mahony, *Comparing Hybrid OTT/Pay TV Solutions on Opposite Sides of the Pond: TV Everywhere and Project Canvas*, to Trender Research, <http://www.trenderresearch.com/profiles/blogs/comparing-hybrid-ott-pay-tv> (Nov. 4, 2009, 8:30 AM) (“Project Canvas [in the UK, led by BBC] is also tackling the hybrid interface challenge head-on by providing an integrated electronic program guide . . .”).

enabling integrated interfaces could result in the industry rushing to the government for subsidies to survive.¹⁷²

1. Content Lock-Out Tactics Against Online Television

The MVPDs are engaging in a classic content-lock-out strategy. Historically, incumbent dominant distributors of any content, for any medium, have tried to stifle emerging competitors by denying them content, almost invariably requiring government action to protect competition. In the first decade of the 1900s, publishers of sheet music tried to deprive manufacturers of musical compositions for piano rolls and records;¹⁷³ and from 1914 through the 1920s, the American Society of Composers, Authors and Publishers (“ASCAP”) brought lawsuits against broadcasters, in the attempt to limit broadcasters’ access to copyrighted content by requiring them to first obtain licenses.¹⁷⁴ In the 1970s, the incumbent television broadcasters (like NBC and CBS) tried to kill cable operators—then new entrants—by denying access to broadcasters’ television content.¹⁷⁵ Without access to that incumbent content, cable operators would have been unable to gain initial subscribers; without initial subscribers, the cable operators would not have had the revenue and the audience to then create their own programming content, like HBO.¹⁷⁶ Years later, ironically, cable operators attempted to deny content to emerging satellite operators,¹⁷⁷ so that satellite operators could not follow the same evolution. Recently, cable operators have deprived phone companies of premium local sports content.¹⁷⁸

¹⁷² See *In re A National Broadband Plan For Our Future*; International Comparison and Survey Requirements in the Broadband Data Improvement Act; Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; Implementation of Section 304 of the Telecommunications Act of 1996 Commercial Availability of Navigation Devices, *Comments of the National Cable & Telecommunications Association on NBP Public Notice #27*, GN Docket No. 09-51, GN Docket No. 09-47, GN Docket No. 09-137, CS Docket No. 97-80, at 22–23 (Dec. 22, 2009) (accessible via FCC Electronic Comment Filing System). Comparing the cable industry to the dire situation facing newspapers “that have been disaggregated from their advertising and subscription revenues,” the NCTA claims “[i]t would make little sense to drive the industry toward that model, at the very time that the funding of broadband deployment is recognized to be an urgent and critical national priority.” *Id.*

¹⁷³ Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 301 (2004).

¹⁷⁴ *Id.* at 305–10.

¹⁷⁵ See *id.* at 312–19.

¹⁷⁶ See *id.* at 320–24.

¹⁷⁷ Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1690–91 (2003).

¹⁷⁸ Kate Aishton, *The Big Phone Companies’ Hypocrisy*, FREE PRESS, Aug. 5, 2009,

Even AT&T, a company larger than the entire cable industry, had to file a complaint with the FCC about access to San Diego Padres games on a Cox-owned channel which Cox—the local cable operator—refused to license for use on AT&T's U-verse service.¹⁷⁹ (Notably, Cox licensed the games to other cable operators that did not compete directly with Cox in San Diego.¹⁸⁰) Similarly, Verizon brought a complaint against Cablevision because Cablevision denied Verizon access to the high-definition version of a Cablevision-owned channel airing New York City professional sports.¹⁸¹

Just as the broadcasters attempted to lock out cable operators, and as cable operators attempted to lock out both satellite operators and phone carriers, *all three* incumbent MVPD industries seek to lock out Internet-enabled competition.

2. Content Lock-Out All Over the Internet

MVPDs apply pressure to programmers, as is well-known to industry observers. Recently, a technology journalist noted that the cable companies could “keep pressuring their content providers—especially the good ones—to keep as much content offline as possible.”¹⁸² The *Los Angeles Times* reports that some MVPDs “have gone so far as to stipulate that cable networks limit the number of episodes they make available online. Others have imposed an outright ban.”¹⁸³ Executives at an unnamed major programmer confirmed that they would not put their programming on the Internet based on the demands of MVPDs.¹⁸⁴ The distributors generally threaten to pay lower per-subscriber fees on the MVPD platform if programmers make content available online: “The message is loud and clear to programmers,” said one observer of industry pan-

<http://www.freepress.net/node/71352>.

¹⁷⁹ John Eggerton, *FCC Denies AT&T Program Access Complaint*, BROADCASTING & CABLE, Mar. 3, 2009, http://www.broadcastingcable.com/article/189668-FCC_Denies_AT_T_Program_Access_Complaint.php.

¹⁸⁰ Molly Peterson, *FCC Rejects AT&T Program-Access Complaint Against Cox (Update2)*, BLOOMBERG.COM, Mar. 9, 2009, <http://www.bloomberg.com/apps/news?pid=20601103&sid=alpOlawRajlc&refer=us>.

¹⁸¹ John Eggerton, *Verizon Files Program Access Complaint Against Cablevision*, BROADCASTING & CABLE, July 8, 2009, http://www.broadcastingcable.com/article/307770-Verizon_Files_Program_Access_Complaint_Against_Cablevision.php.

¹⁸² Dan Frommer, *Why Comcast Has To Worry About Hulu*, BUSINESS INSIDER, May 4, 2009, <http://www.businessinsider.com/why-comcast-has-to-worry-about-hulu-2009-5>. The *L.A. Times* reported that MVPDs, “[b]elieving that they should have exclusivity because their [per-subscriber] payments support the enormous cost of producing TV shows, have been pushing back against the Hulu freebies.” Chmielewski & James, *supra* note 127.

¹⁸³ Chmielewski & James, *supra* note 127.

¹⁸⁴ Posting of Peter Kafka, *Did Big Cable Force Hulu off Boxee?*, to All Things Digital, <http://mediamemo.allthingsd.com/20090218/did-big-cable-force-hulu-off-boxee/> (Feb. 18, 2009, 17:44 PST).

els at conferences. “[Y]ou’ll be jeopardizing those monthly affiliate fees come renewal time if your crown jewels leak out [onto the Internet]; worse, you’ll be subverting the entire cable business model.”¹⁸⁵

Time Warner Cable has been particularly public in pressuring programmers not to put content online. According to the *New York Times*, Time Warner Cable’s chief executive Glenn Britt told reporters in response to a question about making more content available online, “Guess what? We do mind.”¹⁸⁶ Britt announced to content providers at the Cable Show in New Orleans that putting shows online the same day of an MVPD broadcast “will erode your other business model” of cable per-subscriber fees.¹⁸⁷ If the cable networks continue putting shows online, said Britt, “we have to intervene at some point.”¹⁸⁸ The *Los Angeles Times* has also noted that Britt has repeatedly argued “that free, ad-supported TV sites such as Hulu undermine the subscription-TV revenues that the [content] industry depends on.”¹⁸⁹

Time Warner Cable’s chief operating officer Landel Hobbes agrees with his boss. He said: “We have to be very careful of stuff like over the top or all video content over the top on the Internet. There is a dual revenue stream that we have to be careful of. Surviving on just advertising is a very tough thing.”¹⁹⁰ These comments are focused not on survival, of course, but on preserving a model where cable companies and programmers are overpaid and consumers underserved. Incumbents recognize that, in a competitive world, their current profit margins and control are not sustainable.

Time Warner Cable has also publicly engaged in hardball tactics to limit the content its programmers made available online. In a squabble with Viacom over online television, Time Warner Cable threatened to pull eighteen channels, including MTV, Comedy Central, and Nickelodeon, from its cable service.¹⁹¹ Time Warner Cable’s executives “put together a document outlining

¹⁸⁵ Richmond, *supra* note 61.

¹⁸⁶ Posting of Saul Hansell, *The Real Fight Over Fake News*, to N.Y. TIMES BITS BLOG, <http://bits.blogs.nytimes.com/2008/05/29/the-real-fight-over-fake-news/> (May 29, 2008, 8:09 EST). See also Meg James, *TV Viewers in Middle as Titans Clash*, L.A. TIMES, Dec. 31, 2008, at C1 (“Cable operators such as Time Warner are also miffed that Viacom and other companies have made some of their most popular programming available for free on the Internet.”).

¹⁸⁷ Hansell, *supra* note 186.

¹⁸⁸ *Id.*

¹⁸⁹ Posting of Jon Healey, *Time Warner Cable Shows Customers How to Get TV for Free*, to L.A. TIMES TECHNOLOGY BLOG, <http://latimesblogs.latimes.com/technology/2008/10/pc-to-tv-warner.html> (Oct. 6, 2008, 16:50 PST).

¹⁹⁰ Steve Donohue, *Time Warner Cable COO Rips ‘Over-the-Top’ Services*, CONTENTINOPLE, Mar. 18, 2009, http://www.contentinople.com/author.asp?section_id=603&doc_id=173802.

¹⁹¹ Michael Learmonth & Andrew Hampp, *Viacom vs. Time Warner Cable: Is Hulu to*

which shows Viacom is distributing online and where” and threatened to “start instructing subscribers how to connect their televisions to a computer and watch Viacom content online.”¹⁹² Viacom caved, agreeing to delay releasing shows online in favor of Time Warner’s on-demand service, and not to provide full episodes of *The Daily Show* and other popular content, to benefit Time Warner Cable’s controlled video-on-demand offerings.¹⁹³ Time Warner Cable used the same strategy last fall against LIN TV, an over-the-air broadcaster, regarding LIN TV’s online offerings.¹⁹⁴

Some online television distributors have already failed for lack of content. For example, Joost was a company started by the successful founders of Skype that raised over \$50 million in capital.¹⁹⁵ Joost aimed to provide television programming directly to consumers, as an online virtual MVPD provider.¹⁹⁶ But after years of gaining little traction, Joost announced it would become a technology provider, rather than a competitor, to incumbent MVPDs.¹⁹⁷ In a detailed look at the company’s misfortunes, telecommunications analyst Om Malik wrote that “[i]n the end . . . it all boiled down to a lack of content.”¹⁹⁸ Other companies, like Vuze, had cutting edge technology for delivering high-definition television online, but lacked deals to provide much premium content, likely because of MVPD pressure.¹⁹⁹

Netflix’s ability to get valuable content is something of an exception that proves the rule. Netflix began as a DVD service through the mail, but it always intended to become an Internet service (hence the name Netflix, not

Blame?, ADVERTISING AGE, Dec. 31, 2008, http://adage.com/digital/article?article_id=133543.

¹⁹² *Id.*

¹⁹³ Merissa Marr & Nat Worden, *Viacom, Time Warner Cable Reach Last-Minute Programming Deal*, WALL ST. J., Jan. 2, 2009, at A11; Posting of Mike Masnick, *Viacom, Time Warner Cable Fight Over Cost of Comedy Central*, MTV, to TECHDIRT, <http://www.techdirt.com/articles20081231/1129493264.shtml> (Dec. 31, 2008, 13:19 EST).

¹⁹⁴ Healey, *supra* note 189.

¹⁹⁵ Rafat Ali, *Joost Finally Acquired, By Online Ad Network Adconion*, PaidContent.org, Nov. 24, 2009, <http://paidcontent.org/article/419-joost-finally-acquired-by-online-ad-network-adconion/>.

¹⁹⁶ Jacqui Cheng, *Joost Finally Sheds Invite-Only Status, Opens Up to the Public*, ARS TECHNICA, Oct. 1, 2007, <http://arstechnica.com/old/content/2007/10/joost-finally-sheds-invite-only-status-opens-up-to-the-public.ars>.

¹⁹⁷ Scott Morrison, *Joost Names New CEO in Shift*, WALL ST. J., July 1, 2009, at B7.

¹⁹⁸ Posting of Om Malik, *What Went Wrong With Joost?*, to GigaOm.com, <http://gigaom.com/2009/06/30/what-went-wrong-with-joost/> (June 30, 2009, 10:30 PM PST).

¹⁹⁹ See Posting of Cecilia Kang, *Vuze CEO on TV Everywhere, Competition (Uh, or Lack Thereof)*, to WASH. POST POST TECH, http://voices.washingtonpost.com/posttech/2009/10/vuze_ceo_talks_tv_everywhere_v.html (Oct. 20, 2009, 08:00 AM ET).

Postalflix).²⁰⁰ To get valuable content, Netflix found a “loophole” in contracts, realizing that premium channels like Starz could sell rights to Netflix.²⁰¹ This window may not stay open long if “[u]nhappy studios or cable companies . . . renegotiate their contract with Starz to discourage it from working with Netflix.”²⁰²

3. Content-Lock-Out for Big Screens

MVPDs also work to keep Internet-TV content off television screens and solely on laptop screens. Perhaps the most high-profile scuffle in the entire online television space was between Hulu and Boxee.²⁰³ As discussed above, Boxee offers software that allows users to aggregate content from services like Hulu and Netflix, with the media on users’ hard drives, and to stream that content to their televisions.²⁰⁴ Of course, some users have inevitably come to view the service as a potential alternative to cable or satellite service.²⁰⁵ And Hulu’s partners—perhaps under pressure from MVPDs like Comcast—were concerned enough about Boxee to block its use.²⁰⁶

Boxee has observed the pressure on programmers. Speaking on a panel in New York, Boxee CEO Avner Ronen explained:

At the beginning, [the cable companies] didn’t care, because we didn’t have users, we didn’t have money, we didn’t have a product, so everybody was very nice to us. And then, when we launched it, they were also nice to us. But then we opened up our alpha in January 2009, and, in February, we got the call saying, “You’re on the front business section of the New York Times, and there was a big TV with Boxee on it, and the logo of Hulu, and other services.” And then the cable companies started to say, “what’s going on, we’re paying 20 billion dollars a year for licenses to content, and you’re putting them online for free” . . . apparently what we weren’t politically savvy enough to understand is, if you watch a video on a 15-inch screen, it’s one thing, if you project that video on a 32-inch screen, then people freak out.²⁰⁷

The reason for the increased freak-out is evident on reflection—the cable operators and other MVPDs have dominated the living room television screen. They can exact two subscription fees, one for video and one for broadband, as a result. If consumers can watch high-definition, long-form programming on their television screens through competitors delivering over the Internet, then

²⁰⁰ Roth, *supra* note 17, at 122.

²⁰¹ *Id.* at 142 (“We looked at our contract rights and saw that they [Netflix] were an aggregator of content just like the other distributors,” said Starz CEO Robert Clasen.”).

²⁰² *Id.*

²⁰³ Foresman, *supra* note 5.

²⁰⁴ Kafka, *supra* note 169.

²⁰⁵ Stone, *supra* note 109.

²⁰⁶ Kilar, *supra* note 6.

²⁰⁷ The Open Video Alliance, Industry Perspectives on Open Video, June 29, 2009, <http://openvideoalliance.org/videoarchive/?l=en> (from video of discussion featuring Boxee CEO Avner Ronen).

MVPDs have to face increased competition. Boxee's Ronen recalls: "We actually sat in a room with executives from a big media company, and they asked us, 'Can we detect the size of the monitor the users are watching the video on?' . . . I assume the next question would have been, 'So can you block it [on large screens]?'"²⁰⁸

All these reports suggest that MVPDs, notably cable operators, have applied considerable pressure on content programmers to keep content offline, and then to ensure that whatever content is online is unavailable on television screens.

4. *TV Everywhere*

In 2009, incumbent MVPDs reached agreements to counter the threat of on-line television. The heart of the agreement—which consumer groups allege to be illegal collusion²⁰⁹—was requiring popular programmers like TBS, CBS, TNT, and Discovery, to make their content available online to a subscriber only if the subscriber was "authenticated" as a cable subscriber as well as an Internet subscriber.²¹⁰ This tied the availability of online content to a cable subscription. This tie makes it very difficult for a competing virtual MVPD to offer a subscription including such programming, since consumers must also pay the virtual MVPDs' competitors—the incumbent MVPDs—to have access to the content online. Comcast and Time Warner jointly published the "principles" of TV Everywhere, which maintain these deals are "open and non-exclusive,"²¹¹ because, "cable, satellite or telco video distributors can enter into similar agreements with other programmers."²¹² Excluded from the list, of course, are virtual MVPDs, the disruptive innovators and potential competitors. Indeed, the whole goal of TV Everywhere is to undermine the emergence of strong virtual MVPDs. While the traditional MVPDs will make content available online subject to traditional subscriptions, the virtual MVPDs will deliberately remain excluded as the target of the incumbents' apparent collusion.

²⁰⁸ *Id.*

²⁰⁹ Cecilia Kang, *Public Interest Groups Call for Antitrust Probe of TV Everywhere*, WASH. POST, Jan. 4, 2010, at A9.

²¹⁰ *Cable TV Follows Its Subscribers to the Internet*, *supra* note 125.

²¹¹ Press Release, Time Warner Inc., Time Warner Inc. Announces Widespread Distribution of Cable TV Content Online (June 24, 2009), *available at* <http://www.timewarner.com/corp/newsroom/pr/0,20812,1906715,00.html>.

²¹² *Id.*

V. POLICY SOLUTIONS TO CONTENT-LOCK-OUT FOR ONLINE VIDEO

Congress or the FCC should address the content-lock-out strategy to unlock competition in the video market, saving Americans billions of dollars a year and providing additional value and choice. I propose, in this paper, one primary policy solution: a compulsory license, common in the history of communications law's brush with content-lock-out of new entrants.

A. Extending Existing Rules is Not Enough

Some existing rules aim to benefit competing MVPDs, but would likely do little for virtual MVPDs. The existing rules derive from communications laws generally incorporated in the Communications Act of 1934, as amended several times, notably with two cable-focused acts in 1984 and 1992.²¹³

For example, Congress directed the FCC to implement rules "governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors."²¹⁴ The FCC was to ban "a cable operator or other multichannel video programming distributor from coercing" a programmer to provide "exclusive rights against other multichannel video programming distributors as a condition of carriage on a system."²¹⁵ Congress also directed the FCC to ban retaliation against a programmer for refusing to provide exclusive rights.²¹⁶

These provisions, however, may not necessarily help virtual MVPDs subject to content-lock-out, because the FCC defines "coercing" on a context-specific basis requiring a detailed examination of facts (resulting in a costly, time-consuming complaint process with little predictability for a complainant),²¹⁷ and cases would be unlikely because even *powerful* programmers are afraid of retaliation for approaching the FCC over such matters.²¹⁸ In addition, discour-

²¹³ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C. (2006)); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C.).

²¹⁴ 47 U.S.C. § 536(a) (2006).

²¹⁵ § 536(a)(2).

²¹⁶ *Id.*

²¹⁷ See *In re* Implementation Of Sections 12 And 19 Of The Cable Television Consumer Protection And Competition Act Of 1992 Development Of Competition And Diversity In Video Programming Distribution And Carriage, *Second Report and Order*, 9 F.C.C.R. 2642, 2648, ¶ 14 (Sept. 23, 1993).

²¹⁸ *In re* Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, *Memorandum Opinion and Order*, 9 F.C.C.R. 4415, ¶ 11 (1994) ("[T]he

aging distribution by virtual MVPDs is not necessarily covered by the language of an “exclusive” right, as other MVPDs could have access to the content,²¹⁹ and the definition of MVPD in the Communications Act does not clearly cover virtual MVPDs.²²⁰

Beyond this narrow prohibition on “coercing,” Congress directed the FCC to adopt rules

designed to prevent a multichannel video programming distributor from engaging 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 nonaffiliation of vendors in the selection, terms, or conditions.²²¹

This rule prohibiting discrimination against rival MVPDs through controlling affiliated content would not do enough for virtual MVPDs. The incumbents could run up a startup virtual MVPDs’ legal fees, deprive the MVPDs of content for months or years of negotiation while claiming to be nondiscriminatory until a complaint is filed and a long administrative case results. In addition, many programmers are not vertically integrated with a cable operator, yet still deny content to virtual MVPDs, likely because of cable operator demands. Therefore, even if the rule were effective, it would only cover a subset of locked-out content. Finally, AT&T is currently arguing that the cable operators are attempting to avoid this rule for popular sports programming through “loopholes,” so virtual MVPDs may be harmed by similar loopholes.²²²

Moreover, there is little reason to think the FCC will rush to the aid of entrants (or consumers). The FCC is a famously captured agency—captured by the industries it is supposed to regulate, like the phone, cable, and broadcast industries.²²³ The FCC has failed to implement effective rules promoting competition in the cable industry at any level despite congressional directives: the

Chairman of Viacom International, Inc., (‘Viacom’) testified before the Senate Subcommittee on Antitrust, Monopolies, and Business Rights that Viacom has not complained of alleged anticompetitive abuses by TCI because of its fear of retaliation . . .”).

²¹⁹ Cf. 47 U.S.C. § 536(a)(2); 47 C.F.R. § 76.1301(b) (“No cable operator or other [MVPD] shall coerce any video programming vendor to provide, or retaliate against such a vendor for failure to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.”).

²²⁰ 47 U.S.C. §522(13).

²²¹ 47 U.S.C. § 536 (a)(3).

²²² Joelle Tessler, *FCC Seeking to Close Programming Access Loophole*, AB-CNEWS.COM, Dec. 15, 2009, <http://abcnews.go.com/Sports/wireStory?id=9343830>.

²²³ See Kevin Ryan, Comment, *Communications Regulations – Ripe for Reform*, 17 COMMLAW CONSPECTUS 771, 804 (2009). See also Reed Hundt, Chairman, Fed. Comm’n Comm’n, Speech to Center for National Policy (May 6, 1996), <http://www.fcc.gov/Speeches/Hundt/spreh624.txt>. The then-FCC Chairman noted that past Commission practices had led some to joke that the FCC “had come to stand for Firmly Captured by Corporations.” *Id.*

Commission has caved to the cable industry on leased access,²²⁴ on set-top boxes,²²⁵ on program access,²²⁶ and even on Internet access.²²⁷ In the past, incumbents have used the FCC to suppress competition from new entrants by imposing regulations on them, turning the purpose of many pro-competition statutory provisions on their head.²²⁸ If the virtual MVPDs must rely on a regulatory structure, this requires *the FCC* to define “coercion,” to judge whether incumbent MVPDs are nondiscriminatory in their dealings over affiliated programming, and to provide swift justice, the virtual MVPDs would be doomed.

B. Compulsory Licensing

A compulsory license, if properly crafted, is likely the best solution to the content-lock-out strategies of incumbent MVPDs. Regulators ranging from Congress to antitrust courts have applied the familiar remedy of compulsory licenses where incumbents use copyright denial strategies to kill entrant competitors. A compulsory license requires copyright holders to license their content to anyone wishing to use it and sets a maximum price.²²⁹ This license thus ensures access to content and parity among content distributors, ending anti-competitive content-lock-out by incumbents denying content to rival distributors.²³⁰ It also ensures copyright-holders are compensated for their works. Compulsory licenses are common in the history of communications law and could serve the goals of copyright and communications policy here.

C. Copyright, Innovation, and Competition Among Distributors

The copyright laws aim to incentivize innovation, and are crafted by Congress to further that end.²³¹ The copyright laws are what provide programmers the ability to profit from their creations—they can demand payment for copies of their work and seek injunctions and damages from those making unauthor-

²²⁴ See Eggerton, *supra* note 87.

²²⁵ See Anderson, *supra* note 89.

²²⁶ See Tessler, *supra* note 222.

²²⁷ See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 968 (2005) (“[T]he Commission classified broadband cable modem service as an ‘information service’ but not a ‘telecommunications service’ under the 1996 Act, so that it is not subject to mandatory Title II common-carrier regulation.”).

²²⁸ John Blevins, *Death of the Revolution: The Legal War on Competitive Broadband Technologies*, 12 YALE J.L. & TECH. 85, 134–38 (2009) (noting how incumbents have proven successful in using both regulatory and deregulatory policies to harm entrants).

²²⁹ Alan M. Fisch, *Compulsory Licensing of Blacked-Out Professional Team Sporting Event Telecasts (PTSETS): Using Copyright Law to Mitigate Monopolistic Behavior*, 32 HARV. J. ON LEGIS. 403, 410 (1995).

²³⁰ Cf. Wu, *supra* note 173, at 325–29.

²³¹ See *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359–60 (1991).

ized copies.²³² While we usually assume copyright-holders are under no obligation to let others make copies of their work, copyright policy provides numerous exceptions to that rule.²³³ To promote innovation (as well as democratic speech),²³⁴ the Copyright Act has major well-known exceptions including the contours of copyright (public domain works and the non-protection of ideas being notable),²³⁵ fair use defenses to copying,²³⁶ and numerous compulsory licenses.²³⁷ The law's choice of exclusive rights, liability rules, privileges, and no-rights have produced volumes of excellent academic analysis on the relationship between the right of exclusion and copyright's ability to promote innovation and competition.²³⁸ In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, dueling concurrences by Justice Stephen Breyer and Justice Ruth Bader Ginsburg turned on whether exclusive rights would promote or undermine innovation, and what the extent of those effects might be.²³⁹ On one hand, exclusive-rights maximalists (who favor Ginsburg) argue that innovation is best-served by strong, clear exclusive rights—rights-holders are in the best position to determine how to market and license their rights, and the result of these rights-holders making informed decisions based on their self-interest should naturally lead to the greatest innovation.²⁴⁰

On the other hand, exclusive-rights maximization could undermine new technologies, notably new distributors of content. In *Grokster* itself, incumbent distributors of music—the large record distributors—attempted to shut down peer-to-peer technologies.²⁴¹ While Justice Breyer agreed that the particular technology in question had violated the copyright laws because the company actively encouraged copyright violations, he was solicitous of banning an entire technology just because some could use that technology to violate copyright law.²⁴² *Grokster* itself rested on the *Sony* case that determined the VCR was not an illegal device just because most Americans may have used it to make unauthorized, infringing, copies.²⁴³ In that case, too, incumbent distribu-

²³² See 17 U.S.C. §§ 502, 504 (2006).

²³³ See, e.g., *id.* § 107.

²³⁴ See Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 287 (2009).

²³⁵ 17 U.S.C. § 102(b); JAMES BOYLE, *THE PUBLIC DOMAIN* 38 (2008).

²³⁶ 17 U.S.C. § 107 (2006).

²³⁷ *Id.* § 115.

²³⁸ See, e.g., Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L. J. 1742 (2007).

²³⁹ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941–67 (2005).

²⁴⁰ Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 275–80 (1977).

²⁴¹ *Grokster*, 545 U.S. at 919–21.

²⁴² *Id.* at 949–61.

²⁴³ *Id.* at 931–37; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984).

tors of programming—therefore broadcasters—sought to control a new distribution medium, one that was eventually deemed a complement to broadcasting.²⁴⁴

With online video distribution, the question is not necessarily one regarding infringement—companies like Apple and Vuze have not engaged in infringement, they are merely seeking the licenses to distribute content legally. Yet, the debate over copyright and new distribution technologies here is similar to the discussion in the *Grokster* concurrences. Some academics have argued that the current contours of copyright law may undermine new distribution technologies by permitting old media giants to weaken the ability of new technologies (and new creations) to enter the market.²⁴⁵ They argue that a more “balanced” approach would still incentivize copyrighted works while ensuring fair use and innovation in content and technologies.²⁴⁶

Some authors argue that a compulsory licensing system often strikes an appropriate balance between the concerns noted above.²⁴⁷ Unlike the property rights-like exclusive rights, or the “privileges” of finding no infringement at all, compulsory licenses are “liability rules,” permitting others to use the copyright subject to a fee.²⁴⁸ A compulsory license can strike that balance because it ensures a copyright-right holder is compensated, and therefore incentivizes the creation of valuable content and rewards the creators. At the same time, it removes the possibility of strategic anticompetitive behavior by incumbent distributors.

While these arguments are made in the abstract, in network communications, the government has intervened repeatedly to ensure competition among rival distributors.²⁴⁹ Tim Wu has published a seminal article on the relationship between copyright and communications law, observing that much of the Copyright Act is devoted to complex, arcane compulsory licensing regimes and immunities arbitrating disputes (or enacting settlements) of rivaling industries.²⁵⁰ These licenses impact much of the media consumed by Americans and include

²⁴⁴ 464 U.S. at 421 (explaining how the practice of “time-shifting” actually enlarges the broadcast audience).

²⁴⁵ See, LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 145–46 (2001).

²⁴⁶ YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 37–41 (2006).

²⁴⁷ See WILLIAM W. FISHER, *PROMISES TO KEEP* 41, 144–45 (2004).

²⁴⁸ Cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092–93 (1972).

²⁴⁹ See, e.g., *In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, *Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 20,235, ¶ 1 (Oct. 31, 2007) (“[I]n this Order we prohibit the enforcement of existing exclusivity clauses and the execution of new ones by cable operators and others subject to the relevant statutory provisions. This prohibition will materially advance the Act’s goals of enhancing competition and broadband employment.”).

²⁵⁰ See generally Wu, *supra* note 173.

compulsory licenses for: secondary transmissions of broadcast signals by cable operators and others, webcasting by Internet radio stations, public broadcasting of non-dramatic musical works, and pictorial, graphic, and sculptural works, and also the satellite retransmission of broadcast signals.²⁵¹

Copyright-holders simply cannot engage in content lock-out if they must license their content, especially if the compulsory rate is reasonable for new entrants. In addition, compulsory licenses reduce transaction costs surrounding the identification of and negotiation for copyrighted materials, therefore reducing entry costs for new entrants.²⁵² In many industries today, a compulsory license is an accepted part of business.²⁵³

Despite arguments to eliminate existing compulsory licenses, the market for Internet television is precisely the kind where consumers would benefit from a compulsory license. Recently, the Copyright Office has proposed eliminating certain compulsory licenses, including the licenses for satellite and cable retransmissions of broadcast signals.²⁵⁴ The argument against compulsory licenses usually rests on assumptions of efficient bargaining. That is, one assumes that any distributor—incumbent or entrant—can negotiate with copyright-holders for access to copyrighted works. The negotiated terms of this transaction would reflect how much each party values the copyrighted work, and would do so better than any government-set price like a compulsory license.

Moreover, one assumes that the transaction costs (of discovering the rights-holders and negotiating rights) are low and that strategic behavior is unlikely. Or, at the least, one assumes that, despite transactional costs and strategic behavior, such negotiations are more likely to maximize efficiency of allocation than government interventions like compulsory licenses.²⁵⁵

These assumptions argue for “property rules” rather than “liability rules.” These assumptions of relatively low transactional costs and unlikely strategic behavior also pervade arguments in communications policy for strong property rights in networks (rather than compulsory leasing, or “open access” or “unbundling”) and for property rights in spectrum (rather than unlicensed or

²⁵¹ See *id.* at 290.

²⁵² See, e.g., Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1925 (1990) (“The most popular current justification for compulsory licensing is the reduction of otherwise insuperable transactions costs.”).

²⁵³ See DONALD PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 207–210 (6th Ed. 2008).

²⁵⁴ Copyright Office, *SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT* 219–223 (June 2008).

²⁵⁵ See Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2668–69 (1994).

shared access).²⁵⁶ Despite the Copyright Office's conclusion, these assumptions are likely wrong for Internet TV. Transactions costs appear extremely high, as entrants must negotiate with numerous copyright holders to secure all the necessary rights to offer virtual MVPDs. (This is why Congress adopted the original compulsory licenses for cable and satellite, regarding broadcast alone).²⁵⁷

Not only are transaction costs high, strategic behavior is evident. Namely, copyright-holders are subject to the pressure of MVPDs acting strategically to deny their potential Internet-based competition of a key input (content) necessary to compete. As a result, there is little reason to believe the existing market—granting a property-rule right to copyright-right holders vis a vis online television—leads to efficient allocation. Indeed, in comparing this “market” solution to government “intervention” through a compulsory license, government intervention could lead to greater efficiency. (Of course, both are forms of government intervention; one form is a government-conferred property-rule right backed by the power of the state, the other is a government-conferred liability rule backed by the power of the state.)²⁵⁸ A compulsory license could be structured to lower transaction costs for new entrants and society as a whole. With one central clearinghouse for such rights and with set rates, entrants could easily find the party with whom to “negotiate” or pay (the Copyright Office) and easily determine the price.

The transaction costs borne by government to implement this system are likely lower than the “market” costs of today's system, as the government would benefit from economies of scale in clearing all rights, while each video entrant would not have such economies. Of course, government could poorly craft the compulsory license, in a way leading to even less allocational efficiency, if the license is so complex or fragmented that transactions costs remain high. But the history of compulsory licenses shows that they often do work far better than enabling incumbent distributors to deny content needed by new distributors. And government can follow certain principles to ensure the compulsory license fulfils the goals of the license—and a key goal of copyright policy—ensuring creation and wide dissemination of creative works, while ensuring innovation in distribution technologies.

D. Models for the Compulsory License

Compulsory licenses are common remedies where an incumbent distributor

²⁵⁶ See, e.g., FED. COMM'NS COMM'N, SPECTRUM POLICY TASK FORCE REPORT, at 38–39 (2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf.

²⁵⁷ See *In re* Section 109 Report to Congress, *Comments of EchoStar Satellite L.L.C.*, U.S. Copyright Office Docket No. 2007-1, at 6-8 (July 2, 2007).

²⁵⁸ See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470–478 (1923).

is denying content to an entrant distributor to destroy competition. Existing compulsory licenses can provide models for the license necessary here.

The most famous compulsory license may involve the composition license for music. Recorded music is covered by two copyrights—one for the underlying composition (which also gives rights over a “cover” of song) and one for the recorded performance (giving rights for publicly airing or performing a song).²⁵⁹ The first is subject to a compulsory license set by Congress; the second is subject, effectively, to a compulsory license overseen by the courts, based on an antitrust law settlement.²⁶⁰ In the first decade of the 20th century, manufacturers of piano rolls²⁶¹ and early record players were able to buy one copy of sheet music, and then to mass-produce piano-rolls or records based on that one purchase.²⁶² Publishers of sheet music—then the incumbent distributors—accused the early music industry of piracy, as their copyrights underlie the piano rolls and records.²⁶³ When the courts read copyright narrowly, permitted the existing “piracy,” and refused to find the new industry liable, Congress passed a compulsory license scheme in 1909.²⁶⁴ Under that license, “[s]o long as the composer agreed or knowingly acquiesced to an initial recording . . . anyone willing to pay the statutory fee would then be entitled to use any copyrighted composition to record his own version of the song.”²⁶⁵ In this way, the incumbent distributors of copyrighted works were compensated, but could not lock content out of the hands of new distributors.

The music performance royalty has a different history, but a similar resolution. In the 1930s to 1950s, song-performers—the original “distributors” of music performances—sought to undermine the new distributors of over-the-air radio.²⁶⁶ These attempts eventually resulted in the settlement of an antitrust case brought by the Department of Justice.²⁶⁷ That settlement effectively imposed a compulsory license for performance royalties.²⁶⁸ The Department of Justice required licensing to all parties and mandated court arbitration of conflicts over rates, but did not set rates itself.²⁶⁹ To this day, song compositions

²⁵⁹ Brian R. Day, *Collective Management of Music Copyright in the Digital Age: The Online Clearinghouse*, 18 TEX. INTELL. PROP. L.J. 195, 199–200 (2010).

²⁶⁰ Cf. Wu, *supra* note 173, at 301–10.

²⁶¹ A piano roll is a roll of paper with holes punched in it determining the note played on a “self-playing” piano. AL KOHN & BOB KOHN, *THE ART OF MUSIC LICENSING* 308 (1992).

²⁶² See Wu, *supra* note 173, at 300–01; *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 11–18 (1908).

²⁶³ See Wu, *supra* note 173, at 297–301.

²⁶⁴ Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976); see Wu, *supra* note 173, at 301–03.

²⁶⁵ Wu, *supra* note 173, at 303.

²⁶⁶ *Id.* at 307–10.

²⁶⁷ *Id.* at 305–10.

²⁶⁸ *Id.* at 310.

²⁶⁹ *Id.* at 310–11.

are governed by this effective compulsory license.

Similarly, the remedy imposed by the Supreme Court in the *Associated Press* antitrust case acted effectively as a compulsory license. In that case, the Associated Press shared its “must-have” news-wire content only with newspapers that were members of the Associated Press.²⁷⁰ It denied content to non-members, and permitted any incumbent member to deny content (and membership) to new distributing newspapers, crippling those new distributors for lack of content.²⁷¹ The Court approved a remedy “to mean that AP news is to be furnished to competitors of old members without discrimination through By-Laws controlling membership, or otherwise.”²⁷² A requirement to furnish without discrimination, subject to court oversight, effectively serves as a compulsory license.

Later, in the 1970s, the incumbent broadcast television providers, such as those affiliated with CBS, NBC, and ABC, tried to kill cable operators then a new entrant by denying access to broadcast television content.²⁷³ While the Supreme Court initially granted the cable operators immunity from copyright infringement for retransmitting any broadcast signal,²⁷⁴ the eventual settlement to the broadcasters’ efforts was, once again, a compulsory license.²⁷⁵

Years later, Congress enacted a compulsory license for satellite operators to carry local broadcast stations, under some circumstances, on a royalty-free basis.²⁷⁶ This license is intended partly to “promote competition between satellite carriers and cable operators by permitting a parallel array of local programming,”²⁷⁷ thus protecting satellite entrants.

More recently, online radio is subject to a compulsory license, albeit to one with several complexities and issues.²⁷⁸ Administrative modifications in the royalty rates for the license resulted in litigation, legislation, and intense lobbying on both sides, as online radio distributors argued that high rates would put many of them out of business.²⁷⁹

²⁷⁰ *Associated Press v. United States*, 326 U.S. 1, 3–5 (1945).

²⁷¹ *See id.* at 4–5.

²⁷² *Id.* at 21.

²⁷³ *Cf.* Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97, 116 n. 43 (2009).

²⁷⁴ *See* *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400–02 (1968); *Teleprompter Corp. v. Columbia Broad. Sys. Inc.*, 415 US 394, 412–14 (1974).

²⁷⁵ Wu, *supra* note 173, at 320–23.

²⁷⁶ *See* The Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, tit. 2, 102 Stat. 3935, 3949.

²⁷⁷ U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT ii (2008).

²⁷⁸ *See* WILLIAM W. FISHER, PROMISES TO KEEP 104–109 (2004).

²⁷⁹ Amy Duvall, Note, *Royalty Rate-Setting for Webcasters: A Royal(ty) Mess*, 15 MICH. TELECOMM. & TECH. L. REV. 267, 268–87 (2008).

E. Specifying a Compulsory License

Congress, or (if relevant) an antitrust court, should adopt a compulsory license to ensure copyright-holders are compensated and ensure that incumbent distributors cannot ensure content-lock-out of new competitors. With a compulsory license, as the online radio license demonstrates, the devil is in the details, and the details are somewhat difficult to get right.

A few principles should guide the specification of an online television license. First, because setting the details is difficult, a license could be subject to a “sunset” or price re-adjustment after a period of several years or once a certain percentage of consumers have subscribed to any virtual MVPD. After several years with virtual MVPDs, virtual MVPDs could possibly have enough bargaining power to negotiate for programming despite the incumbents’ content-lock-out, as consumers could get accustomed to online video competition and these virtual MVPDs would have consumers, brand recognition, and a supporting business ecosystem. Without a sunset today, the license could continue based on inertia.

Second, the compulsory license must involve very low transaction-costs. New entrants should be able to focus on building a business and a technology, rather than investing in lawyers to handle a complex license. As a result, the fees should be clearly defined for streaming content, downloads, on-demand, and even scheduled content. There should be a catchall rate, should new, interactive firms of streaming or downloading emerge.

Third, the pricing mechanism should encourage use while benefiting copyright holders. The mechanism should be tied to popularity, and be reasonable and nondiscriminatory, and distributed by bodies already tasked with disbursing similar fees. Yet, setting the exact price is not easy, and that price has an enormous impact on business models and competition, as the battles over the online radio license signify. Rather than rely on a government equation or rate setting, market-like mechanisms—much like those used by Google to sell advertising²⁸⁰—could better determine the fee. For example, a real-time auction could set the prices. An auction would ensure that the fee is not too high for market participants to use, nor so low that the fee is unfair.

Setting up a proper auction also would be complicated, but likely less complicated than setting prices in the absence of such a mechanism. With new technologies, the auctions could take place instantaneously and digitally. Virtual MVPDs would have to bid on a finite, scarce number of impressions; if every MVPD had access to an impression the price would be driven to zero. So

²⁸⁰ See Posting of Austin Rachlin, *Introduction to the Ad Auction*, to Inside AdWords, <http://adwords.blogspot.com/2009/03/introduction-to-ad-auction.html> (Mar. 12, 2009, 1:40 EST).

virtual MVPDs could bid on a total number of impressions, capped at a total number of impressions for the Internet market—equal to, say, twenty percent or thirty percent of the population the first week of a program and then fewer over the next weeks. (Anything beyond that number of impressions would be subject to negotiation, not a compulsory license).

At first, even with a cap of twenty percent, the number of impressions available may be so high relative to the market that the bids would be low. The low bids would entice competitors and encourage these competitors to seek consumers rapidly. Eventually, as these competitors attract larger audiences and more viewers, then the price will be bid up and copyright-holders would receive a correspondingly increased share of the increased value.²⁸¹ Of course, setting these numbers would be difficult as well, but the auction mechanism should help ensure, at the least, that the mechanism is useful, rather than too high for use, or so low as to under-incentivize creation of popular content. As the government has implemented successful compulsory licenses throughout history, and can tweak the rules, the government can possibly set the incentives better through a compulsory license than the current incentive structure—which has resulted in content-lock-out.

F. Support for a Compulsory License

If properly structured, many stakeholders would support this compulsory license. For smaller programmers, the license would ensure that they garner revenues from new distributors without retribution from cable operators or others. Furthermore, the advent of legal online distribution would likely curtail current piracy, as it did in the online music market, also benefiting programmers. For smaller MVPDs, who now fear discrimination in the terms and conditions of accessing content, a nondiscriminatory compulsory license would permit small distributors to pay the same fees as their largest competitors for online television. In addition, independent studios would have a level playing field with third-party online television distributors otherwise, distributors may need to make concessions to the largest programmers, such as buying or highlighting those programmers' least popular content at the expense of independent studios' programming. Plus independent studios would benefit from a competitive online television space, which would likely curtail piracy in their works. Finally, virtual MVPDs should certainly support a compulsory license, which would permit them to distribute the premium content now denied them

²⁸¹ Possibly, to ensure one virtual MVPD—such as Apple—does not bid the price beyond other virtual MVPDs and become the sole virtual MVPD making use of the license, any one virtual MVPD could be limited to no more than fifty percent (or thirty percent, etc.) of the auctioned impressions.

by the content-lock-out. These MVPDs would provide innovation, and likely drive lower prices and greater choice in television content—from sitcoms to news—for all Americans.

VI. CONCLUSION

Online television is this nation's best shot at undermining the MVPD industry oligopolies and cartels. Permitting online distributors to compete vigorously on the merits, for computer screens and television screens, is only possible if government responds to current content lock-out tactics by incumbents. The usual, and appropriate, remedy here is a compulsory license. The market resulting from such a license would improve American's lives both as consumers of content and informed participants in our democracy.